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

May 9, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	Case No. 95C00060
DOLLY BOMAN IRANI, Respondent.	)	

DECISION AND ORDER GRANTING COMPLAINANT'S REQUEST TO STRIKE AFFIRMATIVE DEFENSES AND DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural History*

On March 31, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated March 28, 1995, in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF), served by INS upon Dolly Boman Irani (Respondent or Irani), on August 23, 1994.

Count I, the only count, of the Complaint charges Respondent with knowing use of any document issued to a person other than the possessor, in violation of the pertinent provision of the Immigration Reform and Control Act of 1986 (IRCA), i.e., 8 U.S.C. §1324c (a)(3). The INS asks a penalty of $550.00 and an order to cease and desist from violating §1324c(a)(3).

OCAHO issued its Notice of Hearing (NOH) on April 7, 1995, which transmitted to Respondent a copy of the Complaint and a copy of OCAHO rules of practice and procedure, 28 C.F.R. pt. 68.

On May 12, 1995, Respondent, by her attorney, submitted a Motion to Extend Time to File Answer. On May 15, 1995, I issued an Order Granting Extension of Time until May 22, 1995. On May 25, 1995, Respondent filed her Answer, denying all allegations of the Complaint, and asserting two affirmative defenses.

The first affirmative defense asserts that the Complaint "fails to state facts sufficient to constitute a cause of action against Respondent."

The second affirmative defense contends that Complainant voluntarily and knowingly waived any and all causes of action by virtue of ordering a necessary witness, Nancy Mubaraki, to leave the country.

By Order dated September 27, 1995, a telephonic prehearing conference was scheduled for October 11, 1995. At the prehearing conference, Complainant's counsel stated that it intended to initiate discovery. At the second prehearing conference, on November 20, 1995, counsel described their inability to negotiate a settlement. A third prehearing conference was set for January 18, 1996, but postponed due to governmental shutdown.

On March 6, 1995, Complainant filed a Motion for Summary Decision (Motion) which contends that the pleadings and discovery establish that no genuine issue of material fact exists and the Complainant is entitled to summary decision as a matter of law. The Motion is supplemented by attachments including: documents evidencing the criminal conviction and subsequent voluntary departure of Nancy Mubaraki, Respondent's daughter; an Employment Eligibility Verification Form (Form I–9) dated January 30, 1994 in the name of Dolly I. Boman; a Record of Sworn Statement signed by Nancy Mubaraki; an Employment Application for Jack-In-The-Box dated June 12, 1994 in the name of Dolly I. Boman; an Alien Registration Card in the name of Dolly Boman Irani; a Record of Deportable Alien regarding Nancy Mubaraki; a statement of facts signed by Nancy Mubaraki dated July 14, 1994; an Order Granting Complainant's Motion for Summary Decision and Denying Respondent's Cross-Motion for Summary Decision in *United States v. Nancy Mubaraki*, 5 OCAHO 816 (1995); and a July 15, 1994 Record of Sworn Statement by Respondent in the case of Nancy Mubaraki.

Complainant's Motion argues against Respondent's two affirmative defenses. Although Complainant did not file a pleading requesting that the affirmative defenses be stricken, I treat the portion of Complainant's Motion relating to affirmative defenses as, in effect, a motion to strike.

At a Friday, March 8, 1996 telephonic prehearing conference, Respondent requested an extension of time to respond to the Motion to which INS did not object. By Order dated March 11, 1996, I granted Respondent until April 8, 1996 to timely file a response.

Respondent filed her Response on April 8, 1996, supported by her own declaration and those of two former employees of Jack-In-The-Box, Leticia Valencia (Valencia) and Maria Barocio (Barocio). Respondent argues that Complainant has not proved that Respondent knowingly violated 8 U.S.C. §1324c. Relying on the declarations, Respondent argues that substantial issues of material fact warrant an evidentiary hearing. Respondent contends also that Complainant fails to state a cause of action and waived its case against her by ordering Nancy Mubaraki, a necessary witness, to leave the country.

