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

United States of America, Complainant v. Walia's, Inc., d.b.a. Walia's Restaurant, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100259.

ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION AND DENYING IN ITS ENTIRETY RESPONDENT'S MOTION FOR SUMMARY DECISION

I. Procedural History

On June 5, 1989, a Complaint was filed with the Office of Chief Administrative Hearing Officer (OCAHO) alleging that Respondent had violated section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B). The Complaint was charged in two (2) Counts. Count I alleged that Respondent failed to prepare employment eligibility verification forms
(Form I-9) and/or failed to make the forms available for inspection with respect to thirty-three (33) identified individuals. Count II alleged that Respondent failed to complete section 2 of the Form I-9 for six (6) identified individuals.

On July 27, 1989, Complainant filed a Motion for Default Judgment on the grounds that Respondent had failed to file a timely answer.

On July 28, 1989, I issued a Show Cause Order directing Respondent to answer Complainant's Motion for Default Judgment.

On July 31, 1989, Respondent filed a Notice of Appearance, an Answer and Affirmative Defenses and a Motion for a Judgment on the Pleadings.

On August 14, 1989, Respondent filed a First Amended Answer and Affirmative Defenses, a Motion for Leave to File an Answer and Amended Answer, a Motion to Strike Statements on affidavit of John Paulson, which was attached to Complainant's Motion for Default Judgment, and a Motion for Summary Judgment.

On August 21, 1989, Complainant filed its Memorandum in response to Respondent's Motion for Judgment on the Pleadings and a Motion to Strike Respondent's affirmative defense that the Com-

plaint failed to state a claim upon which relief can be granted. Complainant also filed on the same date, it's Response to Respondent's Motion to Strike the affidavit of John Paulson.

On August 25, 1989, Complainant filed a request to amend the Complaint. The amended Complaint was filed contemporaneously with its request. The amended Complaint was also in two counts and alleged that Respondent had violated section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(b). Count one (1) alleges that Respondent failed to prepare eligibility verification form (Form I-9) and/or failed to make the form available for inspection with respect to twenty-five (25) named individuals. Count II alleges that Respondent failed to properly complete section 2 of the Employment Eligibility Form with respect to five (5) named individuals. Complainant makes demand, in its amended Complaint, for a civil monetary penalty of $5,000 on Count 1 and $500.00 on Count II.

On August 31, 1989, Complainant, pursuant to 28 C.F.R. § 68.36, filed a Motion for Summary Decision.

On September 8, 1989, I issued an Order approving the Motion to Amend the Complaint, denied the Motion for Default as moot, directed Respondent to file an answer to the amended Complaint and took under advisement all other pending motions.

On October 2, 1989, Respondent filed its answer to the amended Complaint stating that it incorporated into its answer ``each of the admissions, denials, and affirmative defenses contained in respondent's First Amended Answer and Affirmative Defenses.'' Respondent did not renew or reassert its Motion for Judgment on the Pleadings; therefore, it is denied as moot because of the subsequent filing of an amended complaint.

As I have indicated above, both parties have filed a motion for summary decision in this case and have submitted detailed and well-written briefs and affidavits in support of their respective Motions. For the reasons stated below, I find that Complainant's Motion for Summary Decision should be partially granted and Respondent's Motion for Summary decision denied.

II. Legal Standards in a Motion for Summary Decision

The federal regulations applicable to this proceeding authorize an Administrative Law Judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' 28 C.F.R. § 68.36 (1988); see also, Fed. R. Civ. Proc. Rule 56(c).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matters. Celotex Corp. v. Catrett, 477 U.S. 317 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. See, Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); see also, Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275, 279 (D.C. Cir. 1986) (an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of facts is involved).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary decision adjudications, consideration of any ``admissions on file.'' A summary decision may be based on a matter deemed admitted. See e.g., Home Indem. Co. v. Famularo, 530 F. Supp. 797 (D.C. Col. 1982). See also, Morrison v. Walker, 404 F.2d 1046, 1048-49, (9th Cir. 1968) (``If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts in the affidavit of the party opposing the motion, they are admitted.''); and, U.S. v. One-Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1979) (Admissions in the brief of a party opposing a motion for summary judgment are functionally equivalent to admissions on file and, as such, may be used in determining presence of a genuine issue of material fact).

Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. § 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat. Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).

III. Legal Analysis Supporting Summary Decision

After examining the pleadings and reviewing the legal arguments presented by both sides in this case, I have concluded that for all but one of the charges there is no genuine issue of material fact and that Complainant is entitled to partial summary decision. 28 C.F.R. § 68.36(c).

A. Factual Overview:

The following facts are alleged in Complainant's Memorandum in

Support of its Motion.

Walia's, Inc., owns Wallia's Restaurant in Seattle, Washington. On February 15, 1989, Special Agent Mark Steele, an officer of the Immigration and Naturalization Service (INS), conducted a visit with Mr. Diwan Manjit S. Walia, a/k/a Majit Walia, the Director of Walia's, Incorporated, to educate Respondent about its responsibilities under the employer sanction provisions of the Immigration and Nationality Act (the ``Act''). Mr. Steele gave Walia a copy of the government pamphlet, M-274, ``Handbook for Employers: Instructions for Completing Form I-9.''

On March 7, 1989, Complainant served an administrative subpoena on Respondent. The subpoena ordered Respondent to appear at the Seattle INS District Office for a compliance audit on March 14, 1989. In addition, the subpoena commanded Respondent to bring all of its I-9 Forms and Employer's Quarterly Tax Reports (Forms EMS-5208) for the calendar quarters from December 1986 through December 1988.

On March 14, Manmohan S. Walia, the Vice-President of Walia's, Incorporated, appeared at the Seattle INS District Office and provided INS Special Agent Steele with eleven Form I-9s and the Employer's Quarterly Tax Reports for Walia's Incorporated for December 1986 through December 1988. He also provided a list of current employees of Wallia's Restaurant.

During the course of the audit, Mr. Walia provided Complainant with a sworn statement in which he acknowledged that he had never asked any of his employees to fill out a Form I-9 prior to the educational visit conducted by INS on February 15, 1989. Instead, Walia, Respondent's vice-president, stated that he would decide if an employee was legal from his general impression of the employee after interviewing him. Walia said he only began to fill out Forms I-9 for his employees after February 15, 1989.

After reviewing Respondent's Forms I-9 and Quarterly Tax Reports, INS Special Agent Steele determined that Respondent had failed to prepare Form I-9 for thirty-nine employees. Twenty-five of these employees are listed in Count I of the Amended Complaint. Further review of Respondent's I-9 forms revealed that it failed to properly complete section 2 of the forms for six of its employees. Five of these employees are listed in Count II of the amended Complaint.

B. Respondent's Admissions Concerning Allegations in Counts I and II

Of the 25 employees named in Count I of the Amended Complaint, Respondent asserts that eight of these employees are, in Respondent's characterization, ``grandfathered'' employees. These eight individuals, as separately charged, are named:

Ina BUCKEE
Sudheep DIWAN
David KOSANKE
Christina MILLETTE
Kathy MORROW
Sherry NEAL
Wendy RITZAN
Swarnjit SINGH

See and cf., ``Affidavit of Diwan Walia in Support of Respondent's Motion for Summary Decision,'' at 2; with, Exhibits 16, 17 & 25 of Complainant's ``Memorandum in Support of Motion for Summary Decision.''

Respondent only contests its liability for these eight named employees. Respondent does not contest liability on the other paperwork violations alleged in Counts 1 and 2 of the amended Complaint. In this regard, I find and conclude that Respondent has admitted liability with respect to all of the allegations contained in Counts I and II of the Complaint, except for those eight named above. As I have previously held, admissions can serve as a basis for granting summary decisions. See e.g., United States v. Juan V. Acevedo (OCAHO Case No. 89100397) (ALJ Schneider 9/89).

