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

United States of America, Complainant v. James Q. Carlson, d/b/a Jimmy on the Spot, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100273.

ORDER

A five (5) count Complaint was filed on August 31, 1990, against James Q. Carlson, d/b/a Jimmy On The Spot, the Respondent, by the United States of America. The Complaint alleges, inter alia, that Respondent hired Leland Toxier, Mitchell Thorpe, Heidi A. Crouse, Jose R. Aviles and David R. Garza at various dates during the period from May 23, 1988, to February 8, 1990, but failed to properly complete Section 2 of the Employment eligibility Form for these employees within three business days of hire and continued to employ them thereafter in violation of Section 274A(a)(1)(B) of the Immigration and Nationality Act.

On October 1, 1990, Respondent, acting pro se, filed its answer which stated, inter alia, that Respondent (1) ``totally disagrees with the charges and intent to fine''; (2) ``has never been contacted by the Immigration Department prior to March of 1990''; (3) details its contact with INS agents regarding complying with the paperwork requirements of the Immigration and Reform act of 1986 and how it tried to comply with the law; (4) explains why settlement discussions broke down and (5) has other financial obligations, ``filed a Chapter 7 in November 1989 and have fallen behind on payroll taxes and working (sic) our way into a Chapter 13.''

On October 16, 1990, Complainant filed a Motion to Strike Respondent's Answer as to (1) Respondent's statement that ``he totally disagrees with the charges and Intent to Fine (sic)'' because the statement does not admit or deny each allegation, such that Complainant can know upon what ground Respondent is relying; (2) ``insofar as it attempts to suggest that respondent complied with the paperwork requirements . . . by photocopying documents must be struck as an inadequate defense . . .''; (3) ``Respondent's allegations concerning why settlement discussions in this matter broke

down must be struck as wholly irrelevant to these proceedings''; and (4) ``Respondent's discussions concerning fines against respondent's business by other government agencies must be struck down as an inadequate answer and/or defense to the present proceedings.''

28 C.F.R. section 68.8(c) which details the requirements for an answer in these proceedings states in pertinent part that:

> A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny such allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted; and
>
> A statement of the facts supporting each affirmative defense.

In view of the fact that Respondent is acting pro se, I think it is important to point out to Respondent that there are two legal issues which have to be decided in this case. First, whether or not Respondent is liable for the acts alleged in the Complaint. Second, if Respondent is liable, what would be the appropriate penalty.

In pleading, an affirmative defense is ``matter constituting a defense: new matter which, assuming the complaint to be true, constitutes a defense to it.'' Black's Law Dictionary, West Publishing Co., Fifth Ed. (1979). An affirmative defense is applicable to the first issue of determining liability and may also be applicable to what would be an appropriate civil penalty. Mitigating factors are not affirmative defenses.

Substantial compliance with the paperwork requirements may be an affirmative defense. As I stated in United States v. Manos and Associates, DBA Bread Basket, Case No. 89100130 (Order Granting in Part Complainant's Motion for Summary Decision Decided February 8, 1989), at p. 14:

> Like the concept of `reasonableness,' substantiality of compliance, if applicable, depends on the factual circumstances of each case. See, e.g., Fortin v. Commissioner of Ma. Dept. of Welfare, 692 F.2d 790, 795 (1st Cir. 1982); and Ruiz v. McCotter, 661 F. Supp. 112, 147 (S.D. TX. 1986). As applied to statutes, `substantial compliance' has been defined as `actual compliance with respect to the substance essential to every reasonable objective of the statute. But when there is such actual compliance as to all matters of substance then mere technical imperfections of form . . . should not be given the stature of non-compliance. . . .' See. e.g., International Longshoreman & Warehouseman Unions Local 35 et al. v. Board of Supervisors, 116 Cal. App. 3d 170, 175, 117 Cal. Rptr. 630 (1974); Stasher v. Hager-Haldeman, 58 Cal. 2d 23, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1962). Generally speaking, it means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

In Manos, I held that attaching a photocopy of documents to the I-9 without completing the form itself was not ``substantial compli-

ance'' and therefore not an affirmative defense. It is, however, a factor to consider in mitigation.[1]

There have been several other OCAHO ALJ decisions which have discussed whether or not specific acts constituted substantial compliance with the paperwork requirements of IRCA. See U.S. v. Richfield Caterers, OCAHO Case No. 89100187 (April 13, 1990) (An employer's failure to sign an I-9 is not substantial compliance); U.S. v. Citizens Utilities Co., Inc., OCAHO Case No. 89100211 (April 27, 1990) (Respondent did not substantially comply with the Act by copying employee identity and employment eligibility documents and attaching them to the I-9 Form, rather than filling out the I-9 Form correctly and in its entirety, since the regulations only permit an employer to attach such identification to the I-9 Form in addition to completing each section of the form itself. Respondent did not substantially comply with the Act by accepting commercially produced social security card facsimiles for two employees, specifically prohibited in the instructions to the I-9 Form. Also, that Respondent did not substantially comply with the Act by omitting its company name and address from the I-9 Form.) (Decision and Order Denying Respondent's Motion for Partial Summary Decision and Granting Complainant's Motion for Partial Summary Decision)

Analyzing the Respondent's Answer, I interpret Respondent's statement that he ``totally disagrees with the charges and Intent to Fine'' as a general denial of the allegations of the Complaint and therefore deny Complainant's Motion to Strike that portion of the Answer.

I agree with Complainant that Respondent's Answer insofar as it attempts to suggest that Respondent complied with the paperwork requirements by photocopying documents is not an affirmative defense, but relates to mitigation of the amount of civil penalty to grant in this case. Therefore, Complainant's Motion to Strike this as an affirmative defense is granted.

I also agree with Complainant that Respondent's allegations concerning settlement discussions and fines against Respondent from other businesses are not affirmative defenses; and, therefore, I grant Complainant's Motion to Strike these allegations as affirmative defenses. However, Respondent shall be permitted to show his financial condition which is a mitigating factor to consider by the fact finder in determining an appropriate civil penalty. See, U.S. v.

[1]There are five factors I must consider in mitigation: (1) size of business; (2) good faith of employer; (3) seriousness of violation; (4) whether or not an individual employee listed in the complaint was an unauthorized alien; and (5) history of previous violations. See, 8 U.S.C. section 1324a(e)(5).

Felipe, OCAHO No. 89100151 (October 11, 1989) (discussion on size of business).

ACCORDINGLY, Complainant's Motion to Strike is granted in part and denied in part, as set forth above.

SO ORDERED: This 2nd day of November, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge