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

OMAR EGAL, Complainant, v. SEARS ROEBUCK AND COMPANY, Respondent.	)))) 8 U.S.C. § 1324b Proceeding) CASE NO. 91200173))))

Appearances:

Omar Egal Complainant Pro Se
Laurie E. Leader, Esquire For the Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *Background*

This case involves a pro se complainant,[1] Omar Egal, who was born in Somalia, Africa. Complainant entered the United States on August 15, 1980, as a spouse of a United States citizen, pursuant to § 201(b) of the Immigration and Nationality Act (1992)("the Act"), 8 U.S.C. § 1151. While in the United States, Complainant's status was adjusted to permanent resident alien, pursuant to § 245 of the Act, 8 U.S.C. § 1255. As a permanent resident alien, Complainant was a protected

[1] Complainant was represented by counsel at the time the complaint in this case was filed, but his attorneys withdrew from the case during the early stages of discovery.

individual under § 102 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(3)(B).[2]

Sometime in 1990 prior to June 1st, Sears Roebuck and Company (hereinafter "Respondent") hired Complainant to work at its store located at 302 Colorado Boulevard, Santa Monica, California, in its shipping and receiving department. In its attempt to complete an Employment Eligibility Verification Form (Form I-9) for each employee within three days of hire as mandated by 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b), Respondent requested that Complainant produce evidence of his authorization to work in the United States. The parties dispute the events that followed and whether or not the Respondent's conduct was in violation of IRCA.

Respondent asserts that it terminated Complainant on August 15, 1990, because he failed and refused to submit required evidence of his authorization to work in the United States and because he was belligerent and insubordinate when Respondent's managers and supervisors requested such verification. Complainant contends that he provided Respondent with a duplicate social security card and he argues that Respondent demanded unnecessary and duplicative documentation of his authorization to work in the United States in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a)(6). Complainant further contends that Respondent consequently intimidated and harassed Complainant, in violation of IRCA, 8 U.S.C. § 1324b(a)(5) and 28 C.F.R. § 44.201.

The parties dispute (1) whether Complainant was a protected indi-vidual under IRCA at the time he was employed by Respondent; and, (2) if he was protected by IRCA, (a) whether for the purpose of satis-fying the requirements of 8 U.S.C. § 1324a(b), Respondent requested more documents than were required in violation of 1324b(a)(6), and (b) whether Respondent harassed and intimidated Complainant in violation of 8 U.S.C. § 1324b(a)(5).

Although there are no pending motions in this case, I have decided sua sponte to reconsider Respondent's Motion for Summary Decision because of Complainant's failure to follow court orders, as more fully described herein.

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[2] IRCA, 8 U.S.C. § 1324b(a)(3), defines a "protected individual" as an individual who "(A) is a citizen or national of the United States, or (B) is an alien who is lawfully admitted for permanent residence, . . . temporary residence, . . . or is admitted as a refugee . . . or is granted asylum . . ."

In view of Complainant's failure to comply with my order compelling Complainant to respond to discovery requests and failure to comply with a subsequent order in which Complainant was asked to explain why he had not responded to the prior order, appropriate sanctions against Complainant shall be made in accordance with my authority pursuant to 28 C.F.R. § 68.23(c)(1) and (c)(2) (1991).[3] Based on the sanctions and findings that I will make in this case, Respondent's Motion for Summary Decision will be granted.[4]

In order to more fully understand the reasons for my decision, I will outline in some detail the procedural history of this case.

II. *Procedural History*

On February 11, 1991, Complainant filed charges with the Office of Special Counsel (OSC) alleging unfair immigration-related employment practices by Respondent. OSC advised Complainant, through his attorney, by determination letter dated July 15, 1991, that OSC would not file a complaint on his behalf because he was not a protected person as defined by IRCA. Complainant was advised by this letter that he had 90 days from receipt of the letter to file a complaint before an administrative law judge ("ALJ") in the Office of the Chief Administrative Hearing Officer (OCAHO). This letter was received on July 19, 1991.

On October 11, 1991, Complainant filed a Complaint with OCAHO pursuant to 8 U.S.C. § 1324b, alleging that Respondent demanded unnecessary and duplicative documentation of Complainant's authori-zation to work in the United States and that Respondent consequently intimidated and harassed Complainant, in violation of 8 U.S.C. §

[3] All references to Part 68 of the Code of Federal Regulations are references to Part 68 as amended by the interim rule published in the Federal Register at vol. 56, no. 192, p. 50049.

