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

December 16, 1994

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| UNITED STATES OF AMERICA,<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. 1324a Proceeding |
| | ) | OCAHO Case No. 94A00034 |
| ALBERTA SOSA, INC.,<br>Respondent. | ) | |

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On October 4, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), NYC274A-93006210, upon Alberta Sosa, Inc., (respondent). That five (5)-count citation contained 40 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil penalties totaling $28,080 were proposed.

In Count I, complainant alleged that respondent knowingly hired and/or continued to employ the six (6) individuals named therein for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(A). Complainant assessed civil money penalties of $1,270 for each of those six (6) violations, or a total civil money penalty sum of $7,620.

In Count II, complainant alleged that respondent employed the 11 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare and/or to make available for inspection the Employment Eligibility

Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $725 for each of the 10 violations numbered 1-7 and 9-11, and $555 for violation number 8, or a civil money penalties totaling $7,805 for that count.

Complainant alleged in Count III that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for each of the 13 individuals named therein, all of whom had been hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $700 for each of the three (3) violations numbered 7, 8 and 13, $545 for violations 1, 2, 4, 10 and 12, $530 for violations 3, 5 and 9, and $465 for violations 6 and 11, or a total of $7,345 for those 13 alleged violations.

Complainant alleged in Count IV of the Complaint that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the six (6) individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $635 for each of the two (2) violations numbered 1 and 2, and $465 for the four (4) remaining violations numbered 3-6, or a total of $3,130 for those six (6) alleged violations.

In Count V, complainant alleged that respondent employed the four (4) individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $545 for each of those four (4) violations, or a civil money penalty totaling $2,180 on that count.

Respondent was advised in the NIF of its right to file a written request for a hearing before an Administrative Law Judge assigned to this office provided that such written request be filed within 30 days of its receipt of the NIF. On November 1, 1993, Arthur L. Alexander, Esquire, respondent's counsel of record, timely filed a written request on respondent's behalf.

On March 7, 1994, complainant filed the five (5)-count Complaint at issue, reasserting the allegations set forth in the NIF, as well as the requested civil money penalties totaling $28,080 for those 40 alleged violations.

On March 8, 1994, the Complaint and a Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested.

On April 6, 1994, respondent filed a timely Answer to the Complaint, in which it denied having violated IRCA in the manners alleged, and also asserted two (2) affirmative defenses to the alleged violations.

In its first affirmative defense, respondent asserted that "Respondent did not create any defect or omission of a material nature in completion of any form I-9."

For its second affirmative defense, respondent asserted that "The respondent did not misrepresent any material matter in any incompleted [sic] form I-9. With respect to any of the counts alleged herein."

On November 28, 1994, complainant filed a Motion to Strike Affirmative Defenses, in which it requested that both of respondent's affirmative defenses be stricken for the reason that pursuant to the provisions of 28 C.F.R. §68.9(c), those defenses had been improperly asserted.

On December 12, 1994, respondent filed a pleading captioned Notice of Cross-Motion for a Protective Order and Affidavit in Opposition to Motion and in Support of Cross-Motion, urging therein that complainant's Motion to Strike Affirmative Defenses be denied, and also requesting the undersigned to issue "a protective order striking Complainant's First Request For Production of Documents and Complainant's First Interrogatories as they are untimely and unduly burdensome and onerous and made to delay bring [sic] case to trial."

The procedural rules applicable to cases involving allegations of unlawful employment of aliens and unfair immigration-related employment practices are those codified at 28 C.F.R. Part 68, which provide that "[T]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules . . . ."28 C.F.R. § 68.1. Therefore, because our procedural rules do not provide for motions to strike, it is appropriate to use Rule 12(f) of the FRCP as a guideline in considering motions to strike affirmative defenses. United States v. Makilan, 4 OCAHO 610, at 3 (1994). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

Motions to strike affirmative defenses are generally not favored in the law, and are only granted when the asserted affirmative defenses lack any legal or factual grounds. See United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (1993). Accordingly, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. Makilan, 4 OCAHO 610, at 4; Task Force, 3 OCAHO 563, at 4.

The first affirmative defense asserted by respondent consisted of a one sentence statement contending that respondent did not make any material omissions or defects in completing the pertinent Forms I-9 for its employees.

This first affirmative defense must be stricken because it is wholly conclusory, and as complainant has correctly noted, unsupported by any statement of facts. The procedural regulation governing answers to complaints in unlawful employment cases provides that the answer shall include "[a] statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2).

In its second affirmative defense, respondent asserted that it did not make any material misrepresentations in completing the pertinent Forms I-9 for its employees. Because respondent has again failed to support its conclusory claim, this affirmative defense must also be stricken.

In view of the foregoing, complainant's November 28, 1994 Motion to Strike Affirmative Defenses is granted. Accordingly, the two (2) affirmative defenses asserted by respondent in its April 6, 1994 Answer are hereby ordered to be and are stricken.

JOSEPH E. MCGUIRE
Administrative Law Judge