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

July 15, 1993

IN RE CHARGE OF	)	
ROMELIA COLON	)	
	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	Case No. 92B00147
A. J. BART, INC.,	)	
Respondent.	)	
	)	

DECISION AND ORDER

Appearances: Anita J. Stephens, Esquire, Kirk Flagg, Esquire,
Linda White, Esquire, Verna L. Williams, Esquire,
Washington, D.C., for complainant;
Carol MacKenzie, Esquire, Portnoy, Messinger,
Pearl and Associates, Inc., Westbury, New York,
Christopher P. Jameson, Esquire,
Jameson &Dunagan,
P.C., Dallas, Texas, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding concerns the complaint filed on behalf of Romelia Colon (complainant/Ms. Colon), against her former employer, A. J. Bart, Inc. (respondent/Bart), in which it was alleged that Bart terminated her employment on December 18, 1991 based solely upon complainant's perceived citizenship status, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

On January 15, 1992, complainant timely filed a written complaint with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the United States Department of Justice, alleging therein that on December 17, 1991, Isabella White, respondent's bindery department supervisor, had denied her employment at Bart based upon complainant's failure to produce specific employment eligibility documentation namely, a birth certificate, and had also rejected complainant's offer to provide a valid United States passport for that purpose.

On May 19, 1992, presumably as part of OSC's investigation of complainant's document abuse allegations, the statement of Isabella White, the person with whom complainant dealt in applying for employment on Monday, December 16, 1991, was taken in the presence of a court reporter in Dallas, Texas concerning the nature of the documentation requested of complainant in connection with the preparation of the pertinent Form I-9 (Complainant's Exh. 9) prepared in the hiring process.

On June 15, 1992, in correspondence prepared on respondent's firm's letterhead, A. J. Bart, respondent's president, sent the following two-paragraph letter to complainant: "This letter will serve as a formal offer of employment for a position in our bindery department. If you wish to accept this offer of employment, please contact the undersigned within five (5) days of your receipt of this letter." (Respondent's Exh. A).

On July 13, 1992, OSC filed with this office the three-count Complaint at issue. In Count I, it is alleged that respondent discharged complainant because of her perceived citizenship status and her inability to present a specific work authorization document, i.e. a driver's license, as well as her failure to produce her birth certificate to prove United States citizenship, in violation of 8 U.S.C. §1324b(a)(1). Count II charges respondent with having violated the provisions of 8 U.S.C. §1324b(a)(6) by reason of having engaged in an unfair document abuse practice in the course of having requested specific documents from complainant namely, her driver's license and Social Security card in order to have established her employment eligibility. And in Count III, respondent is charged with having also violated the provisions of 8 U.S.C. §1324b(a)(6) by engaging in a pattern or practice of document abuse by having demanded more and/or different documents than required for Form I-9 purposes by way of having every employment applicant present a Social Security card for Form I-9 purposes and also refusing to accept Texas State

Identification Cards as a valid form of identification for Form I-9 employment verification purposes.

In Count I, OSC requests that respondent be ordered to hire complainant, with full seniority and benefits, and also be ordered to pay complainant full back pay, with interest, from December 18, 1991, to the date of final judgment. OSC also requests that respondent be ordered to pay civil penalties in the amounts of $2,000 for Count I, $1,000 for Count II and $1,000 for each individual, other than complainant, against whom respondent practiced document abuse as more fully alleged in Count III.

Following the filing of the Complaint, discovery activities, including depositions, were conducted. Following due notice to the parties, an adjudicatory hearing was conducted before the undersigned in Dallas, Texas on December 9 and 10, 1992.

Summary of Evidence

Complainant's case-in-chief was comprised of her testimony, as well as that of eight others and the introduction into evidence of some 21 documentary exhibits, marked and entered as Complainant's Exhibits 1 through 11 and 13 through 22.

Those eight witnesses were Lawrence E. Mitchell, an OSC paralegal, two current Bart bindery department employees, Marie Meshell and Michael Padilla, four former Bart employees, Glenn Broussard, Thomas Paul Cook, Khininia Georges and Gary McNatt, and Bart's bookkeeper, Eleanor Mariani, who was called as an adverse witness.

Meanwhile, respondent's evidence consisted of the testimony of its president, A. J. Bart, its bindery supervisors, Isabella White and Desmond Smith, and the placement into evidence of two documents identified as Respondent's Exhibits A and B.

Without particularizing the lengthy and detailed relevant testimony, we will address those facts which will focus upon the central issues in dispute namely, the happenings at Bart's suburban Dallas location on December 16, 17, and 18, 1991, in the course of complainant's having applied and been hired for an advertised position in Bart's bindery department, as well as Bart's employment eligibility documentation policy, as reflected in its Form I-9 preparation practices.

