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

July 1, 2009

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 09A00003
	)	
LFW DAIRY CORPORATION, D/B/A	)	
J & J DAIRY CORPORATION,	)	
Respondent.	)	
	)	

ORDER STRIKING AFFIRMATIVE DEFENSES

I. BACKGROUND AND PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States is the complainant and LFW Dairy Corp. d/b/a J J[1] Dairy Corp. (J J or the dairy) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint alleging that the dairy failed to prepare I-9 forms for thirty-nine (39) named individuals, thereby violating 8 U.S.C. § 1324a(b) and 8 C.F.R. §274a.2(b), and that J J failed to retain those I-9 forms and/or make them available for inspection, thereby violating 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. §§ 274a.2(b) and 274a.2(b)(2).

J J timely filed an answer denying the material allegations of the complaint and asserting thirteen (13) affirmative defenses. The answer was not accompanied by a statement of facts, although applicable rules[2] require a statement of facts in support of each defense. 28 C.F.R. § 68.9(c)(2) (2008). Accordingly, J J was given an opportunity to file a statement of facts, and it subsequently did so. ICE then filed a Motion to Strike Defenses, and J J filed a response to that

[1] The respondent is named in the complaint as J&J, but consistently identifies and refers to itself as J J; accordingly this latter designation is used throughout this order.

[2] *See* Rules of Practice and Procedure, 28 C.F.R. Part 68 (2008).

motion, which is ripe for decision.

II. APPLICABLE STANDARDS

Because OCAHO rules contain no provisions expressly governing motions to strike, it is appropriate to look to Rule 12(f) of the Federal Rules of Civil Procedure in considering a motion to strike affirmative defenses. *United States v. Irani*, 6 OCAHO no. 860, 379, 381 (1996)[3] (explaining that 28 C.F.R. § 68.1 allows for the federal rules to be used as a general guideline where OCAHO rules do not provide for or control a particular situation). Rule 12(f) provides that a court may strike an insufficient defense either in response to a motion or on its own initiative. Fed. R. Civ. P. 12(f).

It is frequently observed that motions to strike affirmative defenses are not favored in the law. *United States v. Makilan*, 4 OCAHO no. 610, 202, 205 (1994); *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, No. 06-CV-6155-CJS-MWP, 2009 WL 368508 at * 5-6 (W.D.N.Y. Feb. 13, 2009). The "persistent exception" to this general observation applies when such a motion may streamline the ultimate resolution of the case or make a trial less complicated. *United States v. Educated Carwash*, 1 OCAHO no. 98, 658, 659 (1989).

Because OCAHO rules require that a statement of facts be filed in support of each affirmative defense, 28 C.F.R. § 68.9(c)(2), more is required to survive a motion to strike in this forum than under the minimal notice pleading called for by the federal rule. Although substantial questions of law or fact will not be decided on a motion to strike, a defense will be stricken as insufficient 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." *United States v. Chavez-Ramirez*, 5 OCAHO no. 774, 408, 410 (1995).

III. THE DAIRY'S STATEMENT OF FACTS

J J asserts that the history and chronology of the investigation, as well as the circumstances and

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

manner of its recordkeeping, should be considered, as well as the nature of the alleged violations themselves. It urges generally that its own cooperation with the investigation is relevant to several of the defenses. Many of the facts alleged are pertinent to more than one of the defenses as well.

J J stated that the former President of the company, Samuel Leifer,[4] was responsible for hiring new employees for the dairy until June, 2005, when he stopped working full time and received his last paycheck. Although Leifer would occasionally come to the dairy after that to oversee operations, J J stated that the dairy's I-9 function was disorganized due to his sporadic appearances and failing health. Leifer died in August 2008 at age 84 leaving the I-9 function unattended, and causing the company to lose track of what I-9 forms it still had. At the commencement of the investigation, Leifer was not present at the dairy, so ICE officers communicated with Menachem Khan, the Controller, who was not aware of the company's I-9 procedures.

