

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

October 26, 1994

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. 1324c Proceeding
)	OCAHO Case No. 94C00128
DAVID SEGURA-SATARAY,)	
Respondent.)	
_____)	

ORDER GRANTING COMPLAINANT'S MOTION
TO STRIKE AFFIRMATIVE DEFENSES

On April 7, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), SNA-274C-93-0100, upon David Segura-Sataray, (respondent). That single-count citation alleged one (1) violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324c, and a civil penalty of \$1,000 was proposed.

In Count I, complainant alleged that respondent knowingly and falsely made an Employment Eligibility Verification Form (Forms I-9) for the individual named therein and did so after November 29, 1990, in violation of IRCA, 8 U.S.C. § 1324c(a)(1). Complainant assessed a civil money penalty of \$1,000 for that alleged violation.

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 provided that he file his written request within 60 days of his receipt of the NIF. On May 27, 1993, Susan Edwards, Esquire, respondent's counsel of record, timely filed a written request for hearing on respondent's behalf.

On July 11, 1994, complainant filed the one-count Complaint at issue.

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On July 12, 1994, the Complaint and a Notice of Hearing were served on respondent's counsel by certified mail, return receipt requested.

On August 16, 1994, respondent filed a timely Answer to the Complaint, in which it denied having violated IRCA in the manner alleged, and also asserted three (3) affirmative defenses to the alleged violation.

In its first affirmative defense, respondent asserted that the Forms I-9 is not a document upon which proceedings under 8 U.S.C. Section 1324c may be initiated.

For its second affirmative defense, respondent asserted that the term "falsely made," as it is used in 8 U.S.C. Section 1324c, does not include documents that contain false information.

Respondent's third affirmative defense asserted that:

These proceedings are unconstitutional in that the immigration consequences of a final order under Section 274C when compared to the milder consequences for a criminal conviction for the same conduct are so arbitrary as to violate the equal protection clause of the constitution of the United States.

On October 7, 1994, complainant filed a Motion to Strike Affirmative Defenses, in which it requested the undersigned to strike all three (3) of respondent's affirmative defenses on the ground that pursuant to the provisions of 28 C.F.R. Section 68.9(c), those defenses had been improperly asserted.

On October 12, 1994, respondent filed a pleading in opposition to complainant's Motion to Strike, in which it petitioned the undersigned to deny complainant's motion, contending that it was both untimely filed and irrelevant to its affirmative defenses.

The procedural rules applicable to cases involving allegations of document fraud are those codified at 28 C.F.R. Part 68, which provide that "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,...." 28 C.F.R. § 68.1. Therefore, because our procedural rules do not provide for motions to strike, it is appropriate to use Rule 12(f) of the Federal Rules of Civil Procedure as a guideline in considering motions to strike affirmative defenses. United States v. Gregorio Alabado Makilan, 4 OCAHO 610, at 3 (2/14/94). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

As respondent has correctly noted, there is a great reluctance in the law to strike affirmative defenses, and motions to strike 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 (9/23/93). Therefore, 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. Gregorio Alabado Makilan, 4 OCAHO 610, at 4; Task Force, 3 OCAHO 563, at 4.

The procedural regulation governing answers to complaints in document abuse cases provides that the answer shall include "[a] statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2).

Complainant has correctly pointed out that respondent has failed, in either its August 16, 1994 Answer or in its October 12, 1994 pleading in opposition to complainant's Motion to Strike, to provide any statement of the facts to support any of its three (3) affirmative defenses.

The first affirmative defense asserted by respondent consisted of a one (1) sentence conclusory statement contending that the Forms I-9 is not a document upon which a Section 1324c proceeding may be commenced.

Respondent is charged with violating 8 U.S.C. Section 1324c(a)(1), which prohibits "any person or entity knowingly to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying any requirement of this Act." (Emphasis added). The Employment Eligibility Verification Form (Forms I-9), is an essential document necessary to the successful implementation of IRCA's Employment Verification System, 8 U.S.C. § 1324a(b), and is unequivocally an actionable document under Section 1324c.

For that reason, along with the fact that respondent did not support its affirmative defense with a statement of facts, respondent's first affirmative defense must be stricken.

In its second affirmative defense, respondent argued that the term "falsely made," does not include documents that contain false information. An affirmative defense must give the opposing party fair notice of the nature of the defense. Without a supporting statement of facts, complainant was denied that fair notice. Accordingly, respondent's

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second affirmative defense should also be stricken because it has not been supported factually.

Respondent's third affirmative defense asserted that proceedings under Section 1324c are unconstitutional because they are arbitrary and violate the Equal Protection Clause of the Constitution. Because respondent has failed to support that conclusory claim, this affirmative defense must also be stricken.

In view of the foregoing, complainant's Motion to Strike Affirmative Defenses is granted. Accordingly, the three (3) affirmative defenses asserted by respondent in its Answer are hereby ordered to be and are stricken.

JOSEPH E. MCGUIRE
Administrative Law Judge