Complainant is a 31-year United States citizen, having been born in Brownsville, Texas on May 29, 1962 (Complainant's Exh. 9). She is a high school graduate (Complainant's Exh. 22) and was awarded a Certificate of Qualification in Graphics Art from Lee College in Baytown, Texas on May 16, 1985 (Complainant's Exh. 15), but has never been employed in that field. Instead, she has worked almost exclusively as a part time food service employee.

She learned of an opening in Bart's bindery department for an experienced handworker by way of a classified advertisement in the Sunday, December 15, 1991 edition of the Dallas News (Complainant's Exh. 7). Those interested were to contact respondent's Isabella White at the telephone number supplied.

Complainant testified that she telephoned Isabella White on the following day and was invited to come to Bart's and file an employment application. She did so on that date and advised Isabella White that she had no experience in the advertised job duties, but that she "had training" (T. 52, 53). Upon determining that complainant was a quick learner, Isabella White told her to return at 7 a.m. on the next day.

She did so and was met by Isabella White, who provided her with a W-2 Form and a Form I-9, (Complainant's Exh. 21). She completed section 1 of the Form I-9, signed that form and gave it to Ms. White, who requested that she furnish her Social Security card and a Texas driver's license (T. 55). Complainant, who was in a room alone with Isabella White at the time, explained that she did not have a Texas driver's license and offered her Social Security card and a Texas I.D. card (Complainant's Exh. 8), instead. Ms. White refused to accept that I.D. card and stated that since complainant had no Texas driver's license she would have to furnish a birth certificate in its place and that complainant was not to return to work on the following day unless she brought her birth certificate (T. 56, 57).

Shortly afterwards, Marie Meshell, who was also applying for a job at Bart on that date and who is still employed there, entered the room. Ms. Meshell was also given a W-2 and Form I-9 by Isabella White, who requested that she also furnish a Social Security card and her Texas driver's license. Ms. Meshell did so and Isabella White made copies of those documents and again reminded complainant that she was to furnish her birth certificate (T. 57).

Isabella White then explained the Bart insurance plan and company holidays to complainant and Ms. Meshell and gave them their time cards. They clocked in, were given instructions, worked the remainder of that work day and clocked out.

Later that evening, complainant spoke to Michael Padilla, another bindery employee at Bart, to whom she is related by marriage and with whose family she then resided, and told him of Isabella White's refusal to accept her Texas I.D. for Form I-9 purposes. He told her that Isabella White only accepts Texas driver's licenses and birth certificates.

Complainant testified that she was unable to locate her birth certificate that evening and for that reason did not return to work at Bart on the following morning, Tuesday, December 17, 1991. On that date, she received a telephone call from Michael Padilla, who informed her that she was still employed at Bart but that Isabella White wanted to see complainant's birth certificate. She told him that she did not have that document but did have a United States passport. That fact was related to Isabella White by Michael Padilla, who informed complainant that Ms. White insisted upon the birth certificate and that complainant was not to return to work unless she produced that document (T. 58, 59).

Complainant's supporting evidence included testimony from eight witnesses. The initial four consisted of two present and two former employees of Bart, Marie Meshell and Michael Padilla, and Thomas Paul Cook and Gary McNatt, respectively, all of whom testified that during the same time period at issue they were also requested by three of Bart's supervisors to provide Social Security cards and Texas driver's licenses for Form I-9 purposes in the hiring process. Complainant also offered testimony from two other former Bart employees, Glenn Broussard and Khininia Georges, who testified that they had been required to supply Bart supervisors with a driver's license and a birth certificate, and a Social Security card and possibly a driver's license, respectively, when hired. In addition, complainant made available the testimony of Lawrence Mitchell, an OSC paralegal, who analyzed the information contained on 104 Form I-9 copies which Bart provided in response to discovery inquiries. Finally, complainant adduced the testimony of an adverse witness, Eleanor Mariani, Bart's bookkeeper, concerning the procedures employed in securing Form I-9 documentation from Bart's job applicants.

Marie Meshell, who was hired on the same date as complainant and who is still employed as a bindery handworker at Bart, testified that while in a conference room with complainant, Isabella White entered and requested that the witness produce her Social Security card and driver's license (T. 120). She identified her completed Form I-9, which contained check marks opposite the driver's license box in List B and the Social Security box in List C in section 2 (Complainant's Exh. 11). She also testified in direct examination that she heard Isabella White tell complainant to bring her birth certificate to work on the following morning (T. 122).

