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

April 22, 1992

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 91100187
CHICKEN BY CHICKADEE FARMS, INC., Respondent.	)	

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

On September 5, 1991, the Immigration and Naturalization Service (complainant) initiated this proceeding by serving a three-count Notice of Intent to Fine (NIF) upon Chicken By Chickadee Farms, Inc. (respondent).

In Count I, complainant alleged that subsequent to November 6, 1986, respondent allegedly knowingly hired and/or continued to employ the nine individuals listed therein, knowing that they were aliens not authorized for employment in the United States, thus violating the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(A). Complainant seeks civil money penalties totaling $8,200 for those nine alleged violations.

In Count II, complainant charged that respondent failed to ensure that each of the nine individuals named therein properly completed section 1 of their Employment Eligibility Verification Forms (Forms I-9), thus violating the provisions of 8 U.S.C. §1324a(a)(1)(B). Complainant has also requested civil money penalties in the aggregate of $2,750 for those nine violations.

Count III alleged that respondent also violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to complete section 2 of the Form I-9, and by having failed to ensure that the individual named therein complete section 1 of that Form I-9. Complainant has assessed a civil money penalty of $350 for that violation.

On September 30, 1991, respondent filed an answer to the NIF, replying fully to all allegations in each Count. Concerning the allegations in Count I, respondent admits that it hired the nine individuals listed therein, and also admits that they were hired after November 6, 1986, but stated that it had insufficient knowledge to admit or deny complainant's charge that those individuals were aliens not authorized for employment in the United States at the time that they were hired. Finally, in its answer to Count I of the NIF, respondent denied having hired or having continued to employ those nine individuals knowing that they were aliens not authorized for employment in the United States.

In addressing the allegations of Count II of the NIF, respondent admitted that the nine individuals named therein had been hired after November 6, 1986, for employment in the United States, but stated that "due to form of question", it could not file a more complete answer to complainant's allegations that it had failed to ensure that those nine employees had properly completed section 1 of their respective Forms I-9.

Respondent's answer to Count III of the NIF consisted of its having admitted that it hired the individual listed therein for employment in the United States and that it had done so subsequent to November 6, 1986. Replying further to the charges in Count III, respondent stated that it could not plead further to complainant's contention that respondent had failed to ensure that that individual properly completed section 1 of that person's Form I-9 "due to form of question" and respondent neither admitted nor denied complainant's allegation that respondent had failed to properly complete section 2 of that same Form I-9.

On November 5, 1990, complainant filed the Complaint at issue with this office, reasserting therein those charges previously recited in the NIF, repeating its request that respondent be ordered to pay civil money penalties totaling $11,300, and requesting that the matter be set for hearing before an Administrative Law Judge.

On December 23, 1991, respondent filed an Answer to the Complaint, as well as a Motion to Dismiss. In that Answer, respondent noted that

in its prior answer to the NIF, respondent had admitted that it hired the nine persons listed in that citation, that those persons were aliens, and that they had been hired after November 6, 1986. However, respondent also maintained that in filing its previous answer to the NIF, it had denied that those same nine individuals were aliens who were not eligible for employment and respondent further denied that it had continued to employ those individuals, knowing that they were not authorized for employment in the United States.

Those denials provided the bases for respondent's three-fold argumentation in support of its Motion to Dismiss:

1. Count I of the Complaint should be dismissed because the complainant failed to allege a sufficiency of facts which would support complainant's charges that respondent committed the alleged violations, since at the time of those alleged infractions the term "knowing" had not been defined statutorily, regulatorily, or decisionally.

2. Since there was no legal definition of the term "knowing" at the time of the alleged infractions, the allegations in the Complaint must contain a sufficiency of factual allegations in order to reasonably demonstrate that respondent had actual knowledge of the alleged violations. In this regard, the Complaint is deficient and should be dismissed.

3. In the absence of there having been a definition of the term "constructive knowledge" at the time of respondent's allegedly violative conduct, respondent cannot be found to have breached a standard which did not exist on the date that complainant filed these charges.