The dairy said ICE's investigation began with an initial subpoena which it received November 27, 2007, and responded to (after obtaining an extension) on December 19, 2007. Additional information was thereafter sought by ICE, all of which the dairy provided. The dairy said that on May 30, 2008, it received a Notice of Technical or Procedural Failures "and thirty nine[5] (sic) I-9 forms (previously provided)," a Notice of Suspect Documents, and a Spreadsheet. J J says it corrected the I-9 deficiencies within 10 days, sent in an affidavit, completed the spreadsheet, and revised the I-9s.

The dairy asserted that many of its original I-9s had been lost or misplaced, so it had filled out new I-9s for some individuals. The attestations had to be dated "as of" rather than the original date.[6] No I-9s could be recreated for former employees who had left the company, however, because the information needed was unavailable. In section 1 of some of the I-9s, omissions of "maiden name" occurred because the employees were male and had no maiden names. The dairy also said it wrote letters to the employees on ICE's Suspect Document list, asking them to provide alternate documents, and explained the discrepancies in the termination dates for several employees.

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[4] In the dairy's statement of facts in support of the defenses, the President's name is spelled Leifer. In its response to the motion to strike, however, his name is spelled Liefer. The former spelling is used throughout this order.

[5] This appears to be an error as only 22 I-9 Forms accompanied the Notice.

[6] Eight of the employee attestations were undated, thirteen were dated in December 2007, and one contained an "as of" date. All but one of the employer attestations were dated "as of" with varying dates, some as far back as 1991. One was "as of" with no date.

The Notice of Intent to Fine (NIF) was served on October 7, 2008.

Although a copy of the NIF accompanied the complaint, the Notice of Technical and Procedural Failures did not. The government supplied a copy pursuant to my request, together with the 22 accompanying I-9 forms and two Notices of Suspect Documents. The documents reflect that technical and procedural failures were cited in the I-9s for 22 of the 39 employees listed in the NIF. Specific infirmities checked on the list and circled on the I-9s included no maiden name, employee attestation date missing in section 1, employee attestation not completed at the time of hire in section 1, employer attestation in section 2 not completed within 3 business days of the hire or, if the employee is hired for 3 business days or less, at the time of hire. Five of those I-9s were for employees whose documents were designated as suspect. The dairy was given a period of not less than ten days to correct the technical and procedural failures.

The remaining seventeen employees listed on the NIF were not included in the notice of technical and procedural failures; it appears that they are the former employees for whom the dairy says it was unable to recreate I-9s.

IV. DISCUSSION AND ANALYSIS

A. FIRST AFFIRMATIVE DEFENSE

J J's first affirmative defense asserts that all of the claims are barred, in whole or in part, by the statutory good faith defenses set forth in 8 U.S.C. § 1324a(a)(3) and § 1324a(b)(6). Neither provision, however, is applicable to the particular violations charged.

The first statutory defense cited, 8 U.S.C. § 1324a(a)(3), provides that,

> A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

As OCAHO jurisprudence has long made clear, this defense by its own terms applies only to "knowing hire" violations, not to alleged violations of the employment eligibility verification requirements (paperwork violations). *See United States v. Moyle Mink Farm*, 1 OCAHO no. 85, 573, 573-74 (1989) (granting motion to strike defense); *United States v. N. Mich. Fruit Co.*, 4 OCAHO no. 667, 680, 690 (1994) (granting motion to strike defense). J J has not been charged with violations of the "knowing hire" provisions, but rather with failing to timely complete, retain, or produce I-9 Forms. The safe harbor provided by § 1324a(a)(3) is thus inapplicable to the violations charged here, and is legally insufficient as a defense to them.

The defense set forth in § 1324a(b)(6) is similarly inapplicable to the violations charged here. This section provides a narrow but complete defense where an entity is charged with technical and procedural failures in connection with the completion of an I-9 form. Here, however, the NIF charges J J with failing to timely complete and/or to retain the forms in the first instance for 39 named individuals. These are substantive violations, not technical or procedural errors. J J appears to be suggesting that because ICE identified certain technical and procedural failures in the 22 recreated I-9 forms, it may not charge J J with failure to complete the forms in the first place at the time of hire, as it should have done.

The Interim Guidelines set out in Limiting Liability for Certain Technical and Procedural Violations of Paperwork Requirements, 63 Fed. Reg. 16909-13 (April 7, 1998)[7] were promulgated in order to implement the so-called "Bono amendment," now codified at 8 U.S.C. § 1324a(b)(6). As noted in the Guidelines, the rule relieves employers from liability for minor, unintentional violations of the verification requirements; it does not provide a shield to avoid the basic requirements of the Act. The defense thus applies only to technical or procedural failures to comply with a partial verification requirement rather than to failures to comply with the verification requirements as a whole. The principal verification requirements not covered by the rule include completion of the I-9 form for each new employee at the time of hire, and the maintenance of the Form for the periods specified. The rule thus does not alter or affect the necessity of completing I-9 forms within three business days of hire, or of retaining them thereafter. Each failure to properly prepare, retain, or produce the forms in accordance with the requirements of the employment verification system is a separate violation of the Act. 8 U.S.C. § 1324a(a)(1)(B); *United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 736 (1997).

The dairy acknowledges in its response to the motion that a legacy INS Memo issued on March 6, 1997 (the Virtue Memorandum) clearly explains that failure to prepare timely I-9s is not a technical or procedural violation. It nevertheless asserts that "the Complainant did not educate the Respondent in this period" so its errors "must be viewed with an understanding that it was operating without explanations from the Respondent."

The suggestion in 2009 that an employer must first have "education" before it can be required to comply with the law is not well taken. After the initial passage of the Immigration Reform and Control Act of 1986 (IRCA), a six month transition period ensued in order to provide employers an opportunity to learn about its provisions before compliance was mandated. In May 1987, INS issued a "Handbook for Employers," subtitled as "Instructions for Completing Form I-9." No enforcement was permitted for a first violation occurring between June 1, 1987 and May 31, 1988. *See United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 56 (1988). The so-called grace period for employers to come into compliance with IRCA thus expired in 1988, more than

[7]Although the final rule was finalized in 2003, 67 Fed. Reg. 74713 (December 9, 2002) (Final Rule 1/00/03), it has not yet been codified.

two decades ago. *See United States v. Sunshine Bldg. and Maint., Inc.*, 7 OCAHO no. 997, 1122, 1171 (1998); *United States v. Widow Brown's Inn*, 3 OCAHO no. 399, 1, 17-21 (1992).

The dairy's response to the motion to strike asserts that the government "treated" the violations charged as being technical or procedural, but the facts alleged do not support this conclusion. J J further argues that "'good faith' itself is not defined by the governing legislation," and that the defense may apply to any of its conduct before and/or during the investigation. The dairy's response invokes as well the "common law understanding of good faith" and says that it acted in good faith in recreating the missing I-9s as best it could. Such assertions may be relevant to the quantum of any civil money penalty, but they do not provide a defense to liability.

The first affirmative defense will be stricken.

B. SECOND AFFIRMATIVE DEFENSE

The second defense asserts that all of the claims are barred in whole or in part by waiver. J J asserts that it complied with the subpoena and with ICE's requests for documents and/or information during its investigation, corrected deficiencies, completed the spreadsheet, revised I-9s, and wrote letters to the employees with suspect documents. The dairy concludes that because it complied with all of ICE's requests, ICE waived its right to commence administrative proceedings.

No legal authority is cited for this novel conclusion, and the dairy does not explain how its own conduct is relevant to, much less determinative of, the question of whether the government elected to waive its right to proceed. Actions of a party under investigation, no matter how cooperative, do not ordinarily operate to effect a waiver of the government's right to seek penalties for violations of the law. Nothing in § 1324a(e) or 8 C.F.R. § 274a.9 suggests that the government's authority to bring complaints is dependent upon or compromised by a respondent's cooperation in the investigative process. To the contrary, 8 C.F.R. § 274a.9(b) requires that service officers be given reasonable access to relevant information by a party under investigation; cooperation in an investigation is thus mandated.

