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

December 14, 1994

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00095
ANCHOR SEAFOOD	)	
DISTRIBUTORS, INC.,	)	
D/B/A ANCHOR FISH	)	
COMPANY,	)	
Respondent.	)	
	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On October 15, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by issuing and serving upon Anchor Seafood Distributors, Inc. (respondent) Notice of Intent to Fine (NIF) NYC274A-92005420. That citation contained four (4) counts alleging 56 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, and proposed civil money penalties totaling $40,620.

In Count I, complainant alleged that subsequent to November 6, 1986, respondent hired and/or continued to employ the 13 named individuals knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(a)(2). Complainant levied civil money penalties of $1,150 for each of those 13 alleged violations, or a total of $14,950.

In Count II, complainant alleged that respondent employed the 41 named individuals for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or

make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $480 for each of the three (3) violations numbered 16, 21 and 22, and $620 for each of the remaining 38 violations, or civil money penalties totaling $25,000 for that count.

Complainant alleged in Count III that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and failed to ensure that that individual properly completed section 1 of the pertinent Form I-9, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $310 for that alleged violation.

In Count IV, complainant alleged that respondent hired the named individual for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the pertinent Form I-9, again in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed a civil money penalty of $360 for that alleged violation.

Respondent was advised in the NIF of its right to contest those charges by timely submitting a written request for a hearing before an administrative law judge. On November 8, 1993, Lawrence M. Wilens, Esquire, filed a written request for hearing on respondent's behalf.

On May 13, 1994, complainant filed the four (4)-count Complaint at issue, reasserting the allegations set forth in Counts I through IV of the NIF, as well as the requested civil money penalties totaling $40,620 for those 56 alleged violations. On May 17, 1994, a copy of that Complaint and the Notice of Hearing were served upon the respondent, as well as its counsel of record.

On June 10, 1994, respondent timely filed its Answer, generally denying all allegations set forth in Counts I and II, and denying the appropriateness of the civil money penalties proposed in Counts III and IV.

On November 25, 1994, complainant filed a pleading captioned Motion for Partial Summary Judgment, in which it requested that partial summary judgment be granted on the facts of violation alleged in Counts II, III, and IV of the Complaint, on the grounds that respondent admitted all of the necessary elements needed to establish liability on all allegations in those three counts.

On December 5, 1994, respondent filed a pleading captioned Opposition to Motion for Partial Summary Judgment/Cross-Motion for Order of Preclusion and Summary Judgment, requesting therein that complainant's motion be dismissed and that its cross-motion for summary judgment be granted. Respondent also requested a hearing to determine the appropriate civil money penalties for the violations alleged in the event that complainant's motion for summary judgment is granted.

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 Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "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 Enters., Inc., 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.

In Count II, complainant alleged that respondent hired the 41 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals.

In order to prove the violation alleged in Count II, complainant must show 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 prepare and/or make available for inspection the Forms I-9 for those individuals.

Respondent denied elements 1, 2, 3 and 4 in its June 10, 1994 Answer. In addition, in its motion opposing complainant's Motion for Summary Judgment respondent urged that there is a genuine issue of material fact with regard to whether any or all of the 41 Forms I-9 listed in Count II were presented to INS Special Agent Charles Mitchell, in response to his request.

Complainant alleges that respondent failed to present the 41 Forms I-9 listed in Count II to the INS special agent when requested to do so at the compliance inspection. In support of its allegation, complainant offers the November 22, 1994 Declaration of Special Agent Charles Mitchell, which advises in pertinent part:

> At the compliance inspection, Respondent should have presented Employment Eligibility Verification Forms (Forms I-9) for approximately eighty (80) employees. The Respondent failed to prepare and present Forms I-9 for forty-one (41) of its employees, and presented incomplete Forms I-9 for two (2) of its employees.

There is no indication that respondent failed to produce Forms I-9 for any or all of the 41 individuals named in Count II. It is uncertain from reading the special agent's declaration whether the 41 individuals named in Count II are the same individuals referenced in that declaration.

Complainant has not shown that respondent hired the 41 individuals named in Count II of its May 13, 1994 Complaint and did so for employment in the United States after November 6, 1986, and has also failed to show that respondent failed to prepare and/or make available for inspection the Forms I-9 for those same individuals.

Accordingly, because there is a genuine issue for trial with regard to respondent's liability for the violations contained in Count II, complainant's Motion for Partial Summary Judgment is denied as it pertains to respondent's liability concerning the facts of violation alleged in Count II.

Complainant alleged in Count III, that respondent hired the individual named therein for employment in the United States and did so after November 6, 1986, and failed to ensure that that individual properly completed section 1 of the pertinent Form I-9.

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; and

(4) respondent failed to ensure that the individual completed section 1 of the Form I-9.

Summary decision may be based on matters deemed admitted. United States v. Primera Enters., Inc., 4 OCAHO 615, at 3 (1994); United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991). Respondent failed to deny any of the allegations set forth in Count III of the Complaint. The procedural regulation governing responsive pleadings provides in pertinent part:

> Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is

excessive or inappropriate, or contending that he/she is entitled to judgment as a matter of law, shall file an answer in writing. The answer shall include:

(1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted.

28 C.F.R. § 68.9(c) (emphasis added).

It is found that respondent has admitted all of the allegations set forth in Count III. Hence, complainant has demonstrated, as alleged in Count III, that respondent failed to have that individual named complete section 1 of the Form I-9, and that that individual 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).

Therefore, complainant's Motion for Summary Judgment is being granted as it pertains to respondent's liability concerning the facts alleged in Count III, since there is no genuine issue for trial with regard to respondent's liability for the violation alleged in that count.

In Count IV, complainant alleged that respondent hired the individual named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the pertinent Form I-9.

In order to prove the violation alleged in Count IV, complainant must show that:

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

(2) the individual named in Count IV;

(3) after November 6, 1986; and

(4) respondent failed to properly complete section 2 of the pertinent Form I-9.

Respondent has also failed to deny any of the allegations set forth in Count IV of the Complaint. Pursuant to 28 C.F.R. Section 68.9 (c), "any allegation not expressly denied shall be deemed to be admitted." Therefore, it is found that respondent has admitted the allegations relating to the single violation contained in Count IV.

Complainant has again shown that there is no genuine issue of material fact with regard to the violation alleged in Count IV. Accordingly, complainant's Motion for Partial Summary Judgment is granted as it pertains to Count IV of the Complaint.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Counts III and IV 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 November 25, 1994 Motion for Partial Summary Judgment is hereby granted as it pertains to respondent's liability for the violations set forth in Counts III and IV. It is therefore being found that respondent has violated the pertinent provisions of IRCA in the manners alleged in Counts III and IV.

With regard to Count II, it is found that there is a genuine issue of material fact pertaining to respondent's liability for the violations alleged. For this reason, complainant's November 25, 1994 Motion for Partial Summary Judgment is hereby denied as it pertains to respondent's liability for the violations set forth in that count.

An evidentiary hearing will be scheduled for the purpose of adducing relevant evidence concerning the alleged facts of violation involving the two (2) remaining allegations at issue, the alleged illegal hire and/or continued to employ allegation set forth in Count I and the failure to prepare and/or make available for inspection the Forms I-9 allegation contained in Count II.

In addition, that hearing will address the appropriate civil money penalties to be assessed for the single violations contained in both Counts III and IV and, if appropriate, the 13 violations alleged in Count I and the 41 infractions outlined in Count II.

The civil money penalty sums which may be assessed in connection with the 13 alleged illegal hire/continue to employ violations in Count I, together with a possible cease and desist order, are those provided in the provisions of 8 U.S.C. § 1324a(e)(4).

Those civil money penalty sums to be assessed for the single paperwork violations alleged in both Counts III and IV, as well as the possible civil money penalties to be levied on the 41 paperwork violations alleged in Count II, will be determined by giving the required due consideration to the five (5) criteria listed at 8 U.S.C. § 1324a(e)(5).

Accordingly, 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 in New York, New York which, according to the provisions of 28 C.F.R. § 68.5(b), is the nearest practicable place to the place where the person or entity resides or to the place where the alleged violations occurred.

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JOSEPH E. MCGUIRE
Administrative Law Judge