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

UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 90100326
NOEL PLASTERING & STUCCO, INC. Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

A Complaint Regarding Unlawful Employment was filed against Respondent Noel Plastering & Stucco, Inc. by the United States of America on November 5, 1990. Said Complaint alleged Respondent's violation of the Immigration Reform and Control Act of 1986 ("IRCA") in eight separate counts.

The First Count of the Complaint alleges that the Respondent has violated 8 U.S.C. §1324a(a) by knowingly hiring fourteen (14) unauthorized aliens; in the alternative, this count alleges that the Respondent continued to hire the fourteen aliens after discovering their unauthorized status.

The remaining Counts of the Complaint allege Respondent's noncompliance with various types of IRCA paperwork requirements in violation of the provisions of 8 U.S.C. §§1324a(a)(1)(B),(b). The Complaint alleges a total of three hundred and one (301) instances of such paperwork violations by the Respondent.

Complainant seeks the imposition of a civil money penalty against the Respondent in the amount of One Hundred Forty Three Thousand Six Hundred dollars ($143,600.00) for such alleged violations.

On December 13, 1990, Respondent, by and through its attorney, John B. Lytle, timely filed an Answer to the Complaint. Aside from making specific admissions and denials in its Answer to the Complaint, Respondent also advanced seven "affirmative defenses" in response to the Complaint's allegations.

On December 27, 1990, Complainant filed the instant Motion to Strike Affirmative Defenses. In this motion, the Complainant seeks to strike six of Respondent's seven claimed "affirmative defenses" in their entirety. As to Respondent's remaining affirmative defense of "good faith" compliance with statute, Complainant also seeks to strike this defense with respect to the paperwork and continuing employment allegations.

Legal Standards for Evaluating Affirmative Defenses

"Affirmative defenses" are new matters which will extinguish the claims of a Complainant even if all of Complainant's allegations are otherwise admitted by a Respondent. See Starcraft Co., A Division of Banqor Punta Operations, Inc. v. C.J. Heck Co. of Texas, Inc., 748 F.2d 982 (5th Cir. 1985), rehearing denied 753 F.2d 1975, rehearing denied C.J. Heck Co. of Texas, Inc. v. Temple Nat. Bank, 755 F.2d 173. "Affirmative defenses" are exculpatory in nature. See U.S. Home Corp. v. George W. Kennedy Const. Co., 610 F.Supp. 759 (1985). Hence any defense which directly attacks a complainant's prima facie case cannot be a proper "affirmative" defense. See In re Rawson Food Service, Inc., 846 F.2d 1343 (11th Cir. 1988). For the same reason, a defense which asserts that the Complainant has failed to state a claim upon which relief can be granted also does not constitute a proper affirmative defense; it, too, is essentially a direct attack on the Complainant's prima facie case. See Instituto Nacional De Comercialiazacion Agricola (Indeca) v. Continental Illinois Nat. Bank and Trust Co., 576 F.Supp. 985 (19--).

In United States v. Samuel J. Wasem, General Partner, d/b/a Educated Car Wash, OCAHO Case No. 89100353, October 25, 1989 (Order Granting in Part and Reserving in Part Complainant's Motion to Strike Affirmative Defenses), ALJ Schneider proposed a two-step analysis of the sufficiency of any affirmative defense.

Educated Car Wash proposed that there should first be an examination of the "prima facie viability" of the legal theory for a claimed affirmative defense. Only when a claimed defense's legal theory is not "clearly insufficient" should a tribunal then proceed onto the secondary

inquiry of whether the statement of facts supporting the affirmative defense constitutes more than "mere conclusory allegations". This secondary inquiry is required as a result of 28 C.F.R. § 68.8(c)(2). Under this proposed two-step analysis, an affirmative defense can survive a motion to strike only if it is both legally sufficient and if it contains supporting facts which takes the defense beyond the status of "mere conclusory allegations".

However, neither Educated Car Wash nor federal regulations explain what constitutes the requisite level of facts which will take an affirmative defense beyond the level of "mere conclusory allegations." Since the regulatory provisions are not probative on this procedural question, the Federal Rules of Civil Procedure ("FRCP") can therefore serve as a guide. See 28 C.F.R. §68.1.

Rule 8(b) of the FRCP requires a party to state his or her defenses "in short and plain terms." Courts have generally construed this language as reflecting a federal policy which views pleadings primarily in terms of its "notice" function. According to this view, pleadings must give fair notice of the content of a claim such that the adverse party can subsequently respond and prepare for trial based on such pleadings. See 2A Moore's Federal Practice 8.13. This view of pleadings can be applied to the current IRCA proceedings. The application of this federal procedural policy to an affirmative defense raised under IRCA indicates that any such proposed defense can exceed the level of "mere conclusory allegations" only if it gives the Complainant fair notice in regard to the content of Respondent's proposed defense.

From the above analysis, the legal standard for evaluating the sufficiency of affirmative defenses raised under IRCA can now be stated with precision. An affirmative defense is sufficient for purposes of a motion to strike only if it satisfies two requirements: (1) the defense must have a facially viable legal theory; and (2) the defense must give fair notice to the Complainant as to the content of Respondent's proposed defense.

The instant Respondent's affirmative defenses will be examined in light of the above legal standards.

Respondent's First Affirmative Defense

Respondent's first affirmative defense to the Complaint asserts its good faith effort to comply with IRCA's statutory provisions.

This defense cannot in any way exculpate the Respondent for the alleged paperwork violations. Prior OCAHO cases have consistently held that "good faith" is not a defense to charges of IRCA paperwork violations. In such cases a Respondent's "good faith" is relevant only for the determination of the proper amount of civil monetary penalty. See United States of America v. USA Cafe, OCAHO Case No. 88100098, February 6, 1989 (Order Granting Complainant's Motion for Summary Decision); see also United States v. Don Moyle, Owner d/b/a Moyle Mink Farm and Springdale Pelt Processing, OCAHO Case No. 89100285, August 22, 1989 (Order Granting Complainant's Motion to Strike Affirmative Defenses). Therefore, as against the paperwork allegations, Respondent's "good faith" defense is legally insufficient on its face.

Respondent's "good faith" compliance with statute, however, is an express statutory defense against charges that it had "knowingly hired" unauthorized aliens in violation of 8 U.S.C. §1324a(a)(1)(A). See 8 U.S.C. §1324a(a)(3). Consequently, with respect to this allegation, Respondent's "good faith defense" is legally sufficient.

In regard to the charge of "continuing employment," the statute is silent as to the applicability of the "good faith" defense. Despite this silence, it appears that "good faith" may nevertheless be interposed as a defense against this allegation. Unlike the case of the paperwork provisions, the statute did not expressly relegate the good faith issue to the penalty phase of "continuing employment" violations. In addition, an examination of the statutory languages shows that the "continuing hire" charge is indistinguishable from a "knowing hire" charge except as to the time at which an employer becomes aware of the unauthorized status of an alien. Furthermore, from a policy perspective, a "knowing hire" violation appears to involve a greater degree of seriousness than a "continuing hire" violation in that the former alleges that an employer deliberately hired an unauthorized alien while the latter essentially alleges that the employer failed to fire an employee in a timely manner after discovering the employee's unauthorized status. In both types of violations, the employer has knowledge of the employee's unauthorized status; however, the statute allows the employer's "good faith" compliance with the paperwork procedure as an exculpatory excuse for "knowing hire" violation. In light of the above discussion, there is no reason why the "good faith" defense should not also be extended to cover the "continuing hire" charge as well.

It appears that the "good faith" defense is legally viable with respect to both the alleged "knowing hire" and "continuing hire" violations currently pending against the Respondent. Thus, there must now be an inquiry into whether the Respondent has alleged sufficient facts to take this defense beyond the status of mere conclusory allegations?

Respondent stated in the Answer that it has made a good faith effort to comply with the statute. But it did not indicate how and when it made such a good faith effort. Such allegations appear to be nothing more than mere conclusions which must be stricken from the pleadings. But in view of the ease with which the Respondent may amend its instant defense with proper factual support, leave will be granted to the Respondent to amend its Answer so as to allege an adequate "good faith" defense with respect to the "knowing hire" and "continuing hire" charges.

Respondent's Second Affirmative Defense

Respondent's second affirmative defense states that it was impossible for Respondent to oversee the hiring of each of its employees because it was conducting business in Arizona and California during the relevant times.

Respondent may properly assert an "impossibility" defense. However the factual support provided by Respondent is entirely inadequate for this defense. IRCA does not require owner oversight of the hiring process; it only requires the employer to refrain from hiring unauthorized aliens and to comply with the paperwork provisions. The issue of owner oversight is therefore irrelevant as to IRCA proceedings.

Respondent's second affirmative defense is clearly insufficient. It shall be stricken from the pleadings.

Respondent's Third Affirmative Defense

Respondent's next defense alleges that it hires most of its employees not at the business office but at the job site. This defense also claims that the Respondent has a large turnover in employees.

Such claims do not constitute legally sufficient excuses for failure to comply with IRCA. In fact, it can be convincingly argued that employers who hire on job sites and who have large staff turnovers are precisely the type of employers which should be targeted for IRCA

enforcement proceedings, due to the greater likelihood that they may hire unauthorized aliens.

This defense is legally insufficient on its face and shall be stricken from the pleadings.

Respondent's Fourth Affirmative Defense

In its fourth affirmative defense, Respondent asserts that a fire had destroyed one of its offices. For this reason, Respondent claims it was unable to produce some of the records previously requested by the INS. Complainant seeks to strike this defense on the ground that Respondent has offered no facts to support its allegations.