[4] Although Complainant has repeatedly asserted his desire for an evidentiary hearing, because of his failure to respond to my order compelling him to respond to discovery requests, there is no dispute as to any material fact in this case; and, therefore, an evidentiary hearing is not necessary. While an evidentiary hearing is a very important part of the administrative process, it is neither a requirement nor a constitutional right for the protection of Complainant's due process rights when summary decision is appropriate. For a discussion on application of summary decision in administrative proceedings, see 3 K. Davis, Administrative Law Treatise § 14.7 at 31 (2d. 1980); E. Gelhorn & W. Robinson, Summary Judgment in Administrative Adjudication, 84 HARV. L. REV. 612 (1971).

1324b(a)(5) and 28 C.F.R. § 44.201. An individual so intimidated shall be considered by OCAHO to have been discriminated against. 8 U.S.C. § 1324b(a)(5).

On October 15, 1991, OCAHO issued a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices. On November 22, 1991, I issued an Order Directing Prehearing Procedures and also a Notice Scheduling a Hearing to be held March 9, 1991, in Los Angeles, California.

Complainant Egal was represented at the early stages of this case by counsel of (1) the Employment Law Office, Legal Aid Foundation of Los Angeles, (2) the National Immigration Law Center, and (3) the Mexican American Legal Defense and Education Fund (MALDEF). On February 4, 1992, attorneys for all three organizations filed a joint Motion to Withdraw as Representative and Substitution of Complainant Pro Se, stating that "Complainant and counsel have a fundamental difference regarding case strategy and the complainant has notified counsel both in person and on the telephone that he no longer desires our assistance." I granted counsel permission to withdraw in an order issued February 4, 1992.

On February 4, 1992, Respondent filed a Motion for Continuance. In support of its motion, Respondent stated that a continuance was necessary because Complainant had not complied with Respondent's numerous discovery requests.

On February 13, 1992, I issued an Order Granting the Motion for Continuance in which (1) the evidentiary hearing was continued until April 1, 1992; (2) Complainant was given until February 28, 1992, to respond to Respondent's discovery requests; and (3) even though Complainant's former counsel had emphatically stated that all requests for discovery were given to Complainant at the time of withdrawal of representation, Respondent was directed to make sure that Complainant had in his possession all discovery requests previously served on Complainant through its counsel.

On February 20, 1992, Complainant called this office concerning the discovery deadline stated in the order of February 13, 1992. He said he had not received any requests for discovery from Respondent and reiterated the fact that the deadline by which he needed to respond was February 28th. This office informed Complainant that he could request an extension of time in the event he felt he did not receive the discovery request in a timely manner.

Respondent's counsel was contacted regarding discovery requests. She stated that she had contacted Complainant's former attorneys and was informed that they had given Complainant all discovery requests, but that Respondent's counsel would send another set to the Complainant at the Ocean Park Community Center in Santa Monica, California, Complainant's address of record, and that she would also send the ALJ correspondence outlining the sequence of events regarding Respondent's requests for discovery.

On February 25, 1992, Complainant contacted this office and asserted that he had not received the discovery requests to which his responses were due on or before February 28, 1992. This office immediately contacted Respondent's counsel to advise of the same.

On February 27, 1992, this office received a letter from Respondent's counsel in which she stated that she had previously served the dis-covery on Complainant at his address of record, but that she was going to resend the discovery requests that same day.

On March 25, 1992, Respondent filed a Motion for Default Judgment or, in the Alternative, to Compel Discovery and Continue Hearing Date. In support of its motion, Respondent set forth the sequence of events in the case regarding its attempts to complete discovery and Complainant's alleged "[failure] and [refusal] to respond to all outstanding discovery" requests.

On March 26, 1992, finding the record unclear as to whether Com-plainant had knowingly disobeyed the orders with regard to answering the requests for discovery, I issued an order (1) denying the Motion for Default; (2) directing Complainant to respond to the discovery requests on or before April 10, 1992; (3) directing that all discovery in this case be completed on or before April 24, 1992; (4) directing that any and all further motions, including a motion for summary decision, must be filed by either party on or before April 30, 1992; and (5) rescheduling the evidentiary hearing for May 25, 1992. This office sent the order to Complainant via certified mail, return receipt requested. The certified mail receipt was signed by Complainant or his agent of April 2, 1992.

On April 13, 1992, Complainant filed a letter with this office, addressed to Respondent's counsel, which was apparently his response to Respondent's discovery requests. The letter to be described fully, infra, at Part III, contained four sentences and had attached to it a copied form of an Immigration and Naturalization (INS) Form I-94 which indicated that Complainant had entered this country on August 15, 1980, as a spouse of an immigrant and once in this country, his

status was adjusted to that of a permanent resident alien. The form also showed that on April 6, 1992, Complainant received temporary evidence of lawful admission for permanent residence and authorization to work in the United States.

On April 22, 1992, Respondent filed a Motion to Dismiss or, in the Alternative, for Summary Decision. In support of its motion, Respondent asserts that (1) Complainant was terminated for his failure and refusal to present sufficient evidence of his authorization to work in the United States; (2) Complainant similarly failed or refused to present such evidence to the Office of Special Counsel; (3) following Complainant's termination and a hearing related thereto, the California Unemployment Insurance Appeals Board (Board) denied him unemployment benefits based on his failure to produce evidence of his right to work in the United States in response to discovery requesting this information; and (5) the only discovery responses Complainant gave Respondent was a letter and copied form showing that Complainant did not receive lawful admission for permanent residence and authorization to work in the United States until April 6, 1992; therefore, Respondent argues that Complainant was not a protected person within the meaning of § 102 of the Immigration and Control Act (IRCA) on August 15, 1991, when Respondent terminated him.

On May 6, 1992, Complainant telephoned this office and asked to speak to my secretary who was out of the office. He left a message, stating that he wanted a status report of his case. At 12:10 p.m., my secretary returned Complainant's call. She left a message at the Ocean Park Community Center, the telephone number of record, that she had returned his call.

On May 8, 1992, at 10:45 a.m., Complainant called again. My secre-tary attempted to explain to Complainant that he needed to respond to the Motion for Summary Decision, pursuant to 28 C.F.R. § 68.38(b). Despite my secretary's attempt to direct Complainant to the applicable regulation, Complainant was argumentative. My secretary told Complainant that she would have my Attorney-Advisor contact him.

On May 13, 1992, my Attorney-Advisor called Respondent's counsel to inform her that the ALJ wished to set a new hearing date of June 29, 1992. Respondent's counsel stated that a June 29, 1992 hearing date would not be problematic. This office then telephoned Complainant and left a message for him to return the call regarding the new hearing date of June 29, 1992. Complainant did not return the telephone call.

On May 21, 1992, my secretary again telephoned Complainant at the telephone number of record and left a message for him to call this office. This call was not returned.

Despite Complainant's failure to respond to Respondent's Motion to Dismiss or, in the Alternative for Summary Decision, on May 21, 1992, I issued an Order Denying the Motion to Dismiss and Motion for Summary Decision and Rescheduling Hearing Date.[5]

In this order, the hearing was rescheduled for June 29, 1992, in Pasadena, California. In addition, Complainant was directed to notify this office on or before June 1, 1992, if his schedule conflicted with the hearing date and location[6] and to inform this office of the language(s), other than english, Complainant spoke and understood so that Com-plainant could be provided with an interpreter. This order was sent to Complainant at the address of record via certified mail, return receipt requested. The certified mail receipt indicates that a Mr. Hill signed as the agent for Complainant on May 29, 1992. Complainant failed to respond to this order as directed.

On June 2, 1992, my secretary again called the Ocean Park Community Center to speak to Complainant. When she inquired if Complainant had received her telephone messages, "Matthew" of the Center stated that Complainant had picked up his messages from her. My secretary again left a message for Complainant to call her. Complainant did not return that telephone call.

Because Complainant failed to respond to the ALJ's order of May 21, 1992, the ALJ, on June 3, 1992, issued an Order to Show Cause why Complainant had failed to respond to the order directing him to contact this office to confirm the hearing date and whether an interpreter would be required. The order also stated that Complainant had failed to return the numerous telephone messages left for him at

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[5] In view of Complainant's pro se status and his consistent disagreement with Re-spondent's position, I decided to overlook his failure to respond to the motion, hoping he would cooperate with the court in identifying the material facts and producing the documents needed by Respondent to prepare adequately for an evidentiary hearing. Unfortunately, he filed to comply with court orders and did not provide the information needed to hold an evidentiary hearing.

[6] Because Respondent's counsel resides in Chicago, Illinois, I felt it important to ascertain that Complainant was aware of the hearing date and planned to be present, before I would direct Respondent's counsel to appear at a hearing in California.

the telephone number of record. The order directed Complainant to telephonically contact this office on or before June 12, 1991. The order further stated that if Complainant should fail to respond or explain why he would not respond to these orders, I would consider taking appropriate action to dismiss the Complaint because of abandonment, pursuant to 28 C.F.R. § 68.37(b).

On June 11, 1992, Mr. Hill, at the Ocean Park Community Center, signed the certified mail return receipt for the Order to Show Cause. Complainant failed to respond to that order on or before June 12, 1992, as directed.

On June 15, 1992, all hearing arrangements previously made in this case were canceled based on Complainant's failure to respond to (1) the May 21, 1992, Order Denying Motion to Dismiss and Motion for Summary Decision and Rescheduling the Hearing Date, and (2) the Order to Show Cause of June 3, 1992. Respondent was notified by telephone that the hearing was canceled.

On June 26, 1992, Complainant called at 12:30 p.m. and spoke to my Attorney-Advisor. Complainant said that he could not pick up the order for two weeks because Ocean Park Community Center, Complainant's address of record was closed. The Attorney-Advisor told Complainant that he needed to submit to this office, in writing, his reasons for not responding to the ALJ's orders in a timely manner. Complainant said that he is currently in a program that does not allow him to send out mail, so he is unable to send a letter to this office explaining his situation. Complainant said that the program will allow him to attend the hearing June 29th and that he plans to be there. The Attorney-Advisor told Complainant that because the hearing would not be held.

At about 1:00 p.m. the same day, the Attorney-Advisor called Com-plainant and left a message for him to return the call. The Attorney- Advisor then called the Ocean Park Community Center in an attempt to corroborate Complainant's assertion that it had been closed for a couple weeks during June. The person who answered the phone at the Center stated that the Center only closes one day each month for a staff meeting; and that in June they were closed on Wednesday, June 24, 1992.

Complainant returned the Attorney-Advisor's call at about 3:30 p.m. Complainant said that he received the ALJ's last two orders on June 25, 1992. He explained that it took him so long to get them because the Community Center had been closed for two weeks. He then stated

that the Community Center "closed a week ago and . . . opened yesterday." Complainant said he called the Community Center and the office was closed, but they said they would be opened June 25th. The Attorney-Advisor asked Complainant if he picked up his mail the beginning of June as he was directed to respond to the order by June 12th. Complainant responded, "Okay, whatever it is, I don't know . . . All I want to know is do I got (sic) to go (sic) court or not, that's all I want to know."

There was no further contact with Complainant and the case was not rescheduled for an evidentiary hearing because of my decision to reconsider Respondent's Motion for Summary Decision.

III. *Legal Standards for Summary Decision*

The rules of practice and procedure applicable to this proceeding, set out at 28 C.F.R. Part 68, authorize an ALJ of OCAHO to "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 a party is entitled to summary decision." 28 C.F.R. § 68.38(c).

Rule 56(c) of the Federal Rules of Civil Procedure parallels this agency's rule regarding summary decision. It is, therefore, instructive to look at the federal courts' interpretation and application of their analogous rule.

The Supreme Court and the Ninth Circuit, recognizing the significant contribution summary judgment motions can make to resolve litigation when there are no factual issues, have established the following standards for consideration of such motions. The party moving for summary judgment has the initial burden of identifying for the court those portions of the materials on file that the movant believes demonstrate the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party may discharge this burden by "showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." Celotex at 325. Once the moving party has met this burden, the burden of production shifts so that the non-moving party must set forth by affidavit or as otherwise required by Rule 56(c), Celotex at 323-4, "specific facts showing that there is a genuine issue for trial." T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) and citing Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100. 1103-4 (9th Cir. 1986), cert. denied, 484

U.S. 1066 (1988)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations, T.W. Electrical Service at 630, or weigh conflicting evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and is required to draw all inferences in a light most favorable to the non-moving party. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Supreme Court has stated that Rule 56(c) nevertheless requires courts to enter 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. Celotex at 322. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Liberty Lobby, 477 U.S. at 252. The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-2.

