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

United States of America, Complainant v. Gerald Hollendorfer, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 90100124.

ORDER GRANTING MOTION TO STRIKE AFFIRMATIVE DEFENSES

On April 2, 1990, a Complaint was filed with the Office of the Chief Administrative Hearing Officer, charging Respondent, Gerald Hollendorfer, with four counts of violating the Immigration Reform and Control Act of 1986 [IRCA], 8 U.S.C. Section 1324a, for failing to prepare, make available for inspection, and/or properly complete Employment Eligibility Forms for 92 employees.

On May 1, 1990, Respondent filed its Answer to Complaint, admitting the allegations in Count I of the Compliant and denying the allegations stated in Counts II through VI. Respondent further asserted the following three affirmative defenses to the Complaint:

a. The I-9 does not state all acceptable documents so other documents could be used for I-9 purposes.
b. The employer attempted in good faith to fill out the I-9s properly. And once he was educated, the forms were done properly. The employer should not be penalized for an educational visit
c. The INS field manual states that educating the employer on their obligation under IRCA is a major goal. Yet, the employer was fined on the first audit instead of being warned.

Complainant now moves for an order striking each of the affirmative defenses as pleaded, on the grounds that they are insufficient as a matter of law. As the affirmative defenses are deficient, the motion of strike will be granted as to the affirmative defenses which are not legally supportable.

Under the Rules of Practice and Procedure, a Respondent who contests any material fact as alleged in the Complaint is required to file an answer which contains a denial of the fact. 28 CFR Section 68.8(c). A Respondent who desires to raise affirmative defenses is also required to provide a ``statement of the facts supporting each affirmative defense.'' 28 CFR Section 68.8(c)(2).

Under the Federal Rules of Civil Procedure 12(e), ``[i]f a pleading to which a responsive pleading is permitted is so vague and ambiguous that party cannot reasonable be require to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading.'' Since the Rules of Practice and Procedure allow the Complainant to file a reply to the affirmative defenses, 28 CFR Section 68.8(d), the Complainant is entitled to seek fair notice of the allegations which it will be required to meet. ``The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.''Wyshak v.City National Bank, 607 F.2d 824, 827, (9th Cir. 1979).

In discussing the specificity required in pleading the affirmative defense of the statute of frauds, the court in Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co,629 F.2d 1118, at 1122, stated:

> Although absolute specificity in pleading is not required, fair notice of the affirmative defense is. Fed.R.Civ.P. 8(f). Under the liberalized pleading guidelines codified in the federal rules, ample opportunity to amend pleadings exists with leave to be freely given. Fed.R.Civ. P. 15(a). Thus, while one wishing to assert an affirmative defense has every opportunity to do so, it must be done . . . in a manner consistent with the language and spirit of the federal rules.

1. First Affirmative Defense.

Respondent asserts that the I-9 Form fails to state all acceptable documents so that other documents can be used, presumably to verify the eligibility of prospective employees. The Complainant argues that this statement fails to rise to the level of an affirmative defense as the Respondent has not alleged facts to show how this assertion is applicable to this case. Respondent does not assert, for example, that it used acceptable documents which were subsequently rejected by the INS and formed the basis for the allegations in the Complaint.

Under the Final Regulations promulgated by the Department of Justice, 8 CFR Part 274a.2(b)(1)(v), an employer is authorized to accept a wide variety of documents to establish the identity and employment eligibility of a prospective employee. The fact that Form I-9 fails to specify every acceptable document does not allow the Respondent to avoid liability if he utilized an unauthorized document to establish identity or employment eligibility. Respondent's affirmative defense fails to clearly state the facts upon which the relief sought may be granted, or which would allow the Complainant to respond. The Motion to Strike the First Affirmative Defense will be granted without prejudice.

2. Second Affirmative Defense.

The Respondent's assertion that it acted in good faith in his efforts to properly complete the I-9 Forms fails to state facts supporting the ``good faith'' defense. The law provides that:

> A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral. 8 U.S.C. 1324a(a)(3).

The ``good faith'' defense, by its terms, applies solely to violations of the knowing hiring provisions and cannot shield an employer from liability for violations of the employment verification requirements. This defense is relevant to situations where the employer reasonably relies upon a prospective employees documents establishing employment authorization, and is subject to rebuttal by the government.

Since Respondent is not alleged to have violated the ``knowing hire'' prohibitions of IRCA, the ``good faith'' defense is legally inapplicable.

To the extent Respondent is seeking to raise its good faith defense as a means of mitigating the amount of a civil money penalty which may be imposed, the issue of Respondent's good faith is not a matter for an affirmative defense, but rather is an evidentiary issue to be considered if an IRCA violation is established.

With regard to the assertion that the Respondent should not be penalized for an educational visit, he fails to assert the facts which would establish that the inspection occurred during the six month statutory education period, which ended May 31, 1987. Since the Respondent admits that he received the Notice of Intent to Fine on January 30, 1990, and that the inspection occurred on September 6, 1989, there is no possibility that such facts can be alleged. The Motion to Strike the Second Affirmative Defense will be granted.

3. Third Affirmative Defense.

Respondent asserts in the Third Affirmative Defense that he was entitled to a warning from the INS on its first inspection, rather than a fine, relying upon an INS Field Manual's statement that the education of employers is a major goal. Complainant seeks to strike this defense as insufficient arguing that the Field Manual, as internal agency guidance, confers no substantive rights upon Respondent.

It has already been established that employers have no right to a prior warning or instruction from the government proceeding the imposition of sanctions for violations of IRCA. Mester Manufactur-

ing Co. v. INS, 879 F.2d 561 (9th Cir. 1989). In Mester, the failure of the Immigration and Naturalization Service to provide instruction on the requirements of IRCA during the initial educational period was held not to be a defense to the imposition of sanctions.

> Mester apparently believes that it had a right to a thorough briefing as to its violations of IRCA prior to enforcement. 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 sanctions against an employer that can show it has not received a handbook or other instruction, or (as here) that it has simply failed to pay attention to them.

Mester Mfg. Co., 879 F.2d at 569-570.

The fact that an internal INS manual may rank the education of employers as a major goal does not confer upon Respondent a right to receive an educational visit prior to the imposition of sanctions for a violation of IRCA. Following the analysis of Administrative Law Judge Robert B. Schnieder in his Order Granting in Part and Reserving in Part Complainant's Motion to Strike Affirmative Defenses in U.S. v. Educated Car Wash, OCAHO 89100353 (Oct. 31, 1989), the Field Manual ``was not intended to be utilized as a supplemental source beyond the statute and the regulations to confer significant procedural protections.''

In Romeiro De Silva v. Smith, 773 F.2d 1021 (9th Cir. 1985) the court noted that INS internal Operating Instructions, as a general statement of policy, do not have the force and effect of law and therefore do not involve substantive rights. Similarly, the INS Field Manual does not provide additional support to employers. Respondent's statement of his Affirmative Defense incorrectly implies that he is entitled to greater protections than that afforded him by the applicable statute and regulations. The Motion to Strike the Fourth Affirmative Defense will be granted.

ACCORDINGLY, the Motion to Strike Affirmative Defenses is GRANTED.

SO ORDERED
Dated: May 17, 1990.

FREDERICK C. HERZOG
Administrative Law Judge
901 Market Street, Suite 300
San Francisco, California 94103