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

United States of America, Complainants v. Dubois Farms, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100179.

ORDER GRANTING IN PART COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(September 28, 1990)

I. PROCEDURAL SUMMARY

On June 1, 1990 Complainant (or INS) filed its complaint charging Respondent, DuBois Farms, Inc., with violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. Specifically, INS charges two violations of the prohibitions against knowing employment of unauthorized aliens, 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2), and ninety-four charges of failure to prepare, maintain or present upon request the employment eligibility verification form (Form I-9), in violation of 8 U.S.C. § 1324a(a)(1)(B).

INS filed a motion for default judgment on July 25, 1990. I issued an Order to Show Cause Why Judgment By Default Should Not Issue on July 27, 1990. Following receipt of responsive pleadings filed by Respondent on July 31 and August 1, 1990, including a proposed Answer to the Complaint, I denied the default judgment by Order dated August 29, 1990, and accepted the Answer previously filed.

The Answer to the Complaint admits the jurisdiction of the Office of the Chief Administrative Hearing Officer (OCAHO), and that Respondent was served with a Notice of Intent to Fine (NIF) on January 17, 1990. Respondent denies the allegations of IRCA violations and proffers ten affirmative defenses. On September 7, 1990 INS filed a Motion to Strike Affirmative Defenses (Motion). Respondent timely filed a Reply and Objection to Motion to Strike (Reply) on September 30, 1990.

II. DISCUSSION

Complainant seeks to strike seven of Respondent's ten affirmative defenses, specifically numbers 1, 3, 4, 5, 8, 9 and 10. As further discussed I grant in part Complainant's Motion to Strike Affirmative Defenses 1, 3, 4, and 10. I also grant the Motion as to affirmative defenses 5, 8 and 9 in their entirety.

A. Affirmative Defenses 1, 3, 4 and 10

Complainant asserts that Affirmative Defenses 1, 3, 4 and 10 should be stricken as insufficient because good faith is not a defense to allegations of failure to comply with employment eligibility verification (paperwork) requirements. Respondent, in contrast, appears to claim that good faith is a defense under 8 U.S.C. § 1324a(a)(3) to both unlawful employment and paperwork charges. As I understand Respondent's pleading, Affirmative Defenses 1, 3, 4 and 10 reflect a misunderstanding of the good faith defense of 8 U.S.C. § 1324a(a)(3).

1. As to paperwork violations.

With regard to paperwork violations, good faith is only one of several factors to be considered in assessing the quantum of civil money penalty. 8 U.S.C. § 1324a(e)(5). Good faith is not a factor to be considered in determining liability. U.S. v. Bayley's Quality Seafoods, Inc., OCAHO Case No. 90100080 (September 17, 1990) (Decision and Order Granting Complainant's Motion for Summary Decision in Part); U.S. v. Multimatic Products, OCAHO Case No. 90100155 (August 15, 1990) (Decision and Order on Complainant's Motion to Strike Affirmative Defenses); U.S. v. Hollendorfor, OCAHO Case No. 90100124 (May 17, 1990) (Order Granting Motion to Strike Affirmative Defenses); U.S. v. Lee Moyle, OCAHO Case No. 89100286 (August 22, 1989) (Order Granting Motion to Strike Affirmative Defense); U.S. v. Big Bear Market, OCAHO Case No. 881000038 (March 20, 1989). On the basis of the analysis above, and the cases already cited, I conclude that 8 U.S.C. § 1324a does not comprehend a defense on the merits of good faith to charges of paperwork violations. Accordingly, I reject the affirmative defenses in question as to all ninety-four paperwork charges.

Moreover, Respondent suggests that its Affirmative Defense 10, alleging lack of knowledge that it had violated the law, relates to a ``scienter'' requirement in 8 U.S.C. § 1324a. Ignorance of the law is not a defense to charges of paperwork violations. Bayley's Quality Seafoood, Inc., OCHO Case No. 90100080. (September 17 1990); U.S. v. USA Cafe, OCAHO Case No. 88-100098 (February 6, 1989) citing Bueno v. Mattner, 633 F. Supp. 1446, 1466 (W.D. Mich. 1986), aff'd,

829 F.2d 1380 (6th Cir. 1987), cert. denied, 486 U.S. _____, 108 S.Ct. 1994 (1988) (Ignorance of the law does not preclude finding a violation of the analogous record-keeping requirements of the Migrant and Seasonal Agricultural Worker Protection Act). Accordingly, Complainant's Motion is granted in part as to Affirmative Defenses 1, 3, 4 and 10 as they relate to a good faith defense of lack of knowledge in violating IRCA's paperwork requirements.