In Acevedo, I held that:

> Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted. 28 C.F.R. 68.6(c)(1) (1988). No genuine issue of material fact shall be found to exist with respect to such an undenied allegation. See, Gardner v. Borden, 110 F.R.D. 696 (S.D. W. Va. 1986) (``. . . matters deemed admitted by the party's failure to respond to a request for admissions can form a basis for granting summary judgment.''); see also, Freed v. Plastic Packaging Mat., Inc., 66 F.R.D. 550, 552 (E.D. Pa. 1975); O'Campo v. Hardist, 262 F.2d (9th Cir. 1958); United States v. McIntire, 370 F. Supp. 1301, 1303 (D.N.J. 1974); Tom v. Twomey, 430 F. Supp. 160, 163 (N.D. Ill. 1977).
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> Id.

Accordingly, with respect to those allegations in the Complaint for which Respondent admits liability, I intend to grant summary decision based on the reasoning specified in Acevedo and USA Cafe as discussed above.

C. Respondent's Statutory Construction of Its Obligations Regarding Contested Employees

With respect to the eight named employees that Respondent intends to contest, however, Respondent argues that it is immune from liability for paperwork violations for these employees, as listed in Count I of the amended Complaint, because 1) Respondent hired the employees before June 1, 1988; and, 2) IRCA forbids INS from fining an employer for violations occurring before June 1, 1988.

It is my view, and Complainant does not dispute, that Respondent is factually correct regarding its first contention. One of these eight employees, Sherry Neal, was hired either in May 1986 or possibly in May 1987, which was during the education period specified in Section 274A(i)(1)(B) of IRCA. See, Exhibit #22 to Complainant's ``Memorandum in Support of Motion for Summary Decision.'' All the other seven employees were hired during the citation period specified in Section 274A(i)(2), i.e., between June 1, 1987, and June 1, 1988. See, Exhibits 18-21 to Complainant's Memorandum in Support of Motion for Summary Decision.

With respect to its second assertion regarding the legal consequences of these facts, however, Respondent is only partially correct.

In support of its argument, Respondent relies upon two maxims of statutory construction and applies them to one sub-section of the statute.

The first maxim of statutory construction that Respondent relies on is set forth as follows in Russello v. United States, 464 U.S. 16 (1984), citing United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972):

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.

Respondent applies this maxim of statutory construction to section 1324a(a)(1) and (2). Respondent focuses on the proper construction of the word ``hire'' in paragraph (a)(1) of 8 U.S.C. § 1324a. Respondent argues that the verb ``hires'' has two compound predicates, Sub-paragraphs (A) and (B) and, because of the grammatical structure of Paragraph (1), the same construction must be given to ``hire'' in the context of hiring violations (Sub-paragraph A) and paperwork violations (Sub-paragraph B).

Respondent further argues that insofar as Congress saw fit to make ``continuing'' hiring violations the subject of a completely separate paragraph (Parapraph 2), the only logical and proper construction of ``hire'' as it appears in Paragraph (1) is the moment at

which a person begins his employment for a particular employer. Respondent further argues that to construe ``hire'' in Paragraph (1) as a continuous process rather than a momentary event would render Paragraph (2) superfluous. The converse must therefore be true, that ``hire'' refers to a momentary event in Paragraph (1).

Respondent's second maxim of statutory construction supports its first maxim. According to Respondent, that maxim is inclusio unis est exculsio alterius. A rough translation of this maxim would be that whenever the legislative authority lists certain elements in its statutory regime, it also intends to exclude elements not listed. Respondent argues that by listing a continuing violation only with respect to the hiring prohibition, Congress intended not to prohibit continuing violations with respect to the

paperwork requirements.[1]

Respondent goes on to argue that since the Act does not prohibit continuing hiring violations, a proper construction of Subsection (a) would be that a paperwork violation is complete as of the moment it occurs. Respondent concludes that if the violation occurs during one of what Respondent refers to as the statutory ``grace periods,'' then that particular employee is ``grandfathered'' with respect to paperwork violations for so long as his employment continues.

I do not find Respondent's interpretive suggestions for sub-section (a) to be persuasive or practical as they pertain to record-keeping violations.

There are at least two distinguishable issues that arise from Respondent's argued frame of reference. One is whether a paperwork violation is a one-time occurrence or whether it is better characterizes as a continuing on-going violation. The other issue is whether Respondent's characterization of all violations arising or occurring prior to June 1, 1988, are ``grace period'' violations and, apparently, non-enforceable as civil monetary penalty proceedings.

With respect to the first of these two issues, I note that previous decisions by other OCAHO ALJs have held that a failure to comply with the record-keeping provisions of IRCA is a continuing violation. See, United States of America v. Citizens Utilities Co., Inc., In-

corporated, Telephone Division (OCAHO Case No. 89100211) (ALJ Frosburg, December 5, 1989); U.S. v. Big Bear Market (OCAHO Case No. 88100038) (ALJ Morse, March 30, 1989); U.S. v. Mester Manufacturing Co. (OCAHO Case No. 87100001) (ALJ Morse); see also, United States of America v. New El Rey Sausage (OCAHO Case No. 88100080) (ALJ Schneider, July 7, 1989), as modified by the acting CAHO, August 4, 1989.[2]

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[1]Though un-analyzed by Respondent, it is not clear that its suggested approach to statutory construction applies to a context which does not include a ``list'' of legislatively inclusive subjects or entities. In a recent comprehensive study of statutory interpretation, Professor Sunstein analyses the more precisely named principle expressio unius est exclusio alterius:

> The expressio unius canon should not be used mechanically. The failure to refer explicitly to the group in question may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts, rather than an implicit negative legislative decision on the subject.

See, Sunstein, ``Interpreting Statutes in the Regulatory State,'' 103 Harvard L.R., 405, 455 (December 1989).

[2]In addition, it should be noted that non-OCAHO ALJs have also been deciding selected IRCA cases and contributing to the clarification of this law's meaning. See e.g., U.S. v. Ralph Sanchez Labor Contractor, OCAHO Case No. 88100131 (ALJ Robbins, May 24, 1989) (in which the hiring date for five of the individuals named in the Complaint was May 3, 1988, a date within the citation period, and penalties were assessed for failure to prepare Form I-9s).

ALJ Frosburg, in Citizens Utilities, which is presently on appeal, essentially adopted the view of ALJ Morse in Big Bear Market. See, Citizens Utility, supra, at 7. In Big Bear, ALJ Morse held that the obligation to comply with the record-keeping verification requirements of IRCA is a continuous obligation because:

> In my judgment, it does not matter, whether within or after the citation period, how many times an employer is charged with a paperwork violation as to a particular individual. The obligation to comply being continuous, liability for non-compliance is continuous also. . . .
>
> See, Big Bear Market, supra, at 19.

In an apparent attempt to clarify the state of the current law, the acting Acting Chief Administrative Hearing Officer (CAHO), relying solely on the conclusions in Big Bear Market, supra, and Mester, supra, appears to have held that in situations in which a citation has been issued by INS, there is a continuous obligation to comply with the record-keeping provisions of IRCA, i.e., to ``correct'' the defective I-9 forms as indicated by the citation issued by INS. Thus, according to this reasoning, liability for a record-keeping violation is continuous if 1) INS has issued a citation, and, 2) the employer warned in the citation fails to ``correct'' the violation.

Neither ALJ Morse nor the acting Acting CAHO indicate from what legal source they find a duty to ``correct,'' nor do they indicate whether or why this analysis should apply to cases, such as New El Rey and the case at bar, in which the INS has not issued a citation.