On cross-examination, she testified that she could not recall telling Lawrence E. Mitchell, an OSC paralegal, in an earlier telephone conversation in the course of the OSC investigation, that Isabella White had requested her Social Security card and driver's license (T. 123) and stated that her having been called to testify "is causing me a lot of problems" (T. 125).

Michael Padilla, who is still employed at Bart as a bindery employee, testified that when hired in June 1991 Desmond Smith, another of Bart's supervisors, requested that the witness furnish a Social Security card and a driver's license (T. 134). He also testified that when complainant applied for work at Bart on December 16, 1991 she had produced a Social Security card and a State I.D. card (T. 130). He stated that he had a conversation with Isabella White concerning complainant and that the former told him that in the event complainant could not produce her birth certificate she could not be employed at Bart (T. 131, 132).

Glenn Broussard, who worked at Bart from December 1991, close on to the time at which complainant also started, and who remained so employed until October 1992, testified that when hired Eleanor Mariani, the bookkeeper at Bart, had requested his driver's license and birth certificate for Form I-9 purposes (T. 192).

Thomas Paul Cook, who worked the night shift at Bart from April 1991 until June 1992, testified that Desmond Smith, a Bart supervisor, requested his Social Security card and driver's license at the time of his hire. He also stated that Smith told him to secure Form I-9 documentation from a prospective employee, Jerry Sikes, one evening in Smith's absence. He did so, receiving and copying Sikes' Social Security card and driver's license, as instructed, and placed the photocopies on Smith's desk, as directed (T. 199). He also stated that

Smith requested the same documentation from a third unnamed applicant/employee (T. 200).

Khininia Georges, another former Bart employee who started there at about the same time as complainant, was requested by Desmond Smith to provide his Social Security card for Form I-9 purposes (T. 203) and possibly his driver's license, also (T. 205).

Gary McNatt, a former Bart employee who began his employment there almost on the same date as complainant, and who accepted other employment in April, 1992, stated that he was requested by Bart supervisor Rodney Crafa to supply his Social Security card and his driver's license in the Form I-9 documentation procedure.

Lawrence Mitchell, complainant's seventh witness, has been employed as a paralegal at OSC for some four years and served previously as a document analyst in the Civil Division of the Department of Justice. His current duties include analyzing completed Forms I-9, such as the 104 Form I-9 copies, those contained in Complainant's Exhs. 1 through 6, which were furnished to OSC by Bart in the course of filing responses to discovery requests.

In essence, he analyzed those 104 Form I-9 copies and provided a statistical summary of the documentary demands made by nine or more job interviewers/supervisors at Bart (Complainant's Exh. 14).

That summary reveals that of the 102 job applicants whose pertinent Forms I-9 copies are in evidence, 85 of those persons, or 84 percent, were requested, as complainant had been, to produce their Social Security cards and drivers' licenses in order to satisfy the employment eligibility documentation. Interestingly, it can be seen that Eleanor Mariani, Bart's bookkeeper, made the same documentary demands on 43 of the 51 Forms I-9 she certified, or exactly 84 percent, also. Of more immediate interest, that summary also discloses that Isabella White, the bindery supervisor who allegedly demanded that complainant produce a Social Security card and a driver's license, also made those precise documentary demands on eight other occasions, or every time she interviewed any job applicant.

Lawrence Mitchell also testified that it appears that Bart maintained two sets of Forms I-9 covering all hires covering the period at issue and subsequently, with one set reflecting the deficient forms, as prepared, and another set prepared subsequently which comports with IRCA recordkeeping requirements.

Complainant's final testimony was that of Bart's bookkeeper, Eleanor Mariani, who was called as an adverse witness. She testified that when joining Bart's Dallas operation in May 1988, she was totally unfamiliar with the Form I-9 and its use. Her Form I-9 training, consisting of two separate periods of instruction, covering some two to three working days, was administered by Eileen Foley, her counterpart in Bart's New York City plant.

She stated that Ms. Foley had instructed her to request that job applicants furnish a Social Security card, a driver's license or another document listed on the Form I-9 (T. 296). Elsewhere in her testimony she stated that Ms. Foley did not explain the purpose of the Form I-9 to her and "all she said to me was to ask for a Social Security card or a driver's license, and if they didn't have that, one of the forms from here, but you needed two documents or one from there. That's what she said." (T. 301, 302). She certified all of the Forms I-9 prepared for the office and sales employees and the supervisors, Rod Crafa, Isabella White, Desmond Smith and Carlos Lanza signed the remaining Forms I-9.

