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

November 28, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 95A00088
TRI COMPONENT PRODUCT CORP., Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

Procedural Background

On February 23, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), initiated this proceeding by issuing and serving upon Tri Component Product Corporation (respondent) a Notice of Intent to Fine (NIF) numbered NYC274A-93005630. That NIF contained three (3) counts alleging 48 paperwork violations of Section 274A of the Immigration and Nationality Act (Act or INA), 8 U.S.C. § 1324a, and sought civil money penalties totaling $11,820.

In Count I of the NIF, complainant alleged that respondent had failed to ensure that the three (3) employees named therein, hired after November 6, 1986, had properly completed Section 1 of their Employment Eligibility Verification Forms (Forms I-9), and, further, that respondent itself had also failed to complete Section 2, the Employer Review and Verification portion, of those same Forms I-9, in violation of Section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Complainant sought a $250 civil money penalty for each alleged violation, for a total of $750 for Count I.

Complainant contended in Count II that respondent had failed to ensure that the four (4) individuals named therein, hired after November 6, 1986, had properly completed Section 1 of their Forms I-9, in violation of Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $250 for

each of those alleged infractions, for a total civil money penalty of $1,000.

In Count III of the NIF, complainant averred that respondent had failed to properly complete Section 2 of the Forms I-9 for the 41 individuals listed therein, who had been hired after November 6, 1986, in violation of Section 274A(a)(1)(B) of the Act, 8 U.S.C. § 1324a(a)(1)(B). As to six (6) of those employees, complainant sought a civil money penalty for each of $220, and as to the remaining 35 employees, complainant assessed a civil money penalty of $250 per individual, for a total penalty of $10,070 for Count III. Thus, the total civil money penalties levied for all three (3) counts were $11,820.

Respondent was advised in that NIF of its right to contest those 48 charges by timely submitting a written request for a hearing before an Administrative Law Judge. By letter dated March 15, 1994, respondent firm's vice president timely requested a hearing.

On May 19, 1995, complainant filed the Complaint at issue, in which it reasserted the 48 allegations set forth in Counts I through III of the NIF, as well as the requested civil money penalties totaling $11,820 for those alleged infractions.

On June 30, 1995, respondent filed its Answer. In that responsive pleading, respondent did not deny that it had hired the 48 individuals listed therein in Counts I through III, nor did it deny that it had hired those employees after November 6, 1986. Respondent, however, did deny generally the operative language of those counts, specifically denying both complainant's allegations that it had failed to ensure that those employees had properly completed Section 1 of their Forms I-9 and its charges that respondent had failed to properly complete Section 2 of those same Forms I-9. Respondent further requested that "no order be issued directing the respondent to pay civil money penalties in light of the substantial and overwhelming compliance of the respondent[.]" Resp't's Answer at 2.

On October 12, 1995, complainant filed a pleading captioned Motion to Compel Respondent to Respond to Complainant's Discovery Requests, in which complainant stated that it had served two (2) discovery requests, specifically Complainant's First Interrogatories and Complainant's First Request for Production of Documents upon respondent on July 3, 1995, and had received no reply. Complainant, relying upon 28 C.F.R. §§ 68.19(b) and 68.20(d)'s requirements that a party respond to discovery requests within 30 days after service,

requested that an order be issued compelling respondent to respond to those requests.

On October 13, 1995, complainant filed an unopposed Motion for Summary Judgment, alleging that it was entitled to summary decision as a matter of law because no genuine issue of material fact remained concerning the allegations contained in the Complaint.

On November 2, 1995, the undersigned issued an Order Granting Complainant's Motion to Compel, ordering respondent to furnish complainant with replies to its two (2) discovery requests within 10 days of its receipt of that Order, or risk the imposition of appropriate sanctions from among those enumerated at 28 C.F.R. § 68.23.

On November 8, 1995, this Office received a copy of Respondent's Reply to Interrogatories along with a letter from respondent's counsel indicating that respondent had simultaneously supplied complainant with the documents it had requested in its request for production of documents.

Complainant's Motion for Summary Decision

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).

Section 68.38(c) 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 caselaw interpreting Rule 56(c) is instructive in determining whether summary decision under Section 68.38 is appropriate in proceedings before this Office. Mackentire v. Ricoh Corp., 5 OCAHO 746, at 3 (1995); 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. Anchor Seafood Distribs., Inc., 5 OCAHO 742, at 4 (1995); United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just,

speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, 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, 475 U.S. at 587; Primera, 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party 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.

The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary judgment, the consideration of any admissions on file. Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted. Primera, 4 OCAHO 615, at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991).

Count I

In order to prove the violations alleged in Count I, complainant must establish that:

(1) respondent hired for employment in the United States;

(2) the individuals named in Count I;

(3) after November 6, 1986; and

(4) respondent failed (a) to ensure that those individuals properly completed Section 1 of their Forms I-9 and (b) to properly complete Section 2 of those forms, which requires employer review and verification of each individual's work eligibility documents.

Respondent's Answer, as well as its payroll documents supplied in response to Complainant's First Request for Production of Documents, and the Employment Eligibility Verification Worksheet prepared by INS's Special Agent Michael T. Ricko and certified as being true and correct by Ernestina Roth, personnel manager and agent for respondent, all indicate that respondent hired the three (3) individuals listed in Count I for employment in the United States, and did so after November 6, 1986. Resp't's Answer at 1; Resp't's Reply Interrogs. at Ex. A; Complainant's Mot. Summ. Decision at 2, Ex. D. As such, elements one (1) through three (3) are conclusively established.

Thus, the only element at issue for purposes of this Order is four (4), whether respondent failed (a) to ensure that those individuals properly completed Section 1 of their Forms I-9 and (b) to properly complete Section 2, the employer review and verification portion, of those forms. Visual inspection of the Forms I-9, supplied to Special Agent Ricko, for those three (3) individuals reveals both a failure on respondent's part to ensure that its employees properly completed Section 1, and a failure on its part to properly complete Section 2. Complainant's Mot. Summ. Decision at Ex. E. In the case of individual one (1) Rosa Maria Aquino, Section 1 was not dated by her, and Section 2 contains no document identification information for either List A or Lists B and C documents. Id. Individual two (2) Bernadette Alice Cuesta also failed to date Section 1, and Section 2 is again lacking in document identification information. Id. Individual three (3) Joseph Perkal not only did not date Section 1, but also failed to sign his Form I-9, and respondent again failed to supply document identification information in Section 2. Id. Thus, element (4), that respondent failed (a) to ensure that those individuals named therein in Count I properly completed Section 1 of their Forms I-9 and (b) to properly complete Section 2 of those forms, has been established by complainant's offers of proof.

To avoid summary decision once complainant has carried its burden, respondent must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). Moreover, respondent "may not rest upon the mere allegations or denials of [complainant's motion for summary decision]. [Its] response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b).

Respondent in its Answer arguably asserted an affirmative defense of substantial compliance. Prior decisions of this Office have recognized that "substantial compliance may be an affirmative defense to allegations of paperwork violations." United States v. Northern Mich. Fruit Co., 4 OCAHO 667, at 14 (1994) (discussing in detail prior OCAHO decisions regarding substantial compliance and further noting that "[n]one of those decisions, however, have found substantial compliance.") (emphasis added).

Respondent's counsel, other than "request[ing] . . . [t]hat no order be issued directing the respondent to pay civil money penalties in light of the substantial and overwhelming compliance of the respondent", has provided no legal nor factual arguments in support of his substantial compliance defense. Answer at 2. While under the reasoning set forth in Northern Michigan Fruit Company respondent may have been able to persuasively argue that it had substantially complied with the requirement that it ensure proper completion of Section 1, it has failed to so argue, and in fact has totally failed to respond to Complainant's Motion for Summary Decision. Because the pertinent rule regarding summary decision makes it clear that respondent cannot rest upon "mere allegations or denials", respondent has failed to offer any "specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b).

Regardless of the validity of respondent's substantial compliance defense, respondent's subsequent failure to properly complete Section 2 of those same forms would nevertheless have led to an entry of summary decision for complainant as to the second part of Count I, namely respondent's failure to properly complete Section 2 of the Forms I-9 for those same individuals listed therein.

Owing to respondent's failure to preserve any genuine issues of material fact which may have existed as to its substantial compliance with Section 274A of the INA, 8 U.S.C. § 1324a, complainant is hereby granted summary decision as to those allegations presented in Count I of its Complaint.

Count II

In order to establish the violations alleged in Count II, complainant must prove that:

(1) respondent hired for employment in the United States;

(2) the individuals named in Count II;

(3) after November 6, 1986; and

(4) respondent failed to ensure that those individuals properly completed Section 1 of their Forms I-9.

As noted previously in Count I, respondent did not contest the allegation that it hired for employment in the U.S. the four (4) individuals listed in that count; nor did it contest that it did so after November 6, 1986. Thus, elements one (1) through three (3) have been established.

Visual inspection of the Forms I-9 presented to INS Special Agent Ricko on February 8, 1993, and attested to by respondent's agent, Ernestina Roth, for individuals one (1) Jose A. Burgos and four (4) Iosif Reznik reveals that each checked the box which indicated they were "alien[s] authorized by the Immigration and Naturalization Service to work in the United States", but failed to provide their alien (or admission) numbers and expiration dates, to which each was required to attest under penalty of perjury.

Similarly, a cursory examination of the Forms I-9 pertaining to two (2) Florencio Quiles and three (3) Suzy Ratner, a/k/a/ Sara Beth Ratner, discloses that both failed to check a box attesting to their employment status.

Accordingly, complainant has carried its burden of proof as to element four (4), that respondent failed to ensure that the employees listed in Count II properly completed Section 1 of their Forms I-9. As noted previously, respondent's failure to respond to Complainant's Motion for Summary Decision, coupled with its inadequate presentation and development of a purported affirmative defense of substantial compliance, result in the finding that no genuine issue of material fact exists as to Count II concerning those individuals. Thus, complainant is granted summary decision as to the allegations contained in Count II, also.

Count III

In order to substantiate its motion for summary decision as to Count III, complainant must establish that:

(1) respondent hired for employment in the United States;

(2) the individuals listed in Count III;

(3) after November 6, 1986; and

(4) respondent failed to properly complete Section 2, which requires employer review and verification of each individual's work eligibility documents, of the Forms I-9 for those individuals.

As in Counts I and II, respondent has not contested complainant's allegations that it hired the 41 individuals listed in Count III, nor that it did so after November 6, 1986, for employment in the United States. Thus, elements one (1) through three (3) have been conclusively established.

The only allegation at issue is whether respondent failed to properly complete Section 2 of the Forms I-9 for those individuals. Prior OCAHO rulings have held that the failure to complete any portion of Section 2 of a Form I-9 is a "serious violation," because "the 'Employer Review and Verification' section is the very heart of the verification process initiated by Congress in IRCA." United States v. Acevedo, 1 OCAHO 95, at 651 (1989); see also United States v. Noel Plastering & Stucco, Inc., 3 OCAHO 427, at 20 (1992) (stressing that "[t]he Act's paperwork requirements form an integral part of the congressional scheme for controlling illegal immigration into this country"). In Wood 'N Stuff, it was held that "the negligent failure to fill out any part of an I-9 form, even if due to mere carelessness, is serious because it completely defeats the purpose of the verification provisions under IRCA." United States v. Wood 'N Stuff, 3 OCAHO 574, at 7 (1993) (emphasis added).

Visual inspection of the 41 Forms I-9 supplied by respondent for those individuals listed in Count III discloses varying examples of non-compliance, ranging from a total lack of document identification information on Lists A or Lists B and C, to incomplete information having been furnished, as well as missing certification dates. That examination also confirms that respondent in fact failed to properly complete Section 2 of the Forms I-9 for those 41 individuals listed in Count III, thus proving that no genuine issue of material fact exists as to those allegations, and that complainant is also entitled to summary decision as a matter of law as to that count.

Conclusion

In summary, because complainant has shown that there is no genuine issue of material facts regarding the violations alleged in Counts I, II and III, and has also shown that it is entitled to summary decision as a matter of law with respect to those violations, complainant's May 19, 1995 Motion for Summary Decision is hereby granted. Accordingly,

respondent's liability as to aLl 48 allegations in those three (3) counts has been conclusively established.

All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for those violations.

In regard to the 48 violations alleged, those civil money penalty amounts will be determined by giving due consideration 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), which provides 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 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 (emphasis added).

Id.

In lieu of conducting an evidentiary hearing on the sole remaining issue, that of determining the appropriate civil money penalties for these 48 violations, the parties are hereby instructed to submit concurrent written briefs, to be filed no later than, Friday, December 29, 1995, containing recommended civil money penalty amounts for those violations, utilizing the previously-mentioned statutory criteria.

JOSEPH E. MCGUIRE
Administrative Law Judge