In Citizens Utilities, supra, which is, as stated, presently on appeal, ALJ Frosburg applied the reasoning of Big Bear Markets to a factual situation in which INS never issued a citation. The respondent, in Citizens Utilities, argued that the proper interpretation of the effective dates of implementation required that INS may only issue a citation for first violations occurring during the

citation period, regardless of when the violations are discovered by the INS. See, section 1324a(i)(2); and 8 C.F.R. 274.9(c). ALJ Frosburg denied this argument because he did not ``find that a change in OCAHO policy is sufficiently justified based upon Respondent's argument.'' See, Citizen's Utility, supra, at 7.

In my view, there is no clear OCAHO ``policy'' regarding the existence of a ``continuing violation'' in a situation wherein no citation was ever issued, and where there has been no showing that INS had ``reason to believe'' that a violation may have occurred during the citation period. See, section 1324a(i)(2). It is also my view, however, that a close reading of the legislative history shows that the Citizen's Utilities Respondent's novel argument is, generally, and as it relates to the case at bar, without merit. As revealed by the legislative history, it is clear that Congress intended that:

> Following the 6-month education period, the Attorney General is authorized to issue, during the subsequent 12-month period, a citation or warning to any person or entity which is found to have employed . . . an undocumented alien. This citation would issue if, upon evidence or information which the Attorney General deems persuasive, he concludes that such person or entity has engaged in such conduct . . . a citation . . . is intended to serve as a personal notification to an offending employer as to the existence of a Federal prohibition on the employment of undocumented aliens, as well as a warning as to the penalties that will be applied in the event of further violations. See, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt.1, at 46, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, at 5662. (emphasis added)

In my view, it is clear that Congress intended to impose the obligation to issue a citation only during the 12-month period following the first 6-month general public education period. Thus, an argument that maintains that INS continues to be under an obligation to issue a citation for violations that originally arose within the 12-month period following the initial public education period is not, in my view, consistent with what the legislative history reveals is Congressional intent. Id.

In this regard, even if I accept, in the case at bar, that the eight contested employees were hired prior to the expiration of the citation period, and I do, I would not accept Respondent's unsubstantiated contention that all employment practices undertaken prior to June 1, 1988, occurred during a so-called ``grace period.''

Respondent, despite its interesting, but essentially unhelpful, semantic construction of sub-section (a) of section 1324a, does not make any effort to similarly construct (or de-construct) the seemingly more relevant sub-section (i) which sets out the effective dates of employer sanctions enforcement. Specifically, Respondent makes no effort to show that Complainant had ``reason to believe'' that a violation may have occurred during the citation period, i.e.

prior to June 1, 1988. Respondent simply asserts, without legal argument, that any violation which arose or occurred in that time period was not enforceable in a liability proceeding because this period was a ``grace period.''

I disagree. Respondent does not factually dispute that it failed to complete a Form I-9 for the seven employees named in the amended Complaint who were hired after May 31, 1987, and before June 1, 1988. Further, Respondent does not show that INS was under a mandatory statutory obligation to issue a citation pursuant to section 1324a(i)(2). Insofar as there has been no showing that INS had ``reason to believe,'' prior to June 1, 1988, that a violation may have occurred, and since INS is not now required to issue a citation for those paperwork violations that occurred prior to June 1, 1988, it is my view that Complainant is not precluded from initiating fine proceedings for these violations which occurred during the citation period but were not reasonably discoverable by INS until after the expiration of the 12-month citation period. Cf. United States v. New El Rey Sausage, (OCAHO Case No. 88100080 (ALJ SCHNEIDER, July 7, 1989).

Applying such an analysis to this case, I conclude that Complainant is not precluded from initiating a fine proceeding for paperwork violations that originally arose within the citation period because there has been no showing by Respondent that Complainant was under any mandatory obligation to have issued a citation for those violations. See, 8 U.S.C. section 1324a(i)(2). Thus, Complainant is not precluded from a summary decision for these allegations in that I find there is no per se ``grace period'' for violations that originally arose within the citation period, i.e. between May 31, 1987, and May 31, 1988. In this regard, it is my view that there is no genuine issue of material fact and that Complainant is entitled to summary decision with respect to all allegations contained in the Complainant except for the allegation regarding an employee named Sherry Neal.