Ms. Mariani also testified that she has not dealt with Forms I-9 since Dan Fabrizio was hired (T. 297). Elsewhere in the record, Mr. Fabrizio advised that he began his duties as Bart's credit manager, a newly-created position, in January, 1992 (T. 231, 232).

Respondent's case began with the testimony of Isabella White, one of Bart's bindery supervisors, who testified that she has worked for respondent firm for 18 years, having transferred to Dallas in 1987 from Bart's New York City printing plant.

She stated that she hired complainant and that she requested that she complete a W-2 Form, section 1 of a Form I-9 and a safety letter, and that complainant worked on that date, for which she was paid, and that complainant filled out the Form I-9 but that she failed to return to work on the following day (T. 233-236).

She categorically denied having requested any employment eligibility documents from complainant, whom she stated had brought no documentation to the job interview. Ms. White also emphatically denied ever having requested complainant or any other job applicant to furnish a Social Security card and a driver's license and stated that she had not told complainant, in Marie Meshell's presence, to bring in her birth certificate.

On cross-examination, and in connection with her testimony that complainant had brought no documents to the December 16, 1991 job interview (T. 235), Ms. White's attention was invited to a letter dated January 28, 1992, over the witness' signature as Bart's bindery supervisor, to an OSC paralegal specialist (Complainant's Exh. 16).

That correspondence was then used to impeach Ms. White's hearing testimony on the basis of a prior inconsistent statement, consisting of the following paragraph Ms. White had written in her January 28, 1992, letter, some 42 days after the event in question:

> On December 17, 1991, after applying in person to an ad ran in the local newspaper, Ms. Colon was hired by our company. At the time she did not have with her all the proper documents needed by law to be hired. She worked for us that day and was told she would supply the needed documents when she reported to work the next day. Ms. Colon never called or reported back to work.

Ms. White also testified that she had received no training concerning the manner in which the Forms I-9 were to have been completed and was unaware that any instruction was in fact necessary. She also acknowledged that in her May 19, 1992, statement to an OSC investigator in the presence of Ms. White's attorney, made under oath and which was recorded by a court reporter, she had stated that she had not requested that complainant produce a birth certificate after complainant had produced and given to her a Social Security card and a Texas I.D. card (Complainant's Exh. 10, at 5).

Desmond Smith, another of Bart's bindery supervisors who transferred to Dallas about five years ago after spending 14 or 15 years in respondent's New York City operation, testified that he also interviews and hires employees and has applicants fill out Forms I-9, but does not request specific documents. Instead, he requests only those documents which the job applicant has in his/her possession, photocopies those and presents the originals and photocopies to Eleanor Mariani, who does the necessary paperwork (T. 254, 255).

He also testified that another bindery supervisor, Isabella White, also follows that practice since they have jointly agreed that the Form I-9 preparation is Eleanor Mariani's responsibility, as opposed to theirs (T. 261, 262). As in the case of Isabella White, he received no formal training concerning the manner in which Forms I-9 were to be completed (T. 258).

Respondent's concluding testimony was that elicited from its president, Alvin J. Bart. His firm is a commercial printing operation

whose principal account is J.C. Penney Company, Inc. Bart prints that firm's catalogs and has for a number of years, with that activity accounting from some 50 to 60 percent of their business. Until recently, those catalogs were printed in Bart's then only plant located in New York City, where Penney's headquarters was also located.

But in 1986 or so, Penney relocated its corporate headquarters to Dallas, Texas and Bart decided to operate a second printing plant in that area, also. Mr. Bart is justifiably proud that its Dallas printing facility began operations in May, 1988, and employs 120 - 125 workers, some 68 per-cent of whom are minority persons. He recounted that his initial bookkeeper had to be replaced and that delinquent accounts receivable dictated that he hire a credit manager to handle those matters and to perform other functions, including overseeing the employee 401K plan. That person was Mr. Fabrizzio, whom he interviewed in October or November, 1991, and who assumed those duties one or two months later.

Concerning the use of Forms I-9, he stated that Bart has no written policy concerning their preparation. He recalls having received a supply of those forms some years ago when IRCA became effective and instructed his supervisory staff at that time to avoid hiring illegal aliens and thus avoid the penalties which could be assessed for "not having the right papers" (T. 283). He never considered the implications involving employment discrimination for two reasons, IRCA was not originally enacted to cover discrimination and he felt that he does not discriminate in any event (T. 284).

Mr. Bart hires the supervisors and higher ranking employees, such as his bookkeeper and credit manager. He hired Eleanor Mariani and stated that Eileen Foley, who worked in the New York plant and who is no longer with Bart, was not sent to Dallas to train Eleanor Mariani. It more likely would have been George Lutz, one of Bart's New York City controllers or one of his accountants, and the purpose of the visit would have been to review bookkeeping procedures (T. 286, 287).

