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

June 25, 1993

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 93A00093
TASK FORCE SECURITY, INC., D/B/A TASK FORCE SECURITY AND INVESTIGATIONS Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE AFFIRMATIVE DEFENSES AND DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

On May 7, 1993, complainant, acting by and through the Immigration and Naturalization Service, filed the five-count Complaint at issue, in which civil money penalties totaling $91,200 were assessed on the 151 violations alleged therein.

Count I alleged that respondent failed to prepare and or make available for inspection the Employment Eligibility Verification Form (Form I-9) for the individual named therein, in violation of the provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a(a)(1)(B). Complainant has proposed a civil money penalty of $600 for this violation.

Count II charged respondent with also having violated the requirements of 8 U.S.C. §1324a(a)(1)(B) by reason of its having allegedly failed to ensure that the 66 employees listed therein properly completed Section 1 of their pertinent Forms I-9 and that respondent failed to properly complete Section 2 of those Forms I-9. Complainant assessed a total civil penalty of $39,600 on that count, or $600 for each of those 66 alleged violations.

In Count III, complainant alleged that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having failed to ensure that the six (6) employees listed therein properly completed Section 1 of their pertinent Forms I-9. Complainant assessed a $600 civil money penalty for each of those six (6) alleged paperwork violations, or a total civil money penalty of $3,600 for Count III.

Count IV contains the allegation that respondent violated the provisions of 8 U.S.C. §1324a(a)(1)(B) by having allegedly failed to complete Section 2 of the pertinent Forms I-9 pertaining to the 76 employees listed therein. For each of those 76 alleged paperwork violations, complainant levied a civil money penalty of $600, or a total civil money penalty of $46,200 for Count IV.

In Count V, complainant asserted that respondent failed to update the pertinent Forms I-9 for the two (2) individuals named therein to reflect that those individuals are still authorized to work in the United States, again, in violation of 8 U.S.C. §1324a(a)(1)(B). Complainant assessed a civil money penalty of $600 for each of those alleged violations, for a total civil money penalty of $1,200 for the violations alleged in Count V.

On June 1, 1993, respondent filed its Answer. In its Answer, respondent asserted that the inspection performed by complainant was done in contravention of the guidelines issued by the Commissioner of the INS; that there had been no prior educational visit by complainant or the Department of Labor, nor had any material concerning the I-9 ever been received by respondent prior to the visit from which emanated the NIF; that complainant had failed to follow the procedures outlined in the memorandum of the Commissioner of INS on 1/9/90 under the heading "Employer and Labor Relations"; and that respondent should have been given "some educational or advisory information, with the issuance of a warning letter." Respondent also asserted two affirmative defenses in its Answer.

On June 7, 1993, complainant filed a Motion to Strike Affirmative Defenses, requesting that the affirmative defenses contained in respondent's Answer be stricken, pursuant to 28 C.F.R. section 68.9(d) and to Rule 12(f) of the Federal Rules of Civil Procedure.

On June 25, 1993, respondent filed its Response to Government's Motion to Strike Affirmative Defenses. Respondent asserts therein that the Federal Rules of Civil Procedure do not apply to these

proceedings, and that therefore complainant's motion made thereunder must fall. Respondent further submits that the cases cited in support of complainant's motion all had specific fact patterns not connected with these proceedings, that each case should be decided on its own merits, and that respondent should be given its day in court under the doctrine of fundamental fairness and the dictates of the statute itself.

Respondent's initial assertion is clearly in error. The procedural regulations provide:

> The Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.

28 C.F.R. §68.1. This provision invokes the Federal Rules of Civil Procedure for use in proceedings before this Office as a general guideline to support the procedural rules as needed. United States v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 274, at 11 (12/5/90).

It should be noted that the Federal Rules of Civil Procedure are not controlling in situations covered by the procedural regulations. Id. Thus, for example, an administrative law judge may not impose sanc-tions based upon the FRCP in a proceeding brought under 8 U.S.C. §1324a which are not among the sanctions listed in 28 C.F.R. section 69.23(c). United States v. Ulysses, Inc., 2 OCAHO 390, at 4 (11/20/91).

