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Issue Date: 05 April 2010

CASE NO.: 2010-TAE-00002

In the Matter of:

GLOBAL HORIZONS, INC. and
MORDECHAI ORIAN,
Respondents.

ORDER GRANTING SUMMARY DECISION AS TO RESPONDENT ORIAN

In this action under the Immigration and Nationality Act,[1] the Administrator, Wage and Hour Division, seeks more than $800,000 in backwages and civil money penalties. He names as respondents in his notice of administrative determination: "Global Horizons Manpower dba Global Horizons Manpower, Inc. and Mordechai Orian, an individual." He alleges that between November 15, 2004 and September 15, 2005, in their operations in Hawaii Respondents failed to comply with the Act's requirements involving workers under the H-2A nonimmigrant worker program. The Administrator specifies violations of eleven different regulatory provisions. For each, he states what "Employer" either did or failed to do, always referring to the person responsible for the violation as "Employer." The notice of administrative determination never alleges any act or failure to act on the part of Respondent Orian in particular (as opposed to an act or failure of Global Horizons), nor does it explain Respondent Orian's relationship to Global Horizons.

Respondent Orian moves for judgment on the pleadings or in the alternative for summary decision.[2] He contends that he is not an employer within the meaning of the Act and thus cannot

[1] 8 U.S.C. §1188 and implementing regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501; as amended in the Immigration Reform and Control Act of 1986, 8 U.S.C. §§1101, *et seq*.

[2] Mr. Orian grounds his motions on F.R.Civ.P. 12(b)(1), 12(b)(2), 12(c), and 56, and 29 C.F.R. §18.40. The rules of procedure generally applicable here are recited at 29 C.F.R. part 18. *See* 29 C.F.R. §501.34. They include the procedure for summary decision to which Respondent points: 29 C.F.R. §18.40. Respondent's remaining motions are addressed to the pleadings. The procedural rules in the regulations do not expressly provide for such motions, although they do provide for motion practice in general. Where the procedures in the regulations are silent, the Federal Rules of Civil Procedure for the U.S. District Courts apply. *See* 29 C.F.R. §18.1. I will therefore apply the Federal Rules and address the motions on the pleadings. I consider those going to jurisdiction [F.R.Civ.P. 12(b)(1), 12(b)(2)] in this footnote and the motion for judgment on the pleadings [F.R.Civ.P. 12(c)] in the text below.

Subject matter jurisdiction [F.R.Civ.P. 12(b)(1)]. Respondent argues that he is not an employer, that the Act's obligations extend only to employers, and that therefore subject matter jurisdiction is lacking. The argument is without merit. There is no question that this Office has jurisdiction to decide claims for violations of this section of the Immigration and Nationality Act, and Mr. Orian does not dispute this. *See* 8 U.S.C. §1188(g)(2) ("Secretary of Labor is authorized to take such actions, including imposing appropriate penalties . . ."); 29 C.F.R. §501.30, *et seq*. The argument that he advances does not go to subject matter jurisdiction; rather, it goes to the adequacy of the Administrator's proof on the merits. *See Arbaugh v. Y & H Corporation*, 546 U.S. 500, 516 (2006) (holding in a

be liable. He submits in support the Administrator's notice of administrative determination, to which I refer as "R.Ex. A."[3] Also on the record is his request for hearing, in which he pleads that he is an individual and not responsible for Global Horizon's alleged violations. Request for Hearing at 2. The Administrator opposes the motion but submits no affidavits or other evidentiary support.

I. Motion for Judgment on the Pleadings.

For purposes of this action, the Administrator's notice of administrative determination and Respondents' request for hearing are given the effect of a complaint and answer. 29 C.F.R. §501.37(a). To meet the regulatory pleading requirement, the Administrator's notice must:

> (a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual obligations required and the amount of any civil money penalty assessment and the reason or reasons therefore.
>
> (b) Set forth the right to request a hearing on such determination.
>
> (c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable.
>
> (d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in [29 C.F.R.] §501.33.

29 C.F.R. §501.32. The Administrator's notice meets each of these requirements. *See* R.Ex. A.

Even if the Administrator were required to be more specific, he did not fail.[4] He names two respondent employers, one a corporation (or other association or organization) and the other a person whom he designates as "an individual." An employer for these purposes is:

> a person, firm, corporation or other association or organization which suffers or permits a person to work and (1) which has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ workers at a place within the United States and (2) which has an employer

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Title VII case that whether a defendant came within the statutory definition of employer because it had sufficient numbers of employees is an element of a plaintiff's claim for relief, not a jurisdictional issue).

Personal jurisdiction [F.R.Civ.P. 12(b)(2)]. Respondent does not dispute that he was served by certified mail with the Administrator's notice of administrative determination. He does not dispute that he invoked the jurisdiction of this Office to demand a hearing. This establishes personal jurisdiction. Again Respondent's argument goes to a failure of the Administrator's proof on the merits, not jurisdiction.

[3] Without objection, I admit R.Ex. A in to evidence.

[4] Respondent misplaces his reliance on *Ashcroft v. Iqbal*, 192 S.Ct. 1937 (2009). That case involves the adequacy of a complaint under F.R.Civ.P. 8. The pleadings in the present action are controlled by the applicable regulations, set out in the text above. Those regulations have specific pleading requirements that differ from those under Rule 8, F.R.Civ.P.

> relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee.

29 C.F.R. §501.10(h)(i). Stating that Mr. Orian is being sued as an individual merely identifies him as an employer who is a person being named individually and not in some official capacity such as that of an officer, director, or shareholder of a corporate respondent. "Persons" come within the regulatory definition of employers.

The notice of administrative determination, which serves as the complaint, is legally sufficient.

II. Motion for Summary Decision.

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson* at 252.

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex at 322-23.

Here, the Administrator pleads no theory other than that Respondent Orian violated the Act while acting as an employer. Respondent Orian asserts in his request for hearing (answer) that he is not an employer but merely an individual with no responsibility for Global Horizon's actions. He argues on this motion that his status outside the statutory definition of "employer" is

undisputed. This is enough to put the Administrator's contention that Mr. Orian is an employer to the test.

Specifically, it is the Administrator who bears the burden to show that each respondent is an "employer" within the meaning of the Act. *See, e.g.*, *Mizwicki v. Helwig*, 196 F.3d 828, 831 (7th Cir. 1999) (in a Title VII case, the plaintiff must show that the defendant is an employer within the meaning of the Act; a failure to do so entitles the defendant to judgment on motion); *Melton v. Yellow Transportation, Inc*., ARB NO. 06-052 (Sept. 2008) (complainant under the Surface Transportation Assistance Act must allege and prove, among other things, that the respondent is an employer). Because this is the Administrator's burden, his failure to make a sufficient showing entitles Respondent Orian to summary decision.

Yet the Administrator has done no more than rely on his pleadings. He has failed to prove up – whether through discovery responses, affidavits, official notice, or otherwise – any facts to show that Mr. Orian was an employer within the meaning of the Act. He offers no evidence to show that Mr. Orian suffered or permitted a person to work in the United States or that he could hire, pay, fire, supervise, or otherwise control the work of any employees.

The Administrator doesn't even offer *an argument*, irrespective of any factual showing, that would bring Mr. Orian within the statutory definition.[5] Instead, he merely argues in conclusory fashion that Respondent Orian's status as an employer is a "central disputed" fact. Actually, that's what's at issue on the present motion: Can the Administrator offer sufficient proof on this motion that a reasonable factfinder could find Mr. Orian an employer within the Act? At this stage, a fact is not in dispute unless the party bearing the burden of proof can offer some evidence to show that the dispute is genuine; pleadings or unbased statements of contentions are not enough. The Administrator's showing fails to meet the Supreme Court's requirements to resist summary judgment.

In the alternative, the Administrator argues that this motion is premature, that discovery has only recently begun, and that he hasn't taken Mr. Orian's deposition. These arguments are without merit.

