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

January 9, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 94A00175
CHI LING, INC., D/B/A CHI LING CHINESE RESTAURANT, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE AND ALSO GRANTING COMPLAINANT'S MOTION FOR A MORE DEFINITE STATEMENT

On or about February 10, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), JAC-93-56, upon Chi Ling, Inc., d/b/a Chi Ling Chinese Restaurant (respondent). That five (5)-count citation contained 110 violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a, for which civil penalties totaling $11,750 were proposed.

In Count I, complainant alleged that respondent knowingly hired and/or continued to employ the five (5) individuals named therein for employment in the United States and did so after November 6, 1986, knowing that those individuals were aliens not authorized for employment in the United States, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(A). Complainant assessed civil money penalties of $250 for each of those five (5) violations, or a total civil money penalty sum of $1,250.

Complainant alleged in Count II that respondent failed to ensure proper completion of section 1 and also failed to properly complete section 2 of the Forms I-9 for each of the three (3) individuals named therein, all of whom had been hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $100 for each of the three (3) violations, or a total of $300 for those alleged violations.

Complainant alleged in Count III of the Complaint that respondent failed to ensure proper completion of section 1 of the Forms I-9 for each of the 12 individuals named therein, all of whom were hired by respondent for employment in the United States after November 6, 1986, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $100 for each of the violations, or a total of $1,200 for those 12 alleged violations.

In Count IV, complainant alleged that respondent employed the 32 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to properly complete section 2 of the Forms I-9 for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $100 for each of those 32 violations, or a civil money penalty totaling $3,200 on that count.

In Count V, complainant alleged that respondent employed the 58 individuals named therein for employment in the United States and did so after November 6, 1986, and that respondent failed to prepare the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant levied civil money penalties of $100 for each of the 58 violations, or a civil money penalties totaling $5,800 for Count V.

Respondent was advised in the NIF of its right to file a written request for a hearing before an Administrative Law Judge assigned to this office, and on April 26, 1994, Richard J. D'Amico, Esquire, respondent's counsel of record, filed a written request on respondent's behalf.

On September 29, 1994, complainant filed the five (5)-count Complaint at issue, reasserting the allegations set forth in the NIF, as well as the requested civil money penalties totaling $11,750 for those 110 alleged violations.

On October 4, 1994, the Complaint and a Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested.

On October 24, 1994, respondent filed a timely Answer to the Complaint, in which it denied having violated IRCA in the manners alleged, and also asserted three (3) affirmative defenses to the alleged violations.

In its first affirmative defense, respondent asserted that it complied in good faith with the verification requirements of IRCA.

For its second affirmative defense, respondent contended that many of the alleged violations cited in the Complaint involved offenses that occured more than three (3) years after the date of hire or more than one (1) year after the date of termination for the cited individuals.

In its third and final affirmative defense, respondent claimed that complainant failed to provide three (3) days advance notice prior to inspecting respondent's place of business.

On December 16, 1994, complainant filed an unopposed Motion to Strike Affirmative Defenses, in which it requested that two (2) of respondent's affirmative defenses, the good faith defense and the failure to provide notice defense, be stricken because those defenses had been improperly asserted pursuant to the provisions of 28 C.F.R. §68.9(c).

On December 19, 1994, complainant filed another pleading captioned Motion for More Definite Statement - Affirmative Defenses, requesting therein that respondent be required to provide a more definite statement for its second affirmative defense, which contended that many of the alleged violations occured more than three (3) years after the date of hire or more than one (1) year after the date of termination for certain cited individuals.

The procedural rules applicable to cases involving allegations of unlawful employment of aliens are those codified at 28 C.F.R. Part 68, which provide that "[t]he 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 . . . ." 28 C.F.R. § 68.1.

Consequently, because our procedural rules do not provide for motions to strike, it is appropriate to use Rule 12(f) of the FRCP as a guideline in considering motions to strike affirmative defenses. United States v. Makilan, 4 OCAHO 610, at 3 (1994). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

Motions to strike affirmative defenses are generally not favored in the law, and are only granted when the asserted affirmative defenses lack any legal or factual grounds. See United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (1993). Accordingly, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. Makilan, 4 OCAHO 610, at 4; Task Force, 3 OCAHO 563, at 4.

The first affirmative defense asserted by respondent was that of good faith, specifically contending that:

> Respondent had shown good faith compliance withthe employment verification requirements of Section 274a 2 (b) and therefore has not violated the Act.

Complainant correctly noted in its December 16, 1994 Motion to Strike that good faith is not a defense for paperwork violations of the employment eligibility verification system, which constituted four (4) of the five (5) counts in this case. See, e.g., United States v. Task Force Security, Inc., 3 OCAHO 533, at 5 (1993). Instead, good faith is only an affirmative defense to violations of knowingly hiring or recruiting unauthorized aliens, 8 U.S.C. §§ 1324a(a)(1)(A), 1324a(a)(3).

Although Count I is a knowingly hiring violation, respondent has failed to support its affirmative defense with the required statement of facts. The procedural regulation governing answers to complaints in unlawful employment cases provides that the answer shall include "[a] statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2).

Accordingly, because four (4) of respondent's alleged violations were paperwork violations, and because the knowingly hiring violation was not factually supported, complainant's motion to strike respondent's good faith affirmative defense is well taken and must be granted.

In its second affirmative defense, respondent asserted that:

> A significant number of the alleged violations in reporting Form I-9 were cited more than three years after the date of hire and more than one year after the date of termination of employment of the stated employees.
>
> All such alleged violations which were cited more than three years after the date of hire and more than one year after the date of termination of employment of an employee, pursuant to Statute, are time barred.

Complainant has requested the undersigned to order the respondent to supply a more definite statement for its second affirmative defense. In particular, complainant correctly contends that the information provided in respondent's second affirmative defense is insufficient to enable complainant to prepare a meaningful response.

The pertinent procedural regulation governing answers, 28 C.F.R. Section 68.9, grants a complainant the opportunity to file a response to each affirmative defense asserted. Section 68.9 implicitly requires that an affirmative defense be pleaded with enough specicifity to give the opposing party fair notice of the nature of the defense.

Complainant was denied that fair notice in this case, and thus was denied a meaningful opportunity to respond to the second affirmative defense. Complainant has charged respondent with 110 violations of IRCA, and respondent has not indicated which of those 110 violations are covered under its affirmative defense. Accordingly, complainant's Motion for a More Definite Statement is granted with respect to respondent's second affirmative defense.

In its third affirmative defense, respondent asserted that:

> The Department failed to provide Respondent with three (3) days advance notice prior to inspection of the I-9 Forms as required by statute.

Complainant has presented an uncontradicted letter dated August 3, 1993, which was delivered via certified mail on August 5, 1993, the receipt of which respondent has given written acknowledgement. That letter notified respondent that INS would be inspecting Forms I-9 for respondent's employees on August 24, 1993. That letter gave respondent 19 days advance notice, or 16 additional days notice over the three (3) days required under the pertinent regulation. See 8 C.F.R. § 274a.2(b)(viii)(B)(2)(ii). Therefore, complainant's motion to strike respondent's third affirmative defense is well taken and must also be granted.

In summary, complainant's December 16, 1994 Motion to Strike Affirmative Defenses is granted. Accordingly, two (2) of the affirmative

defenses asserted by respondent in its October 24, 1994 Answer, namely good faith and insufficient notice, are hereby ordered to be and are stricken.

In addition, complainant's December 19, 1994 Motion for a More Definate Statement is also granted. Respondent is ordered to submit a more definite statement of the facts, in compliance with 28 C.F.R. Section 68.9(c)(2), for its second affirmative defense, and to have done so within fifteen (15) days of its acknowledged receipt of this Order.

In the event that respondent fails to do so and thus comply with the provisions of this Order, its second affirmative defense, pleaded in its October 24, 1994 Answer will also be ordered to be stricken.

JOSEPH H. MCGUIRE
Administrative Law Judge