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

United States of America, Complainant v. Thomas R. Heisler, Individually, and d.b.a. as the owner of the Playground Bar, formerly Playground, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100002.

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S THIRD AND FOURTH AFFIRMATIVE DEFENSES

On March 5, 1990, Complainant filed, pursuant to 28 C.F.R. §§ 68.8 and 68.9 and Rule 12(f) of the Federal Rules of Civil Procedure, a Motion to Strike Respondent's Third and Fourth Affirmative Defenses.

On March 15, 1990, Respondent filed its Response to Complainant's Motion to Strike.

Respondent's third affirmative defense, as set out in its answer to the Complaint, states that: ``Complainant owed to Respondent a duty to educate Respondent in the requirements of 8 U.S.C. § 1324a and failed to do so.

Respondent's fourth affirmative defense, as set out in its answer to the Complaint, states that: ``Complainant owed To Respondent a duty to provide Respondent Form I-9 and failed to so.''

Complainant states in its Motion that Rule 12(f) of the Federal Rules of Civil Procedure provides that ``the court may order stricken from any pleading any insufficient defenses.'' Complainant further states in its Motion that Respondent's third and fourth affirmative defenses primarily deal with an alleged or presumed duty on the part of Complainant to educate Respondent as to the requirements of the law and to provide the Respondent with Forms I-9. Moreover, Complainant alleges that there was an educational visit provided to Respondent prior to the inspection and any failure of Respondent to understand and comply with the record-keeping requirements of IRCA are its own responsibility. Complainant further argues that Respondent's alleged lack of actual knowledge of the law's applicability and requirements does not excuse Respond-

ent from the law's recordkeeping responsibilities. Complainant cites in support of its contentions, Mueller, ``On Common Law Mens Rea,'' 42 Minn. L. Rev. 1043, 1060, n. 49 (1958); Bueno v. Mattner, 633 F. Supp. 1446, 1466 (W.D. Mich. 1986), aff'd, 829 F.2d 1380 (6th Cir. 1987), cert. denied, 108 S. Ct. 1994 (1988); and, United States v. Aguilar, 883 F.2d 662, 673-676 (9th Cir. 1989).

Analysis

The Complaint filed in this case alleges eighty-seven (87) verification or so called paperwork violations of the employer sanction provisions of the Immigration Reform and Control Act of 1986 (IRCA); 8 U.S.C. § 1324a(a)(1)(B). There are no knowing violations alleged in the Complaint.

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. Samuel 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.

I have previously held that INS' alleged failure to adequately disseminate forms and ``educate'' the public with respect to the employer sanctions provisions of IRCA are not affirmative defenses. See, United States v. Walia's, Inc. DBA Walia's Restaurant, ``Order Granting In Part Complainant's Motion For Summary Decision and Denying in its Entirety Respondent's Motion For Summary Decision,'' OCAHO Case No. 89100259 (ALJ Schneider, Decided January 5, 1990); and, United States v. The Body Shop, ``Order Granting Complainant's Motion for Summary Decision,'' OCAHO Case No. 89100450 (ALJ Schneider, Decided April 2, 1990). Moreover, the Ninth Circuit has held that an employer does not have ``a right to a thorough briefing as to its violations of IRCA prior to enforcement'' and, also, that ``ignorance of the statutory requirements is

no defense to charges of IRCA violations.'' See, Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 569 (9th Cir. 1989).

In this regard, I find that Respondent's affirmative defenses three and four are essentially ``good faith'' arguments, and are more properly considered in the context of arguments in support of mitigation of penalty.

Accordingly, for the reasons stated in the cases I have cited above, I find that Respondent's affirmative defenses three and four are insufficient legal defenses to the issue of liability, but may be raised as mitigating factors at an evidentiary hearing or otherwise by affidavit on the issue of what would be an appropriate civil penalty. See § 1324a(e)(5).

ACCORDINGLY, it is hereby ORDERED that Complainant's Motion to Strike Affirmative Defenses Three and Four is GRANTED.

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

ROBERT B. SCHNEIDER
Administrative Law Judge