At an April 25, 1996 telephonic prehearing conference, I orally denied the Motion; this Order confirms and explains the denial. As agreed by the parties and the bench, an evidentiary hearing is scheduled for August 27–28, 1996 in or around San Diego, California.

II. *Discussion*

A. *Affirmative Defenses*

OCAHO rules of practice and procedure (Rules) applicable to cases involving allegations of document fraud are codified at 28 C.F.R. Part 68, which provide in pertinent part that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules. . . . " 28 C.F.R. §68.1.

Because the Rules are silent as to motions to strike, it is appropriate to apply Rule 12(f) of the Federal Rules of Civil Procedure (FRCP) as a guideline in considering motions to strike affirmative defenses. *United States v. Chi Ling, Inc.*, 5 OCAHO 723, at 3 (1995);

United States v. Makilan, 4 OCAHO 610, at 3 (1994). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

It is well settled that motions to strike affirmative defenses are disfavored in the law, and should be granted only when the asserted affirmative defenses lack any legal or factual grounds. *United States v. Chavez-Ramirez*, 5 OCAHO 774, at 2 (1995); *Makilan,* 4 OCAHO 610, at 4; *United States v. Task Force Security, Inc.,* 3 OCAHO 563 at 4 (1993). For example, an affirmative defense will be struck only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. *Chi Ling,* 5 OCAHO 723, at 3; *Makilan,* 4 OCAHO 610, at 4; *Task Force*, 3 OCAHO 563, at 4.

As mentioned above, Respondent's first affirmative defense asserts that the Complaint fails to state facts sufficient to constitute a cause of action. Complainant argues that pleadings in the format of the Complaint give Respondent sufficient notice and satisfy the requirement that a complaint contain a "clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. §68.7(b)(3); *see also Malikan,* 4 OCAHO 610, at 8 citing *United States v. Villatoro-Guzman*, 3 OCAHO 540, at 20 (1993).

Count I asserts that after November 29, 1990, Respondent knowingly provided and attempted to provide an Alien Registration Receipt Card bearing the name IRANI, Dolly Boman, to a person other than the possessor for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA). From the face of the Complaint, it cannot be seriously doubted that for pleading purposes this allegation recites a "clear and concise statement of facts" sufficient to fairly apprise Respondent of the charge against her. *Makilan*, 4 OCAHO 610, at 8. Accordingly, Respondent's first affirmative defense is stricken.

Respondent's second affirmative defense is that Complainant "voluntarily and knowingly waived any and all causes of action against Respondent because Complainant ordered a necessary witness in Respondent's case to leave the United States." Answer at 2. Complainant responds that no waiver occurred because the witness, Respondent's daughter, *voluntarily* left the country. Moreover, Complainant argues that the government is mandated to impose a civil money penalty upon each person who is found to have violated §1324c.

Complainant argues that §1324c *mandates* that a civil money penalty be imposed upon each person or entity who is found to have violated the document fraud provision of the Act, relying upon *United States v. Makilan*, 4 OCAHO 610, at 6 (1994). [1]

OCAHO precedent suggests that even when a respondent departs the United States, " her departure from the United States cannot be used to frustrate the hearing process contemplated by 8 U.S.C. §1324c." *United States v. Flores-Martinez*, 4 OCAHO 698, at 1 (1994). In *United States v. Mubaraki*, the ALJ held that the United States did not waive its cause of action against Mubaraki by allowing her to voluntarily depart the country to avoid deportation. *Mubarak*i, 5 OCAHO 816, at 8. *Flores-Martinez* and *Mubaraki* instruct that a respondent's voluntary departure does not constitute a waiver of the cause of action. Here, Respondent has not left the country; she currently resides in San Diego, California. It is Respondent's daughter, the alleged "necessary witness," who left voluntarily. Since departure of a respondent has been held not to bar §1324c cases from moving forward, it would seem an *a fortiori* case where a putative witness becomes unavailable. In the present case, whether the absence of Nancy Mubaraki is critical to Complainant's cause of action will depend on an evaluation of all the evidence presented at an evidentiary hearing. Although it might be helpful for Respondent's daughter to serve as a witness, the fact that she has left the country by voluntary departure in lieu of deportation does not constitute a waiver, particularly in light of OCAHO caselaw which holds that even when a *respondent* departs voluntarily, the hearing process continues unabated. Accordingly, Respondent's second affirmative defense is stricken.

