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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Equal Employment Opportunity
Commission,

No. CV 07-1710-PHX-EHC

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Plaintiff,

ORDER

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vs.

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Cannon & Wendt Electric Co., Inc.,

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Defendant.

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On June 25, 2010, this case came before the Court for a Hearing on Plaintiff's Application for an Order to Show Cause Why Defendant Should Not Be Held in Contempt for Failure to Obey an Order of the Court (Doc. 105). Plaintiff contends that Defendant has failed to comply with certain provisions of the Consent Decree (Doc. 104) filed on April 12, 2010. On May 18, 2010, Defendant filed a Preliminary Response to the Application for Show Cause Order (Doc. 106). On June 10, 2010, Plaintiff filed a Reply (Doc. 109).

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Pursuant to the Court's Order (Dkt. 108) filed on June 1, 2010, the parties filed a Joint Status Report (Doc. 111) on June 18, 2010 regarding disputed issues. The parties filed a Supplemental Joint Status Report (Doc. 112) on June 24, 2010.

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Plaintiff's Complaint asserted claims for discrimination regarding Defendant's former employee Victor Cortez under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and 42 U.S.C. § 1981a. On September 22, 2009, the Court filed an Order denying Defendant's Motion for Summary Judgment (Doc. 89 - Order). The Consent Decree (Doc.

1 104) was approved and consented to by counsel for the parties and an official of Defendant
2 company all of whom signed the Consent Decree. The Court entered and ordered the
3 Consent Decree on April 9, 2010. The Consent Decree was filed on April 12, 2010.

4 Consent decrees “‘have attributes both of contracts and of judicial decrees,’ a dual
5 character that has resulted in different treatment for different purposes.” Gilmore v. People
6 of the State of California, 220 F.3d 987, 1001 n.17 (9th Cir. 2000). Courts may use contract
7 principles in construing consent decrees. Thompson v. Enomoto, 915 F.2d 1383, 1388 (9th
8 Cir. 1990). “The contract law of the situs state applies.” Id.

9 The scope of a consent decree is discerned within its four corners, “‘and not by
10 reference to what might satisfy the purposes of one of the parties to it’ or by what ‘might
11 have been written had the plaintiff established his factual claims and legal theories in
12 litigation.’” Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984)(quoting
13 United States v. Armour & Co., 402 U.S. 673, 681-682 (1971)). “A district court has the
14 power to modify a consent decree if experience with the administration of the decree shows
15 the need for modification in order to accomplish the primary goals of the decree.”
16 Thompson, 915 F.2d at 1388. “‘A consent decree is a judgment, has the force of res judicata,
17 and it may be enforced by judicial sanctions, including ... citations for contempt.’” Gilmore,
18 220 F.3d at 1001 n.17 (quoting Securities & Exch. Comm’n v. Randolph, 736 F.2d 525, 528
19 (9th Cir. 1984)).

20 The disputed issues raised in Plaintiff’s Application for Order to Show Cause, the
21 Joint Status Report, and the Supplemental Joint Status Report are discussed as follows.

22 Defendant’s Payment to Cortez of \$20,000 in Back Pay

23 Plaintiff argues that Defendant has not paid Victor Cortez \$20,000 in “back pay” as
24 required by paragraphs 3-6 of the Consent Decree.

25 Defendant responds that a disputed issue remains regarding whether Defendant is
26 required to obtain a Form I-9 prior to issuing a 2010 payroll check to Victor Cortez. A Form
27 I-9 is an Employment Eligibility Verification and is attached as Exhibit 1 to Defendant’s
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1 Preliminary Response. Defendant argues that its failure to verify employment eligibility and
2 properly retain a current Form I-9 possibly would subject Defendant company to criminal
3 and civil liabilities. Defendant had on file a 2000 Form I-9 as to Victor Cortez based on an
4 “unexpired INS employment authorization” which by its terms expired on January 7, 2009.
5 Defendant argues that it is required to re-verify employment eligibility when an employee’s
6 work authorization expires. Defendant informs the Court that Victor Cortez is refusing to
7 sign the Form I-9 (Employment Eligibility Verification). Defendant asks that the Court
8 decide the following issues: (1) that Defendant is not required to obtain a Form I-9; or (2)
9 whether Victor Cortez is required to complete the Form I-9 prior to receiving the check in
10 payment of the “back pay” amount. In the Supplemental Joint Status Report, Defendant
11 suggests amending the Consent Decree to change the “back pay” to compensatory damages
12 (which are not run through a payroll account).