J J's own actions have no power to extinguish the government's authority to proceed, because a waiver by definition requires the intentional relinquishment of a known right. *Sunshine Bldg. Maint.*, 7 OCAHO no. 997 at 1169 (citing BLACK'S LAW DICTIONARY 1581 (6th ed. 1990)). There is neither a legal nor a logical basis for the conclusion that the government intentionally relinquished its right to bring charges against the dairy just because the respondent cooperated with the investigation.

The second defense is insufficient as a matter of law and will be stricken.

C. THIRD AFFIRMATIVE DEFENSE

The dairy's third defense asserts that all of the claims are barred, in whole or in part, by the doctrine of estoppel. It says again that because it complied with the subpoena and responded to ICE's requests for information, corrected deficiencies, wrote letters to the suspect employees asking for additional documents, and otherwise cooperated with the investigation, ICE is estopped from bringing charges against it. J J contends that "[b]y requesting additional documents and/or information and by J J Dairy complying with each request, ICE induced J J Dairy's expectation of settling the matter," and that "J J Dairy reasonably relied on and acted in accordance with such expectation and will suffer a detriment if the above-referenced expectations are not met."

But conducting an investigation does not create an estoppel any more than it creates a waiver, even when the party under investigation cooperates. No facts are set forth which would give rise to any reasonable "expectation" of settlement arising simply from J J's cooperation with the investigation, and J J does not explain how a legitimate "expectation" can be "induced" in the absence of any representations whatsoever by the government.

The history of modern decisions respecting the availability of estoppel against the federal government, moreover, makes clear in any event that this defense must fail. As summarized in *OPM v. Richmond*, 496 U.S. 414, 419-23 (1990), that history left open the question of whether even affirmative misconduct would ever be sufficient to estop the United States. OCAHO case law reflects that administrative law judges have consistently declined repeated invitations to apply equitable estoppel against the government. *See*, *e.g.*, *United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 983-84 (1997); *United States v. Tom & Yu*, 3 OCAHO no. 412, 163, 168-70 (1992) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 379, 380 (1947)).

Although it has never been squarely held on the highest authority that equitable estoppel will not lie against the government under any circumstances, precedents nevertheless indicate that the United States "is virtually impervious to an equitable estoppel claim." *Tom & Yu*, 3 OCAHO no. 412 at 169 (citing *Merrill*, 332 U.S. at 380). In *United States v. Big Bear Market*, 1 OCAHO no. 48, 285, 312-13 (1989), for example, where a respondent asserted that an INS agent had expressly told him "there will be no fine," it was held that no estoppel could arise from such remarks. Similarly, in *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981), express erroneous oral advice from an agency representative was insufficient to estop the social security administration from denying benefits.

If an express oral representation cannot estop the United States, an estoppel is a fortiori not created in the absence of any representations whatsoever. Because "the government may not be estopped on the same terms as other litigants," it is clear that a complainant must at minimum allege that the government engaged in affirmative misconduct. *Corporate Loss Prevention*, 6 OCAHO no. 908 at 983-84; *Schweiker*, 450 U.S. at 788-89.

The third affirmative defense is patently insufficient and will be stricken.

D. FOURTH AFFIRMATIVE DEFENSE

J J avers as a fourth defense that the claims are barred, in whole or in part, by the doctrine of laches. It notes that ICE's investigation began on November 27, 2007, and the NIF was not served until October 7, 2008. The dairy points out that its former President passed away in August 2008, and "thus Respondent cannot effectively defend itself at this time." According to the dairy, the "great delay and lapse of time" severely disadvantaged the company.

Longstanding precedent has established, however, that laches is ordinarily not available as a defense when an action is filed within the applicable statute of limitations. *See United States v. Mack*, 295 U.S. 480, 489 (1935); *see also United States v. Milstein*, 401 F.3d 53, 63-64 (2d Cir. 2005); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997); *United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982). The limitations period applicable to an action for civil money penalties in this forum is that set out in 28 U.S.C. § 2462, which provides that,

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued, if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

United States v. Fairfield Jersey, Inc., 9 OCAHO no. 1069, 7-8 (2001) (citing cases); *United States v. Davila*, 7 OCAHO no. 936, 253, 267-68 (1997). Because this action is well within the limitations period, laches has no application.

More importantly, longstanding precedent makes clear as well that laches is unavailable as a defense against the United States. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940). When the federal government undertakes to enforce a public right or to protect the public interest, laches provides no defense. *United States v. Angell*, 292 F.3d 333, 338 (2d Cir. 2002). The laches defense has consistently been rejected in this forum when asserted against a federal agency seeking to enforce a public right or to protect the public interest. *See*, *e.g.*, *United States v. Agripac, Inc.*, 8 OCAHO no. 1028, 399, 413 n. 9 (1999); *United States v. Mac Specialties, Ltd.*, 6 OCAHO no. 920, 1189, 1199 (1997).

Laches provides no defense in this matter and the fourth defense will be stricken.

E. FIFTH AFFIRMATIVE DEFENSE

The dairy next contends as a fifth defense that the current action is barred "to the extent that the

Complainant failed to timely and properly exhaust all necessary administrative, statutory and/or judicial prerequisites for the commencement of this action." It does not, however, identify any administrative, statutory and/or judicial prerequisites to this action that remain unsatisfied, and no such prerequisites are evident from examination of 8 U.S.C. § 1324a, 8 C.F.R. § 274a, or OCAHO case law. No facts have been alleged that would lead to a conclusion that ICE failed to exhaust prerequisites of any kind.

J J reiterates that it complied with ICE's investigation, and says it "was willing to continue to comply with the next steps, and was waiting for further notice regarding how to proceed," yet ICE did not seek "other options" to "mitigate the issues." Its response to the motion says "it is a principle of administrative law that an agency should thoroughly seek all non-juridical options prior to commencing an action." No legal authority is cited in support of this proposition.

This defense is patently insufficient as a matter of law and will be stricken.

F. SIXTH AFFIRMATIVE DEFENSE

J J's sixth defense represents that the claims are barred "to the extent that they were not alleged or encompassed within the "administrative charge" or the administrative investigation. Specifically, J J contends that none of the documents it received on March[8] (sic) 30, 2008 include any reference to § 1324a(a)(1)(B), the statutory provision cited in the NIF, and thus it did not have a chance to "discuss or defend these charges prior to this proceeding."

The violations with which J J is charged in this action are substantive, not technical and procedural in nature, so there is no reason to expect that a Notice of Technical and Procedural Failures would include such violations. *See* 63 Fed. Reg. 16,909-16,913. The dairy cites no law, regulation, or precedent requiring that a respondent be notified before the issuance of a NIF that it will be charged with substantive violations of § 1324a, and it does not disclose the basis of its suggestion that a warning is required. It has been well established for many years in our case law that a Respondent is not entitled to a "warning" prior to the issuance of a NIF. As explained in *United States v. Hollendorfer*, 1 OCAHO no. 175, 1177, 1179-80 (1990), "employers have no right to a prior warning or instruction from the government proceeding (sic) the imposition of sanctions for violations of IRCA." (citing *Mester v. INS*, 879 F.2d 561 (9th Cir. 1989)). *Cf. N. Mich. Fruit*, 4 OCAHO no. 667 at 691.

Nevertheless, it appears that the dairy was expressly notified in paragraph three of the Notice of Technical and Procedural Failures that there might be a NIF. It provides,

> NOTE: Additional failures to meet the employment verification requirements of

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[8] The reference is apparently to the documents the dairy received on May 30, 2008.

> Section 274A(b) of the Act may have been discovered. These failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine (Form I-763). If a Notice of Intent to Fine is issued, it will be served separately from this notification.

In response to the motion, J J invokes only vague statements about transparency and unspecified constitutional questions regarding due process, but fails to set out any matter constituting an affirmative defense.

The sixth defense will be stricken.

G. SEVENTH AFFIRMATIVE DEFENSE

J J asserts as a seventh defense that the claims must be dismissed because the dairy exercised reasonable care to comply with all the Complainant's requests in a timely manner, and no deadlines were missed. Again, no legal authority is cited for the proposition that cooperating with an investigation means that a respondent should be insulated from the consequences of substantive violations detected in the course of the investigation. No statute, regulation, or OCAHO precedent suggests that cooperation with an administrative investigation immunizes a respondent from liability pursuant to § 1324a(a)(1)(B).

The seventh defense is substantially similar to other claimed defenses already found to be legally insufficient. That the dairy made efforts to recreate some of the missing I-9s once it realized they were missing may appropriately be considered in mitigation of any penalty that might be assessed in the event liability is found, but it fails to state an affirmative defense.

The seventh defense will be stricken.

H. EIGHTH AFFIRMATIVE DEFENSE

J J's eighth defense asserts that the Complainant unreasonably and inappropriately contravened the administrative mission of its own agency by bringing charges against the dairy. In support of this proposition, it points to a speech made by former United States Secretary of Homeland Security Michael Chertoff on September 9, 2008, "on the record," at a presentation at the Brookings Institution in Washington, D.C., in which he said in effect that the Department of Homeland Security (DHS) does not "fine people for honest errors," and that "people get fined when they knowingly violate the law." J J evidently seeks to imply that its failure to timely prepare or present I-9 forms is among the "honest errors" to which the statement referred.

A great deal of OCAHO precedent, cited by neither party, addresses the question of when agency publications, rules, and other statements bind the agency in a manner that is enforceable in this forum. *See, e.g.*, *United States v. WSC Plumbing, Inc.*, 9 OCAHO No. 1071, 9 (2001); *United*

States v. Dominguez, 8 OCAHO No. 1000, 1, 34 (1998) (collecting OCAHO cases); *United States v. De Leon-Valenzuela*, 6 OCAHO no. 899, 878, 883-888 (1996). Isolated, opaque phrases culled from the public speeches of political appointees are not among such statements, because they have no legal force, and they satisfy none of the criteria required to bind an agency. The dairy's response to the motion to strike expressly acknowledges that this assertion "may not ascend to the status of an affirmative defense," as indeed it does not.

The eighth defense will be stricken as insufficient to state a defense.

I. NINTH AFFIRMATIVE DEFENSE

The dairy's ninth defense states that all the claims must be dismissed because J J "did not knowingly aid, abet, ratify, condone, encourage, or acquiesce in any alleged unlawful actions." The dairy appears to be arguing that even if it failed to retain or produce the required I-9 forms, it should escape liability either because it did not know that its actions were unlawful, or because it should have no responsibility for the acts or omissions of its former president.

Knowledge of the illegality of one's actions has never been required in order to find liability under § 1324a(a)(1)(B). *See United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 281 n. 3 (1998); *United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 924, 933 (1994). Although ignorance of § 1324a's requirements may be considered as a mitigating factor when assessing the amount of the civil penalty, ignorance is not an affirmative defense to liability. Thus in *United States v. USA Café*, 1 OCAHO no. 42, 220, 223 (1989), where a respondent asserted that it did not act intentionally or knowingly, and that the violations were "caused by "circumstances arising within the operation of the business which were beyond the control of respondent," the administrative law judge concluded that while those circumstances might be considered in assessing penalties, they were essentially irrelevant for determining actual liability: "[a]n employer either complies with the I-9 verification requirements or he does not." The state of mind of the respondent is not a factor in making that assessment.

The ninth defense will be stricken.

J. TENTH AFFIRMATIVE DEFENSE

The tenth defense is that ICE's "claims for damages[9] must be dismissed in their entirety because such damages are not contemplated in the context of these allegations." In support of this defense, J J asserts that 1) it attempted to comply in good faith with the IRCA by recreating I-9 documents once it discovered that they were missing; 2) it has no prior history of violations, and

[9] ICE makes no claim for "damages" in this action. The relief sought, as authorized by, and set out in, the statute, is that of civil money penalties. 8 U.S.C. § 1324a(e)(5).

the current violations are non-serious; 3) it did not knowingly engage in any unlawful conduct; and 4) the mission of DHS is not to fine employers for inadvertent violations.

This defense essentially reiterates arguments previously put forth in other defenses, or raises mitigating factors to be considered in assessing the amount of the penalty to be assessed if liability is established; it does not state an affirmative defense to liability. 8 U.S.C. § 1324a(e)(5).

The tenth affirmative defense will be stricken.

K. ELEVENTH AFFIRMATIVE DEFENSE

J J asserts that all of the claims must be dismissed because of a lack of specificity in the allegations, and that the complainant "failed to inform, with accuracy and completeness, the facts sufficient to allow J J Dairy to know without questions on what grounds to make a defense." ICE argues that the complaint is sufficiently specific because the NIF identified the respondent, the actions that constituted the violation, and the names of the employees whose I-9 forms were not timely completed, retained or produced.

No facts are asserted that would support this defense or even clarify its basis. No citation of legal authority is provided. The complaint satisfies the minimal pleading standards set forth in 28 C.F.R. § 68.7 (2009), which require only sufficient information to "giv[e] the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *United States v. Broadway Tire, Inc.*, 1 OCAHO no. 250, 1611, 1611-12 (1990). The remedy, in any event, for a lack of specificity in a complaint, is a motion for a more definite statement or the use of discovery provisions. *United States v. Aguar-Arabs*, 4 OCAHO no. 642, 464, 468-69 (1994).

This defense has no legal or factual basis, and will be stricken.

L. TWELFTH AFFIRMATIVE DEFENSE

The dairy's twelfth defense asserts that the Complainant is not entitled to damages pursuant to its claims because the Respondent at no time engaged in willful violations or conduct with malice or reckless indifference to the law.

The motion to strike observes that, "assuming that leaving former I-9 responsibilities in the hands of an unpaid former officer who was over eighty years of age, and only occasionally visited Respondent's office was not tantamount to reckless indifference," the twelfth defense would still fail because no authority requires willfulness, malice, or reckless indifference in order to support a finding of liability under § 1324a. J J's response contends that its inadvertence and curative behavior should be considered.

As with other purported defenses, these matters are appropriately considered in mitigation of any penalty, but the absence of malice fails to provide an affirmative defense.

The twelfth defense is insufficient, and it will be stricken.

M. THIRTEENTH AFFIRMATIVE DEFENSE

The dairy's thirteenth defense asserts that ICE's "claims for various forms of relief are barred to the extent that [it] failed to take into account the applicable mitigating circumstances."

The purported defense directly addresses the statutory penalty factors listed in § 1324a(e)(5) and how those factors relate to J J's business. As the motion to strike points out, these factors are relevant to the assessment of civil penalties in the event liability is found, *see*, *e.g.*, *N. Mich. Fruit Co.*, 4 OCAHO no. 667 at 690, but do not assist in determining liability. *Id.* (striking respondent's "good faith" defense because it was relevant only to the assessment of penalties).

The thirteenth defense does not constitute an affirmative defense and will be stricken.

V. CONCLUSION

While the dairy contends that the legal theories behind its defenses are buttressed by the statement of facts submitted, I find to the contrary. The purported defenses, for the reasons stated, either have no application to the particular violations charged, are not, strictly speaking, affirmative defenses at all, or are not supported by the facts alleged.

ORDER

The complainant's motion to strike respondent's affirmative defenses is granted with respect to all defenses.

SO ORDERED.

Dated and entered this 30th day of June, 2009.

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Ellen K. Thomas
Administrative Law Judge