This is not a civil case in which the plaintiff has had limited opportunity to conduct a pre-filing investigation.[6] The Administrator is required to investigate *before* issuing the notice of administrative determination, and here he stated in the notice that he did so. As he wrote: "An investigation of your operation . . . disclosed that you failed to comply with Section 218 of the INA." If the Administrator lacked sufficient facts to find Mr. Orian an employer within the Act,

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[5] The Administrator argues that the general enforcement provisions in the regulations allow him to seek a recovery of unpaid wages and assess a civil money penalty against "any person" for a violation of the Act; that Mr. Orian is a person; and that therefore the regulations "on their face . . . allow for precisely the type of liability that Orian [disputes]," *citing* 29 C.F.R. §501.16(b). This argument is frivolous and begs the question. The regulation does not authorize enforcement against just any person. It authorizes enforcement against persons *for a violation* of the Act. The Administrator has not alleged that Orian violated the Act except insofar as he acted as an employer.

[6] Even in civil cases, when signing and filing a complaint to initiate litigation, an attorney or unrepresented party certifies that, "after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support . . . ." F.R.Civ.P. 11.

he should either have delayed the notice until he had the facts, or he should not have named Mr. Orian as a respondent.

And the Administrator has had enough time for discovery in any event. The Administrator, through counsel, signed the Order of Reference to this Office on November 9, 2009. Nearly five months have passed for the Administrator to continue to investigate, interview witnesses, search for documentation, and take discovery, in addition to the investigation time prior to his issuing the notice of administrative determination. The Administrator has filed no motions to compel discovery; there is nothing on the record to show that Respondent has resisted discovery or otherwise hampered the Administrator's investigation.[7] By now, the Administrator should have evidence to show whether Mr. Orian, for example, could supervise or otherwise control the employees' work or whether he hired, paid, or fired them.

The Administrator has also been on notice for months that he needed to prepare his case. This Office expedites hearings under this Act. On December 8, 2009, I noticed the hearing for January 25, 2010. When the parties jointly moved for a nine-month continuance to October 2010, I agreed to a continuance, but only for somewhat less than four months: I reset the hearing for May 5, 2010. Under the Pre-Hearing Schedule Order, I set a discovery cut-off date of April 21, 2010, about two weeks from now. The Administrator's contention notwithstanding, discovery did not recently begin; rather, the five-month discovery period is about to close.

In addition, the Solicitor in fact has taken considerable discovery. On March 3, 2010, she requested an extension to March 26, 2010 to oppose this motion. She said that between March 3 and April 2, 2010, the parties had scheduled ten depositions. All or nearly all of those should have been completed before the Administrator filed his opposition. I am also aware from a telephone conference that Respondents produced for inspection and photocopying several bankers boxes of documents responsive to the Solicitor's discovery requests. I must assume that the Administrator interviewed at least some of the affected workers during the investigation stage, and the Solicitor could have interviewed more at any time.

The proof requirements that this motion places on the Administrator are comparatively narrow, simple, and few. Before the Administrator issued the notice of administrative decision he should have had sufficient facts to show Mr. Orian was an employer. I find no basis to conclude that Respondent's motion is premature.

Order

Respondent Mordechai Orian's motion to dismiss is DENIED. His motion for summary decision is GRANTED. The Administrator has failed to offer any proof that Mr. Orian is an employer

[7] The Solicitor earlier requested a nine-month continuance of the trial. Her stated reason was that she anticipated that Respondents would be recalcitrant in discovery. I allowed only a four-month continuance and advised all parties that they must act promptly in the event of any failure to cooperate in discovery. I asked that they meet and confer, and if dissatisfied, file a prompt motion to compel. I agreed to take phone calls and make immediate rulings on discovery disputes if that would help, and I've done that twice. If the Administrator believed that Respondents were failing in their discovery obligations, he should have filed whatever motions were necessary so that he could meet his evidentiary obligations.

within the meaning of the Act and has not alleged any other theory under which Mr. Orian might be liable. The Administrator bears the burden of proof on the issue of Respondent's status as an employer. The Administrator's failure of proof therefore entitles Respondent Orian to summary decision. Accordingly, Respondent Orian is DISMISSED.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge