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

United States of America, Complainant v. Boah Fashion Corp., Respondent; 8 U.S.C. 1324a Proceeding, OCAHO Case No. 90100305.

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On October 9, 1990 the Immigration and Naturalization Service (Complainant) filed a complaint against Boah Fashion Corp. (Respondent) alleging violations of the Immigration Reform and Control Act of 1986 (IRCA), specifically, that Respondent had unlawfully employed seven individuals who were unauthorized to work in the United States, in violation of the provisions of 8 U.S.C. § 1324a(a)(1)(A), and had failed to prepare and/or present employment verification forms for eight individuals, a practice proscribed under 8 U.S.C. § 1324a(a)(1)(B).

On November 9, 1990 Respondent timely filed its answer, in which it denied the charges of unlawful employment, and also urged that the proposed $21,750 civil penalty in Count II, that which involved the alleged employment verification violations, is excessive and should be reduced.

Respondent also asserted two affirmative defenses in that responsive pleading. Initially, Respondent maintains that the proposed civil monetary penalty should not have been levied because Complainant had not conducted a meaningful educational visit at Respondent's place of business prior to having issued the Notice of Intent to Fine at issue. That because the educational visit had been conducted in English, and Respondent's understanding of that language is so lacking that the educational visit was thereby deprived of any meaningful instructional benefit to Respondent.

In its second affirmative defense, Respondent avers that the Complainant had improperly alleged violations in Counts I and II which are mutually exclusive namely, that Respondent had unlawfully hired and continued to employ these seven individuals named in Count I and had failed to prepare Form I-9s for those same

seven employees, as well as one other, the alleged infractions upon which Count II is based.

On November 28, 1990 Complainant filed a Motion to Strike Affirmative Defenses, and an accompanying memorandum in support thereof, urging that Respondent's purported affirmative defenses are insufficient as a matter of law.

In addressing Respondent's first affirmative defense, that involving the instructional visit which Respondent argues was flawed because of the linguistic shortcomings, Complainant urges that the recent ruling in Mester Manufacturing v. I.N.S., 879 F.2d 561, 569, (9th Cir. 1989), contains the ruling, among others, that an employer has no right to a thorough briefing as to its violations of IRCA prior to enforcement.

Complainant also relies upon the more recent ruling in U.S. v. Thomas R. Heisler, OCAHO Case No. 90100002 (April 5, 1990) (Order Granting Complainant's Motion to Strike Respondent's Third and Fourth Affirmative Defenses) in which Judge Robert Schneider found that a failure to educate the public with respect to the employer sanctions provisions of IRCA could not be asserted as an affirmative defense.

Concerning Respondent's second affirmative defense, Complainant maintains that there are several rulings which authorize INS to fine employers for simultaneous violations involving unlawful employment of unauthorized aliens, 8 U.S.C. 1324a(a)(1)(B), involving the same alien. Maka v. I.N.S., 904 F.2d 1351 (9th Cir. 1990); U.S. v. O'Brien, OCAHO Case No. 89100387 (May 2, 1990); U.S. v. Student Exchange International, Inc., OCAHO No. 89100110 (December 20, 1989); U.S. v. Fine, OCAHO Case No. 89100363 (December 19, 1989); U.S. v. Harrold, OCAHO Case No. 89100097 (December 14, 1989); U.S. v. Salido,, OCAHO Case No. 89100023 (August 8, 1989).

On December 13, 1990 Respondent filed a pleading captioned Statement in Opposition to Motion to Strike Affirmative Defenses, in which it is asserted that Respondent was entitled to an educational briefing on the provisions of IRCA prior to INS' enforcement activities having been commenced.

Respondent also relies upon an undocumented public statement to that effect which Respondent attributes to the Commissioner of the Immigration and Naturalization Service in which he reportedly announced that no civil fines would be levied for IRCA infractions in the absence of an educational visit, presumably conducted by INS personnel.

In that pleading, also, Respondent reiterates its conviction that it may not be fined for simultaneous alleged infractions involving un-

lawful hiring and documentation oversights involving the same aliens. It further believes that that issue involves a mixed question of law and fact and must be resolved on a case-by-case basis.

Respondent also maintains that the documentation charge involving the I-9 Forms, which it describes as the lesser of the two charges, is merged into the alleged unlawful employment allegation, resulting in the respective proposed fines being mutually exclusive.

Finally, Respondent also urges that ``this affirmative defense should not be stricken by motion but a hearing should be held to determine the facts on which the judge's decision would be made.''

In the absence of any statutory, regulatory, or decisional bases, Respondent's argumentation is not persuasive in its contention that the INS Commissioner, or even Congress, intended that every employer in the nation be individually educated on the requirements of IRCA prior to its implementation. To the contrary, the Ninth Circuit has interpreted IRCA not to have intended such a requirement, Mester Manufacturing v. I.N.S., supra, at 569, and OCAHO rulings clearly hold that ignorance of the statutory requirements is not an adequate defense. U.S. v. The Body Shop, OCAHO Case No. 89100450 (April 2, 1990); U.S. v. USA Cafe, OCAHO Case No. 88100098 (Feb. 6, 1989). See also U.S. v. Walia's, Inc., OCAHO Case No. 89100259 (Jan. 5 1990) (Order Granting In Part Complainant's Motion for Summary Decision . . .) (finding facts supporting claim that INS failed to disseminate forms and educate the public with respect to employer sanctions insufficient to show affirmative misconduct).

That portion of IRCA which is most instructive of Congress' public information concerns is the wording found in section 274A(i) of IRCA, 8 U.S.C. § 1324a(i), which provided for a 6-month information period beginning on the first day of the first month following enactment, or until June 1, 1987, during which information and forms were to have been disemminated to employers, among others. That accommodation, however, did not include educational visits to employer's premises, per se.

In addition, there is no statutory requirement that directives be given in any language other than English. It is the non-delegable duty of employers to ensure adequate compliance with the requirements of IRCA. See, e.g., U.S. v. J.J.L.C.,OCAHO Case No. 89100187 (April 13, 1990) (holding employer responsible for ensuring that both Parts 1 and 2 of Form I-9 be properly completed); U.S. v. Boo Bears Den, OCAHO Case No. 89100097 (July 19, 1989). Accordingly, neither the failure to educate Respondent on IRCA's requirements nor Respondent's claims of difficulties with the English language

instructions provides an affirmative defense to the alleged violations at issue.

In its second affirmative defense, Respondent argues that it may not be charged simultaneously with the unlawful employment of an unauthorized individual, as well as the failure to complete a Form I-9 on that same individual. As Complainant has correctly noted, Respondent's argument has no legal basis, as evidenced by he previously cited cases. Maka v. I.N.S., supra.; U.S. v. O'Brien, supra.

It should be noted, however, that although Complainant is correct in objecting to Respondent's assertion of these conceived affirmative defenses, its Points and Authorities in Support of Motion incorrectly refers to 8 U.S.C. § 1324a(a)(1)(A) as ``knowingly hire/continuing to employ an illegal/unauthorized alien.'' Title 8 U.S.C. § 1324a(a)(1)(A) solely refers to the unauthorized hiring of an individual. Section 1324a(a)(2) refers to unlawfully continuing to employ an individual under IRCA. Although the Immigration and Naturalization Service appears to commonly plead 8 U.S.C. § 1324a(a)(2) in the alternative in those cases involving violations of unlawful hiring under 8 U.S.C. § 1324a(a)(1)(A), these provisions are separate and distinct and should not be used interchangeably.

For the foregoing reasons, Complainant's Motion to Strike Affirmative Defenses, pursuant to 28 C.F.R.§ 68.1, 54 Fed. Reg. 48593 (1989) (to be codified at 28 C.F.R. pt. 68) and Fed. R. Civ. Proced. 12(f), is granted and both affirmative defenses are hereby ordered to be stricken.

JOSEPH E. MCGUIRE
Administrative Law Judge