D. Factual Dispute Regarding Sherry Neal

With respect to Sherry Neal, there appears to be a factual dispute as to when Ms. Neal was actually hired by Respondent. Respondent asserts that Ms. Neal was hired in May 1986, and Complainant alleges, on the basis of its review of Respondent's tax record, that Ms. Neal was hired in May 1987. The significance of the hiring date is important because if Ms. Neal was hired in May 1986, then she is a ``grandfathered'' employee because she would have been hired prior to the effective date of IRCA (i.e. November 6, 1986), but if she was hired in May 1987, then the regulations pro-

vide that an I-9 Form would have had to have been filled out for her if she was employed after September 1, 1987. See, 8 CFR 274a.2(a). Because there is a factual dispute regarding the actual hiring date of Sherry Neal, the Motion for Summary Decision for this allegation is denied.

E. Affirmative Defenses

In addition, Respondent plead ten affirmative defenses. It is my view, however, that these affirmative defenses are both legally and factually insufficient to preclude summary decision against Respondent.

In the context of deciding a Motion to Strike Affirmative Defenses, I have, on an earlier occasion, discussed at length my approach to assessing the sufficiency of an affirmative defense. See, United States v. Samual J. Wasem, General Partner, DBA Educated Car Wash, ``Order Granting in Part and Reserving in Part Complainant's Motion to Strike Affirmative Defenses.'' (OCAHO Case No. 89100353) (ALJ Schneider, October 25, 1989).

In Educated Car Wash, I suggested that I would take the following approach to analyzing the sufficiency of 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.' See, Mohegan, supra; see also, Kohen v. H.S. Crocker Co., 260 F.2d 790, 792 (5th Cir. 1958). If the legal theory on which the affirmative defense 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.
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> Id. at 4.

Applying this approach to the case at bar, I intend to analyze each of the affirmative defenses as plead by Respondent in order to determine if they are sufficient to preclude summary decision.

Accordingly, the first affirmative defense asserted by Respondent in its Answers is that ``no individual mentioned in the complaint is or has been an `unauthorized alien.' '' This assertion is not based on a legal theory that constitutes a valid defense to a paperwork violation. An employer must complete Forms I-9 on each employee hired after November 6, 1986, regardless of whether or not the employee is an alien. See, 8 U.S.C. section 1324a(b).

Respondent's second affirmative defense is that it ``has substantially complied in good faith with its obligations'' under IRCA. This defense is insufficient because it is premised on a legal theory that is not now tenable. ``Good faith'' is not a legal defense to a charge of a paperwork violation.

Respondent's third and fourth affirmative defenses relate to the hiring date of Ms. Sherry Neal and was discussed above.

Respondent's fifth affirmative defense, which relates to the hiring of persons during the citation period, was also discussed above.

Respondent's sixth affirmative defense is that the employer sanctions provisions of IRCA are violative of the due process clause of the United States Constitution because of insufficient notice. Respondent does not present, in my view, a specifically argued legal theory to support this defense, nor does Respondent plead facts that are sufficient to persuade me that it received insufficient notice. See also, Mester Manufacturing Company v. INS, et al., 879 F.2d 561, 569 (9th Cir. 1989).

Respondent's asserted seventh defense is that the INS audit of Respondent's I-9 Forms took place after the Respondent was no longer required to retain the forms. But IRCA requires that each employer retain the Form I-9 on his workforce for three years. See, 8 U.S.C. § 1324a(b)(3). Since IRCA was passed on November 6, 1986, it is clear that three years has not yet elapsed from the date of passage of IRCA. Therefore, Respondent's requirement to retain its Forms I-9 could not have expired. Respondent's seventh defense is without merit.

Respondent's eighth affirmative defense is that INS ``failed to adequately fulfill its statutory duty to disseminate forms and educate the

public with respect to the employer sanctions provisions of the [IRCA].'' Apparently, Respondent intends to make an estoppel argument, but I do not find that Respondent has plead facts sufficient to show ``affirmative misconduct.'' See, 28 C.F.R. part 68.8(c)(2); see also, Mukherjee v. INS, 793 F.2d 1006, 1008-1009 (9th Cir. 1986).

Respondent's ninth affirmative defense is simply a challenge to the sufficiency of Complainant's pleadings, and does not premise itself on a prima facie legal theory supported by relevant facts.

Respondent's tenth affirmative defense is a service of process issue, and does not allege facts that are sufficient to support an affirmative defense. The record shows that Respondent's agent signed a certificate of service for the amended Complaint.

Accordingly, it is my view that none of the pleaded affirmative defenses are sufficient to preclude a summary decision against Respondent. In this regard, I conclude that Complainant's Motion for Summary Decision should be granted for all allegations contained in Count I and Count II with the exception of the allegation concerning Sherry Neal.

With respect to the allegation involving Sherry Neal, I intend to order the parties to submit to me factual and legal clarification of her actual hiring date. I encourage the parties, in this regard, to use their best efforts to efficiently resolve this remaining issue of liability, and to avoid the administrative and economic inefficiency of going to trial over one allegation of liability.

With respect to the issue of determining the proper amount of penalty in this case, it is my view that this matter may be best decided by having the parties submit to this office relevant legal memorandum and supporting documentation in lieu of a formal evidentiary hearing on the issue of mitigation of penalty. See, section 1324a(e)(5); see also, United States v. Felipe Cafe, (OCAHO Case No. 89100151) (ALJ Schneider, October 11, 1989); and United States v. Juan V. Acevedo, (OCAHO Case No. 89100397) (ALJ Schneider, October 12, 1989).

Findings of Fact, Conclusions of Law and Order

I have considered the pleadings, memoranda, briefs and affidavits of the parties submitted in support of and in opposition to the Motion for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I determined that, with the exception of the allegation involving Ms. Sherry Neal, no genuine issue as to any material fact has been shown to exist with respect to Counts I and II of the Complaint and that, therefore, pursuant to 8 C.F.R. section

68.36, Complainant is entitled to a partial summary decision as to both counts (except for, as stated the allegation contained in Count I involving Sherry Neal) of the Complaint as a matter of law.

2. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) in that Respondent hired, for employment in the United States, the individuals identified in Counts I and II without complying with the verification requirements in section 1324a(b), and 8 C.F.R. § 274a.2(b)(1)(i)(A) and (ii) (A) & (B).

3. Because there is a genuine issue of material fact regarding the hiring date of Ms. Sherry Neal, Complainant's Motion for Summary Decision on that allegation is denied.

4. Wherein Respondent has not shown that Complainant, through its enforcement agency, the Immigration and Naturalization Service (``INS''), had ``reason to believe,'' during the 12-month citation period designated by Congress, that a violation under sub-section (a) of section 1324a of Title 8 of the United States code ``may have occurred,'' INS is not precluded from initiating a fine

proceeding based on alleged violations that originally arose in the 12-month citation period provided for by statute. See, section 1324a(i)(2).

4. Respondent's Motion for Summary Decision is hereby denied.

5. The final decision in this case shall be issued after all issues of liability and penalty amount have been considered and decided.

6. That the parties are hereby ordered to submit, on or before February 12, 1990, legal memorandum and supporting factual documentation regarding:

a) the legally effective hiring date of Ms. Sherry Neal;

b) all issues relevant to deciding the amount of civil penalty to be assessed in this case, including all aspects of statutorily prescribed criteria concerning mitigation. See, section 1324a(e)(5).

SO ORDERED: This 5th day of January, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge