

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

United States of America, Complainant v. A & B Carpet Steam Cleaning and General Services, Corp., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100189.

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION

**E. MILTON FROSBURG**, Administrative Law Judge

Appearances: DAYNA M. DIAZ, Esquire for Complainant, Immigration and Naturalization Service  
LAWRENCE A.L. SCHEFTEL, Esquire for Respondent

Procedural History and Statement of Relevant Facts

On April 23, 1990, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on A & B Carpet Steam Cleaning and General Services, Corporation. The Notice of Intent to Fine, in Counts I, II, and III, alleged violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act). In a letter dated April 30, 1990, Respondent, through its attorney Lawrence A.L. Scheftel, Esquire, requested a hearing before an administrative law judge.

The United States of America, through its attorney Dayna M. Diaz, filed a Complaint incorporating the allegations of the Notice of Intent to Fine against Respondent on May 29, 1990. On June 12, 1990 the Office of the Chief Administrative Hearing Officer issued a Notice of hearing on Complaint Regarding Unlawful Employment, assigning me as administrative law judge in this case and setting the hearing place at or around Honolulu, Hawaii, with the date of hearing to be determined later.

Respondent answered the Complaint on July 10, 1990, admitting all allegations in the complaint and objecting to the amounts of the

finer assessed. On July 17, 1990 I issued an Order Directing Procedures for Prehearing.

On July 23, 1990, through its attorney Dayna M. Dias, Complaint filed a Government Memorandum in Support of Motion for Partial Summary Decision, and on July 24, 1990, filed a Government Motion for Partial Summary Decision, asserting that no genuine issue of material fact existed except with regard to the appropriateness of the civil monetary penalty assessed. On July 27, 1990 I issued an Order to Show Cause Why Summary Decision Should Not Issue.

On August 1, 1990, Respondent, through its attorney Lawrence A.L. Scheftel, filed a Respondent's Motion in Opposition to Government Motion for Partial Summary Judgment, again admitting to the allegations in the Complaint but asserting that genuine issues of material fact existed as to whether or not a Notice of Intent to Fine should have been issued in lieu of a warning.

After careful consideration of all documents before me, I conclude that no genuine issues of material fact exist as to Counts I, II, and III, and that Complainant is entitled to partial summary decision as to liability on Counts I, II, and III as a matter of law.

#### Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . 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. § 68.36 (1988); see also Fed. R. Civ. Proc. 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555 (1986). A material fact is one which controls the outcome of the litigation. See Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); see also Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any "admissions on file." A summary decision may be based on a matter deemed admitted. See, e.g., Home Indem. Co. v. Famularo, 539 F. Supp. 797 (D. Colo. 1982). See also Morrison v. Walker, 404 F.2d

1046, 1048-49 (9th Cir. 1968) ('If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.');

and U.S. v. One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) ('matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.');

see also Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardisty, 262 F.2d 621 (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D. N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

#### Legal Analysis Supporting Partial Summary Decision

Complainant argues in its Memorandum in Support of Motion for Partial Summary Decision that Respondent admitted to all allegations contained in the Complaint with the exception of the appropriateness of the monetary fine imposed. Complainant further submits that Respondent did not assert any affirmative defenses. As such, Complaint argues that it is entitled to a partial summary decision as a matter of law.

In its Motion in Opposition to Government Motion for Partial Summary Judgment, Respondent argues that Complainant misinterpreted Respondent's admissions in its original Answer to the Complaint, asserting that Respondent was only admitting that it hired the persons indicated in the Notice of Intent to Fine after November 6, 1986, and that the paperwork violations cited were true and correct. Respondent contends that genuine issues of material fact still exist as to whether or not a Notice of Intent to Fine should have been issued in lieu of a warning.

Respondent clearly misunderstands Complainant's Motion for Partial Summary Decision and accompanying Memorandum in Support of Motion for Partial Summary Decision. Complainant's motion goes precisely to those matters which Respondent admitted in its original Answer to Complaint, and reiterated in its Motion in Opposition to Government Motion for Partial Summary Judgment. Respondent's motion does not contain any facts under affidavit

which would distract from the original answer in which Respondent admitted that it hired employees after November 6, 1986 and did not properly complete the required paperwork.

Respondent asserts that it should have received a warning in lieu of a monetary penalty. The INS ``Handbook for Employers'' states that ``After May 31, 1988, INS will no longer issue warning citations, and first violations may result in penalties.'' Immigration and Naturalization Service, Handbook for Employers at 5 (1987). As such, issuance of warnings by the INS is discretionary after May 31, 1988. Given that the violations cited in the Notice of Intent to Fine occurred after May 31, 1988, INS has discretion as to its decision to warn or fine for violations of the Act.

Respondent further argues that imposition of a monetary penalty is contrary to an INS Policy Memorandum issued January 9, 1990 by Commissioner Gene McNary. Respondent, however, fails to indicate just how this memorandum would apply to its situation and require INS to issue a warning rather than a civil monetary penalty.

Respondent has admitted in its Answer and its Motion in Opposition to Government Motion for Partial Summary Judgment that it hired employees after November 6, 1986 and that all of the paperwork violations cited in Counts I, II, and III were true. As such, I conclude that no genuine issues of material fact exist as to the violations alleged in Counts I, II, and III, and that Complainant is entitled to a Partial Summary Decision on these counts as a matter of law. This matter remains open however, as to the determination of the amount of civil penalties assessed.

#### Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, memoranda and supporting documents submitted in support of the Motion for Partial Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I determine that no genuine issues of material fact exist with respect to the issues of liability under Counts I, II, and III. Therefore, Complainant is entitled to Partial Summary Decision as a matter of law pursuant to 28 C.F.R. Section 68.36.

2. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(b) in that Respondent hired for employment in the United States the individuals identified in Count I without complying with the verification requirements in Section 1324a(b) and 8 C.F.R. 274a.2(b).

3. That Respondent violated 8 U.S.C. Section 1324a(a)(1)(b) in that Respondent hired for employment in the United States the individuals identified in Count II without complying with the verification requirements in Section 1324a(b)(1) and 8 C.F.R. 274a.2(b)(1)(ii).

4. That Respondent violated 8 U.S.C. Section 1324a(1)(b) in that Respondent hired for employment in the United States the individuals identified in Count III without complying with the verification requirements in Section 1324a(b) (1), (2) and 8 C.F.R. 274a.2(b)(1) (i), (ii).

5. That Complainant's Government Motion for Partial Summary Decision is hereby granted, and Respondent's Motion in Opposition to Government Motion for Partial Summary Judgment is hereby denied.

6. That the Court will keep jurisdiction of this matter to make a determination as to the appropriateness of civil penalties to be imposed.

**IT IS SO ORDERED:**

This 16th day of August 1990, at San Diego, California.

E. MILTON FROSBURG  
Administrative Law Judge