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

IN RE CHARGE OF JAIME GIRON	)	
	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 90200307
HARRIS RANCH BEEF COMPANY,	)	
Respondent.	)	
	)	

ORDER DENYING IN PART AND GRANTING IN PART
COMPLAINANT'S MOTION FOR MORE DEFINITE STATEMENT
AND TO STRIKE AFFIRMATIVE DEFENSES

I. *Procedural History*

A Complaint Regarding Unfair Immigration Related Employment Practices was filed by the Office of Special Counsel (hereinafter "Complainant") on October 10, 1990, charging Harris Ranch Beef Company (hereinafter "Respondent") with violating 8 U.S.C. § 1324b for alleged discrimination in hiring against Jaime Giron on the basis of his citizenship status. On October 24, 1990, Respondent filed its Answer, generally denying the allegations of the Complaint.

On February 25, 1991, Complainant filed a Motion to Amend Complaint, seeking to incorporate in its Complaint the changes made by Section 533(a) of the Immigration Act of 1990 and to add a pattern or practice count alleging that Respondent had/has a policy of

requiring non-U.S. citizen applicants to produce an immigration card in addition to a state driver's license or identification card and a social security card. Complainant's Motion to Amend Complaint was granted by my Order issued on April 17, 1991.

Respondent filed its Answer to Complainant's Amended Complaint on April 24, 1991. In its Answer, Respondent sets forth three (3) affirmative defenses to the allegations of the Amended Complaint, which are as follows: (1) With respect to Counts I and II, Respondent alleges that Mr. Giron lacks standing under 8 U.S.C. § 1324b(a)(3)(B) because he did not file a valid application for naturalization on or before February 7, 1991;[1] (2) With respect to Counts I and III, Respondent alleges that these counts are time-barred since they allege violations of sections of the Immigration Act of 1990, which are not retroactive;[2] and (3) With respect to Counts I and III, Respondent alleges that these counts are barred by the doctrine of unclean hands since Complainant failed to properly educate employers concerning the requirements of IRCA.[3]

On April 30, 1991, Complainant filed a Motion for More Definite Statement and to Strike Affirmative Defenses. Respondent filed its Opposition to Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses on May 14, 1991. Upon careful consideration of Complainant's motion, as well as Respondent's opposition, I am denying in part and granting in part Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses for the reasons set forth below.

II. *Motion for More Definite Statement*

By its motion, Complainant first seeks a more definite statement of Respondent's First Affirmative Defense, on the grounds that, "without a more definite statement regarding [Respondent's] legal and factual bases for its affirmative defense, the [Complainant] would have to reply and conduct discovery on two defenses where just one may be

[1] To be a "protected individual," 8 U.S.C. § 1324b(a)(3)(B) requires that a lawful permanent resident have applied for naturalization within six months of the date the alien first became eligible to apply for naturalization.

[2] i.e. Respondent's request for more or different documents is an unfair immigration- related employment practice, pursuant to Section 535 of the Immigration Act of 1990.

[3] This alleged affirmative defense may reasonably be construed as an estoppel defense.

involved." It is my view, however, that Complainant's Motion for More Definite Statement should be denied for several reasons.

First, as Complainant correctly notes in its motion, our regulations at 28 C.F.R. § 68.8(c)(2) require that each alleged affirmative defense be supported by "a statement of facts." Although Complainant apparently disagrees, I believe that Respondent has sufficiently satisfied this regulatory requirement.

In its First Affirmative Defense, Respondent supports its argument that Mr. Giron lacks standing by first noting the statutory requirement for protected individual status that lawful permanent residents have applied for naturalization within six months of the date the alien first became eligible to apply, see 8 U.S.C. § 1324b(a)(3)(B). Thereafter, Respondent states that "Jaime Giron became eligible for naturalization on August 7, 1990," and that "Giron did not file a valid application for naturalization on or before February 7, 1991." In my view, Respondent has not only set forth a statement of facts regarding Mr. Giron's eligibility for protected individual status, but has also provided Complainant with the statutory basis for its defense. 28 C.F.R. § 68.8(c)(2) does not require a particular or detailed statement of facts supporting the alleged affirmative defense, only "a statement of facts."

Second, under Federal Rule of Civil Procedure ("FRCP") 12(e), which I may use as a general guideline pursuant to 28 C.F.R. § 68.1, a party may move for a more definite statement "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . . ." It is my view that, in accordance with Rule 12(e), Complainant's motion should be denied on the grounds that: (1) a motion for a more definite statement is disfavored in the law; (2) the alleged First Affirmative Defense is not so vague or ambiguous that Complainant cannot reasonably be required to frame a responsive pleading; and (3) the matters sought are subject to discovery, which provides a more satisfactory method of narrowing the issues. See Thrasher v. Missouri State Hwy. Comm'n., 534 F. Supp. 103 (D.C. Mo. 1981), aff'd without opinion, 691 F.2d 504 (8th Cir. 1982), cert. denied, 460 U.S. 1043, 103 S. Ct. 1440, 75 L.Ed.2d 797 (1983).

Under federal case law, the determination of whether to grant a motion for a more definite statement is within the discretion of the trial court. Delta Educ., Inc. v. Langlois, 719 F. Supp. 42 (D.C. N.H. 1989). Further, federal case law reveals that trial court's disfavor

motions for a more definite statement. See Frederick v. Koziol, 727 F. Supp. 1019 (D.C. Va. 1990); Cox v. Maine Maritime Academy, 122 F.R.D. 115 (D.C. Me. 1988). Thus, the availability of a motion for a more definite statement is limited to those few instances in which the pleading is sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith, without prejudice to itself. See Wright and Miller, 5A Federal Practice and Procedure sections 1376-1377 (1990); Delta Educ., Inc. v. Langlois, supra; and American Sheet Metal, Inc. v. Em-Kay Engineering Co., 478 F. Supp. 809 (D.C. Cal. 1979). Finally, motions for more definite statement are not to be used as a means of discovery. See Federal Savs. & Loan Ins. Corp. v. Musacchio, 695 F. Supp. 1053 (D.C. Cal. 1988).

In the instant case, Respondent's First Affirmative Defense is not "so vague or ambiguous that the opposing party cannot respond." In fact, Complainant makes this point clear in its motion by noting that a reading of Respondent's defense suggests two possible defenses--(a) that the charging party filed an invalid application for naturalization, and/or (b) that the charging party did not timely file a valid application. Simply because Respondent's affirmative defense as alleged suggests two, rather than one, possible defenses does not mean that it is "so vague or ambiguous that the opposing party cannot respond." Complainant can evidently respond to the First Affirmative Defense by addressing the two possible defenses that it has itself identified.

Furthermore, the information sought by Complainant is subject to discovery. Complainant wishes Respondent to provide specific information regarding both the validity of Mr. Giron's application for naturalization and the timeliness of the filing of Mr. Giron's application for naturalization. Complainant can and should seek this information through discovery.

Based upon the foregoing, I am denying Complainant's Motion for a More Definite Statement.

III. *Motion to Strike Respondent's Second and Third Affirmative Defenses*

A. *Motion to Strike Respondent's Second Affirmative Defense*

Complainant argues in its motion that Respondent's Second Affirmative Defense should be stricken on the grounds that it is immaterial "because it defends against a cause of action that is not being advanced in the case." As will be explained below, I agree with Complainant that Respondent's Second Affirmative Defense should be stricken as immaterial.

As previously mentioned, Respondent argues in its Second Affirmative Defense that, with respect to Counts I and III of the Complaint, it is being charged with violations of Section 535 of the Immigration Act of 1990, which was not enacted at the time of the acts alleged, and which is not retroactive; therefore, "Counts I and III are time-barred."

The argument presented in the Second Affirmative Defense was previously raised by Respondent in its Opposition to Complainant's Motion to Amend Complaint filed March 28, 1991, and addressed during the telephonic conference conducted on April 12, 1991. At that time, it was concluded that Counts I and III do in fact allege violations of 8 U.S.C. § 1324b prior to its amendment by the Immigration Act of 1990, and not violations of Section 535. Since the decisional law interpreting pre-amendment 8 U.S.C. § 1324b indicates, in my view, that an employer's request for more or different documents constitutes evidence of an unfair immigration-related employment practice,[4] the allegations set forth in Counts I and III do properly allege violations of Section 1324b. Therefore, I find that Counts I and III are not "time-barred," and grant Complainant's Motion to Strike Respondent's Second Affirmative Defense.

B. *Motion to Strike Respondent's Third Affirmative Defense*

In its Motion to Strike Affirmative Defenses, Complainant argues that Respondent's Third Affirmative Defense should be stricken because, "even if [Respondent's] allegations regarding failure to adequately educate were correct, such a failure would not estop the government from enforcing the law against Respondent." Having considered the parties' pleadings, it is my view, however, that Respondent's Third Affirmative Defense should not be stricken as

[4] See United States v. Lasa Marketing Firms, OCAHO Case No. 88200061, (Nov. 27, 1989); United States v. Marcel Watch Corporation, OCAHO Case No. 89200085, (March 22, 1990); Jones v. De Witt Nursing Home, OCAHO Case No. 88200202, (June 29, 1990).

legally and factually insufficient, because it may reasonably be interpreted as alleging a legitimate, nondiscriminatory reason for its employment decision, as well as an insufficient estoppel defense.