On January 3, 1992, complainant filed its Opposition to Motion to Dismiss, noting that the form of its Complaint comports with the requirements set forth in the pertinent procedural regulation, 28 C.F.R. §68.7(b). Complainant also addressed respondent's contention that in the absence of there having been a definition of the term "knowing" at the time the allegations at issue were initiated on September 5, 1991, the Complaint must contain enough factual allegations to reasonably disclose that respondent possessed actual knowledge, which includes constructive knowledge, that its conduct was violative in character.

In doing so, complainant notes that the concept of knowledge is well defined in American jurisprudence, as well as in the decisions of

OCAHO's Administrative Law Judges, who have utilized controlling federal case law for guidance. See, e.g. U.S. v. Buckingham Limited Partnership, 1 OCAHO 151 (4/6/90); U.S. v. New El Rey Sausage Co., 1 OCAHO 66 (7/7/89), modif., 1 OCAHO (8/4/89), aff'd 925 F.2d 1153 (9th Cir. 1991). In that connection, complainant argued that it has been held that at a minimum, "knowledge" includes actual knowledge, and, at a minimum, also, the proof of facts from which actual knowledge can be inferred is adequate to prove knowledge. See, U.S. v. Mr. Z Enterprises, 1 OCAHO 288 (1/11/91); U.S. v. YES Industries, 1 OCAHO 198 (7/16/90). Complainant also pointed out that the term "knowledge" implies constructive knowledge, a long-recognized legal fact. See Mester Manufacturing Co. v. INS, 879 F.2d 561 (9th Cir. 1989).

In the undersigned's February 2, 1992 Order Denying Respondent's Motion to Dismiss, it was found that the wording of Count I of the Complaint had more than adequately set forth the requirements contained in 28 C.F.R. §68.7(b), to the effect that a complaint filed under the provisions of IRCA must contain "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred."

It was further found that given the fact that complainant's allegations in Count I, the only one of the three counts to which respondent had registered objections, clearly complied with the previously-quoted pleading requirements set forth at 28 C.F.R. §68.7(b), and further that because the facts set forth in those allegations had furnished respondent with fair notice of the nature of that claim, respondent's Motion to Dismiss was being denied.

On January 8, 1992, complainant filed a Motion to Strike, in which it requested that respondent's Answer be stricken since it failed to comply with the requirements of the pertinent procedural regulation, 28 C.F.R. §68.9(c)(1), to the effect that answers shall include a statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation in a complaint.

On February 3, 1992, respondent filed a nine-page response to complainant's Motion to Strike, urging therein that that motion be denied, and pursuant to the provisions of 28 C.F.R. §68.9(e), those which deal with amendments and supplemental pleadings, that consideration be given to "amendments and/or supplemental pleadings as may be necessary to make the pleadings conform to the evidence as alleged by either party."

On February 20, 1992, complainant's Motion to Strike was granted and in the pertinent order respondent was instructed to file an amended answer. More specifically, respondent was ordered to file an answer which comported with the provisions of 28 C.F.R. §68.9(c)(1), or one in which respondent admitted, denied, or stated that it did not have and was unable to obtain sufficient information to admit or deny every allegation in the Complaint.

On March 4, 1992, respondent filed its Amended Answer, which included three affirmative defenses. In its first affirmative defense, respondent asserted that the Complaint fails to state a claim on which relief can be granted, since respondent's alleged violations predated the implementing regulation defining the term "knowing", 8 C.F.R. §274a.1(1)(c)(i)-(iii), which became effective on November 21, 1991, and those rulings which dealt with the issue of employers' knowledge, Mester and U.S. v. Sophie Valdez, d/b/a La Parilla Restaurant, 1 OCAHO 91 (9/27/89).

For its second affirmative defense, respondent asserted that it has complied in good faith with the verification system in the course of having screened its applicants for employment.

In its third affirmative defense, respondent asserted that it has substantially complied with the paperwork verifications that are the subjects of dispute in Counts II and III.

On March 11, 1992, complainant filed its Motion to Strike Affirmative Defenses, along with a supporting memorandum. In that memorandum, complainant states that the Complaint consists of several knowing hire/continuing to employ allegations in Count I and several paperwork charges in Counts II and III. Complainant next explains that respondent's Amended Answer set forth three affirmative defenses, two of which were explicitly and/or implicitly found to have been insufficient by the rulings in the undersigned's previous orders.

Specifically, complainant explains that respondent's first affirmative defense alleges that the Complaint fails to state a claim upon which relief can be granted because the case law and/or regulatory definition of "knowing" did not exist at the time of the violations. Furthermore, complainant notes that that same defense was the basis of the denied Motion to Dismiss and it was also a subject of the granted Motion to Strike.

Complainant next states that respondent's second affirmative defense alleges that respondent complied in good faith with the verification system. However, complainant contends that it had also already dealt with this "good faith" defense in its Motion to Strike.

Complainant then addresses respondent's third affirmative defense to Counts II and III, that respondent has substantially complied with the paperwork requirements of IRCA.

In its argumentation, complainant contends that each of the affirmative defenses must be stricken as legally insufficient and offers the following reasoning to show why such a ruling is in order.

Complainant argues generally that respondent's affirmative defenses are insufficient as a matter of law. Complainant then specifically reviewed and analyzed each of respondent's affirmative defenses, beginning with the defense that respondent cannot be held liable because "at the time of the alleged violations . . . 8 C.F.R. 274(a)(1)(c)(i)-(iii) did not exist, and the Mester and Valdez decisions . . . were yet to be issued."

Complainant provides several reasons why this defense must be stricken, the principal one being that "it is no defense to a knowing-hire or to a knowing-continue-to-employ violation that 'knowledge' was not defined specifically in the regulations or in OCAHO case law as it is today," since "the current regulations merely spell-out the definition that has been used in OCAHO case law, and the case law merely uses the well-recognized definition of knowing or knowledge."

Regarding that affirmative defense, complainant maintains that the defense of a failure to state a cause of action is not a true affirmative defense, and it should be stricken where the Complaint clearly demonstrates that a cause of action has been pleaded. Additionally, complainant explains that this "defense" has no conceivable application to the second and third counts, or the paperwork counts, of the Complaint. Complainant maintains that it is not a defense to a knowing-hire or to a knowing-continue-to-employ violation that "knowledge" was not then defined specifically in the regulations or in OCAHO rulings.

Complainant argues that the concept of knowledge is well defined, and at a minimum, "knowledge" includes actual knowledge, and the proof of facts from which actual knowledge can be inferred is adequate to prove knowledge. Moreover, complainant argues, "knowledge" also commonly includes constructive knowledge. Based on this argumenta-

tion, complainant contends that the respondent's first affirmative defense must be stricken.

In addressing respondent's second affirmative defense, complainant contends that the law is well established that liability for a paperwork violation is not subject to a "good faith" defense, as has been asserted by respondent. Complainant also contends that similarly the allegations of Count I, which charge a continuing-to-employ violation, are also not subject to a "good faith" defense.

Finally, complainant argues that respondent's third affirmative defense, in which it asserts that it has substantially complied with the paperwork specifications which are the subject of Counts II and III, must also be stricken since substantial compliance is an insufficient defense.

On March 25, 1992, respondent filed its Answer to Complainant's Motion to Strike Affirmative Defenses. In that reply, respondent points out that complainant insists that it has already addressed the insufficiency of respondent's "good faith defense" in complainant's previous pleadings and therefore this defense should now be stricken. Respondent then urges that complainant's stated reason for having done so is that complainant's position concerning at least two of these defenses has been sustained by the undersigned in having ruled on two previous motions. Respondent maintains that in the undersigned's February 20 order, no reference was made regarding the affirmative defenses, nor was any explicit or implicit reference made with respect to the ultimate legal sufficiency of respondent's defenses.

Respondent also maintains that complainant's Motion to Strike should be denied, since at the time of the alleged violations, 8 C.F.R. §274(a)(1)(c)(i)-(iii) did not exist and the decision in Mester was yet to be issued, and therefore, respondent could not have known that the individuals it hired were unauthorized to work.