However, because there is no equivalent provision in the procedural regulations, Rule 12(f) of the FRCP has been used by the administrative law judges in this Office as a guideline in considering motions to strike affirmative defenses. See United States v. Applied Computer Technology, 2 OCAHO 306 (3/22/91).

With respect to respondent's assertion that it should be given its day in court, respondent cites, and the undersigned knows of, no provision, precedent, or tenet of law requiring that every respondent be given a formal hearing in every cause of action brought under 8 U.S.C. §1324a. Because the procedural regulations provide for the entry of summary decision in proceedings before this Office, it can be inferred that there is no such requirement.

The procedural rule pertaining to responsive pleadings allows com-plainants to file a reply responding to each affirmative defense asserted in the answer. 28 C.F.R. §68.9(d). In accordance with this rule, complainant requests that respondent's defenses be stricken, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, which provides: "the court may order stricken from any pleading any insufficient defense ...."

Motions to strike are highly disfavored in the law, and granted only when the asserted affirmative defenses lack any legal or factual bases. United States v. Thomas Fox & Son, Inc., OCAHO Case No. 92A00208 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Answers and Affirmative Defenses)(1/6/93). Accordingly, an affirmative defense will only be stricken if there is no prima facie viability of the legal theory, or if the supporting statement of facts is wholly conclusory. Id. at 4-5. See also United States v. Watson, 1 OCAHO 253 (10/19/90); United States v. Broadway Tire, 1 OCAHO 226 (8/30/90).

Complainant asserts that respondent's first affirmative defense, which complainant contends is an educational defense, should be stricken as insufficient as a matter of law. In support of this proposition, respondent cites to a series of cases decided by this tribunal holding that respondent is not entitled to an educational briefing on the law prior to its enforcement.

Congress did not intend that every employer in the nation be indivi-dually educated on the requirements of the employment eligibility verification system prior to the implementation of IRCA. Mester Mfg. v. INS, 879 F.2d 561, 569 (9th Cir. 1989). United States v. Boah Fashion Corp., 1 OCAHO 281, at 5 (12/21/90). For this reason, an employer may not assert INS's failure to educate the public with respect to the employer sanctions provisions as an affirmative defense. United States v. Heisler, 1 OCAHO 150 (4/5/90). See also United States v. The Body Shop, 1 OCAHO 149 (4/2/90).

However, a careful review of respondent's first affirmative defense reveals that respondent asserts therein substantial compliance, not lack of education, as an affirmative defense to the allegations contained in the Complaint. Substantial compliance is a proper affirmative defense on the fact of violation with respect to paperwork violations. See United States v SDI Indus., Inc., OCAHO Case No. 92A00117 (Order Granting in Part and Denying in Part Complainant's

Motion to Strike Affirmative Defenses)(8/20/92). United States v. Carlson, 1 OCAHO 260 (11/2/90); United States v. Watson, 1 OCAHO 253 (10/19/90); United States v. Manos & Assocs., 1 OCAHO 130 (2/8/89).

A showing of substantial compliance depends upon the factual circumstances of each case. United States v. Chicken by Chickadee Farms, Inc., OCAHO Case No. 91100187 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses) (4/22/92). However, since neither party has specifically listed which acts have been taken regarding each violation in the Complaint, 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 it substantially complied with the paperwork requirements of 8 U.S.C. §1324a with respect to the charges contained in the Complaint.

Complainant also asserts that respondent's second affirmative defense, as stated in paragraph 7 of the Answer should be stricken as a matter of law. In paragraph 7 of the Answer, respondent alleged the following:

> That there is no mens rea: that one of the elements of the violation, knowingly employing unauthorized persons, or failing to complete the required documentation, was not present. The employer did not knowingly hire unauthorized persons, and, as soon as the employer became aware of the I-9 requirement, without the assistance or advice of the INS, the employer did the best they (sic) could, with the deficient forms and incomplete advice or training, to comply.