Upon consideration of the Complaint and OCAHO precedent, both affirmative defenses are struck.

B. *Summary Decision*

OCAHO Rules authorize the judge to dispose of cases, as appropriate, upon motions for summary decision. 28 C.F.R. §68.38(c). An ALJ

[1] Complainant argues that *Makilan* and *Mubaraki,* in effect, instruct that because the successful prosecution of a §1324c action mandates a penalty, jurisdiction attaches whether or not the respondent is in the United States. In light of my holding in *Flores-Martinez,* 4 OCAHO 698 (1994), which I adopt here, I do not reach the *Makilan* and *Mubaraki* hypothesis.

may "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242,248 (1986). Any uncertainty as to a material fact must be considered in the light most favorable to the non-moving party. *Matsushita V. Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Once the movant has carried its 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).

To prove a violation of §1324c(a)(3), Complainant must show:

(1) Respondent knowingly used or attempted to use or provided or attempted to provide;

(2) any document lawfully issued to a person other than the possessor (including a deceased individual);

(3) for the purpose of satisfying a requirement of the INA.

8 U.S.C. §1324c(a)(3).

Complainant argues that Respondent admitted the violation of §1324c by her sworn statements and by the fact that Respondent's alien registration card was used for employment eligibility by Respondent's daughter to obtain employment. Complainant asserts that Respondent admits assisting in filling out the I–9 and signing the paychecks issued to Nancy in Respondent's name. Complainant relies on Respondent's Sworn Statement of July 15, 1994. Respondent now alleges that her statement is untrue, was coerced and given under duress. Although not precisely analogous, caselaw is instructive in ascertaining whether, in effect, Respondent can recant her prior sworn statement on the basis that it was taken under duress, thereby creating a genuine issue of material fact as to whether Respondent "admitted the violation and there is no evidence to the contrary." Motion at 9.

Complainant further argues that the Court should consider such factors as: (1) Respondent allowed her daughter to use the card to gain employment while her daughter was obtaining food stamps; (2) Respondent's daughter was not authorized for employment; and (3)

Respondent's daughter was criminally prosecuted. It is undisputed that Nancy Mubaraki was criminally prosecuted; the other issues can only be considered at an evidentiary hearing unless the Motion is granted.

Respondent asserts that there are inherent problems with Complainant's support for its Motion. In particular, Respondent alleges that the Form I–9 dated January 30, 1994 along with the declaration that the unauthorized employment began in February does not prove a violation of §1324c. Respondent alleges that the January 30, 1994 Form I–9 was used for *her* to gain lawful employment at that time. Response at 6. Complainant contends instead that there is an I–9 dated June 13, 1994; Respondent states that it has not been made available. Moreover, Respondent contends that Nancy's Sworn Statement cannot be relied upon because it was dictated to her by restaurant officials who fraudulently promised that if she cooperated, she would not suffer any consequences.

Respondent argues that Complainant has offered little evidence besides Respondent's Sworn Statement regarding Respondent's knowledge of the events. In particular, Respondent contends that: the criminal complaint and statement does not show that Respondent knowingly provided the documents; Nancy's sworn statement does not implicate Respondent; Respondent's declaration states that she believed that Nancy was working without pay; the Barocio declaration states this belief; the Form I–213 with the attached Form I–831 implicates Nancy's brother, and not Respondent; the Order granting summary judgment against Nancy is not probative of Respondent's knowledge; and the Statement made on July 15, 1994, by Respondent was made against her will and under severe stress and anxiety. Response at 5–9.

Respondent argues that she was persuaded to give a statement under the pretext that such a statement was necessary to process her daughter Nancy immediately so that she would not have to stay the weekend in jail. Nancy was brought out to Respondent and other family members in chains, handcuffs, and dressed in prison clothes which created stress and anxiety on Respondent's part. Today Respondent recants many of her statements made during her interview. Respondent alleges that :

(1) her rights to remain silent and be represented by an attorney were not read to her;

(2) she worked at Jack-In-The-Box until July 14, 1994, not until February 14, 1994;

(3) she denies Nancy took over her job;

(4) she denies knowledge that Nancy was working under her name or social security card;

(5) when Respondent admitted signing an I-9 card in her sworn statement, she was shown an I-9 dated January 30, 1994, not one dated June 13, 1994;

(6) she admits signing paychecks as compensation for *her* work; and

(7) she admits giving Nancy her greencard for safe keeping.

Respondent contends that her Sworn Statement is inherently unreliable because it was taken under duress. Respondent also submits her own declaration and two declarations from co-workers who confirm her employment and contradict some of the statements contained within both Respondent's Sworn Statement and Nancy Mubaraki's Sworn Statement. See Declaration of Dolly Boman Irani; Valencia Declaration; Barocio Declaration. Two former employees support that Respondent was working at Jack-In-The-Box and that Respondent did receive pay checks. Valencia Declaration ¶6; Barocio Declaration ¶5. U.S. Circuit Court decisions have addressed whether due process rights were violated where involuntary confessions, constituting inherently unreliable evidence, were admitted. *LaFrance v. Bohlinger*, 499 F.2d 29 (1st Cir. 1974); *see also Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973). It is a due process violation where the involuntary confession of a witness is admitted into evidence. In *LaFrance*, the witness recanted at trial the statements made in an earlier confession and stated that the confession was the product of coercion. Emphasizing that the charge of coercion was made under oath and a factual setting established, the court held that neither it nor the government may simply brush it aside. *LaFrance v. Bohlinger*, 499 F.2d 29, at 35.

In the instant case, Respondent provides a sworn declaration that her prior sworn statement was the product of duress. Response, Exhibit A. As in *LaFrance,* I cannot ignore her claim that the prior statement was the result of coercion and, therefore, not accurate and truthful.

Respondent is entitled to the opportunity to recant her prior statement. She is entitled to judicial consideration of her more recent declaration and those of her Jack-In-The-Box co-workers. Because the issue of reliability of Respondent's sworn statement is in dispute, Complainant's argument that Respondent has admitted the violation in Count I is not persuasive. On the basis of the filings in support of the Motion and Response, I find a sufficient dispute of specific facts to demonstrate that there is a genuine issue of material fact with regard to liability for the violation set forth in the Complaint.

III. *Disposition*

A. *Conclusion*

Upon consideration of Complainant's Motion, Respondent's Response, and in context of the procedural history of this case, I conclude that because Respondent is entitled to be heard on her denial of the veracity of her initial Sworn Statement, there are genuine issues of material fact yet to be resolved. Accordingly, Complainant's Motion is denied. Additionally, as discussed above, Complainant's request to strike affirmative defenses is granted.

I note that INS addresses the quantum of civil money penalty in its Motion. That discussion is proper as a predicate for a full and final disposition of the Complaint in the event the Motion were granted. Having denied the Motion, however, there is no need to discuss the penalty at this juncture.

B. *Evidentiary Hearing Schedule*

Upon further consideration of the date set for hearing, this Order contemplates rescheduling from August 27–28, 1996, to August 26–27, 1996. Unless the parties advise otherwise by May 24, 1996, I will set the hearing to start on the morning of Monday, August 26 and conclude on Tuesday, August 27, 1996.

SO ORDERED:

Dated and entered this 9th day of May 1996.

MARVIN H. MORSE
Administrative Law Judge