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

IN RE CHARGE OF HAROLDO BATRES	)	
UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
THE BEVERLY CENTER, Respondent.	)	Case No. 94B00110

FINAL DECISION AND ORDER GRANTING
COMPLAINANT'S MOTION FOR SUMMARY DECISION
(May 19, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Daniel Echavarren, Esq.
for Complainant
Robert R. Cleary, Esq.
for Respondent

I. *Procedural History*

Haroldo Batres (Batres or Complainant) filed a charge dated October 15, 1993,[1] alleging that The Beverly Center (Beverly or Respondent) discriminated against him by committing document abuse, i.e., refusing to accept a valid document or demanding more or different documents than are required for completing the INS Form I-9, in violation of section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b. Batres filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

[1] Office of Special Counsel states that the charge was filed in its Office on November 19, 1993.

Batres, a Guatemalan national with employment authorization to work in the United States, alleges that he applied for work with Beverly on or about September 9, 1993. Following his initial application, Batres alleges that he was asked for specific documents including his social security card, his driver's license and his work permit in order to establish employment authorization under 8 U.S.C. § 1324a. The Personnel Coordinator, Cynthia Ann DiMino (DiMino), allegedly informed Batres that his employment authorization card would expire within the next few months and he could not be hired without a card valid for one year. Batres conferred with his attorney who explained to DiMino that Batres could not be denied employment based on a future expiration date on his employment authorization.

On June 6, 1994, OSC filed the Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO) which alleged that Respondent violated 8 U.S.C. § 1324b (1) by requesting more or different documents than are required for proving employment and (2) by refusing to accept valid documents offered by Batres.[2]

On August 11, 1994, OSC filed a Motion for Judgment by Default for failing to file an answer as required under 28 C.F.R. § 68.93[3] after obtaining an extension of time from OSC in which to file. Respondent filed a Response to the Motion on August 16, 1994 in which it argued that it had failed to answer the Complaint because the parties were negotiating a settlement for backpay and to rehire Batres and that the delay in filing the answer "was merely due to operational demands of Respondent." On August 16, 1994, Respondent filed an Answer to the Complaint denying the allegations made by OSC. In addition, Respondent filed a separate pleading stating "Respondent reserves the right to assert affirmative defenses as appropriate and as same may be discovered throughout this proceeding."

On October 19, 1994, the ALJ previously assigned to this case denied the Motion for Judgment by Default finding "that Respondent has shown good cause for failing to file a timely answer because (1) the delay in filing the answer was not willful or in bad faith; (2) Respondent has alleged affirmative/meritorious defense[s] to the substantive

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[2] This case was originally assigned to Administrative Law Judge (ALJ) Schneider and reassigned to me on February 7, 1995.

[3] See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

allegations of the Complaint; and (3) Complainant was not prejudiced by the delay in filing of the answer." However, the ALJ cautioned Respondent "to carefully follow the rules and regulations that govern this proceeding and to respond to any and all orders and motions on a timely basis." (Citing to 28 C.F.R. §§ 68.1 - 68.11).

As requested by the Order Denying Complainant's Motion for Judgment by Default, both parties subsequently filed status reports. Respondent's status report stated that "Respondent has hired the subject employee and has agreed to back-pay for the appropriate period in the approximate amount of $6,100.00." Respondent refused, however, to pay the civil money penalty assessed against it by OSC.

On December 2 and 19, 1994, Complainant filed Motions to Deem Matters Admitted and to Compel Discovery, respectively. No opposition or other response was filed by Respondent. In an Order dated February 27, 1995, I granted Complainant's Motions. In addition, the parties were directed to attempt further settlement and to submit either a joint status report if possible or separate reports explaining why a joint submission could not be achieved.

On March 27, 1995, Complainant filed its status report indicating that it was unable to reach counsel for Respondent in order to negotiate further settlement. OSC stated that it would continue to try but, if unable to reach Respondent counsel soon, it would file a motion for summary decision. No status report was filed by Respondent.

On April 5, 1995, Complainant filed a Motion for Summary Decision. No response was filed by Respondent. For the following reasons, I agree with Complainant that this case is appropriate for summary decision.

II. *Discussion*

OCAHO rules of practice and procedure authorize the ALJ to dispose of cases, as appropriate, upon motions for summary decision. 28 C.F.R. § 68.38(c). An ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially notices . . ." show that there is "no genuine issue as to any material fact." Id. A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986). The bur-

den of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden of proof shifts to the non-moving party to prove that there is a genuine issue of fact for trial. Celeotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Matsushita, 475 U.S. at 587.

A. Liability Established

As already stated, I granted Complainant's Request for Admissions. Accordingly, Respondent is deemed to have admitted to the following:

12. Ms. DiMino met with Mr. Batres at the Beverly Center on or about September 21, 1993, for the sole purpose of further processing his employment application.

13. During their meeting on September 21, 1993, Ms. DiMino asked Mr. Batres to show her his social security card, his state identification card and his work permit.

14. Ms. DiMino's request for documents from Mr. Batres on September 21, 1993, was made for the purpose of complying with the employment authorization verification requirements of 8 U.S.C. § 1324a(b).

15. In response to Ms. DiMino's request, Mr. Batres presented his social security card, his state identification card and his Form I-688 Employment Authorization card to her.

16. Ms. DiMino told Mr. Batres on September 21, 1993, that the Employment Authorization card that he had presented was not acceptable.