Complainant contends that respondent must complete Forms I-9 for all employees, and further contends that good faith is not a defense to charges under 8 U.S.C. §1324a(a)(1)(B).

Both of complainant's contentions are well taken. Respondent has a duty to verify the employment eligibility of, and complete a Form I-9 for, all of its employees, including those who are citizens of the United States. See United States v. Thomas Fox & Son, Inc., OCAHO Case No. 92A00208 (1/6/93); United States v. Diamond Constr., 3 OCAHO 456, at 4 (6/15/92). In addition, while respondent's good faith is a mitigating factor for the administrative law judge to consider in determining the appropriate civil money penalty for paperwork violations, 8 U.S.C. §1324a(e)(5), it is only an affirmative defense to

violations of the knowing hiring prohibition, 8 U.S.C. §1324a(1)(A) by virtue of 8 U.S.C. §1324a(a)(3), and does not shield respondent from liability for violations of the employment eligibility verification system. United States v. Nevada Lifestyles, Inc., 3 OCAHO 463, at 22 (10/16/92). See also Chicken by Chickadee Farms, 3 OCAHO 423; Diamond Constr., 3 OCAHO 456.

Moreover, and contrary to respondent's assertion, complainant does not need to prove that respondent knowingly failed to complete the required documentation in order to prove a paperwork violation. See United States v. Tuttle's Design Build, Inc., OCAHO Case No. 91100114 (Order Granting in Part and Denying in Part Complainant's Motion to Strike Affirmative Defenses)(8/30/91); United States v. Dubois Farms, Inc., 1 OCAHO 242, at 2 (9/28/90); United States v. USA Cafe, 1 OCAHO 42, at 4 n. 1 (2/6/89).

Accordingly, complainant's motion is granted as it pertains to respondent's second affirmative defense.

On June 7, 1993, complainant also filed a Motion for Judgment on the Pleadings, requesting therein that the undersigned enter judgment in its favor on the pleadings on the ground that complainant is entitled to judgment as a matter of law based on the undisputed facts appearing in the pleadings.

The procedural regulation pursuant to which complainant seeks relief provides that an Administrative Law Judge may enter summary decision for either party if the pleadings show there is no genuine issue as to any material fact and that a party is entitled to decision. 28 C.F.R. §68.38(c).

In support of its motion, complainant notes that respondent failed to admit, deny, or state in its Answer that it lacks information sufficient to admit or deny each allegation of the Complaint, and that therefore respondent has admitted all of the allegations in the Complaint, establishing a substantive violation of IRCA, 8 U.S.C. §1324a(a)(1)(B).

The procedural regulation governing the content of an answer in an action brought under 8 U.S.C. §1324a, 28 C.F.R. section 68.9(c), pro-vides, in pertinent part:

> Answer. Any respondent contesting any material fact alleged in a complaint, or contesting that the amount of a proposed penalty or award is excessive or inappropri-

> ate, or contending that he/she is entitled to judgment as a matter of law, shall file an answer in writing. The answer shall include:
>
> > (1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed admitted....

In its Answer, respondent failed to deny any of the allegations con-tained in the Complaint. Under the provisions of the 28 C.F.R. section 68.9(c)(1), therefore, respondent is deemed to have admitted all of the allegations contained in the Complaint.

However, as noted previously above, respondent alleged, as an affir-mative defense, that it substantially complied with the requirements of IRCA in completing the Forms I-9 in question. Because substantial compliance is a proper affirmative defense on the fact of violation with respect to paperwork violations, and because respondent's substantial compliance with the employment verification provisions of 8 U.S.C. §1324a remains at issue, complainant is not entitled to judgment on the pleadings at this time. Therefore, complainant's motion for judgment on the pleadings is denied.

JOSEPH E. McGUIRE
Administrative Law Judge