Respondent appears to be reasserting an "impossibility" defense. This defense is not legally insufficient on its face. If a fire did, indeed, destroy many of the I-9s requested by the INS, then it follows that it would have been impossible for the Respondent to produce them in a proper manner. The issue here hinges on whether the Respondent has advanced sufficient facts to allow the Complainant to prepare for the hearing and to fairly respond to this defense.

In the relevant paragraph of the instant motion, Complainant claims that Respondent did not advance any facts to support this defense. In the same paragraph, however, Complainant objects to Respondent's failure to provide information as to the specific documents which were affected by the alleged fire. Complainant has clearly been put on notice with regard to Respondent's claim of fire. This constitutes sufficient notice to the Complainant, since it can now prepare for this defense by collecting further information on this allegation through the use of discovery procedures. The Respondent is not required to elaborate its defense in detail at the pleading stage; it only needs to advance sufficient facts so as to put the Complainant on fair notice in regard to this defense. This has been accomplished here.

Complainant's motion to strike the fourth affirmative defense shall be denied at this time. But it is clear that the Complainant shall have the opportunity to employ all the discovery tools provided by the federal regulations to gain more information as to this particular defense.

Respondent's Fifth Affirmative Defense

Here, the Respondent advances a constitutional defense by claiming that the Complainant has seized Respondent's records without a valid search warrant.

INS officials may employ subpoenas to compel production of documents and witnesses in IRCA compliance investigations. This implicitly dispenses with administrative search warrants in IRCA proceedings. However, federal cases indicate that where a formal search warrant is not required for administrative investigations, the relevant investigative procedures must nevertheless provide safeguards equivalent to those contained in traditional search warrants. United States v. Mississippi Power & Light Co., 638 F.2d 899, 907 (1981), certiorari denied 102 S.Ct. 387. In any case, it is clear that antecedent administrative search warrants are required only where the government is seeking to make nonconsensual entries into areas not open to the public. Donovan v. Lone Steer, Inc., 464 U.S. 408, 414, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984).

In the present case, Respondent's illegal seizure claim does not make clear whether there was a nonconsensual entry. Neither does it indicate the ways in which the INS' investigative procedure in this case failed to achieve the safeguards contained in traditional search warrants. Without such factual information, Respondent cannot state a legally sufficient case for its defense of invalid search and seizure. There is also insufficient facts to fairly notify the Complainant as to the substance of the Fourth Amendment claim.

In any case, it appears that the exclusionary rule for Fourth Amendment violations probably is not applicable in IRCA administrative proceedings. United States v. Lee Moyle, Owner, d.b.a. Moyle Mink Farm, OCAHO Case No. 89100286, July 30, 1990 (Decision and Order), at p.18. Hence an Administrative Law Judge is in effect powerless to hear any constitutional defense based upon claims of Fourth Amendment violations.

For the above reasons, Respondent's fifth affirmative defense shall be entirely stricken from the pleadings.

Respondent's Sixth Affirmative Defense

This defense states that the Complaint has failed to allege Respondent's duty to produce I-9s for inspection. It also claims that the

Respondent only need to keep I-9s for one year after an employee's termination.

An inspection of the Complaint and of the relevant statutory provision reveals that Respondent's instant claims are invalid on their face. In addition, these allegations are not true "affirmative defenses," in that they seek only to negate elements of Complainant's prima facie case. For these reasons, Respondent's sixth affirmative defense shall be entirely stricken from the pleadings.

Respondent's Seventh Affirmative Defense

In this defense, Respondent alleges that Complainant has failed to state facts sufficient to state a cause of action.

The claim of "failure to state a cause of action" is not a true affirmative defense. See Instituto Nacional De Comercialiazacion Agricola (Indeca) v. Continental Illinois Nat. Bank & Trust, supra. Further, a cursory examination of the Complaint clearly demonstrates the existence of sufficient allegations to state several causes of actions against the Respondent. Accordingly, Respondent's seventh affirmative defense shall be entirely stricken from the pleadings.

Order

In accordance with the above discussion, it is ordered that Complainant's Motion to Strike Affirmative Defenses shall be granted in part and denied in Part.

Respondent's First Affirmative Defense shall be stricken with respect to all allegations of paperwork violation.

Respondent's First Affirmative Defense shall also be stricken with respect to the "continuing hire" and "knowing hire" allegations. However, Respondent is granted leave to amend the first affirmative defense as to these two allegations.

Respondent's Second Affirmative Defense shall be stricken in its entirety.

Respondent's Third Affirmative Defense shall be stricken in its entirety.

Respondent's Fourth Affirmative Defense shall not be stricken from the pleadings at this time.

Respondent's Fifth Affirmative Defense shall be stricken in its entirety.

Respondent's Sixth Affirmative Defense shall be stricken in its entirety.

Respondent's Seventh Affirmative Defense shall be stricken in its entirety.

SO ORDERED.

FREDERICK C. HERZOG
Administrative Law Judge

Dated: February 12, 1991