Complainant's argumentation is more persuasive. Respondent is attempting to avoid liability by claiming that it could not have had the requisite knowledge necessary to support the allegation in Count I because the Mester ruling, one of the first IRCA cases which involved the issue of knowledge, including constructive knowledge, had not then been decided. That argument must fail, because in Mester, the respondent was found to have possessed the requisite knowledge, despite the fact that no regulation then existed which defined the term "knowing". On appeal, the Ninth Circuit relied upon the common definition and concept of knowledge, stating that "Mester had

constructive knowledge, even if no Mester employee had actual specific knowledge of the employee's unauthorized status." Additionally, the Mester court cited to United States v. Jewell, 532 F.2d 697(9th Cir.) (en banc), cert. denied, 426 U.S. 951(1988), for the proposition that in criminal law, a deliberate failure to investigate suspicious circumstances imputes knowledge.

Two years later, the Ninth Circuit again addressed the issue of knowledge in New El Rey, a case in which INS had filed a complaint against New El Rey, charging it with two counts of knowingly continuing to employ unauthorized aliens in violation of §1324a(a)(2). Both the ALJ and the CAHO concluded that although New El Rey did not have actual knowledge of its workers' unauthorized status, it did have constructive knowledge. New El Rey had argued that a constructive knowledge standard was not authorized by the statute. The Ninth Circuit rejected that argument, explaining that it had previously adopted the constructive knowledge standard in the Mester decision and noted that in that ruling it had analogized the factual scenario therein to that in Jewell, in which it was held that in criminal law a deliberative failure to investigate suspicious circumstances imputes to the defendant the knowledge which such an investigation would have made available.

In its Mester and New El Rey rulings, the Ninth Circuit found that those employers had constructive knowledge that the hired aliens were unauthorized for employment. And those findings of constructive knowledge were made despite the fact that at the time of both rulings there was neither a statutory nor regulatory definition of that term.

Respondent herein is attempting to advance the same argumentation which was made and rejected in Mester and New El Rey. The Ninth Circuit refused to accept that contention in those cases, and therefore that argumentation must be rejected in this ruling. Respondent cannot escape liability by relying on the affirmative defense that the concept of knowledge had not then been given statutory, regulatory, or decisional expression. Accordingly, complainant's motion to strike the first affirmative defense is granted.

Respondent's second affirmative defense is a "good faith" defense. More specifically, respondent stated that it "complied in good faith with the verification system with the actions it took for screening applicants for work." A reasonable interpretation of that language leads to the conclusion that respondent is asserting a good faith defense to all three counts of the Complaint. This view is also expressed by complainant in its Memorandum in Support of Complain-

ant's Motion to Strike Affirmative Defenses. In that pleading, complainant lists respondent's second affirmative defense as "good faith", and then notes that this defense has been asserted "across the board as to each Count of the Complaint." Complainant begins its argument in support of its Motion to Strike this affirmative defense by stating that the law is well established that liability for a paperwork violation is not subject to a "good faith" defense, and therefore, to the extent that the second affirmative defense of good faith addresses the paperwork violations of Counts II and III, it must be stricken.

Complainant's position is adopted since there is ample supporting authority to the effect that good faith is not a factor to be considered in determining liability for paperwork violations. Instead, it is one of five criteria which must be considered in determining the appropriate related civil money penalty to be assessed. U.S. v. Dubois Farms, Inc., 1 OCAHO 242 (9/28/90) (Order Granting in Part Complainant's Motion to Strike Affirmative Defenses); U.S. v. Bayley's Quality Seafoods, Inc., 1 OCAHO 238 (9/17/90) (Decision and Order Granting Complainant's Motion for Summary Decision in Part); U.S. v. Multimatic Products, 1 OCAHO 221 (8/21/90) (Decision and Order on Complainant's Motion to Strike Affirmative Defenses); U.S. v. Hollendorfer, 1 OCAHO 175 (5/17/90) (Order Granting Motion to Strike Affirmative Defenses); U.S. v. Lee Moyle, 1 OCAHO 85 (8/22/89) (Order Granting Motion to Strike Affirmative Defense). In view of those rulings, complainant's motion to strike the affirmative defense of good faith, as it pertains to the facts of violation in the paperwork allegations in Counts II and III, is granted.

We now address respondent's good faith defense as it relates to the knowingly hiring and/or continuing to employ allegations in Count I. In doing so, it might be well to summarize the parties' relevant argumentation.

Complainant properly contends that those allegations of Count I which charge a continuing-to-employ violation are not subject to a "good faith" defense. The Ninth Circuit in Mester adopted that premise in finding that compliance with the paperwork requirements is not a good faith defense to an allegation of knowingly continuing to employ an unauthorized alien. It also explained that completing the paperwork properly does not insulate an employer against a continuing employment sanction. Accordingly, complainant's motion to strike the good faith affirmative defense as it pertains to the continuing to employ violations is hereby granted.

Respondent, however, has properly asserted the good faith defense as it relates to the unlawful hiring allegations in Count I. As explained in footnote 11 of the Mester case, "compliance with the paperwork procedures establishes a good faith defense against a finding of unlawful hiring. 8 U.S.C. §1324a(a)(3)." Therefore, complainant's motion to strike the good faith affirmative defense, as it applies to the unlawful hiring allegations contained in Count I, is denied.

Respondent's third and final affirmative defense is that it substantially complied with the paperwork verifications involved in Counts II and III of the Complaint. Respondent maintains that it should not be held liable for the paperwork counts because in preparing the pertinent Forms I-9 it substantially complied with the paperwork verification requirements of IRCA. Complainant disagrees and argues that when substantial compliance is asserted as a defense, the party asserting it must plead facts showing that it did all that can be reasonably expected, and since respondent has failed to do so, its substantial compliance defense should be dismissed.

That request for relief, however, is contrary to the controlling precedential rulings which hold that substantial compliance with the paperwork requirements may be asserted as an affirmative defense on the fact of violation. U.S. v. James Q. Carlson d/b/a Jimmy on the Spot, 1 OCAHO 260 (11/2/90); U.S. v. Manos and Associates, d/b/a The Bread Basket, 1 OCAHO 130 (2/8/89) (Order Granting in Part Complainant's Motion for Summary Decision); U.S. v. Broadway Tire, Inc., 1 OCAHO 226 (8/30/90) (Order Granting in Part and Taking Under Advisement in Part Complainant's Motion to Strike Affirmative Defenses).

As noted in those rulings, a showing of substantial compliance depends upon the factual circumstances of each case. All of the cited cases have discussed which specific acts would or would not constitute substantial compliance with the paperwork requirements. However, since neither party has specifically listed which acts have been taken regarding each violation of Count II and Count III, I am unable to determine whether or not respondent has substantially complied. Therefore, respondent must file an amended pleading detailing the manner in which it avers that it has substantially complied with the paperwork requirement charges contained in Counts II and III.

Accordingly, complainant's motion to strike respondent's first affirmative defense, that which avers that the Complaint has failed to

state a claim upon which relief can be granted, is hereby granted and that affirmative defense is hereby ordered to be and is stricken.

Complainant's motion to strike respondent's second affirmative defense of good faith, regarding the paperwork violations in Counts II and III, is granted and that affirmative defense is also hereby ordered to be and is stricken.

Complainant's motion to strike the good faith affirmative defense, as it applies to the unlawful hiring allegations in Count I, is denied.

Complainant's motion to strike the good faith affirmative defense, as it applies to the continuing to employ violations in Count I, is granted and that affirmative defense is hereby ordered to be and is stricken.

Complainant's motion to strike the affirmative defense of substantial compliance, regarding the paperwork violations in Counts II and III, is denied.

In that connection, and as noted earlier, respondent is hereby ordered to file an amended answer within 15 days of its acknowledged receipt of this Order, specifically stating the manner in which it believes that it has substantially complied with the paperwork requirements at issue in Counts II and III of the Complaint.

Following the parties' orderly and timely completion of discovery activities, a telephonic pre-hearing conference will be conducted, in the course of which this matter will be set for hearing on the earliest mutually convenient date in a location agreed upon by counsel after giving due consideration to the needs and wishes of the parties and their witnesses.

JOSEPH E. MCGUIRE
Administrative Law Judge