Without considering Respondent's Opposition to Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses, it does appear that Respondent's Third Affirmative Defense only alleges an estoppel defense based upon Complainant's alleged "[failure] to properly educate employers concerning the requirements necessary to comply with 8 U.S.C. section 1324b(a)(1)(B)." If Respondent's Third Affirmative Defense did indeed consist solely of these allegations it would, unfortunately, have to be stricken as both legally and factually insufficient.

First, Complainant is not required by either the statute or the regulations to provide employers with any educational visit. In U.S. v. Mester, 879 F.2d 561 (9th Cir. 1989), the Ninth Circuit Court of Appeals rejected as an affirmative defense an educational visit requirement stating:

> Mester's claimed ignorance of the statutory requirements is no defense to charges of IRCA violations. It is true that Congress provided for education of employers during the early period of IRCA. However, we do not read that accommodation to employers as in any way giving them an entitlement to the education, or prohibiting sanction against an employer that can show that it has not received a handbook or other instruction, or that it has simply failed to pay attention to them.

Although Mester dealt with violations of 8 U.S.C. § 1324a of the Act, its holding is equally applicable to cases alleging violations of Section 1324b, since the court in Mester did not limit its holding to education relating to Section 1324a; rather, the court broadly states that "ignorance of IRCA's statutory requirements is no defense to charges of IRCA violations."

Second, an adequate estoppel defense requires a showing of affirmative misconduct by the government that goes beyond mere negligence. See U.S. v. Manos & Associates, Inc., OCAHO Case No. 89100130 (February 8, 1990) (Order Granting In Part Complain- ant's Motion for Summary Decision). Respondent's contention in its Third Affirmative Defense that Complainant failed to adequately educate employers does not show affirmative misconduct by the government. Therefore, Respondent has failed to set out a legally and/or factually adequate estoppel defense.

However, a careful review of both Respondent's Answer to Amended Complaint and Respondent's Opposition to Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses reveals, in my view, that Respondent's Third Affirmative Defense alleges a legitimate, nondiscriminatory reason for its disputed employment decision, as well as an insufficient estoppel defense. Thus, since a legitimate, nondiscriminatory reason for the employer's disputed employment decision is a legally sufficient defense to the charges of unfair immigration-related employment practices under 8 U.S.C. § 1324b, and Respondent has set forth sufficient facts to support such a defense, I find that Complainant's motion to strike Respondent's Third Affirmative Defense should be denied.

Previous OCAHO decisions and analogous Title VII decisions clearly indicate that an employer may allege in defense to charges of employment discrimination that its contested employment decision was made for a legitimate, nondiscriminatory reason(s). See United States v. Lasa Marketing Firms, OCAHO Case No. 88200061 (Nov. 27, 1989); United States v. San Diego Semiconductors, Inc., OCAHO Case No. 89200442 (April 4, 1991); United States v. Weld County School District, OCAHO Case No. 90200097 (May 14, 1991); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and TWA v. Thurston, 469 U.S. 111 (1985). Therefore, if Respondent's Third Affirmative Defense can reasonably be construed as alleging, with sufficient supporting facts, a legitimate, nondiscriminatory reason for its disputed employment decisions, Respondent's Third Affirmative Defense would constitute a sufficient affirmative defense to the charges of the Complaint.

As noted above, reading Respondent's Answer to Amended Complaint and Respondent's Opposition to Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses together, it is my view that Respondent's Third Affirmative Defense can be reasonably construed as alleging, with sufficient supporting facts, a legitimate, nondiscriminatory reason for its disputed employment decision. In its Answer to First Amended Complaint, Respondent suggests in its Third Affirmative Defense that the information and documents provided by Complainant to employers regarding an employer's responsibilities under IRCA are not only confusing, but also contradictory. In its Opposition to Complainant's Motion for More Definite Statement and to Strike Affirmative Defenses, Respondent argues that, considering the conflicting information concerning an employer's duty to review an employee's

INS-issued work authorization issued by Complainant (i.e. the duty to reverify an employee's work authorization by examining a document that either shows an extension of employment eligibility or that is a new grant of work authorization, pursuant to 8 C.F.R. § 274a.2(b)(8)(vii), and the obligation not to ask for a particular document verifying the employee's work authorization), it is reasonable for an employer to interpret the information as requiring the employer to review an employee's INS-issued work authorization documents. In my view, these allegations, taken together, set forth with sufficient supporting facts what Respondent contends was its legitimate, nondiscriminatory reason for allegedly requiring non-U.S. citizen applicants to produce an INS-issued work authorization document.

ACCORDINGLY, it is hereby ORDERED that:

(1) Complainant's Motion for a More Definite Statement of Respondent's First Affirmative Defense is denied;

(2) Complainant's Motion to Strike Respondent's Second Affirmative Defense is granted; and

(3) Complainant's Motion to Strike Respondent's Third Affirmative Defense is denied.

SO ORDERED, this 20th day of May, 1991, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge