

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

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) Case No. 91100220
WILLIAM BOATRIGHT,)
an individual,)
and)
JANIE BOATRIGHT,)
an individual,)
D/B/A BNB KENNELS,)
Respondent.)
_____)

CORRECTION TO SIXTH PREHEARING CONFERENCE
REPORT AND ORDER
(December 30, 1993)

This Order corrects the Sixth Prehearing Conference Report and Order (12/23/93) as follows:

Page 5, first and second line, change the phrase "equitable estoppel" to "collateral estoppel."

SO ORDERED.

Dated and entered this 30th day of December, 1993.

MARVIN H. MORSE
Administrative Law Judge

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SIXTH PREHEARING CONFERENCE REPORT AND ORDER

(December 23, 1993)

1. The sixth telephonic prehearing conference was held on December 21, 1993, as scheduled by my order dated December 13, 1993. The Immigration and Naturalization Service (Complainant or INS) and each of the individual respondents, William D. Boatright (WDB), and Janie Boatright (JB) were separately represented by counsel of record. BNB Kennels (BNB), the commercial enterprise which is also a respondent is not represented.

2. Previously, by motion dated December 2, 1993, Roberta Farrell (Farrell), counsel for WB, filed a motion to withdraw as attorney of record. Farrell's motion recited that she,

can no longer effectively perform her responsibilities as counsel for Respondent. Specifically, counsel and her client do not agree on the course of action to follow and do not agree on the presentation of defense herein, thus preventing counsel from performing her services in a suitable manner.

The motion states also that "Respondent has failed to abide by his financial obligation and agreement to counsel."

Farrell's motion was served on opposing counsel and on WDB. Counsel for INS and JB stated that they did not oppose it. No

response was tendered by WDB. Accordingly, I stated that I would grant the motion. At my request, Farrell agreed to participate in the conference. No prospective commitments which would bind WDB were undertaken or discussed, except to schedule the next conference at a date sufficiently in advance to permit him a reasonable opportunity to obtain new counsel if he so elects. Without addressing the merits, I complimented Farrell on the quality of her representation of WDB and on her cooperation.

3. Because more than a year has elapsed since the last prehearing conference, it is useful to summarize developments subsequent to the fifth conference on November 30, 1992.

A. As confirmed by the Fifth Prehearing Conference Report and Order (11/30/92), a conference was originally scheduled for January 28, 1993. That conference was canceled, as appears from the order dated March 3, 1993, upon the basis of a January 26, 1993 telephonic representation by INS counsel that a settlement of the entire dispute had been achieved. A March 22, 1993 status report by INS counsel remained optimistic that such settlement would be forthcoming. By a status report of May 3, 1993, however, INS counsel advised that William D. Boatright (WDB) would not participate in a settlement.

B. The status report was accompanied by a motion to dismiss allegations against Janie Boatright (JB) as to certain of the individuals listed in the complaint. In support of the motion, INS filed an October 25, 1990 divorce decree between WDB and JB, and a sworn statement of JB (Form I-215B). INS asserts, that after June 1989 the respondents separated from their marriage, she disassociated herself from BNB Kennels.

C. By motion dated May 27, 1993, supported by a memorandum with exhibits attached, INS seeks partial summary judgment against WDB, contending that as to certain identified individuals among those listed in the complaint, there is no issue of material fact. INS contends also that there is no genuine dispute of material fact as to all other individuals listed in the "failure to prepare," paperwork counts (II and III), leaving for dispute only five unauthorized employment charges (count III), and adjudication of civil money penalties.

(i) Among the attachments, Exhibit A is a Judgment and Probation/ Commitment Order (dated 7/7/92) in United States v. William D. Boatright (D, KS), together with an underlying Information dated

November 19, 1991. The defendant, WDB, was charged with hiring three named aliens knowing them to be unauthorized for employment in the United States. Two of the aliens are among the seven listed in Count I of the complaint in the case before me, i.e., Norberto Garcia Verde and Velantia P lacencia-Placencia (sic). WDB plead guilty to the charges, alleged as violations of 8 U.S.C. §1324a(1)(A). He was sentenced, inter alia, to imprisonment for six months and a fine of \$3,000. On the basis that WDB plead guilty to unlawful hiring of two aliens named in count I of the complaint before me, INS asserts that res judicata dictates a finding of liability in the present case.

(ii) On July 1, 1993, INS filed a June 25, 1993 supplement to its memorandum in support of the motion for partial summary judgment. INS submits that its Exhibit A (the order in the criminal conviction of WDB) is in error, and that steps to obtain a correction had been undertaken:

A review of that Order reveals that while it was the intent and the agreement of the parties that William D. Boatright plead guilty to criminal violations, the violations as shown are charged as "knowing hire" violations pursuant to 8 U.S.C. §1324a(1)(A). The violations, as written, do not include 8 U.S.C. §1324a(f), which sets forth criminal penalties for pattern and practice violations.