Issues

The initial issue to be examined is that of determining whether, as OSC alleges in Count I, respondent violated the provisions of 8 U.S.C. §1324b(a)(1)(B) by unlawfully discriminating against Ms. Colon by reason of its having treated her differently in the discharge process owing to her perceived citizenship status, as evidenced by respondent's

demand that she produce a birth certificate in order to establish her United States citizenship.

In the event that that issue is decided in complainant's favor, further consideration must be given to complainant's requests that respondent be ordered to cease and desist from that discriminatory practice; that respondent be ordered 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 said order; that respondent be ordered to retain, for a period of three years, the names and addresses of each individual who applies, in person or in writing, for work with respondent; that respondent be ordered to educate its personnel concerning their responsibilities under 8 U.S.C. §§1324a and 1324b; that respondent be ordered to pay a civil penalty sum of $2,000 for that violation; and that respondent be ordered to hire Ms. Colon, with full seniority and benefits, and pay Ms. Colon full back pay, at the rate of $4.50 per hour, with interest, from December 18, 1991, to the date of final judgment.

The next issue presented is that of determining whether, as OSC has alleged in Count II, respondent engaged in an unfair document abuse practice against Ms. Colon by having violated the provisions of 8 U.S.C. §1324b(a)(6) by reason of having refused to honor a document which she had tendered which on its face appeared to be genuine namely, her Texas identification card, and by having requested more and/or different documents, i.e. Ms. Colon's birth certificate, than are required for Form I-9 employment verification purposes.

Should that issue also be resolved in favor of complainant an appropriate civil penalty must be assessed against respondent.

The concluding issue to be addressed is that of ascertaining whether, as OSC has alleged in Count III, respondent engaged in a pattern or practice of document abuse, in violation of the provisions of 8 U.S.C. §1324b(a)(6), in the course of having demanded that other similarly situated job applicants produce more or different documents than those required under the employment verification system set forth at 8 U.S.C. §1324a(b).

Similarly, if it is found that respondent violated that statutory provision, an appropriate and mandatory civil penalty must be assessed for each of the 102 individuals against whom OSC alleges that respondent has also discriminated in that manner.

Discussion, Findings and Conclusions

In bringing this action, complainant is exercising those rights which are set forth in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374 (Nov. 6, 1986)), 8 U.S.C. §1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. §1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. {8 U.S.C. 1324b} (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.
>
> (1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in Section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.
> (emphasis added) * * * * *

Complainant's evidentiary burden of proof in asserting her charge of an unfair immigration-related employment practice based upon citizenship status, is that of establishing by a preponderance of the evidence, 8 U.S.C. §1324b(g)(2)(A), that Bart knowingly and intentionally engaged in the discriminatory activity which she has alleged, 8 U.S.C. §1324b(d)(2).

The necessary elements of that burden of proof in actions of this nature can be determined by reviewing and adopting those decisions involving parallel claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (Title VII), Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (6/1/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91); Williams v. Lucas & Associates, 2 OCAHO 357 (7/24/91); Ryba v. Tempel Steel Company, 1 OCAHO 289 (1/23/91); U.S. v. LASA Marketing Firms, 1 OCAHO 141 (3/14/90).

Under Title VII guidelines, complainant may, in either of two ways, establish Bart's alleged discriminatory practice, that of knowingly and intentionally having treated her differently, or disparately, than other employees similarly situated in the course of terminating her

employment on December 18, 1991 solely because of her citizenship status.

She can provide indirect, or circumstantial, proof of such discrimination, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), or she may adduce direct evidence of such discrimination, Price Waterhouse v. Hopkins, 490 U.S. 228 (1986), Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Prior to June 25, 1993, should complainant's evidence have been viewed as indirect evidence of discrimination and in the event that she had proven a prima facie case, the burden of production then would have shifted to Bart to articulate a legitimate reason for her discharge. Should Bart have carried this burden, Ms. Colon then would have had the opportunity to prove that the reasons articulated by Bart were a mere pretext for discrimination. McDonnell Douglas Corp., 411 U.S. at 807. See also Texas Dept. of Community Affairs, 450 U.S. at 248. Moreover, "[t]he ultimate burden of persuading the trier of the fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253.

In the event that complainant's evidence consists of direct evidence of discrimination, the McDonnell test is not applicable since that evidentiary test is intended to be utilized to assist in discovering discrimination where only circumstantial evidence is available. Trans World Airlines, 469 U.S. 121, 122. Direct evidence will not only constitute a prima facie case of discriminatory conduct, it serves as complainant's entire case and imposes upon Bart the burden of proving, by a preponderance of the evidence, that it would have discharged her even in the absence of the discrimination element.

On June 25, 1993, however, the U.S. Supreme Court modified the McDonnell Douglas framework by ruling in St. Mary's Honor Center v. Hicks, __ U.S. __, 61 U.S.L.W. 4782 (1993), that a discharged plaintiff alleging racial discrimination is not entitled to judgment as a matter of law after proving that all of the defendant's reasons were merely pretextural and that in order to prevail plaintiff must bear the ultimate burden of persuasion of showing that the defendant intentionally discriminated against him based upon his race.

It is to be noted that that ruling is limited to factual scenarios involving indirect, or circumstantial, evidence of discriminatory intent and thus has no effect upon this decision, which involves a finding of

direct evidence supporting complainant's allegation that Bart engaged in a proscribed unfair employment practice under IRCA.

As provided for in the wording of §1324b(a)(B), complainant must qualify as a "protected individual" in order to prosecute her claim of citizenship status discrimination and that term has been defined as an individual who is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee, or one who has been granted asylum. §1324b(a)(3). Ms. Colon has demonstrated that she is a protected individual by having established that she is a United States citizen.

We proceed then by directing our attention to OSC's allegation embraced in Count I and in doing so our inquiry concerning respondent's liability on the alleged unfair immigration related employment practice against Ms. Colon must be resolved in complainant's favor since there is controlling OCAHO authority supportive of that finding. Jones v. DeWitt Nursing Home, 1 OCAHO 189 (June 29, 1990). In that ruling, involving an almost identical factual scenario, an employer, as here, demanded that a newly-hired employee provide a Social Security card and a birth certificate in order to establish the employee's identity and employment eligibility, and rejected a state identification card which had been offered for that purpose.

The administrative law judge in DeWitt found that an employer's insistence that a birth certificate be provided, at the risk of the loss of employment, after the employee had provided adequate documentation concerning her identity and employment eligibility was a per se violation of the prohibition against citizenship status discrimination. It was further found that that employment practice constituted direct evidence of a discriminatory action which IRCA proscribes.

Owing to the precedential character of the DeWitt ruling, I also find Bart's demand that complainant provide a birth certificate in order to determine her citizenship status constitutes direct evidence of a violative employment practice under IRCA.

Given that finding, an appropriate civil penalty must be assessed for that violation, ranging from the mandatory minimum sum of $250 to the maximum amount of $2,000 for each individual against whom discrimination has been practiced. 8 U.S.C. §1324b(g)(2)(B) (iv)(I). It should be noted that the statutory civil penalty sums established for this type violation are tiered, resulting in substantially higher civil

penalty ranges for repeat violations, $2,000 to $5,000 for persons or entities involved in a single prior violation that is the subject matter of an order such as this and $3,000 to $10,000 for persons or entities involved in more than one such prior violation and order. 8 U.S.C. §1324b(g)(2)(B)(iv)(II), (III).

OSC urges that respondent should be assessed the maximum $2,000 civil penalty for this violation because respondent firm did not exercise reasonable care to acquire the most rudimentary knowledge of IRCA's antidiscrimination provisions and the manner in which they applied to its hiring and discharge policies.

It is found that a civil penalty sum of $350 is in order for the reason that this hearing record discloses that Bart has simply misunderstood the nature and scope of the employment verification requirements set forth in §1324a, as opposed to having acted flagrantly in documenting Ms. Colon's identity and employment eligibility.

The finding of liability on the facts of violation in Count I, together with the accompanying $350 civil penalty, will more than adequately serve to invite Bart's attention to that recordkeeping oversight and, pragmatically, respondent's knowledge that repeat violations will result in civil penalties of up to $10,000 for each will almost certainly and predictably result in future compliance.

Having found that respondent violated the provisions of IRCA by having discharged Ms. Colon on the basis of her perceived citizenship status, consideration must be given to OSC's requests, among others, that respondent be ordered to rehire Ms. Colon with full seniority and benefits, and award her full back pay in the amount of $4,344.33, or $4.50 per hour, with interest, from December 18, 1991, to the date of final judgment, or in the alternative, that respondent make an unconditional offer of employment to Ms. Colon for a full-time, permanent bindery position as a handworker at the current wage of other bindery handworkers, with seniority from December, 1991, or in the alternative that respondent be ordered to pay Ms. Colon the sum of $8,160 in front pay.

In support of those demands, Ms. Colon has provided four pages of earnings statement copies from eight current and former catering and hotel firms for which she worked as a part-time, on call luncheon, banquet and special events waitress prior and subsequent to her one-day work experience at Bart (Complainant's Exh. 18).

From that documentation, as well as Ms. Colon's hearing testimony, it was learned that she was paid by function, or $40 for a luncheon, involving some four hours work or more (T. 64, 71). It was also determined that at least one employer paid Ms. Colon $45 for a luncheon period of four hours, or $11.25 per hour, and $7.50 per hour for any period she worked in excess of four hours for such luncheon waitress services (T. 71, 72). For other functions, she was paid $59 for a four-hour banquet assignment, $5 per hour for 3.8 hours, or $19 in wages (T. 72, 73). According to these figures, Ms. Colon both before and after her brief employment at Bart, at $4.50 per hour, was routinely averaging between $10 and $15 per hour as an institutional on call waitress.

Ms. Colon testified to, and her documentary evidence (Complainant's Exh. 18) supported, the fact that her gross wages in 1992 totaled $6,491.67, or approximately $6,500 (T. 82, 83).

Given that fact, I find that Ms. Colon's back pay period will consist of the six-month period between the termination date of December 18, 1991 and June 18, 1992, the probable delivery date of Bart's June 15, 1992 letter to Ms. Colon, in which she was offered a position in Bart's bindery department (Respondent's Exh. A).

Accordingly, the appropriate back pay award for that six-month period is $1,430, plus interest for six months at the annual rate of seven percent, or $100.10, or a total back pay and interest sum of $1,530.10, computed in the following manner.

Complainant's six-month gross wage amount at Bart would have been $4,680, or $4.50 per hour, or $180 per week for 26 weeks, less the sum of $3,250, or $6,500 divided by two, representing Ms. Colon's interim earnings for that six-month period, which must be deducted in accordance with the provisions of §1324b(g)(2)(C), resulting in a net salary loss of $1,430 for the six-month period, December 18, 1991 to June 18, 1992.

The Count II allegations, as noted earlier, are premised upon respondent's unfair document abuse practices which consisted of having refused to honor Ms. Colon's offer of her Texas I.D. card, which on its face appeared to be genuine, and also by having requested that she furnish more and/or different documentation namely, her birth certificate, than those which the provisions of IRCA require for Form I-9 employment eligibility verification purposes, in violation of the provisions of §1324b(a)(6).

Since respondent's failure to verify Ms. Colon's employment eligibility is central to this alleged infraction, it might be well to discuss the purpose and use of the Form I-9 in the hiring process. The Employment Eligibility Verification (Form I-9) is a one-page, two-sided document. The face sheet contains two sections, an Employee Information and Verification portion and a second section, Employer Review and Verification, together with self- explanatory instructions for employees/employers on the reverse side (Complainant's Exh. 20).

Employers are clearly advised in the section 2 wording that specified documents from Lists, A, B and C are to be examined and utilized to determine the identity and employment eligibility of all job applicants. List A documents establish both identity and employment eligibility and include United States passports, certificates of United States citizenship, certificates of naturalization, unexpired foreign passports with attached employment authorization and alien registration cards with photographs (green cards). Accordingly, any job applicant presenting a single document from List A effectively establishes both his/her identity and his/her employment eligibility and no other documents need be furnished.

Meanwhile, List B documents establish the applicant's identity only and include, among others, a State-issued driver's license or a State-issued I.D. card with a photograph, or information, including name, sex, date of birth, height, weight, and color of eyes, and a U.S. military card. Resultingly, all persons providing a List B document must also furnish a List C document.

List C documents establish an applicant's employment eligibility only and include, among others, an original Social Security number card (other than a card stating it is not valid for employment), a birth certificate issued by State, county, or municipal authority bearing a seal or other certification, and unexpired INS employment authorization. And all individuals having presented a List C document must also provide a List B document.

Accordingly, any applicant has the option of presenting a List A document which establishes his/her identity and employment eligibility and no other documentation is necessary for Form I-9 purposes. In the alternative, and in the absence of possessing a List A document, an applicant must produce a List B document and a List C document to determine his/her identity and employment eligibility, respectively. And employers may not establish stricter eligibility

requirements, nor may they request or demand additional or different documents for Form I-9 purposes.

Given those recordkeeping parameters, it is obvious that Bart, in the course of having refused to accept Ms. Colon's offer of a United States passport, as a dual purpose document, or her offer of her Texas I.D. card, or by either having required and/or requested that she furnish her driver's license for the purpose of establishing her identity and by requiring and/or requesting that she provide her Social Security card or birth certificate in order to determine her employment eligibility, violated the document abuse provisions set forth in §1324b(a)(6) in the manner alleged in Count II.

