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

United States of America, Complainant v. Broadway Tire, Inc., Respondent; 8 U.S.C. § 1324a Proceeding, Cast No. 90100183.

ORDER GRANTING IN PART AND TAKING UNDER ADVISEMENT IN PART COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On August 9, 1990, Complainant filed a Motion to Strike Respondent's affirmative defenses pursuant to Federal Rule of Civil Proc. 12(f) and 28 C.F.R. § 68.9 because the affirmative defenses are redundant, immaterial, impertinent, irrelevant and unsupported by facts or law.

On August 21, 1990, Respondent filed its response to the Motion to Strike affirmative defenses arguing (1) that the allegations in paragraph 1-9 of Complainant's motion must be construed in favor of Broadway Tire, Inc., because of the district court's decision in United States of America, et al v. Broadway Tire, Inc., Civ. # S-89-1176-RAR (E.D. CA. Decided April 19, 1990) denying INS' motion for summary judgment and granting Respondent motion for an administrative hearing; (2) that the motion to strike is unnecessarily duplicative and untimely; (3) that Complainant's argument at paragraph 14 is immaterial to its motion to strike and groundless; that an answer does not need to be supported by case law or statutory authority; (4) that the statement of facts supporting each of the affirmative defenses are sufficient to put Complainant on notice of the substance of the defense and no more is required; (5) and a motion to strike is properly an attack on the sufficiency of the pleadings, not the underlying facts of the action. Respondent further argues that sanctions should be taken against Complainant for causing Respondent to defend the action in federal district court and for filing the motion to strike solely to multiple the proceedings ``unreasonably and vexatiously within the meaning of 28 U.S.C. 1927.''

I have previously addressed in some detail the issue of what standards an administrative law judge (ALJ) should apply in as-

sessing motions to strike affirmative defenses in these types of proceedings. See, U.S. v. Samuel J. Wassem, general partner, DBA Educated Car Wash, OCAHO Case # 89100353 (ALJ Schneider, October 25, 1989).[1]In that case, I stated that in determining whether or not to grant a motion to strike an affirmative defense:

> I am inclined to examine first the prima facie viability of the legal theory upon which the affirmative defense is premised. Second, if the affirmative defense is based on a legal theory which is not `clearly insufficient on its face,' then it is necessary, as I see it, to proceed with an analysis of whether the supporting statement of facts presents something more than `mere conclusory allegations.' (citations omitted) If the legal theory on which the affirmative defense is not `clearly insufficient,' and the supporting statement of facts presents something more substantial than `mere conclusory allegations,' I intend to deny the motion to strike.

In addition, the regulations applicable to this proceeding require that Respondent set forth a ``statement of facts supporting each affirmative defense.'' 28 C.F.R. § 68.6(c)(2).

As stated, Complainant has moved to strike all six pleaded affirmative defenses. In order to rule on Complainant's motion, I find that it is necessary to examine each opposed affirmative defense and precisely analyze the applicability of a motion to strike in terms of the standards set forth in my decision in Educated Car Wash.

As a first affirmative defense, Respondent alleges that the Complaint fails to state a cause of action. Although this may be a legal reason to dismiss a Complaint, Respondent does not detail why the Complaint is deficient. Since failure to state a cause of action may be an affirmative defense, I will permit Respondent to amend its answer or file a motion to dismiss stating with specificity the legal basis in support of its motion. See, 28 CFR 68 and Rule 12(f)(6) Federal Rules of Civil Procedure.

As a second affirmative defense, Respondent alleges that it ``substantially complied'' with the provisions of section 274A of the Immigration and Nationality Act. I have previously held that ``substantial compliance'' with paperwork requirements under IRCA may be an affirmative defense. See, U.S. v. Manos and Associates, OCAHO Case No. 89100130, (Feb. 8, 1990) (Order Granting in Part Complainant's Motion for Summary Decision); Cf. U.S. v. Richfield Caterers, OCAHO Case No. 89100187 (April 13, 1990) (The requirement to properly complete Form I-9 is one of substance, breach of which cannot be defended by substantial compliance. An employer's failure to sign an I-9 is not substantial compliance. Respondent did not substantially comply with the act by copying employee

[1] Since my decision in Educated Car Wash is not reported in either an official or unofficial publication, I will attach a copy of Educated Car Wash to this order.

identity and employment eligibility documents and attaching them to the I-9 Form, rather than filling out the I-9 Form correctly and in its entirety, since the regulations only permit an employer to attach such identification to the I-9 Form in addition to completing each section of the form itself.); U.S. v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211 (April 27, 1990) (Decision and Order Denying Respondent's Motion for Partial Summary decision and Granting Complainant's Motion for Partial Summary Decision) (Respondent did not substantially comply with the Act by accepting commercially produced social security card facsimiles for two employees, an employment practice specifically prohibited in the instructions to the I-9 Form. Respondent did not substantially comply with the Act by omitting its company name and address from the I-9 form).

Since Respondent does not detail in its answer how it ``substantially complied'' with the provisions of section 274A, Respondent shall file, as directed herein, an amended Answer with a supporting statement of facts or, in the alternative, a motion to dismiss based on the same theory, detailing the facts and law in support of its argument.

Respondent's third affirmative defense is that the Complaint is barred by the statute of limitations. Respondent's fourth affirmative defenses is that the complaint is barred by laches. Although both of these defenses are based on a prima facie valid legal theory, Respondent's Answer does not detail the facts in support of either affirmative defense.

Respondent's fifth pleaded affirmative defense is that it is entitled to a set-off. This is not an affirmative defense and should be raised by motion with supporting legal memorandum.

Respondent's sixth pleaded affirmative defense is ``good faith.'' Good faith is not an affirmative defense to a paperwork violation; it is only a factor in determining the amount of penalty. See, 8 U.S.C. § 1324(a)(3); U.S. v. Mester Manufacturing Co., Case No. 871-00001 (1988), at 17; U.S. v. Big Bear Markets, Case No. 88100038 (1989) at 26.

The purpose of pleading with sufficient detail in employment sanctions cases is to provide both the parties and the ALJ with an opportunity to determine what, if any, material issues are in dispute which may require an evidentiary hearing. Moreover, requiring specific statement of facts in pleadings provides the parties with an opportunity to streamline discovery requests and hopefully present to the ALJ, pursuant to 28 C.F.R. § 68.36, motions for summary decisions where appropriate.

Accordingly, it is hereby ORDERED that:

(1) Complainant's motion to strike Respondent's affirmative defenses one through four is taken under advisement;

(2) Complainant's motion to strike Respondent's pleaded affirmative defenses five and six is granted;

(3) Respondent shall on or before September 14, 1990, file with this court an amended answer detailing the factual foundation in support of any and all affirmative defenses it may wish to allege or in lieu, thereof, file an appropriate motion to dismiss.

SO ORDERED: This 30th day of August, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge