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

United States of America, Complainant v. Robert Watson, d.b.a. North State Tile Co., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100233.

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

On September 26, 1990, Complainant filed a Motion to Strike Affirmative Defenses pursuant to Federal Rule of Civil Procedure 12(f) and 28 C.F.R. § 68.9, because the affirmative defenses are insufficient.

On October 9, 1990, Respondent filed an Opposition to Complainant's Motion to Strike Affirmative Defenses. In its Opposition, Respondent argues that: (1) Complainant has failed to show that Respondent's affirmative defenses are legally and factually insufficient; (2) Complainant's motion should be denied because Complainant has failed to show that it will suffer any prejudice from a denial of its motion; (3) Respondent may properly allege matters which go to the level of fine (i.e. mitigating factors) as affirmative defenses; (4) Respondent must set forth in its answer all matters constituting affirmative defenses, even if unable to provide a statement of facts in support thereof at the time the Answer is filed, since failure to do so may result in waiver of the affirmative defenses; (5) Under the controlling statutory authority, the employer is not ultimately responsible for the completion of Section 1 of the I-9 Form; and (6) Under the Federal Rules of Civil Procedure and pertinent case law, identification of the particular statute of limitations relied upon is not required as a matter of pleading.

I have previously addressed in some detail the issue of what standards an administrative law judge (ALJ) should apply in assessing motions to strike affirmative defenses in these type proceedings. See, U.S. v. Samuel J. Wassem, general partner, DBA Educatee Car Wash, OCAHO Case #89100353 (ALJ Schneider, October 25, 1989); see also, U.S. v. Broadway Tire, Inc., OCAHO Case No.

90100183 (ALJ Schneider, October 25, 1989) (Order Granting In Part and Taking Under Advisement In Part Complainant's Motion to Strike Affirmative Defenses, citing Educated Car Wash). In Educated Car Wash, I stated that in determining whether or not to grant a motion to strike affirmative defenses:

> 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 based 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.

This standard for assessing motions to strike affirmative defenses is not inconsistent with case law cited by Respondent which states, in part, that motions to strike are generally disfavored, and are often denied by the courts unless prejudice would result to the moving party from the denial of the motion. See, United States v. 729.773 Acres of Land, 531 F. Supp. 967, 971 (D. Haw. 1982); Bennett v. Spoor Behrans Campbell & Young, Inc., 124 F.R.D. 562, 564 (S.D.N.Y. 1989).

The case law cited by Respondent further states that: ``although a motion to strike is not normally granted unless prejudice would result to the movant from the denial of the motion, it is appropriately granted when the defense is clearly legally insufficient. . . . '' 729.773 Acres of Land, supra. Thus, a review of the case law reveals that a showing of prejudice is necessary to support a motion to strike only where there are disputed and substantial questions of law on the motion, or when the possibility of a meritorious defense exists. See, Bennett, supra; see also, Coca-Cola Co. v. Howard Johnson Co., 386 F. Supp. 330 (D.C. GA 1974). Therefore, a grant of a motion to strike based upon a finding that the legal theory on which the affirmative defense is based is `clearly insufficient' would be proper even in the absence of a showing of prejudice to the moving party. My prior decisions in Educated Car Wash and Broadway Tire are not inconsistent with this reasoning.

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).

Complainant has moved to strike all eighteen 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.

Respondent alleges as a first affirmative defense that the Complaint fails to state a cause of action. The viability of this affirmative defense was addressed in Broadway Tire, supra. As in the present case, the Respondent in Broadway Tire did not provide any factual support for its assertion that the Complaint failed to state a cause of action. And as was stated in that case, ``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 C.F.R. § 68 and Rule 12(f)(6) Federal Rules of Civil Procedure.

As a second affirmative defense, Respondent alleges that its I-9s were lawfully maintained and completed, or it believed in good faith that it was lawfully maintaining and completing its I-9s. It is unclear to me from this statement whether Respondent is alleging as an affirmative defense simply good faith compliance or whether it is attempting to allege substantial compliance with the provisions of section 274A of the Immigration and Nationality Act. Due to this uncertainty, I will analyze this allegation in the alternative: first, as an assertion of good faith compliance, and second, as an assertion of substantial compliance.

First, with regard to good faith as an affirmative defense, Complainant correctly states in its motion that 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. 87100001 (1988), at 17; U.S. v. Big Bear Markets, Case No. 88100038 (1989), at 26; U.S. v. USA Cafe, Case No. 88100098 (ALJ Schneider, 1989); U.S. v. Broadway Tire, Inc., Case No. 90100183 (1989). In USA Cafe, I stated that good faith is ``not a material fact in the determination of liability for recordkeeping violations. . . .'' Thus, as indicated in prior decisions, good faith is ``clearly insufficient'' as an affirmative defense.

Although the above analysis is sufficient to dispose of the issue of good faith, I feel this is an appropriate point to address the issue of whether the ``mitigating'' factors set forth in 8 U.S.C. § 1324a(e)(5) may properly be alleged as affirmative defenses to paperwork violations.

``An affirmative defense admits allegations in the complaint and then asserts facts that would defeat recovery.'' Fleming v. Kane County, 636 F. Supp. 742 (N.D. Ill. 1986). Based upon this definition, it is clear that none of the factors for determining level of penalty in 8 U.S.C. § 1324(e)(5) may properly be asserted as affirmative defenses to a paperwork violation since those factors would not defeat recovery if proven; proof of their existence would only reduce the level of penalty to be imposed.

I acknowledge that some courts have held that mitigation of damages should be pleaded as an affirmative defense to a breach of contract action. See, Consolidated Mortgage Financial Corp. v. Landrieu, 493 F. Supp. 1284, 1293 (D.C.D.C. 1980); Erler v. Five Points Motors, 249 Cal. App.2d 560, 57 Cal. Rptr. 516 (1967). But such cases are distinguishable from employment sanctions cases. Striking allegations of mitigating factors as affirmative defenses is appropriate in employment sanctions cases because such defenses do not admit the allegations of the Complaint, and striking the ``defenses'' will not preclude evidence on the mitigating factors/``defenses'' at a subsequent evidentiary hearing. Thus, Respondent does not risk waiving the ``defense'' if he does not plead the mitigating factors as affirmative defenses in its Answer.

In addition, it should be noted that even in breach of contract cases pleading mitigation of damages as an affirmative defense is not always necessary. In Erle, supra, it was noted that there is a distinction between computation (diminution of damages by earnings) and evaluation (mitigation from proof of potential earnings). Factors which go to computation, as opposed to those that go to evaluation, need not be plead as an affirmative defense. Erle, supra at 568.

The mitigating factors set forth in 8 U.S.C. § 1324a(e)(5) are more analogous to factors which would go to computation because they are only analyzed after a finding of liability has been made and proof of the factors figures into a calculation of the fine amount. thus, consistent with prior decisions, I find that all the mitigating factors set forth in 8 U.S.C. § 1324a(e)(5) (not only the factor of good faith) are not affirmative defenses to paperwork violations; rather, they are only factors for determining the amount of penalty which can be raised and analyzed at a subsequent evidentiary hearing.

Based on the above finding, Respondent's affirmative defenses #3, #4, and #5, which allege the seriousness of the violation, the size of the business, and the history of previous violations, respectively, are not affirmative defenses because they are mitigating factors set forth in 8 U.S.C. § 1324a(e)(5).

Turning once again to Respondent's second affirmative defense, I will now construe that defense as alleging substantial compliance and analyze it according to the aforementioned standards for assessing motions to strike affirmative defenses. 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 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.).[1]

Since Respondent does not detail in its answer how it ``substantially complied'' with the provisions of section 274A, Respondent may 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 affirmative defenses #6-#8, #10, and #13-#15, allege, respectively, that the fact it was not charged with knowingly hiring unauthorized aliens dictates that the fine amounts must be reduced to the minimum level; that its new procedures ensure, to the extent possible, current and future compliance with IRCA and dictate that the fine amount must be reduced to the minimum level; that its financial position dictates that the fine amount to be reduced to the minimum level; that the congressional intent and INS policy is not to levy immense monetary fines against employers solely for alleged recordkeeping violations; that the range of fines demanded by Complainant . . . are arbitrary and capricious; that it cooperated fully with Complainant during its investigation; and that its best efforts were used to complete the I-9s in accord-

[1] There is a thorough and lengthy discussion of the current ALJ OCAHO decisions on ``substantial compliance'' in 67 Interpreter Releases 1071. In view of the fact that the relevant OCAHO decisions discussing substantial compliance are not reported in an official publication, and the fact that Respondent may not receive the Interpreter Releases publication, I am attaching the relevant portions of the September 24, 1990 edition of the Interpreter Releases. 67 Interpreter Releases 1071-73 (September 24, 1990).

ance with the nature of its business and business conditions at the time. It appears to me that what Respondent is trying to allege in each of these defenses is matter in mitigation of penalty. Thus, these allegations are not affirmative defenses, but evidence that may be raised in a later evidentiary hearing.

Several of the above allegations seem to suggest that proof of one of the five mitigating factors would result in reduction of the fine amount to the minimum level. However, that is not the case. In U.S. v. Felipe, OCAHO Case No. 89100151 (Oct. 11, 1989); aff'd by CAHO, (Nov. 29, 1989), I determined that, in computing a civil monetary penalty, each of the five factors set forth in 8 U.S.C. § 1324a(e)(5) are equally important, and thus should be given equal weight. Therefore, proof of a single mitigating factor would not result in reduction of the penalty to the minimum level.

Respondent's affirmative defenses #9, #16, and #18 allege, respectively, that Complainant's actions are barred in whole or in part by waiver, estoppel and/or accord and satisfaction; that, assuming, arguendo, certain I-9s were not satisfactorily completed, such act(s) occurred without the knowledge, consent or ratification of managing officers and/or agents of Respondent and were done by individuals outside the scope and course of their employment by Respondent; and that the Complaint, or any portion of it, is barred by the applicable statute of limitations. Although these defenses are based on prima facie valid legal theories, Respondent's Answer does not detail the facts in support of the affirmative defenses.

Respondent's eleventh affirmative defense, alleges that Complainant is disparately prosecuting it for recordkeeping violations. Respondent's seventeenth affirmative defense alleges that the conduct of Complainant's investigation was deficient and irregular, and that as a result, the conclusions drawn were incorrect. It appears to me that in both of these defenses what Respondent is alleging as an affirmative defense is some violation of due process rights, a prima facie valid legal theory. With regard to the eleventh affirmative defense, it is quite possible that Respondent is alleging either a due process violation, or a violation of the equal protection clause, or even selective prosecution. Unfortunately, I cannot be certain since no facts have been provided in support of these defenses. Hence, Respondent may provide a supporting statement of facts for these defenses in an amended Answer or in a motion to dismiss.

Respondent's twelfth affirmative defense alleges that it cannot be fined for its alleged failure to complete section 1 of the I-9 form. This issue was decided by me in U.S. v. Boo Bears Den, OCAHO

Case No. 89100097 (July 19, 1989) (Order Granting Complainant's Motion for Summary Decision). In that case I stated that

> while it is clear that the employee actually fills out section 1, it cannot be doubted that the employer is ultimately legally responsible and accountable for the completion and integrity of the form. This legal responsibility is borne out by [8 U.S.C.] section 1324a(a)(1)(B) which requires that an employer can only hire individuals after `complying with the requirements of subsection (b).' Seen in its totality, subsection (b) includes employer and employee attestations as well as retention of forms. See, section 1324a(b)(1), (2), (3).

In view of my decision in Boo Bears Den, Respondent's affirmative defense is clearly legally insufficient.

As I stated in Broadway Tire, supra, 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 a 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, two, nine through eleven, and sixteen through eighteen is taken under advisement;

(2) Complainant's Motion to Strike Respondent's affirmative defenses three through eight and twelve through fifteen is granted;

(3) Respondent may file with this court, on or before November 16, 1990, an amended answer detailing the factual foundation in support of any and all affirmative defenses it may wish to allege or in lieu, file an appropriate motion to dismiss.

SO ORDERED: This 19th day of October, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge