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

United States of America, Complainant v. Multimatic Products, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100155.

DECISION AND ORDER ON COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(August 21, 1990)

MARVIN H. MORSE, Administrative Law Judge

SYLLABUS

Where all affirmative defenses are stricken as a matter of law, upon a finding that a respondent has admitted the allegations of a complaint the administrative law judge will proceed as though respondent had agreed to entry of a final decision and order on the issue of liability for violation of 8 U.S.C. § 1324a, leaving only the issue of quantum of civil money penalty for subsequent adjudication, but without prejudice to respondent's right to obtain review of the decision striking the affirmative defenses.

Appearances: **CHESTER J. WINKOWSKI**, Esq., for the Immigration and Naturalization Service.
ALLEN B. BRESLOW, Esq., for the Respondent.

The Complaint filed by Complainant (or INS) against Respondent on May 10, 1990, served May 18, 1990 alleges two counts of violations of 8 U.S.C. § 1324a(a)(1)(B) including, as to Count II, violation of 8 U.S.C. § 1324a(b)(1) and/or (2). Each count identifies also the provisions of the implementing regulation, at 8 C.F.R. Part 274a alleged to have been violated. Count I demands a civil money penalty of $500 per individual for four named employees hired after November 6, 1986 as to whom Respondent is alleged to have failed to complete properly the employment eligibility verification forms (Form I-9) required by law. Count II demands a penalty of $500 for

a named individual similarly hired as to whom Respondent is alleged to have failed to ensure proper completion of the Form I-9.

Pursuant to agreement between the parties for an extension of time in which to answer the Complaint, Respondent by counsel timely filed its Answer on June 25, 1990. Respondent's Answer ``admits the truth'' of each and every factual allegation. At paragraph 6, however, the answer asserts five affirmative defenses, pleading at paragraph 7 that in event of a finding of liability it maintains a further affirmative defense as the premise for imposition of the minimum statutory civil money penalty of $100 per individual. The total sum of $2500 claimed by Complainant would be reduced to $500.

By Motion to Strike Affirmative Defenses filed July 23, 1990, with Points and Authorities in Support (Memo), Complainant asks that the five affirmative defenses of paragraph 6 of the Answer ``be stricken as insufficient as a matter of law.'' The time for Respondent to have filed a responsive pleading has run. 28 CFR §§ 68.7(c)(1), 68.7(c)(2) and 68.9(b). No response has been received from Respondent.

As to 6A: Respondent claims the complaint fails to satisfy the requirement of 28 C.F.R. § 68.6(b)(3) that the complaint shall contain ``a clear and concise statement of facts for each violation alleged to have occurred.'' Complaint contends its Complaint satisfies the regulation, Federal Rule of Civil Procedure 8(f) and provides fair notice.

In the first case to reach an evidentiary hearing under 8 U.S.C. § 1324a, U.S. v. Mester Manufacturing Co., OCAHO Case No. 87100001, June 17, 1988, I commented critically concerning the acceptability of the Notice of Intent to Fine (NIF), the document which INS serves on an employer to demand a civil money penalty and which explains that in lieu of payment the employer may within 30 days request a hearing before an administrative law judge. 8 U.S.C. § 1324a (e)(3). In Mester the complaint incorporated the NIF by reference while here it has substantially repeated the text of the NIF in the Complaint itself.

Complainant's pleading here is an improvement over the version examined in Mester both in terms of clarity and because the Complaint is self-contained., Even in Mester, however, although I held against INS on certain counts for the reason that the NIF, and, therefore, the complaint incorrectly stated which subsection of 8 U.S.C. § 1324a had been violated, I did not reject the form of pleading as to other counts. See, id. at 10, where I said that ``the structural deficiencies in the NIF and, accordingly, in the complaint which incorporated and depends for its validity on the NIF, are not

on this record prejudicial to Mester. . . .'' Upon affirming that decision and order, the Court of Appeals referred to the NIF, commenting that ``[A]lthough factually simple, some of the violations were alleged in puzzling ways,'' and adding, ``[T]he ALJ sharply criticized the NIF, which he understood only through `herculean effort.' '' Mester Manufacturing Co. v. INS, 879 F.2d 561, 564 n. 3. (9th Cir. 1989).

However much a judge might prefer as more informative a format other than that utilized by INS, judicial preference along is no basis for finding the Complaint deficient. Rather, I find the Complaint to provide adequate notice sufficient to permit Respondent to plead in response. Indeed, Respondent has unreservedly done so in paragraphs one through five of its Answer. Moreover, as suggested by Complainant, Respondent is at liberty to seek a more definite statement. Memo at 2. The discussion by the administrative law judge in an early resolution of a similar challenge is instructive:

> Motions to dismiss a complaint for failure to state a claim upon which relief can be granted are disfavored by the courts. Only in the most extra ordinary circumstances are they granted. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Viewing the pleadings most favorably to the INS, as I must when ruling on Azteca's affirmative defense #9, Scheuer v. Rhodes City, 416 U.S. 232, 236 (1974), I find that the Complaint sets forth the elements of a cause of action, which, if the facts pleaded are true, would justify the relief sought by the INS. Middletown Plaza Associates v. Dora Dale of Middletown, Inc., 621 F.Supp. 1163, 1164 (D.C. Conn. 1985).

U.S. v. Azteca Restaurant, OCAHO Case No. 88100087 (November 8, 1988) (Order Ruling on Motion to Strike).

I hold that the Complaint provides fair notice of what is alleged and the grounds upon which the allegations rest. In no way does it appear that Respondent has been prejudiced by the form of Complainant's pleading. The Motion to Strike the first affirmative defense, 6A, is granted.

As to 6B: Respondent claims entrapment as an equitable bar to liability, i.e., ``[I]t is unconscionable for Complainant to assess Respondent with damages in view of . . .'' factual allegations set forth in its Answer. In response, Complainant cites the conclusion of an administrative law judge confronted with a similar claim in an 8 U.S.C. § 1324a adjudication. See U.S. v. Irvin Industries, Inc., OCAHO Case No. 88100068 (March 9, 1990) at 8 (``entrapment is a criminal defense not available to Respondent herein.'').

I agree with the Irvin conclusion. Moreover, I find nothing in the sequence of events outlined at subparagraphs (i) through (xi) of 6B of Respondent's Answer which suggests the sort of deliberate conduct by INS as might constitute entrapment. At most, the Answer

contends that had a specified INS Agent advised that I-9s were inadequate at the time of an earlier compliance visit and had he educated Respondent's bookkeeper in correct I-9 practices, the later violations alleged here would not have occurred. These are matters of proof and not a bar to enforcement. The Motion to Strike the second affirmative defense, 6B, is granted.

As to 6C: At both 6B(v) and 6C, Respondent contends that it cooperated with an INS Agent, presumably to show its good faith. Good faith, however, is not a defense to the Complaint in this case where only paperwork charges are implicated. 8 U.S.C. § 1324a(e)(5). Rather, ``the good faith of the employer'' is one of five imperatives to which ``due consideration shall be given'' in determining the quantum of penalty; it does not excuse a violation. Id. U.S. v. Mester, at 17; U.S. v. La Fiesta, OCAHO Case No. 88100027 (Aug. 5, 1988) (Order Dismissing Counterclaims) T3U.S. v. USA Cafe, OCAHO Case No. 88100098 (Feb. 6, 1989) (Order Granting Complainant's Motion for Summary Decision)_; U.S. v. Big Bear Market, OCAHO Case No. 88100038 (March 30, 1989) (suppl. dec. and order, April 12, 1989), aff'd by CAHO (May 5, 1989), appeal docketed, No. 89-70227 (9th Cir. filed May 31, 1989); U.S. v. Boo Bears Den, OCAHO Case No. 8910097 (July 19, 1989); U.S. v. Moyle, OCAHO Case No. 89100286 (August 22, 1989) (Order Granting Complainant's Motion to Strike Affirmative Defense). The Motion to Strike the third affirmative defense is granted.

As to 6D: Asserting that ``[T]he General Accounting Office [the Comptroller General] has found that the implementation'' of IRCA ``has led to widespread discrimination,'' Respondent urges that employer sanctions ``should be repealed as failing to accomplish its stated purpose.'' Moreover, Respondent misunderstands that the Comptroller General's finding of widespread discrimination ``as a result of IRCA,'' failed to trigger the automatic termination provision of IRCA, 8 U.S.C.)1324a(l)(1). The GAO was unable to conclude that such discrimination resulted solely from implementation of employer sanctions. Title 8 U.S.C. § 1324a(l)(1)(A) provides a mechanism for termination had the Comptroller General reported ``that a widespread pattern of discrimination has resulted against citizens or nationals of the United States or against eligible workers seeking employment solely from the implementation of this section. . . .'' He made no such report. GAO Report GGD-90-62 (B-125051) Immigration Reform: Employer Sanctions and the Question of Discrimination (March 29, 1990) at 3. See, id, at 4: ``IRCA-related discrimination is serious but not pervasive. And the sanctions provision at this time appears to have slowed illegal immigration to the United States.''

Complainant is correct that the claim of this affirmative defense is for the Congress, not the forum, and ``should be stricken as insufficient as a matter of law.'' (Memo at 2). Respondent overlooks that this is an adjudication; it is not inquiry into the success of national policy on immigration. The Motion to Strike the fourth affirmative defense is granted.

As to 6E: Respondent contends that INS ``is failing in its mission'' by not providing the Form I-9 in Spanish ``so that all employees will be able to complete the form without confusion.'' I agree with Complainant's response that it ``is under no statutory or regulatory mandate to provide forms in the Spanish language,'' however salutary such an assist may be. Even more to the point, Respondent's claim is inconsistent with the locus of responsibility under IRCA. The statutory scheme places the burden on the employer to assure not only that it properly completes its portion of the employment eligibility verification form (e.g., Count I of the Complaint) but also to ensure that the employee properly completes his or her portion (Count II). 8 U.S.C. § 1324a(b) [introductory sentence]. U.S. v. Boo Bear's Den at 3; 5-6. There is no reason to suppose on the pleadings in this case that the employer failed to comply with I-9 requirements because the form is not in Spanish.

Against the possibility that Respondent's Spanish language claim turns on constitutional considerations, Complainant argues also that I lack power to resolve such an issue. Such a constitutional question will be reached only if clearly addressed and if necessary to a just outcome. Those considerations not being present, I do not reach a constitutional question. Contrary to Complainant's supposition, however, (memo at 3), it is not at all clear such questions are beyond the jurisdiction of administrative law judges under IRCA. See e.g., U.S. v. Big Bear Market at 31, quoting an instructive commentary in Plaquemines Port, Harbor and Terminal District v. F.M.C., 838 F.2d 536, 544 (D.C. Cir. 1988), Bork, J., ``[A]dministrative agencies are entitled to pass on constitutional claims but they are not required to do so merely because their members, like all government personnel, owe allegiance to the Constitution.'' The Motion to Strike the fifth affirmative defense is granted.

All affirmative defenses have been stricken as a matter of law. Respondent has admitted liability on the merits of the Complaint but has put Complainant to its proof as to the quantum of civil money penalty. Accordingly, the parties will be expected to advise me whether they are prepared to submit such remaining issue on the record or request instead that I schedule an evidentiary hear-

ing. Responses to this Order will be timely if received not later than September 10, 1990.

This Decision and Order is the final action of the judge on the issue of liability as alleged in the Complaint for violation of 8 U.S.C. § 1324a, in accordance with 28 C.F.R. § 68.51(a). As provided at 28 C.F.R. § 68.51(a), this action shall become the final order of the Attorney General on that issue unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it. See also 8 U.S.C. § 1324a(e)(8), (formerly (7)); 28 C.F.R. § 68.51(a)(2).

SO ORDERED.
Dated this 21st day of August, 1990.

MARVIN H. MORSE
Administrative Law Judge