13 In its Reply, Plaintiff argues that current U.S. Department of Homeland Security
14 guidelines disallow the re-verification of expired permanent residence cards, and that
15 Defendant must pay Victor Cortez the “back pay” amount without requesting a Form I-9.
16 Plaintiff reports that an attorney with the U.S. Department of Justice Office of Special
17 Counsel for Immigration Related Unfair Employment Practices consulted with the U.S.
18 Citizenship and Immigration Services (USCIS) and then in an e-mail on June 2, 2010 notified
19 Defendant’s counsel of the following: “If the individual is not being hired or employed by
20 the employer, the employer cannot require the individual to complete a Form I-9” (Doc. 109 -
21 Exhibit 4). Plaintiff argues that Defendant continues to unreasonably delay paying Victor
22 Cortez the “back pay” amount despite receiving this e-mail. Plaintiff argues that Defendant
23 failed to raise any concerns relating to the Form I-9 prior to the entry of the Consent Decree.
24 In the Supplemental Joint Status Report, Plaintiff objects to Defendant’s assertion that “the
25 backpay ordered by the Consent Decree be ‘changed’ to compensatory damages because this
26 ‘change’ would subject Mr. Cortez to a higher level of scrutiny from the IRS, and would
27 violate the terms of the Consent Decree negotiated by the Parties, and Ordered by the Court.”

1 At the hearing on June 25th, Plaintiff's counsel argued that Defendant was not rehiring
2 Cortez as an employee and described the issue regarding the Form I-9 as "frivolous."
3 Defendant's counsel argued that the issue concerned "back pay" and the Form I-9 matter
4 requires resolution by the Court.

5 In this case, Cortez allegedly suffered an adverse employment action when his
6 employment was terminated by Defendant company on May 6, 2005. Cortez was
7 unemployed for approximately seven months until he was hired by another company on
8 December 30, 2005. An award of back pay is generally calculated from the date of the
9 discriminatory discharge until the date of the final judgment. Kraszewski v. State Farm
10 General Ins. Co., 912 F.2d 1182, 1184-1185 (9th Cir. 1990); Edwards v. Occidental
11 Chemical Corp., 892 F.2d 1442, 1449 (9th Cir. 1990). Back pay is calculated by subtracting
12 the actual wages a discharged employee earned subsequent to termination from the amount
13 the employee would have earned absent the employer's discrimination. Gotthardt v. National
14 R.R. Passenger Corp., 191 F.3d 1148, 1158 (9th Cir. 1999). Sias v. City Demonstration
15 Agency, 588 F.2d 692, 696 (9th Cir. 1978). According to Defendant, it had on file a 2000
16 Form I-9 as to Victor Cortez based on an "unexpired INS employment authorization" which
17 by its terms expired on January 7, 2009. It therefore appears that Defendant had on file a
18 Form I-9 as to Cortez during the time between Cortez's May 6, 2005 employment
19 termination and the date he was hired by another company on December 30, 2005. Cortez
20 was not an employee of Defendant and did not perform any work for Defendant in 2010.
21 Cortez's completion of another Form I-9 appears unnecessary.

22 The Consent Decree (Doc. 104) at paragraph 3 requires Defendant to pay Victor
23 Cortez a sum of money that includes \$20,000 for "back pay." The Consent Decree at
24 paragraph 4 requires Defendant to pay Cortez the settlement amount within five (5) business
25 days of entry of the Decree. Paragraph 4 further provides that: "For the amount designated
26 as back pay, \$20,000, Defendant shall be responsible for paying the employer's share of
27 FUTA and FICA and the amount will not be taken from the settlement amount." The
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1 Consent Decree at paragraph 6 requires Defendant to mail the check, via certified mail,
2 within time periods specified in the Consent Decree. The Consent Decree does not contain
3 any term regarding completion of a Form I-9 by Victor Cortez regarding Defendant's
4 payment to Cortez of the \$20,000 in "back pay."

5 A district court's authority to adopt a consent decree comes only from the statute
6 which the decree is intended to enforce, not from the parties' consent to the decree.
7 Firefighters Local Union No. 1784, 467 U.S. at 576 n. 9. Plaintiff's Complaint asserted
8 claims for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e
9 et seq., and 42 U.S.C. § 1981a. The parties have not provided any discussion regarding the
10 basis of this litigation and a Form I-9. As discussed above, the scope of a consent decree is
11 not discerned by reference to what might satisfy the purposes of one of the parties to it.
12 Defendant will be required by November 15, 2010 to pay Victor Cortez \$20,000 in "back
13 pay" as required under the Consent Decree.

14 The Selection of the In-House Trainer

15 In the Joint Status Report (Doc. 111), the parties raised an additional disputed issue
16 "other than those raised in Plaintiff's Application for Order to Show Cause," that is,
17 Plaintiff's objection to Defendant's request to utilize its employee, Robert Hanson, for the
18 training required under the Consent Decree (see Consent Decree, ¶ 11(A)).

19 By way of background, Defendant's employee Robert Hanson, Director of Training
20 and Safety (a management position), took the photograph that allegedly showed Victor
21 Cortez working under a golf cart supported by a forklift. This asserted activity allegedly
22 was a safety violation and was an alleged reason in part for Cortez's employment
23 termination. Cortez appeared to dispute being the employee depicted in the photograph.

24 Plaintiff objects to Hanson as the in-house trainer because Hanson allegedly
25 participated in retaliating against Cortez. Plaintiff also objects because Hanson's resume
26 does not indicate that he has obtained any certifications, training or proficiency in the areas
27 of equal employment opportunity or workplace discrimination and harassment.

1 Defendant has responded that Hanson is qualified based on his resume and has been
2 approved by the EEOC for equal opportunity training in another case.

3 The in-house trainer dispute does not otherwise concern Victor Cortez. The dispute
4 is between Plaintiff and Defendant regarding a provision set forth in the Consent Decree.

5 The Consent Decree provides that “[w]ithin ninety (90) days of the entering of this
6 Decree, Defendant shall provide training on national origin discrimination and retaliation,
7 according to” certain terms as set forth in the Decree. These terms include that “Defendant
8 shall retain and pay for a qualified consultant/lecturer who shall provide consultation and
9 training for a period of three (3) years from the date of this Decree” (Doc. 104 - Consent
10 Decree ¶¶ 11 & 11(A)). The Consent Decree further provides that “Defendant must obtain
11 the EEOC’s written approval for the consultant/trainer” (*id.*).

12 The Consent Decree’s terms provide that Defendant must obtain Plaintiff’s written
13 approval for the consultant/trainer. Plaintiff has demonstrated in the Joint Status Report that
14 it does not agree with Defendant’s selection of Hanson. Defendant therefore will be required
15 to select a consultant/lecturer that Plaintiff has approved in writing by November 15, 2010.

16 Other Issues

17 In the Application for Order to Show Cause, Plaintiff argued that Defendant had not
18 paid Cortez \$80,000 in compensatory damages or issued to him an apology letter as required
19 by the Consent Decree. These issues have since been resolved by the parties.

20 In its Reply, Plaintiff moves for an Order that (1) fines Defendant an appropriate
21 amount per day for each day Defendant fails to comply with the Consent Decree; (2) requires
22 Defendant to pay to Victor Cortez a sum comparable to the attorney’s fees and costs incurred
23 by Plaintiff EEOC in prosecuting the Show Cause Application; (3) extends the Consent
24 Decree by one additional year (to April 12, 2014); and, (4) requires Defendant to pay Victor
25 Cortez the remaining \$20,000 (back pay) due under the Consent Decree plus interest for the
26 continued delay from April 28, 2010 through (a) the date the \$80,000 in compensatory
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1 damages was paid on May 19, 2010 and (b) the date the \$20,000 in back pay (presently due)
2 is paid to Victor Cortez.

3 The Consent Decree contains a duration and compliance provision as follows:

4 23. The duration of this decree shall be three (3) years from its
5 entry. This Court shall retain jurisdiction of this action for the
6 duration of this decree, during which the Commission may
7 petition this Court for compliance with this decree. Should the
8 Court determine that Defendant has not complied with this
9 decree, appropriate relief, including extension of this decree for
10 such period as may be necessary to remedy its non-compliance,
11 may be ordered.

12 (Doc. 104 - Consent Decree ¶ 23). The Court declines to order further relief under the
13 Consent Decree as requested by Plaintiff subject to the right of Plaintiff to re-apply for relief
14 as appropriate after the November 15, 2010 deadline set in this Order.

15 Accordingly,

16 **IT IS ORDERED** that Plaintiff's Application for an Order to Show Cause Why
17 Defendant Should Not Be Held in Contempt for Failure to Obey an Order of the Court (Doc.
18 105) is granted in part and denied in part without prejudice.

19 **IT IS FURTHER ORDERED** that Plaintiff's Application for an Order to Show
20 Cause, etc. (Doc. 105) is granted to the extent that by November 15, 2010 (1) Defendant shall
21 pay to Victor Cortez \$20,000 in "back pay" and (2) Defendant shall select a
22 consultant/lecturer that Plaintiff has approved in writing.

23 **IT IS FURTHER ORDERED** that Plaintiff's Application for an Order to Show
24 Cause, etc. (Doc. 105) is denied without prejudice to the right of Plaintiff to re-apply for
25 relief under the Consent Decree as appropriate after the November 15, 2010 deadline set in
26 this Order.

27 DATED this 12th day of October, 2010.

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Earl H. Carroll
United States District Judge