Rule 56(c) of the Federal Rules of Civil Procedure also permits consideration of any "admissions on file" as the basis of summary decision adjudication. See, e.g., Home Indemnity Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982); see also Morrison v. Walker, 404 F.2d 1046, 1048-9 (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.").

IV. *Findings of Fact and Conclusions of Law*

A. Complainant's Failure to Follow ALJ Orders Regarding Discovery

As stated previously, I have decided to reconsider Respondent's Motion for Summary Decision, filed April 22, 1992, sua sponte. Complainant has been given sufficient advance notice and an adequate opportunity to demonstrate why summary decision should not be granted, including this office's staff informing him telephonically on May 8, 1992, of his need to respond to the motion and directing him to the applicable regulation. Complainant, however, failed to respond to the motion. Based on Complainant's pro se status, I liberally construed the pleadings to find that there were material facts in dispute

and on May 21, 1992, an Order Denying Respondent's Motion to Dismiss and for Summary Decision was issued. After reconsidering Respondent's motion, I have decided to grant summary decision for Respondent based on Complainant's failure to comply with my orders.

The record in this case shows that Respondent submitted to Complainant sixteen interrogatories, most containing several subparagraphs and eleven document requests, also containing several subparagraphs. Under this agency's rules of practice and procedure, Complainant was required, pursuant to 28 § C.F.R. 68.19(b), to answer each interrogatory "separately and fully in writing under oath or affirmation, unless it [was] objected to, in which event the reasons of objection [should have been] stated in lieu of an answer," and was required to state, with respect to each document he was asked to produce pursuant to 28 C.F.R. § 68.20(e) "(1) [t]hat inspection and related activities [would] be permitted as requested; or (2) [t]hat objection is made in whole or in part, in which case the reasons for objection [would] be stated."

Complainant, however, failed to respond to these discovery requests, and based on Respondent's Motion to Compel filed on March 25, 1992, an order was issued March 26, 1992, directing Complainant to answer Respondent's discovery requests by April 24, 1992. Complainant failed to answer Respondent's interrogatories or produce the requested documents, but instead submitted to Respondent a four-sentence letter and a copied form. See Letter from Complainant to Respondent, filed April 13, 1992.

In the letter, Complainant said that he enclosed a copy of his green card which showed that he was currently authorized to work in the United States and he also said that he would produce his social security card within ten working days. Furthermore, Complainant stated that at the hearing scheduled for May 4, 1992 he would fully testify at which time Respondent would get all the information it was currently seeking. Attached to this letter was a copied form which indicated that Complainant had entered the United States on August 15, 1980, as a spouse of an immigrant and as such, while he was in this country, his status was adjusted to permanent resident. The form also showed that on April 6, 1992, Complainant received temporary evidence of lawful admission for permanent residence and authorization to work in the United States.

I find that Complainant failed to comply with my order of March 26th and, therefore, he did not adequately respond to Respondent's discovery requests. Complainant's failure to comply with my order

and respond to Respondent's discovery requests is shown by: (1) Complainant's admission that he did not respond to Respondent's discovery requests, inferred by his statement that Respondent would fully testify at the hearing at which time Respondent would get the information it was seeking in discovery (See Letter, supra.); (2) Respondent's Motion for Summary Decision which stated that, "the only discovery responses received from Complainant was the letter and copied form . . ." Respondent's Motion for Summary Decision, para. 10; and (3) Complainant's failure to respond to this allegation in Respondent's Motion for Summary Decision.[7]

In addition to Complainant's failure to comply with my order of March 26, 1992, which directed Complainant to answer Respondent's discovery requests by April 24, 1992, I also find that Complainant failed to comply with my Order to Show Cause issued June 3, 1992, which directed him to telephonically contact this office on or before June 12, 1992, to explain, inter alia, why he had not responded to the March 26th order.[8] I do not find his explanation credible. In view of Complainant's failure to comply with these two orders, I find it appropriate to take sanctions against him.[9]

B. Sanctions

OCAHO's regulations provide for a number of sanctions an ALJ may impose on a party who fails to comply with an ALJ's order for "the production of documents, the answering of interrogatories . . . or any other order of the [ALJ]." 28 C.F.R. § 68.23(c). In such a case, the ALJ may:

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[7] A party opposing a motion for summary decision may not rest upon the mere allega-tions or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing. 28 C.F.R. § 68.38(b).