17. Ms. DiMino told Mr. Batres on September 21, 1993, that he would have to present to her a work authorization card valid for at least one year in order to be hired by the Beverly Center

18. The social security card, the state identification card and the Form I-688 presented by Mr. Batres to the Beverly Center on September 21, 1993, all appeared genuine on their face.

19. Mr. Batres was not hired by the Beverly Center on September 21, 1993, because of the expiration date on his I-688.

Complainant asserts three violations of § 1324b's prohibition on asking for certain types of documents. First, that "Ms. DiMino violated the law by asking Mr. Batres to present a social security card, a state identification card and a work permit." As Complainant correctly points out, this is explicitly prohibited by § 1324b which states that "a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required . . . shall be treated as an unfair immigration-related employment practice. . . ." 8 U.S.C. § 1324b(a)(6). See also

United States v. Strano Farms, 5 OCAHO 748 (1995). Furthermore, in its status report, Respondent states that "[t]his incident was entirely isolated and does not reflect Respondent's employment practices with respect to the Act [i.e., IRCA] or qualified immigrant applicants." Accordingly, I find Respondent in violation of § 1324b(a)(6) for having asked for more or different documents than are required.

Secondly, Complainant states that "Ms. DiMino violated the law by requesting specific documents. A request for a specific document constitutes a request for different documents than are required." (Citing Westendorf v. Brown & Root, 1 OCAHO 477 (1992); United States v. A.J. Bart, 3 OCAHO 538 (1993)). OCAHO case law has consistently held that by insisting on a specific document or documents an employer is in violation of § 1324b. See, e.g., Strano Farms, 5 OCAHO 748; A.J. Bart, 3 OCAHO 538. Therefore, I also find Respondent in violation of § 1324b for requesting specific documents.

Finally, Complainant alleges that "Ms. DiMino violated the law by rejecting Mr. Batres' valid Form I-688 because the document appeared genuine on its face." Section 1324b(a)(6) states that an employer who refuses "to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice. . . ." As Respondent is deemed to have admitted that the documents presented by Batres appeared genuine, I also find Respondent in violation of § 1324b for failing to accept the documents proffered by Batres.

B. Relief Requested--Civil Money Penalty

Throughout the pleadings, the only issue which appears to have prevented the parties from negotiating a settlement was the civil money penalty of $1,000.[4] Under § 1324b(g)(2)(B)(IV), I am authorized to assess a "penalty in the amount of not less than $100 and not more than $1,000 for each individual discriminated against." Complainant argues that the maximum penalty should be assessed for the following reasons. First, that "it is difficult to conceive of a more egregious violation [since] . . . [t]his section of the statute [§ 1324b(a)(6)] can be violated in three different ways, and the Beverly Center violated it in every way possible." I agree with Complainant that the facts show this to be a particularly egregious form of document abuse.

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[4] Respondent's Status Report stated that it "will settle this matter, in its entirety, if the Special Counsel would waive or otherwise suspend the civil money penalty of $1,000,00 [sic]."

Complainant also asserts that because of the three ways in which to violate § 1324b(a)(6), Respondent could have been charged with three separate violations for a total of $3,000 and therefore has already received a lesser fine. I disagree with this type of "piling on" of penalties. In addition, the statute states that the civil money penalty may be assessed "for each individual discriminated against. . . ." 8 U.S.C. § 1324b(g)(2)(B)(IV) (emphasis added). This construction does not lead me to conclude as OSC does that Respondent could have been charged with three violations based on Batres' lone charge; it leads me to believe only that OSC could have proven its case in one of three ways.

OSC also states that the civil money penalty should be high because the result, i.e., denial of employment, was significantly harmful. Since the purpose of § 1324b is to prevent discrimination against legal aliens, I agree that the result here is particularly serious.

Finally, OSC argues that Respondent "has shown an appalling lack of respect for the law and this forum . . . [by failing] to recognize its error and flatly refused to pay any civil penalty." In addition, OSC denounces Respondent's "cavalier approach to this litigation for "failing to timely answer the Complaint, failing to timely answer a request for admissions, giving unacceptable answers to the request for admissions (when it was finally answered), refusing to cooperate in discovery, and refusing to return telephone calls to the Special Counsel made for the purpose of discussing settlement." I agree that, beginning with Respondent's failure to file timely an answer to the Complaint and ending with its failure to file any response to the Motion for Summary Decision after being warned by the ALJ of its duty to respond to motions, Respondent has exhibited behavior not conducive to finding a low civil money penalty. For these reasons, I assess the penalty at the maximum of $1,000.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint filed by OSC, the Answer filed by Respondent and the pleadings and supporting documents filed by both parties. All motions and other requests not previously ruled upon are denied.

For the reasons more fully discussed above, I find and conclude the following:

1. Respondent is in violation of 8 U.S.C. § 1324b(a)(6);

2. Complainant's Motion for Summary Decision is granted;

3. I order Respondent:

a. to cease and desist from violating 8 U.S.C. § 1324b;

b. to comply with the requirements of 8 U.S.C. § 1324a(b) with respect to individuals hired for a period of three years from the date of this order;

c. to retain for a period of three years the name and address of each individual who applies, in person or in writing, for work at the Beverly Center;

d. to instate Mr. Batres into the position for which he applied, with full benefits, back pay and interest, and seniority from September 21, 1993;

e. to pay a civil money penalty in the amount of $1,000.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order Granting Complainant's Motion for Summary Decision is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States Court of appeals in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 19th day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge