

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

UNITED STATES OF AMERICA, )  
Complainant, )  
 )  
v. ) 8 U.S.C. 1324a Proceeding  
 ) CASE NO. 90100314  
CINDY L. GOLCHUK, d.b.a., )  
RANCHO SIERRA DRYWALL, )  
Respondent. )  
\_\_\_\_\_ )

ORDER DENYING COMPLAINANT'S  
MOTION FOR PARTIAL SUMMARY DECISION

On June 14, 1991, Complainant submitted a Motion for Partial Summary Decision, requesting summary decision as to liability only for each of the 69 counts remaining in this matter. Complainant argued that no issues of material fact existed and that it was entitled to summary decision as a matter of law, based upon the exhibits accompanying said motion.

Respondent objected to the granting of summary decision in its opposition brief of June 29, 1991. Respondent indicated that its affirmative defenses, presented in its original Answer as well as its Answer to the Amended Complaint, demonstrated the existence of material facts in dispute. Therefore, summary decision would not be appropriate in this matter.

Having examined the parties' submissions and the pleadings on file, it appears that there are material facts in dispute. As Respondent correctly states, summary decision may not be granted where genuine factual disputes exist. 28 C.F.R. Part 68.36(c).

Complainant has very completely set forth the bases for liability in this case and has made a very strong presentation as to its position respecting summary decision. I am compelled, however, to deny Complainant's motion, based upon Respondent's presentation regarding certain of its affirmative defenses. Complainant's evidence contesting these defenses demonstrates that a genuine dispute does exist. I am not able to dispose of these contested issues at this level, but must await further factual presentations at a hearing on the merits.

It is my desire, and I am sure it is that of the parties as well, that this matter be resolved as expeditiously as possible. I will comment below on my current view as to these affirmative defenses in order to guide the parties and allow them to better prepare for a hearing on the merits. These comments are not to be construed as findings by me, but are merely my impressions based upon the current filings by the parties.

Respondent's first and eighth affirmative defenses suggest that Complainant improperly amended the Complaint by adding an alternative pleading method for several of the alleged violations, and by referencing a Notice of Intent to Fine which was never served upon Respondent. It is my recollection that the Complaint was amended at my suggestion during a pre-hearing telephonic conference, held April 19, 1991, in order to permit the Complaint to better fit the evidence obtained through discovery. I believe that Respondent was put on notice of Complainant's intention to pursue such an amendment and the reasons for doing so. I will certainly hear any evidence Respondent has which will support its allegations of fraud on the part of Complainant, however, it does not appear at this time that Respondent has been prejudiced by the manner in which Complainant amended its Complaint.

Respondent's second affirmative defense alleges that Complainant's representative, while conducting the June 11, 1990 inspection, improperly removed Forms I-9 from Respondent's premises and did not adequately safeguard them or return them to Respondent in a timely fashion. I find that this is a question of fact which remains in dispute. Complainant's evidence contests this assertion, therefore I am not in a position to rule upon this issue at this juncture.

Respondent's third affirmative defense points out that the owner of Respondent business was not present at the business premises during the time of the scheduled inspection. My review of the exhibits filed in this case reveals that the owner, Cindy Golchuk, personally

signed the Notice of Inspection, which was served well in advance of the June 11, 1990 inspection. Respondent does not appear to object to the authenticity of this Notice. I fail to see, at this point, how Respondent can argue that she was not present for this inspection when she knew when and where it was to occur.

Respondent's fourth affirmative defense requests that the alleged violations be excused or mitigated due to the ransacking of the office housing Respondent's business records on or about June 5, 1989. Again, I preliminarily agree with Complainant that this defense does not have much merit. The burglary incident report filed by the Riverside County Sheriff's office after its investigation of this incident, as presented by Respondent for my review, demonstrates that nothing was taken or missing from the office as a result of this incident. I also note that this unfortunate incident occurred more than a year prior to the inspection in this case. Without more, I would agree that justification is lacking in this defense to excuse the alleged violations.

Respondent's fifth affirmative defense asserts that Respondent's owner was not in possession of many of the Forms I-9 required to be presented at said inspection because many of the forms were in the control of foremen in the field. Further, Respondent argued that many of these forms were provided to Complainant at a later date, after said inspection, when the forms were retrieved from the foremen. This defense amounts to a concession by Respondent that several of the forms were not presented to Complainant's agent at the time of the inspection. It does not appear that the facts are in dispute regarding this defense, however, I would like to hear more from the parties as to their legal theories regarding both liability and mitigation of the proposed penalty as a result of this situation.

Respondent's sixth affirmative defense appears to be without merit, due to a misreading or misinterpretation of the applicable regulations regarding proper notice for an inspection. Respondent states that the Notice of Inspection was not served three days prior to the scheduled inspection, but was served 45 days prior thereto. I agree with Complainant that 8 C.F.R. Part 274a.2 requires that notice be provided to the employer at least three days prior to the inspection. It does not require that the notice be given exactly three days in advance of the inspection.

Respondent raises a substantial compliance defense at affirmative defense number seven. The parties dispute whether Respon-

dent's actions amounted to substantial compliance with IRCA. I will rule on this issue upon further presentation by the parties at a hearing on the merits.

Respondent's ninth and final affirmative defense raises a question of fact as to the employment status of the individuals identified in the Complaint. Respondent contends that these individuals were not "employees" in the technical sense of the term, but were independent contractors, and were, therefore, not subject to the requirements of IRCA. I find this to be a disputed question of fact which is material to this case. I will require further presentation regarding the employment status of these individuals prior to entering my findings as to liability.

Based upon these questions of fact, I will hold this case for a hearing. I will be contacting the parties shortly to re-schedule the date. Both parties should compile exhibit and witness lists and make any requests for subpoenas as soon as possible in order to expeditiously prepare for the hearing. I expect that discovery is completed by this point, however I will require any outstanding discovery requests to be complied with no later than July 31, 1991.

Any additional motions or requests should be made by that date also, if possible.

**IT IS SO ORDERED** this 16th day of July, 1991, at San Diego, California.

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E. MILTON FROSBURG  
Administrative Law Judge