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

November 9, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 95A00081
GIAMBLIS ENTERPRISES, INC., T/A CAMP HILL DINER, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

Procedural Background

On May 10, 1995, complainant, acting by and through the Immigration and Naturalization Service (INS), filed the Complaint at issue against Giamblis Enterprises, Inc., d/b/a Camp Hill Diner (respondent or Giamblis Enterprises) in the Office of the Chief Administrative Hearing Officer (OCAHO). That Complaint, based upon Notice of Intent to Fine (NIF) number PHI-94-274A-077, which was issued and served upon respondent on January 12, 1995, included four (4) counts alleging 19 illegal hire and paperwork violations of Section 274A of the Immigration and Nationalization Act (INA), 8 U.S.C. § 1324a, and sought civil money penalties totaling $8,250.

In Count I of that Complaint, complainant alleged that respondent hired and/or continued to employ the individual listed in paragraph A, Felix Torres-Quiros, knowing that he was an alien not authorized for employment in the United States, and did so after November 6, 1986, in violation of § 274A(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a(a)(1)(A). Alternately, complainant alleged that respondent continued to employ that individual knowing that he was, or had become, an alien unauthorized for employment in the U.S., in violation of § 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2).

In Count II, complainant charged that subsequent to November 6, 1986, also, respondent failed to prepare and/or make available for inspection Employment Eligibility Verification Forms (Forms I-9) for the two (2) individuals named in paragraph A, thus violating the provisions of § 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B).

In Count III, complainant asserted that respondent failed to complete properly Section 2 of the Forms I-9 for the 15 individuals listed as employees in paragraph A, and that respondent did so after November 6, 1986, in violation of § 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B).

In Count IV, complainant contended that respondent failed to ensure that the employee named in paragraph A, Drosos N. Kostopoulos, properly completed Section 1 of his Form I-9, in violation of § 274A(a)(1)(B) of the INA, 8 U.S.C. 1324a(a)(1)(B).

On May 11, 1995, the Chief Administrative Hearing Officer (CAHO) served a Notice of Hearing Regarding Unlawful Employment and a copy of the Complaint upon respondent and respondent's counsel.

On June 6, 1995, respondent timely filed its Answer to Complaint Regarding Claimed Unlawful Activity, which (1) denied the allegations concerning Felix Torres-Quiros alleged in Count I; (2) denied, as to the first individual listed in Count II, Felix Torres-Quiros, the allegations contained in paragraphs A-E, and admitted, as to the second individual listed, Sharon Smith, those allegations contained in paragraphs A-E of Count II; (3) admitted all allegations contained in Counts III; and (4) admitted all allegations included in Count IV. Additionally, respondent's counsel argued that the two (2) separate charges concerning Torres "are violative of 8 CFR 274.10(b) as charging [sic] two violations for one individual in the same transaction." Answer at 1.

On July 18, 1995, complainant filed a Motion for Summary Decision, in which it moved for summary decision on all 19 alleged violations at issue since there were no remaining genuine issues for adjudication.

On July 20, 1995, complainant filed an unopposed Motion to Compel Discovery, stating that on May 18, 1995, it had served upon respondent three (3) discovery requests, including Complainant's First Set of Interrogatories, Complainant's First Request for Production of Documents, and Complainant's First Request for Admissions, responses to which were due on or about June 20, 1995, but that respondent, as of July 14, 1995, had not complied with those requests.

On August 25, 1995, the undersigned issued an Order Granting Complainant's Motion to Compel Discovery, ordering respondent to fully respond to complainant's three (3) discovery requests within 10 days of that Order, or risk the imposition of sanctions, in accordance with the provisions of 28 C.F.R. § 68.23(c).

On September 27, 1995, complainant filed a Motion for Sanctions, stating that respondent had failed to comply with the undersigned's August 25, 1995 Order, and requesting that appropriate sanctions be ordered from among those enumerated at 28 C.F.R. § 68.23(c).

The undersigned thereafter granted complainant's Motion for Sanctions and ordered, in part, the following sanctions, as provided for in the pertinent procedural regulation, 28 C.F.R. § 68.23(c):

(1) That it was inferred and concluded that the information sought in the interrogatories, requests for admissions, and the copies of the documents requested from respondent, did contain evidence adverse to the respondent;

(2) That for the purposes of this proceeding, the matters concerning which the August 25, 1995 Order was issued, were to be taken as having been established adversely as to the respondent;

In light of those sanctions, we will now revisit complainant's July 18, 1995 Motion for Summary Decision.

Complainant's Motion for Summary Decision

In its unopposed July 18, 1995 Motion for Summary Decision, complainant correctly states that in its Answer respondent has admitted to 17 of the 19 alleged violations, namely the violation regarding Susan Smith in Count II, the 15 violations contained in Count III, and the single violation stated in Count IV. The two (2) remaining violations at issue in complainant's Motion for Summary Decision are those regarding Felix Torres-Quiros (Torres-Quiros), specifically, the single violation alleged in Count I, and the violation regarding Torres-Quiros contained in Count II.

The pertinent procedural rule governing motions for summary decision in unlawful employment cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and 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." 28 C.F.R. § 68.38(c).

This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. For this reason, Federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). A genuine issue of fact is material if it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986); Primera Enters., Inc., 4 OCAHO 615, at 2.

Count I

In Count I of the Complaint, complainant alleged that respondent had hired Torres-Quiros, after November 6, 1986, for employment in the United States, knowing that he was an alien not authorized for such employment, in violation of § 274A(a)(1)(A) of the INA, 8 U.S.C. § 1324a(a)(1)(A), and/or alternately, that respondent continued to employ Torres-Quiros knowing that he was, or had become, an unauthorized alien with respect to such employment, in violation of § 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2).

In order to prove the violation alleged in Count I, complainant must demonstrate that:

(1) after November 6, 1986;

(2) respondent hired for employment, and/or continued to employ, in the United States;

(3) the individual named in Count I namely, Torres-Quiros; and

(4) respondent knew that Torres-Quiros was unauthorized for employment in the United States.

Respondent stated in its Answer that Giamblis Enterprises "is a new business; it opened in April 1994." Answer at 2. Because respondent began doing business in April 1994, it is readily apparent that any

individuals hired by respondent would have been so employed after November 6, 1986. Given that fact, element one (1) above is satisfied.

Although respondent denies the allegations contained in Count I, it makes the following assertion: "[t]he individual [Torres-Quiros] was asked to produce authorization to work and when he did not, his employment was terminated. The individual did not work more than 3 days, and failing to produce documentation, he was not employed. The individual did not receive [sic] any pay from Respondent." Id. at 1.

While respondent denies having hired Torres-Quiros, and Torres-Quiros's name does not appear on respondent's list of employees, respondent nonetheless stated that "his [Torres-Quiros's] employment was terminated." Id. It is difficult to conceive how someone's employment could be terminated unless that person had been previously hired.

In addition, complainant in its First Request for Admissions asked respondent to admit that it had hired Torres-Quiros, after November 6, 1986, for employment in the United States. Complainant's First Req. Admis. at 2, reqs. 2.a(1)-(2). By granting Complainant's Motion for Sanctions, the undersigned specifically ordered that those "matters concerning which the August 25, 1995 Order [Granting Complainant's Motion to Compel Discovery] was issued [including those issues addressed in Complainant's First Request for Admissions], are to be taken as having been established adversely as to the respondent." Aug. 25, 1995 Order at 2.

In view of that circumstance, the second and third required elements have been proven, also.

Element four (4) addresses the crucial issue of whether respondent hired Torres-Quiros knowing that he was an alien unauthorized to work in the United States, and/or knowingly continued to employ him after discovering that he was unauthorized. The regulations implementing Section 274A of the INA define the term "knowing" to include

> not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
>
> (i) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

> (ii) Has information available to it that would indicate that the alien is not authorized to work . . . .

8 C.F.R. § 274a.1(l)(1).

In its Answer, respondent states that "the individual [Torres-Quiros] did not work more than 3 days, and failing to produce documentation, he was not employed." Answer at 1. Complainant contends in its motion that Torres-Quiros was employed for five (5) days. Mot. Summ. Decision at 11-12. Viewing the facts in the light most favorable to the non-moving party, however, the undersigned will accept respondent's assertion that Torres-Quiros was employed for only three (3) days. Nonetheless, respondent, in its assertion that Torres-Quiros "did not work more than 3 days," has apparently confused the requirement that an employer comply with the employment verification requirements within three (3) business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), with a purported total exception to the regulations for an individual employed for fewer than three (3) days. Such is not the case.

In support of its Count I charge, complainant has provided a Record of Sworn Statement given by Torres-Quiros to INS Special Agent James Martinelli, stating that the person, "Jimmy" at "Camp Hill Restaurant," who hired him [Torres-Quiros] asked if he had permission to work in the United States, and that he [Torres-Quiros] had told "Jimmy" that he did not. R. Sworn Statement at 4. Respondent has not denied nor has it questioned the veracity of that Record.

In addition, in its First Request for Admissions, complainant requested that respondent admit that it had (a) hired Torres-Quiros knowing that he was unauthorized to work in the United States, and that it had also (b) continued to employ him knowing that he was an unauthorized alien. Complainant's First Req. Admis. at 2, reqs. 2.a(3)-(4). These admissions were also directed by the undersigned "to be taken as having been established adversely as to the respondent." Aug. 25, 1995 Order at 2. Thus, even if respondent had created a genuine issue of material fact by alleging that it did not knowingly hire Torres-Quiros, it has since insufficiently preserved, if not waived, that issue by having failed to respond to this Office's August 25, 1994 Order Granting Complainant's Motion to Compel Discovery.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. Based on the previous offerings, complainant has carried its burden as to element four (4), which is accordingly established. Once complainant has carried this burden, respondent, in order to

avoid summary decision, must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Respondent's remaining counterargument in its Answer to Count I is that "[t]his allegation [in conjunction with Count II] charges two violations for the same individual in violation of 8 CFR 274[a].10(b)." Answer at 1. While the respondent is correct in its citation of the regulation's text, it is incorrect in its interpretation.

The treatment of a finding of one or more violations in a single proceeding as a single offense does not preclude charging respondent with more than one violation for the same employee arising out of the same set of facts, but rather goes to the imposition of penalties and the appropriateness (or rather, lack thereof) of escalating penalties based on the theory that multiple violations in a single proceeding constitute multiple offenses. See 8 C.F.R. § 274a.10(b) (treating each violation within a proceeding as a separate offense would result in the escalation of a minimum fine of $250 for the first offense, to $2,000 for the second, to $3,000 for two or more offenses; the maximum fines would ratchet upwards to $10,000 for two or more offenses).

Section 274a.10(b) not only allows separate penalties, but unambiguously mandates them for both knowingly hiring an unauthorized alien and also for failure to comply with employment verification requirements. 8 C.F.R. § 274a.10(b)(1)-(2). Clearly, there is no statutory prohibition to the two (2) separate charges in Counts I and II regarding Torres-Quiros.

While the facts are to be viewed in the light most favorable to the non-moving party in summary decision proceedings, respondent's bare assertions regarding Count I in its Answer fail to indicate that there exists a genuine issue of material fact as to that Count. Because complainant has demonstrated that no genuine issue of material fact exists as to Count I, complainant's Motion for Summary Decision is granted as to that count.

Count II

In order to establish that respondent violated Section 274A(a)(1)(B) of the INA, complainant must demonstrate:

(1) after November 6, 1986;

(2) respondent hired Torres-Quiros for employment in the United States; and

(3) respondent failed to prepare and/or make available for inspection the Form I-9 for Torres-Quiros.

The previous discussion of the facts presented in Count I has already led to the establishment of both the first and second elements. Thus, the remaining issue as to this count is whether respondent failed to prepare and/or make available for inspection the Form I-9 for Torres-Quiros.

In its Request for Production of Documents, complainant asked respondent to "[p]rovide any and all documents that relate to or that regarding [sic] . . . Felix Torres-Quiros . . . " Req. Produc. Docs. at 2. Further, in its First Request for Admissions, complainant requested that respondent verify that (1) it hired Torres-Quiros for employment in the United States; (2) after November 6, 1986; (3) and it failed to both (a) prepare a Form I-9 for Torres-Quiros, and (b) present to the INS on August 19, 1994, that Form I-9. First Req. Admis. at 2-3, reqs. 2.b(1)-(4).

Respondent's failure to produce any documents or to respond to complainant's request for admissions necessarily leads to the inference that production of such documents and responsive answers to such requests would have been adverse to respondent's case. Furthermore, its sole reliance on the argument that the allegations contained in Count II "regarding Torres are violative of 8 CFR 274[a].10(b) as charging [sic] two violations for one individual in the same transaction," without more, does not constitute the requisite "specific facts showing that there is a genuine issue for trial." See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Because complainant has established that there is no genuine issue of material fact concerning the violation regarding Torres-Quiros which is alleged in Count II, and because respondent has failed to offer specific facts in contradiction of complainant's motion, complainant's motion for summary judgment as to that allegation is hereby granted.

Accordingly, respondent's admissions in its Answer as to Counts II, III and IV, coupled with the instant Order Granting Complainant's Motion for Summary Decision as to the allegations regarding Torres-Quiros in Counts I and II, entitle complainant to summary decision on the facts of violation on all 19 violations alleged in its May 10, 1995 Complaint.

Resultingly, the sole remaining issue is that of determining the appropriate civil money penalties to be assessed for those 19 violations.

In arriving at those civil money penalty sums, due consideration must be given to the five (5) criteria listed in the pertinent provision of IRCA governing civil money penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5). Those being (1) the size of the business of the employer being charged, (2) the good faith of the employer, (3) the seriousness of the violation, (4) whether or not the individual was an authorized alien, and (5) the history of prior violations.

Complainant urges that respondent be found to have waived both its right to contest the proposed civil money penalties, as well as its right to offer facts in mitigation thereof.

In order to extend to respondent the fullest measure of its due process rights, and in lieu of an adjudicatory hearing to determine the appropriate penalties, the parties are hereby ordered to submit concurrent written briefs addressing the civil penalty sums to be assessed for each of the 19 violations and to have concurrently filed their briefs on or prior to December 4, 1995.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§ 1324c(d)(4); 1324c(d)(5), and 28 C.F.R. § 68.53.