[8] Complainant did not contact this office telephonically on June 26, 1992, and made mis-leading statements in an attempt to explain why he failed to timely respond to my last two orders. Complainant stated that the Center where he picks up his mail was closed for two weeks at the end of June and later stated that the office was closed for one week. When my Attorney-Advisor called the Center in an attempt to corroborate Complainant's story, she was told that the Center was closed only one day in the month of June.

[9] Complainant also failed to respond to an order not related to discovery which was issued May 21, 1992. Despite the best efforts of this office and its staff to assist Com-plainant, in view of his pro se status, in understanding his responsibilities with regard to his case, Complainant's failure to respond to the last three orders issued by this ALJ, notwithstanding the explicit directions contained therein, are grounds for dismissal because of abandonment. 28 C.F.R. § 68.37(b)(1).

> for the purposes of permitting resolution of the relevant issues and disposition of the proceeding and to avoid unnecessary delay take the following actions:
>
> (1) infer and conclude that the admissions, testimony, documents or other evidence would have been adverse to the non-complying party;
>
> (2) Rule that for the purpose of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party . . .

28 C.F.R. § 68.23(c)(1) and (2).

In view of Complainant's failure to comply with the order directing him to respond to Respondent's discovery requests and the Show Cause Order demanding an explanation as to why he had not responded, I infer and conclude, pursuant to 28 C.F.R. §68.21(c)(1), that the admissions, testimony and documents would have been adverse to Complainant. I further find, pursuant to 28 C.F.R. § 68.21(c)(2), that the matters covered in my order directing Complainant to respond to the discovery requests be taken as established adversely to the Complainant.

More specifically, I make the following findings:

1. Complainant's status as a permanent resident, granted on or about August 15, 1980, was rescinded, pursuant to § 246 of the Act, 8 U.S.C. § 1256, before his employment by Respondent began (Respondent's Motion for Summary Decision, Exh. C, "Respondent's First Set of Interrogatories to Complainant," para. III, Interrogatory ("I")-(2)(e), filed April 22, 1992) and, thus, Complainant was not protected under IRCA, 8 U.S.C. § 1324b(a)(3), at the time he was employed by Respondent.

2. Complainant does not currently possess any documents which reflect that he was authorized to work in the United States during the time he was employed by Respondent (Id. at (Document ("D")-3)).

3. Even if Complainant was a protected individual under IRCA at the time he was employed by Respondent, Complainant did not submit any documents to Respondent to demonstrate his identity and

employment eligibility verification process (Id. at I-1, Document ("D")-2)).[10]

4. On the date he was hired by Respondent, Complainant did not possess any of the sixteen listed documents which would have authorized him to work in the United States (Id. at I-5(a)-(p)).[11]

5. Complainant did not provide Respondent with an application for duplicate Social Security card at the time Respondent filled out his I-9 Form (I-6) and Respondent did not call the Social Security Administration and verify that Complainant's alleged duplicate Social Security card in fact represented a valid number issued to Complainant (Id. at I-12).

6. Complainant did not provide Respondent with an original Social Security card within twenty-one business days of the date of his hire (Id. at I-6). Based on Complainant's failure during Respondent's employment eligibility verification process to submit to Respondent any documentation of his authorization to work in the United States, I find that Respondent did not demand unnecessary and duplicative docu-mentation of Complainant's authorization to work.

7. Respondent had reasonable and lawful grounds to discharge complainant and did so without violating any of the provisions of IRCA.

8. At no time while Complainant was employed by Respondent was he subjected to any type or form of harassment or intimidation in violation of 8 U.S.C. § 1324b(a)(5) and 28 C.F.R. § 44.201 (Id. at I-12).

C. Conclusion

In view of my findings that Complainant was not a protected indi-vidual," as that term is defined under IRCA, that Respondent did not require him to produce or show any documents or papers which were

[10] Complainant has a duty pursuant to § 264(e) of the Act, 8 U.S.C. § 1304, to carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card. This would have been prima facie evidence that he was authorized to work in the United States.

[11] Furthermore, based on the fact that almost two years after he was terminated by Respondent, Complainant applied to INS for a replacement alien registration receipt card, it can be inferred that Complainant had no proof that he was authorized to be employed in the United States at the time he was employed by Respondent.

not required to complete the employment eligibility verification form (Form I-9) and Respondent did not at any time, while Complainant was employed by Respondent, intimidate, threaten, coerce or retaliate against him for any reason, Respondent's Motion for Summary Decision is hereby GRANTED.

D. Attorney Fees Denied

Respondent seeks reimbursement for its attorneys' fees pursuant to 8 U.S.C. § 1324b(h) which confers discretion on an ALJ to "allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law in fact."

It is helpful to look at the analogous Title VII standard for determining whether to award attorneys' fees to prevailing defendants. Under Title VII, the standard is whether the non-prevailing Complainant's cause of action is "frivolous, groundless and without foundation, even though not brought in bad faith." See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) ("a . . . court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in bad faith"). An award of attorneys' fees to a meritorious defendant is intended to "deter the bringing of lawsuits without foundation." Id. at 420.

In its argument for the shifting of attorneys' fees, Respondent erroneously asserts that Complainant's Form I-94 sent to Respondent during discovery is evidence that Complainant was not lawfully admitted for permanent residence until April 6, 1992. Respondent argues based on its analysis of this document that Complainant knew his status was not protected during the course of his employment by Respondent, but he filed his complaint anyway, knowing it was "without reasonable foundation in law and fact."

Respondent's argument, however, is without merit as the Form I-9 actually shows that Complainant was lawfully admitted for permanent residence after he entered this country on August 15, 1980, and that for a reason Complainant never offered, on April 6, 1992, he applied for proof that he was lawfully admitted for permanent residence. Therefore, at the time of his employment by Respondent, Complainant may have been or may have believed that he was protected under IRCA. Furthermore, both of Complainant's legal theories for citizenship status discrimination were filed in a complaint by his former lawyers. His claims are not facially unreasonable or so lacking any

legal foundation as to persuade me to shift Respondent's attorneys' fees to Complainant.

Furthermore, even though I find that Complainant is not a protected individual under IRCA, I am not compelled to grant the shifting of fees, as my findings were based on inferences made because of sanctions taken against Complainant. Accordingly, in the exercise of my discretionary authority, Respondent's request for the shifting of its attorneys' fees to Complainant is DENIED.

V. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, affidavits, memoranda, materials and arguments submitted by the parties. Accordingly, and in addition to the findings and conclusions already specified, I make the following determinations, findings of fact and conclusions of law:

1. During the course of Complainant's employment by Respondent, Complainant was an alien unauthorized for employment in the United States.

2. During the course of Complainant's employment by Respondent, he was not a "protected individual" under IRCA, as defined at 8 U.S.C. § 1324b(a)(3)(B).

3. For the purpose of satisfying the employment verification requirements of 8 U.S.C. § 1324a(b), Respondent did not request more or different documents than are required by that section and did not refuse to honor documents tendered that on their face reasonably appeared to be genuine.

4. Respondent did not violate 8 U.S.C. § 1324b(a)(6), as Respondent did not commit an unfair immigration-related employment practice regarding documents in its hiring of Complainant.

5. Respondent did not intimidate, threaten, coerce or retaliate against Complainant for the purpose of interfering with any right of privilege secured under 8 U.S.C. § 1324(b) or because Complainant intended to file or has filed a charge or complaint under 8 U.S.C. § 1324(b).

6. Respondent did not violate 8 U.S.C. § 1324b(a)(5) and 28 C.F.R. § 44.201, as Respondent did not discriminate against Complainant based on his citizenship status by intimidating, threatening, coercing or retaliating against Complainant for the purpose of interfering with

any right or privilege secured under 8 U.S.C. § 1324(b) or because Complainant intended to file or has filed a charge or complaint under 8 U.S.C. § 1324(b).

7. Respondent's Motion for Summary Decision is GRANTED.

8. Respondent's request for attorney fees is DENIED.

9. This proceeding is now concluded. This Decision and Order is the Final Decision and Order of the Attorney General. Pursuant to 8 U.S.C. § 1324b(i) and 28 C.F.R. § 68.53(b), Complainant may, within sixty days after entry of the order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 23rd day of July, 1992.

ROBERT B. SCHNEIDER
Administrative Law Judge