* * *

Upon receipt of the corrected Order, copies will be immediately submitted to all parties and the Complainant will file a further supplement to the Motion for Partial Summary Decision dated May 27, 1993.

D. On June 7, 1993, WDB filed an opposition to Complainant's motion to dismiss certain allegations against JB. WDB alleges that JB remained "integrally involved with the business," even after WDB and JB "separated" from their marriage in June 1989. Exhibits attached to WDB's opposition include BNB Kennels' checks signed by JB after June 1989.

E. On June 16, 1993, JB filed a sworn response to WDB's opposition to dismissal of any charges against JB. She contends that after June 1989 she had no "supervisory, managerial or ownership interest in BNB Kennels." Specifically, she claims any checks she signed other than for family purchases were done in a ministerial role and as an accommodation for WDB. Similarly, she discounts the significance of telephone billings and other exhibits tendered by WDB.

F. By orders dated June 8 and July 6, 1993, I granted extensions of time in which WDB might respond. On August 9, 1993, WDB filed his response, with exhibits attached, to Complainant's motion for partial

summary judgment. WDB's filing followed two orders, dated June 8 and July 6, granting extensions of time in which to respond. WDB admits that the seven individuals listed in Count II and the six individuals listed in Count III, who are identified in Complainant's motion, were employees hired by BNB, but asserts that I-9s were prepared by BNB. Except for those thirteen acknowledged employees, WDB denies that the individuals listed in counts II and III were employees. Instead, WDB claims they were dog trainers and helpers hired by trainers who operated as independent contractors outside BNB's control for purposes of §1324a liability.

G. On November 2, 1993, sua sponte, I denied all pending motions, and advised that a sixth prehearing conference would be scheduled at an early date. The order provided, inter alia:

I have considered Complainant's pending motion for partial summary decision against Respondent William D. Boatright (WDB), and WDB's response. I am unable to conclude at this stage that there is no genuine issue of material fact as to the elements of the complaint addressed by Complainant's motion. At this juncture also, the parties are in dispute as to whether Janie Boatright is a necessary party.

* * *

The conference will focus primarily on scheduling a confrontational evidentiary hearing and, in aid of an expeditious hearing, on an effort to develop fact stipulations to the maximum feasible extent. As a vehicle for achieving stipulations, the parties should be able to capitalize on the detailed and extensive factual assertions set out in their pleadings to date.

On August 21, 1992, (sic) the United States District Judge entered the record of WDB's conviction for violation of 8 U.S.C. §1324a(1)(A). The question arises whether that record is sufficient, without correction to specify pattern and practice culpability under §1324a(f)(1), to premise a judgment of civil liability with respect to any unauthorized hire implicated in that conviction. Complainant and WDB are requested to advise of the significance for this case of the record of WDB's plea and conviction with or without the pending correction to the record referred to by the parties.

* * *

H. On November 3, 1993 INS filed an October 29, 1993 supplement to its partial summary judgment motion. INS attached an amended criminal conviction order dated October 22, 1993. As amended, WDB is understood to have plead guilty to a pattern or practice of hiring unauthorized aliens in violation of 8 U.S.C. §1324a(f). INS asks that I accept the corrected order in substitution of the July 7, 1992 order (exhibit A to its 5/27/93 motion). INS contends that "although the issue is identical," since the unlawful pattern or practice violates §1324a(f) as distinct from unauthorized hire in violation of

§1324a(1)(A), the appropriate claim is equitable estoppel, and not res judicata. In lieu of its res judicata argument, INS advances an equitable estoppel rationale for concluding liability against WDB with respect to the two aliens implicated in both cases.

4. After granting the motion to withdraw by WDB's attorney, I initiated a discussion of Complainant's motions for partial summary judgment and for partial dismissal of charges against JB. Obviously, that order had crossed in the mail with Complainant's supplemental filing dated October 29, 1993. In light of Complainant's new filing, coupled with withdrawal of WDB's attorney, it appeared to me to be appropriate to review the status of the entire case, and not move directly to preparation for hearing. The discussion focused only on pleadings already filed and addressed only facts and argument already of record. Counsel appeared to be in agreement that both motions can be resolved as questions of law, without need for further factual inquiry. For those reasons, and the inability of the parties to achieve fact stipulations until either WDB acts on his own or obtains substitute counsel, I will, as discussed, take the motions under further consideration.

5. The motion by counsel for WDB to withdraw is granted.

6. A telephonic prehearing conference will be held at 10:00 a.m., EST (9:00 a.m., CST) on Thursday, March 24, 1994, whether or not the motions are resolved by that date. Unless before that date an attorney enters an appearance on behalf of WDB by filing notice of such entry, he will be expected, and by this order is so directed, to participate in his own behalf. The record is advised that WDB's mailing address and telephone number are:

R.R. #1, Mayfield, Kansas 67103

(316) 434-5461

SO ORDERED.

Dated and entered this 23rd day of December 1993.

MARVIN H. MORSE
Administrative Law Judge