For that violation, OSC again requests that the maximum civil penalty sum of $2,000 be assessed for this document abuse infraction. And again I find that the assessment of a civil penalty of $350 will prove to be equally effective in inviting Bart's attention to this recordkeeping lapse, as well as ensuring future compliance.

Finally, we consider those allegations set forth in Count III, to the effect that Bart engaged in a pattern or practice of document abuse in the course of verifying job applicant employment eligibility. Complainant's evidence has amply shown that Bart's Form I-9 preparation practices reveal a pattern or practice of document abuse concerning those 102 job applicants whose pertinent Form I-9 copies were provided to OSC as discovery replies (Complainant's Exhs. 1 through 6).

As noted earlier, those document copies clearly depict a discernible pattern of Bart's having routinely requested and/or demanded certain documents in the Form I-9 preparation process namely, Social Security cards, drivers' licenses and birth certificates. In summary, the collective evidence offered by OSC in support of its document abuse pattern or practice allegation, consisting of Ms. Colon's testimony and that of eight other present or former Bart employees, as well as the documentary evidence, is overwhelmingly persuasive on that issue. For that reason, I find that Bart violated the document abuse provisions of §1324b(a)(6) in the manner alleged in Count III.

In view of that finding, appropriate civil penalty sums for those 102 violations must be assessed, ranging from the statutorily mandated minimum of $100 to the maximum amount of $1,000 for each violation. §1324b(g)(2)(B)(iv)(IV).

In addition to the previously-discussed back pay plus interest and front pay sums of $4,344.33 and $8,160, respectively, OSC requests that maximum civil penalty sums totaling $105,000 be assessed, allocated as follows: $2,000 for the single §1324b(a)(1) unfair immigration-related employment discrimination practice violation contained in Count I; $1,000 for the single §1324b(a)(6) document abuse violation set forth in Count II; and $102,000, or $1,000 for each of the 102 §1324b(a)(6) document abuse violations involved in Count III.

The document inspection and verification duties which IRCA impresses upon employers, while serving a very necessary function in the day-to-day enforcement of that remedial legislation, can reasonably be seen to be burdensome, to say the least, for firms such as Bart, which employs between 120 and 125 persons in its Dallas operation. It has been shown that 68 percent of that workforce consists of ethnic and racial minority persons and that 11 or 12 of those workers are non-citizens (T. 274, 275).

By any measure, that is a remarkable statistic, especially when one recognizes that in today's distressed national economy firms such as Bart constitute the very few remaining sources of entry level and near entry level positions that are being provided to applicants such as Ms. Colon and others similarly situated.

With those facts in mind, I find that civil penalties totaling $10,200 are appropriate for the 102 pattern or practice of document abuse violations contained in Count III, or $100 for each violation.

And even with having utilized the minimum assessment amount in the statutory $100 to $1,000 levy spectrum, there is an awareness that these civil penalty sums, which total some $10,900 for Counts I, II, and III, as well as a back pay and interest award of $1,530.10 in Count I, for a total of $12,430.10, in addition to Bart's legal defense costs, are being paid from that firm's net earnings. That fact will almost certainly cause Bart to revisit its Form I-9 recordkeeping policies, with the very unlikely probability that there will be future violations of this character.

Order

Having found that respondent violated the provisions of 8 U.S.C. §1324b(a)(1)(B) in the manner alleged in Count I namely, by having discharged Ms. Colon on December 18, 1991, because of her perceived

citizenship status and respondent's demand that she furnish a birth certificate to establish her United States citizenship, it is hereby ordered that respondent cease and desist from such unfair immigration-related employment practice.

It is further ordered that respondent pay to Ms. Colon the net sum of $1,530.10 as total back pay and interest for that violation, or $1,430 for the net back pay sum for the six-month period extending from the December 18, 1991 termination date to June 18, 1992, plus the sum of $100.10, as interest for that six-month period at the annual rate of seven percent.

It is further ordered that respondent pay the sum of $350 as the appropriate civil penalty assessment for that Count I violation.

Having also found that respondent violated the provisions of 8 U.S.C. §1324b(a)(6) as charged in Count II, it is further ordered that respondent pay the sum of $350 as the appropriate civil penalty assessment for that violation.

Having also found that respondent violated the provisions of 8 U.S.C. §1324b(a)(6) as alleged in Count III, it is further ordered that respondent pay the sum of $10,200, or $100 for each of the 102 violations alleged therein, as the appropriate total civil penalty sum for those violations.

JOSEPH E. McGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.