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

October 26, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No.93A00058
BLUEBERRY HILL FAMILY RESTAURANT, INC., D/B/A BLUEBERRY HILL FAMILY RESTAURANT #3, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On May 6, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), LVG-274A-14-91, upon Blueberry Hill Family Restaurant, Inc., d/b/a Blueberry Hill Family Restaurant #3, (respondent). That citation contained six (6) counts which alleged 16 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, and civil penalties totaling $4,200 were proposed.

In Count I, complainant alleged that respondent employed the three (3) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare the Employment Eligibility Verification Forms (Forms I-9) and/or failed to retain and/or make available for inspection the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Com-

plainant levied civil money penalties of $400 for each of the three (3) violations, or a civil money penalty totaling $1,200 for Count I.

Complainant alleged in Count II that respondent employed the six (6) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare the Employment Eligibility Verification Forms (Forms I-9) and/or failed to retain and/or make available for inspection the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $250 for each of the violations, or a civil money penalty totaling $1,500 for the six (6) violations contained in the second count.

Complainant alleged in Count III that respondent failed to ensure proper completion of sections 1 and 2 of the Form I-9 for the individual named therein, who was hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied a civil money penalty of $200 for that alleged violation.

In Count IV, complainant alleged that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the three (3) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $200 for each of the violations, or a total of $600 for the three (3) alleged violations in the fourth count.

Complainant alleged in Count V that respondent employed the individual named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure proper completion of section 1 of the Employment Eligibility Verification Forms (Forms I-9) for that individual, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $300 for that alleged violation.

In Count VI, complainant alleged that respondent employed the two (2) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $200 for each of the two (2) violations, or a civil money penalty totaling $400 in that count.

Respondent was advised in the NIF of its right to file a written request for a hearing before an Administrative Law Judge assigned to this office provided that it file that written request within 30 days of its receipt of the NIF, and on May 6, 1992, Eva Garcia-Mendoza, Esquire, then respondent's counsel of record, timely filed a written request on respondent's behalf.

On March 16, 1993, complainant filed the six-count Complaint at issue.

On March 17, 1993, the Complaint and a Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested. Respondent was informed in that Notice of Hearing that it had a right to file an Answer to the Complaint and that the Answer must have been filed within 30 days of its receipt of the Complaint.

On March 30, 1993, prior to the time that the Answer was due, respondent extended a $2,100 offer of settlement, which was accepted by complainant. Complainant prepared a settlement agreement and mailed it to respondent on April 6, 1993, for execution and return for filing, but respondent has failed to execute that settlement agreement.

On November 8, 1993, complainant filed a Motion for Default Judgment, in which it requested the undersigned to find respondent in default for not having filed an Answer within the time provided in the pertinent procedural regulation governing answers to complaints, or by April 21, 1993, under these facts. 28 C.F.R. § 68.9.

On November 24, 1993, respondent filed a responsive pleading captioned Proposed Answer and Affirmative Defenses, in which it denied all of the allegations set forth in the Complaint, and asserted, as an affirmative defense, that the Complaint failed to state a claim upon which relief could be granted.

On February 9, 1994, complainant initiated discovery by serving upon respondent Complainant's First Request for Admissions and Complainant's Interrogatories and Requests for Production.

In Interrogatory 1, complainant requested that respondent state whether each individual named in the Complaint was or had been in respondent's employ since November 6, 1986.

In Interrogatory 2, respondent was required to state the date of employment, date of commencement of employment, employment

status, date of separation from employment and rehire, if appropriate, for the individuals listed in that interrogatory.

In Interrogatory 5, complainant requested that for each individual named by respondent in its response to Interrogatory 1, respondent state whether a Form I-9 had been prepared for each of those individuals, and in the event that of an affirmative reply, that it attach copies of those Forms I-9.

On March 21, 1994, after having received no response to any of its February 9, 1994 discovery requests, complainant filed a pleading captioned Motion for Sanctions and/in the Alternative Motion to Compel, in which it requested the undersigned to:

> Deem respondent's request for a hearing abandoned;
>
> Deem the request for admissions admitted;
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> Infer the Interrogatories and Request for Production of Documents to be adverse to respondent; and
>
> In the alternative, compel respondent to respond to all discovery requests.

On March 23, 1994, respondent provided to complainant its answers to complainant's February 9, 1994 First Request for Admissions, but in doing so respondent failed to reply to complainant's Interrogatories, as well as its Request for Production of Documents, which were part of that February 9, 1994 discovery request served upon respondent.

On October 12, 1994, complainant filed a Motion for Summary Decision, in which it moved the undersigned to grant summary decision in its favor contending that the record was lacking of any genuine issue of material fact.

On October 20, 1994, respondent filed a pleading captioned Defendant's Response in Opposition to the Government's Motion for Summary Judgment.

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 caselaw 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 Construction, 3 OCAHO 430, at 7 (6/1/92).

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 (4/26/91). "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, 586-587 (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., D/B/A J.B.'s Lounge, 4 OCAHO 615, at 2 (3/8/94). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived there-from are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera Enters., Inc., 4 OCAHO 616, 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.

Summary decision may be based on matters deemed admitted. Primera Enters., Inc., 4 OCAHO 616, at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (4/26/91).

Blueberry Hill Family Restaurant, Inc., the properly named respondent herein, contended in its October 20, 1994 response to complainant's Motion for Summary Decision, that Howard Sutton, d/b/a BHNV

#3 is the real party at interest. However, the record clearly discloses that Blueberry Hill Family Restaurant, Inc., is in fact the proper party.

During the pendency of this proceeding, the respondent firm was sold, as evidenced by a Release Agreement, dated December 5, 1992, executed by Howard Sutton doing business as Blueberry Hill Family Restaurant, the cited respondent firm, and "Howard Quam and Blueberry Hill Family Restaurant, Inc." See Complainant's October 12, 1994 Motion for Summary Decision, Attachment 5. The Release Agreement stated in pertinent part that:

> It is further noted that Howard Sutton personally and doing business as a Blueberry Hill Family Restaurant will be held harmless for any tax liability or other financial burdens from doing business as a Blueberry Hill Family Restaurant owner/operator or manager.

Complainant correctly asserts that under the provisions of that December 5, 1992 Release Agreement, Howard Quam and Blueberry Hill Family Restaurant, Inc., are liable for any fines arising from this proceeding. On April 6, 1994, Howard Quam filed a request for Substitution of Attorney, in which he petitioned the undersigned to substitute Steve Venit, Esquire, as respondent's successor counsel of record in place of Eva Garcia-Mendoza, Esquire. That request was granted on April 12, 1994. It is found that that request by Howard Quam's attorney to succeed predecessor counsel is sufficient to deem that Howard Quam is a successor in interest to Howard Sutton. Accordingly, Blueberry Hill Family Restaurant, Inc., is the successor real party in interest.

Complainant alleged in Counts I and II of its March 16, 1993 Complaint, that respondent hired the nine (9) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare the Employment Eligibility Verification Forms (Forms I-9) and/or failed to retain and/or make available for inspection the Forms I-9 for those individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violations alleged in Counts I and II, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Counts I and II; (3) after November 6, 1986; and (4) respondent failed to prepare and/or retain and/or make available for inspection the Forms I-9 for those individuals.

With respect to elements 1 and 2, respondent supplied complainant with an employee roster that listed the dates of hire for six (6) of the nine (9) employees named in Counts I and II. See Complainant's October 12, 1994 Motion for Summary Decision, Attachment 14. The remaining three (3) employees were observed either working at respondent's place of business or found hiding in the ceiling when INS agents conducted an investigation, after having obtained respondent's consent. See id. at Attachments 9, 11-12. All three (3) individuals gave statements that they were employed by respondent, and those allegations have not been denied by respondent.

With respect to the third element, respondent's place of business did not open until 1990. This corresponds with the employee roster produced by respondent, which listed the dates of hire for the employees.

An examination of the fourth element shows that complainant unsuccessfully requested the Forms I-9 for the nine (9) individuals on at least three (3) separate occasions, the 1991 INS investigation, Complainant's First Request for Admissions and Complainant's Interrogatories and Requests for Production, February 9, 1994, and Complainant's Motion for Sanctions and/in the Alternative Motion to Compel, March 21, 1994.

IRCA imposes an affirmative duty upon employers to prepare and retain Forms I-9, and to make those forms available for inspection by INS officers. 8 U.S.C. § 1324a(a)(1)(B). A failure to prepare, retain, or produce Forms I-9, in accordance with the employment verification system, 8 U.S.C. § 1324a(b), is a violation of IRCA.

Complainant has demonstrated, as alleged in Counts I and II of its March 16, 1993 Complaint, that respondent hired the nine (9) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare the Employment Eligibility Verification Forms (Forms I-9) and/or failed to retain and/or make available for inspection the Forms I-9 for those individuals, and in doing so violated the provisions of 8 U.S.C. § 1324a(a)(1)(B).

In respondent's October 20, 1994 response to complainant's Motion for Summary Decision, respondent failed to produce specific facts showing that there is a genuine issue for trial with regard to its liability for the violations contained in Counts I and II.

Accordingly, complainant's Motion for Summary Decision is granted as it pertains to respondent's liability for the facts of violation alleged in Counts I and II.

In Count III, complainant alleged that respondent failed to ensure proper completion of sections 1 and 2 of the Form I-9 for the individual named therein, who was hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violation alleged in Count III, complainant must show that: (1) respondent hired for employment in the United States; (2) the individual named in Count III; (3) after November 6, 1986; (4) respondent failed to ensure that the individual properly completed section 1 of the Form I-9; and (5) respondent failed to properly complete section 2 of the Form I-9 for that individual.

The employee roster submitted by respondent, listing the October 17, 1990 date of hire for that individual, clearly shows that respondent hired that individual for employment in the United States after November 6, 1986. See Complainant's October 12, 1994 Motion for Summary Decision, Attachment 14.

A review of the Form I-9 for that individual indicates that it was completed in an ineffectual manner as alleged by complainant in Count III. See id. at Attachment 15.

Complainant has thus established, as alleged in Count III, that respondent failed to ensure proper completion of section 1, and failed to properly complete section 2 of the Form I-9 for that individual, who was hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

Respondent has also failed to show that there is a genuine issue for trial as to a material fact pertaining to respondent's liability for the Count III violation. Therefore, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the facts alleged in that count.

In Counts IV and V, complainant alleged that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the four (4) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violations alleged in Counts IV and V, complainant must show that:

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

(2) the individuals named in Counts IV and V;

(3) after November 6, 1986; and

(4) respondent failed to ensure that those individuals properly completed section 1 of the pertinent Forms I-9.

The four (4) individuals listed in Counts IV and V were listed in the employee roster supplied by respondent. It was also disclosed that two (2) of the named individuals were hired in 1990 and the remaining two (2) were hired in 1991. See Complainant's October 12, 1994 Motion for Summary Decision, Attachment 14.

A review of the Forms I-9 relating to the four (4) individuals named in Counts IV and V amply illustrates that the forms were completed improperly as complainant has alleged. See id. at Attachments 16-19.

Complainant has shown that there was no genuine issue of material fact with regard to the violations alleged in Counts IV and V, and respondent has offered no facts to indicate otherwise. Accordingly, complainant's Motion for Summary Decision is granted as it pertains to Counts IV and V of the Complaint.

Complainant alleged in the sixth and final count, that respondent employed the two (2) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

In order to prove the violations alleged in Count VI, complainant must show that: (1) respondent hired for employment in the United States; (2) the individuals named in Count VI; (3) after November 6, 1986; and (4) respondent failed to properly complete section 2 of the Forms I-9 for those individuals.

Once again, it has been shown that the employee roster submitted by respondent discloses that both of the individuals named in Count VI were hired by respondent after 1990. See Complainant's October 12, 1994 Motion for Summary Decision, Attachment 14.

A review of the Forms I-9 for the two (2) individuals named in Count VI shows that section 2 was not properly completed by respondent. See id. at Attachments 20-21.

Complainant has thereby established, as alleged in Count VI, that respondent employed the two (2) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B).

Respondent has failed to offer specific facts showing that there is a genuine issue for trial with regard to its liability for the violations alleged in Count VI. For this reason, complainant's Motion for Summary Decision must also be granted as it pertains to respondent's liability for the violations alleged in Count VI.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Counts I through VI of the Complaint, and has also shown that it is entitled to decision as a matter of law with respect to those violations, complainant's October 12, 1994 Motion for Summary Decision is hereby granted. It is found that respondent has violated the pertinent provisions of IRCA in the manners alleged in Counts I, II, III, IV, V, and VI of complainant's March 16, 1993 Complaint.

All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for those 16 violations. An evidentiary hearing will be scheduled for the exclusive purpose of determining the appropriate civil money penalties to be assessed for those violations alleged in Counts I through VI, 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).

In view of this ruling, the evidentiary hearing scheduled to begin at 9 a.m. on Wednesday, November 2, 1994, in Las Vegas, Nevada, is hereby canceled.

Instead, a telephonic prehearing conference will be scheduled shortly for the purpose of selecting the earliest mutually convenient date upon which that hearing can be conducted, or in the alternative, whether the

parties wish to submit written briefs in lieu of attending an adjudicatory hearing, held solely for the purpose of considering the previously-mentioned five (5) criteria.

JOSEPH E. MCGUIRE
Administrative Law Judge