2. As to unlawful hiring.

With regard to the substantive violation of unlawful hiring the Reply relies on Mester Manufacturing Co. v. INS, 879 F.2d 561, 569 n. 11 (9th Cir. 1989), to the effect that, ``Compliance with the paperwork procedures establishes a good faith defense against a finding of unlawful hiring. 8 U.S.C. § 1324a(a)(3).'' Both Mester and 8 U.S.C. § 1324a(a)(3) make clear that compliance with paperwork requirements constitutes a good faith defense to a charge of unlawful hiring, recruiting or referring for a fee an alien, knowing the alien to be unauthorized in violation of 8 U.S.C. § 1324a(a)(1).

To the extent that Complainant pursues a theory of liability for unlawful hire in violation of 8 U.S.C. § 1324a(a)(1), proof by Respondent of compliance with paperwork requirements as to the two individuals alleged to have been unlawfully hired will be received. Therefore, to the extent that the affirmative defenses at issue are understood to pertain to allegations of hiring aliens knowing them to be unauthorized with respect to such employment, Complainant's Motion as to affirmative defenses 1, 3, 4 and 10 is denied in part.

3. As to continuing to employ.

Compliance with IRCA paperwork requirements is not a good faith defense to a charge of knowingly continuing to employ an unauthorized alien. The court in Mester commented that, ``Proper paperwork does not insulate an employer against a continuing employment sanction under section 1324a(a)(2), . . . if the employer gains the requisite knowledge of unlawful status.'' 879 F.2d at 569 n. 11. Accordingly, I reject so much of Respondent's claim that IRCA imposes no liability on an employer who makes an honest attempt to verify an employee's documents as it refers to the alternative substantive charge of continuing to employ. Complainant's Motion to Strike Affirmative Defenses 1, 3, 4 and 10 is granted in part so far as it relates to the good faith defense for knowingly continuing to employ an unauthorized alien.

B. Affirmative Defense 5

Respondent's Affirmative Defense 5 claims that ``several thousand employment records'' of Respondent are in Complainant's possession as a result of an INS subpoena duces tecum. INS characterizes, and Respondent confirms, this claim as one of estoppel based on alleged affirmative misconduct by INS. Complainant argues that Respondent has neither identified or demanded return of any such documents, nor alleged prejudice or harm by INS's failure to produce them. I do not understand Respondent to have asserted an affirmative defense that is material to the allegations of the Complaint. Fed. R. Civ. P. 12(f). The Motion to Strike Affirmative Defense 5 is granted.

C. Affirmative Defense 9

Affirmative Defense 9 asserts that any offenses by Respondent are de minimus and unintentional. Respondent's Reply appears to limit applicability of this defense to paperwork charges. Accordingly, to the extent Respondent is understood to assert that through its agent it was ready and willing to present the forms to INS it will be able to make such a defense. I reject as a proper affirmative defense both the intent and the de minimus claim as going to the question of liability. These claims may be asserted with respect to the issue of civil money penalty in light of the requirement of 8 U.S.C. § 1324a(e)(5) that good faith is among the five specified factors to be considered in determining the quantum of such penalty. Good faith implicates both the de minimus aspect of a violation and the willfulness or lack of intent. Those factors need not be raised by way of affirmative defense. Complainant's proof with respect to the statutory considerations to be taken into account in adjudging the civil money penalty is put into issue by the denial plea without need of affirmative defenses. Accordingly, Complainant's Motion is granted as to Affirmative Defense 9.

D. Affirmative Defense 8

Respondent's Affirmative Defense 8 is that fourteen of the violations listed on Exhibit B of the NIF cannot be sustained because the employer is not responsible for I-9 completion where the employee has been employed for less than three days. Complainant contends, however, that an employer is responsible for an employee's completion of Section 1 of the Form I-9 at the time of hire without regard to the duration of employment. 8 C.F.R. § 274a.2(b)(1)(i)(A). Indeed, an employer is at risk for failing to satisfy paperwork requirements even where individuals are employed less than three days. 8 C.F.R. § 274a.2(b)(1)(iii). Because I agree with

Complainant, I grant the Motion to Strike Affirmative Defense 8, noting also that Respondent did not address this issue in its Reply.

In sum, Complainant's Motion to Strike Affirmative Defenses 1, 3, 4, 5, 8, 9, and 10 is granted except to the extent that Respondent's Affirmative Defenses 1, 3, 4, and 10 are understood to put at issue its compliance with paperwork requirements as a good faith defense to charges of hiring aliens knowing them to be unauthorized as to that employment.

SO ORDERED: This 28th day of September, 1990.

MARVIN H. MORSE
Administrative Law Judge