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

September 19, 2019

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 19A00018
LAZY DAYS SOUTH, INC., Respondent.	)	

ORDER ON MOTION TO DISMISS AND MOTION FOR SUMMARY DECISION

I. INTRODUCTION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a)(1)(B) (2017). Pending before the Court are Respondent's Motion to Dismiss and Motion for Summary Disposition. For reasons set forth herein, Respondent's Motion to Dismiss is DENIED and Respondent's motion for summary decision is GRANTED IN PART and DENIED IN PART.

II. BACKGROUND AND PROCEDURAL HISTORY

Respondent operates a restaurant in Marathon, Florida. On November 15, 2016, the Department of Homeland Security, Immigration and Customs Enforcement (ICE or Complainant) served a Notice of Inspection (NOI) on Respondent, Lazy Days South, Inc. Complainant served the Notice of Intent to Fine (NIF) on June 28, 2017. On March 26, 2019, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent violated provisions of § 1324a. The Complaint alleges that Respondent hired sixty-four employees named in the complaint after November 6, 1986, and that the Respondent failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for these sixty-four employees after being requested to do so. Complainant seeks $75,271.80 in penalties. Complainant attached the NIF to the Complaint, but the attached NIF does not contain the attachment setting forth the violations. Respondent timely requested a hearing.

On June 13, 2019, Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted. Simultaneously, Respondent filed a "Response in Opposition to Notice of

Intent to Fine (NIF) Motion for Summary Disposition."[1] Complainant filed a response to Respondent's motions.

III. STANDARDS

A. Motion to Dismiss

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10.[2] Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing*, 12 OCAHO no. 1291 at 8; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)). OCAHO's rules of practice and procedure merely require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3).

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113–14.

B. Motion for Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . 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). "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific

[1] Respondent's "Response in Opposition to Notice of Intent to Fine (NIF) Motion for Summary Disposition" will be referred to as Mot. Summ. Dec.

[2] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

facts showing that there is a genuine issue of fact for the hearing." *U.S. v. 3679 Commerce Place, Inc. d/b/a Waterstone Grill*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States. v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

III. DISCUSSION

A. Motion to Dismiss

First, Respondent argues that Complainant failed to provide a clear and concise statement of facts for each alleged violation and therefore, the Complaint does not put Respondent on notice as to the precise nature of the violations alleged. Mot. Dismiss at 2–3.

The elements of a violation under 8 U.S.C. § 1324a(a)(1)(B) are that a person or other entity, after November 6, 1986, hires for employment in the United States, an individual, without complying with the employment verification requirements of § 1324a(b). The employment verification requirements include employer attestation after examination of documents, individual attestation of employment authorization, and retention of the verification form, which includes making the form available for inspection by ICE. § 1324a(b)(1-3); 8 C.F.R. § 274a.2. Additionally, the regulations set forth the I-9 requirements, and require that the Forms I-9 must be made available for inspection at the time of the inspection. § 274a.2(b)(2)(ii). "Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act." *Id.*

Here, the Complaint asserts that Respondent employed the sixty-four persons named in the complaint, and alleges that Respondent failed to prepare and/or present Form I-9s for each of the sixty-four employees. Complainant does not allege that the Form I-9s were improperly completed, it alleges that they were not prepared or presented. While these allegations are asserted in the conjunctive and alternative, both are sufficiently pled to assert a violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant has pleaded enough to put Respondent on notice of the alleged violations. *United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 5–6 (2013) (CAHO declined to modify or vacate interlocutory order).

Respondent next argues that it timely prepared Form I-9s for its employees, the I-9s were scanned and sent to Complainant, and Complainant has not indicated what violations the Form I-9s contain. This argument cannot be resolved in a motion to dismiss. As noted above, the Court must limit its analysis to the four corners of the complaint. The claim that the company prepared and sent the forms to Complainant is a factual statement not contained in the complaint.

Respondent also argues that the company demonstrated good faith compliance, which is a defense to a § 1324a violation. This argument is likewise unavailing. As an initial matter, this argument suffers from the same defect as the claim above, that it cannot be determined from the four corners of the complaint. Furthermore, 8 U.S.C. § 1324a(a)(3) provides that,

> A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

As OCAHO jurisprudence has made clear, this defense by its own terms applies only to "knowing hire" violations, not to alleged violations of the employment eligibility verification requirements. *United States v. LFW Dairy Corp.*, 10 OCAHO 1129, 3–4 (July 1, 2009); *see also United States v. Moyle Mink Farm*, 1 OCAHO no. 85, 573, 573-74 (1989) (granting motion to strike defense); *United States v. N. Mich. Fruit Co.*, 4 OCAHO no. 667, 680, 690 (1994) (granting motion to strike defense). Complainant did not charge Respondent with violations of the "knowing hire" provisions, but rather with failing to timely complete or present I-9 Forms. The safe harbor provided by § 1324a(a)(3) is thus inapplicable to the violations charged here, and is legally insufficient as a defense to them.

Additionally, the "good faith" defense set forth in § 1324a(b)(6) is a separate defense, but is similarly inapplicable to the violations charged here. "This section provides a narrow but complete defense where an entity is charged with technical and procedural failures in connection with the completion of an I-9 form." *LFW Diary Corp.*, 10 OCAHO 1129 at 4. Again, Complainant charged Respondent with failing to prepare and/or present the forms in the first instance for sixty-four named individuals. These are substantive violations, not technical or procedural errors. *United States v. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10 (2016) (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). The § 1324a(b)(6) "good faith" defense does not provide a shield to avoid the basic requirements of the Act to complete I-9 forms within three business days of hire, or of retaining them thereafter. *LFW Dairy Corp.*, 10 OCAHO no. 1129 at 5. Each failure to properly prepare, retain, or produce the forms in accordance with the requirements of the employment verification system is a separate violation of the Act. 8 U.S.C. § 1324a(a)(1)(B); *United States v. Jonel, Inc*., 7 OCAHO no. 967, 733, 736 (1997).

Lastly, Respondent argues that the retention periods for the Forms I-9 had expired, and therefore it cannot be held liable for failing to produce them. The complaint does not contain hiring and termination dates for the listed employees, so the requisite retention period cannot be determined within the four corners of the complaint. This argument will be discussed further below.

B. Summary Decision

1. Liability

In the motion for summary disposition, Respondent argues first that there was no violation, and that the company is entitled to a good faith defense under § 1324(a)(3). Respondent asserts that the company took every step within its power and understanding to comply with § 1324a(a)(1)(B), including reviewing the I-9s, retaining the forms, and the individuals attested to

being authorized to work. Through counsel, Respondent asserts that each employee filled out an I-9 form when they started their employment. Respondent's counsel states that when ICE came to inspect the restaurant, the ICE agents dropped off the Department of Homeland Security's current revision of the I-9 form with a date of November 14, 2016. Respondent contends that its employees did not understand the complexities of immigration law, and transferred the information from the original I-9 forms to the new forms. When Respondent retained counsel, counsel obtained the original forms, scanned them and sent them to ICE with the above explanation. Thereafter, Hurricane Irma caused the restaurant to be destroyed, and the original I-9 forms were lost. Mot. Summ. Dec. at 2-3. Respondent attached the following evidence: Ex. A – Sworn Statement in Proof of Loss; Ex. B – Spreadsheet detailing total loss of income from September 6 to September 29; Exs. C – HHH – 58 I-9 Forms.

ICE states, through counsel, that when its Special Agent served the NOI, Respondent's office manager, Guadalupe Ornelas, advised the Special Agent that Respondent had never prepared Form I-9s and that they were unaware of the requirement to prepare such forms. The Agent advised the office manager to complete the Forms, but not to backdate them. When the Agent returned, Respondent provided the forms on the sample that ICE provided. Respondent also returned a written employer questionnaire completed by the office manager who stated that the restaurant had never completed the I-9s. Subsequently, Respondent submitted two additional sets of Form I-9s, claiming that they are copies of the originals. Attached to its response to the motion for summary decision, ICE submitted a document entitled "Employer Questionnaire" from Guadalupe Ornelas, the office manager, and a list of names with birth dates, social security numbers, dates of hire, and termination dates.

As an initial matter, Respondent admits in the answer that it hired each of the persons listed in the Complaint. Answer at 2. As noted above, Respondent provided fifty-eight I-9 forms with dates ranging from as early as 2009. Mot. Summ. Dec. Exs. C–HHH. The forms are either versions from 2005 or 2009, and each form is signed by either Bernardo Ornelas who lists himself as the owner, or Cesar Sandoval, who lists himself as the manager, or Guadalupe Ornelas. The motion does not contain any affidavits supporting counsel's explanation of what happened during the inspection, or explaining the process that Respondent followed when completing the forms. The additional exhibits show a substantial insurance claim in the aftermath of Hurricane Irma but do not itemize or provide a description of the damage (Mot. Summ. Dec. Ex. A) and indicate that the restaurant was closed for 24 days for both preparation for the Hurricane, and then after for, presumably, repairs, for a considerable loss of revenue (Mot. For Sum. Dec. Ex. B).

Based upon the evidence submitted with the Respondent's motion, the Respondent satisfied its burden of production as to preparation of the Form I-9s for fifty-eight of the individuals, but did not meet its burden of production as to the remaining six for whom Respondent did not provide an I-9.

Regarding the alleged failure to present I-9s, Respondent has not met its burden of production to show that it presented Forms I-9 at the time of inspection. Respondent attached fifty-eight I-9s to its motion and alleges that Respondent's counsel provided I-9s to Complainant in November 2018. However, there is no evidence as to when or whether Respondent's counsel submitted

these forms. At the time of inspection, the parties do not dispute that Respondent presented I-9 forms that were completed after the NOI.

Complainant also alleges that Respondent provided a different set of I-9s in November 2018, after Complainant served the NIF. Complainant did not provide any of the Forms I-9 that it asserts Respondent sent to it after the inspection in its response to the motion. Subsequently, ICE attached what it purports to be both sets of I-9s to its prehearing statement without filing a motion to supplement its response to the motion. For the sake of completeness and judicial economy, these will be considered. The three sets of I-9s vary in the number of forms provided. Other than counsels' statements, there is no evidence of when Respondent presented these I-9s to Complainant.

Further, regarding the alleged failure to prepare Forms I-9, sections 1 and 2 of the set of fifty-eight I-9s are dated prior to the NOI. Thus, the burden shifts to Complainant to provide contravening evidence to show Respondent did not prepare these I-9s for fifty-eight individuals. ICE did not provide any affidavits to substantiate the statements made in its response, and, as noted above, did not provide the Forms I-9 that it asserts Respondent sent it after the inspection with its response, only attached them, two months later, to the prehearing statement. In its Response, ICE asserts that it has not seen the Forms I-9 provided in the motion, which contradicts the claim made by Respondent's counsel and also contradicts the I-9 forms Complainant submitted with its prehearing statement, some of which are identical to those attached to the motion. *See* Complainant's Prehearing Statement Ex. G-4. Considering that ICE has charged Respondent with failure to prepare and/or present I-9s and there are contradictory statements and evidence regarding what was produced, when it was produced, and who produced it, Respondent has not met its burden to show the absence of a material fact warranting summary decision.

Additionally, Complainant's response relies on a questionnaire that Respondent's office manager, Guadalupe Ornelas, purportedly completed. In the questionnaire, the office manager indicates that she or the owner are responsible for hiring. Resp. Ex. 1 at 2. She states that she has files for all employees with copies of their identification documents, Social Security cards, and applications, which she keeps in a filing cabinet. *Id.* In the questionnaire, she also states, "We are not aware of the I-9s[.]" Resp. Ex. at 2. However, she signed the employer attestation on two I-9s that Respondent attached to its motion. Mot. Summ. Disposition Ex. X, FFF. The questionnaire is not dated, signed, or affirmed. While ICE's counsel indicates that the questionnaire was completed after the inspection, ICE did not submit any evidence of this.

Also noted above, the Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994). The Court also notes that the motion was filed before any discovery has been conducted. Taking the evidence in the light most favorable to Complainant, the Court denies the motion for summary disposition with leave for Respondent to renew and supplement the motion after the close of discovery. The questionnaire purportedly from the office manager directly raises a factual issues as to whether the Forms I-9 submitted with the motion existed at the time of the inspection, especially since the Office Manager signed the section 2 attestation on several I-9s that Respondent submitted.

Further, as previously noted, Respondent did not provide I-9 forms for six employees named in the Complaint. Thus, Respondent did not meet its burden of production to establish that it presented I-9s for these six employees at the time of inspection.

However, summary decision will be granted for the violation related to David Bodenstein's I-9. Employers must retain an employee's Form I-9 for three years after the date of hire or one year after the date of termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A). The record shows that Respondent hired Bodenstein in 2011, and terminated him on January 22, 2016. Resp. at 12, 14. As Complainant served the NOI on November 15, 2016, Respondent no longer had an obligation to retain Bodenstein's Form I-9. Thus, Respondent is not liable for any violation related to David Bodenstein's Form I-9.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Lazy Days South, Inc. hired David Bodenstein in 2011 and terminated him on January 22, 2016.

2. On November 15, 2016, Immigration and Customs Enforcement served the Notice of Inspection on Lazy Days South, Inc.

B. Conclusions of Law

1. Lazy Days South, Inc. is not liable for any violation related to David Bodenstein's Form I-9.

2. Employers must retain an employee's Form I-9 for three years after the date of hire or one year after the date of termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A).

V. CONCLUSION

The Court finds that Complainant adequately pled violations of § 1324a and therefore the Respondent's Motion to Dismiss is DENIED. The Court finds that Respondent's motion for summary decision is GRANTED IN PART and the violation related to David Bodenstein's I-9 is DISMISSED.

The Court finds that the Respondent did not establish the absence of a genuine issue of material fact regarding the remaining sixty-three violations, and therefore the Respondent's motion for summary decision is DENIED IN PART.

SO ORDERED.

Dated and entered on September 19, 2019.

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Jean C. King
Chief Administrative Law Judge