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

August 28, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324a Proceeding
	)	OCAHO Case No. 95A00092
U.S. STYLE, INC., Respondent.	)	

ORDER STAYING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On August 4, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served a Notice of Intent to Fine (NIF), NYC-94-EE000027, upon U.S. Style, Inc. (respondent). That three (3)-count citation alleged (21) violations of IRCA, 8 U.S.C. § 1324a, for which civil money penalties totaling $13,160 were proposed.

In Count I, complainant alleged that respondent hired the three (3) individuals named therein for employment in the United States 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). In the alternative, complainant alleged that respondent continued to employ those individuals knowing that they were or had become unauthorized aliens with respect to employment, in violation of IRCA, 8 U.S.C. § 1324a(a)(2). Complainant levied civil money penalties of $1,000 for each of those three (3) violations, or a total civil money penalty of $3,000 for Count I.

In Count II, complainant alleged that respondent hired the 10 individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to prepare and/or make available for inspection the Employment Eligibility Verification Forms (Forms I-9) for those individuals, in violation of IRCA, 8 U.S.C. § 1324a(a)(1)(B). Complainant assessed civil money penalties of $640 for each of the infractions numbered 1-6 and 8-10, and $500 for violation number 7, or $6,260 for the 10 Count II violations.

In Count III, complainant alleged that respondent employed the eight (8) individuals named therein for employment in the United States after November 6, 1986, and that respondent failed to ensure proper completion of sections 1 and 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 $470 for each of the violations numbered 1-5 and 7-8, and $610 for violation number 6, or a total of $3,900 for the eight (8) alleged violations in Count III.

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 such request was filed within 30 days of its receipt of the NIF.

On August 15, 1994, Emanuel F. Saris, Esquire, filed such a request on respondent's behalf.

On May 23, 1995, complainant filed the three (3)-count Complaint at issue, reasserting the 21 violations set forth in the NIF, as well as the requested civil money penalties totaling $13,160.

On May 26, 1995, a Notice of Hearing on Complaint Regarding Unlawful Employment, as well as a copy of the Complaint at issue, were served on respondent's counsel by certified mail, return receipt requested.

On June 29, 1995, respondent filed its Answer, in which it denied having violated IRCA in the manners alleged, and also asserted four (4) affirmative defenses.

In its first affirmative defense, respondent asserted that "[t]he 'unauthorized aliens' named in the July 18, 1994 Notice of Intent to Fine were not Respondent's 'employees.' They were independent contractors. Respondent was not required to verify the employment eligibility of these persons and was unaware of their unlawful status. Therefore, Respondent has not violated S 274 A (a) (1) (A) or S 274 A (a) (4) of the Immigration and Nationality Act, 8 U.S.C. S 1324a (a) (1) (A) and 1324a (a) (4)."

For its second affirmative defense, respondent argues that "[t]he verification of employment eligibility requirements set forth in S 274 A (a) (1) (B) or S 274 A (b) of the Immigration and Nationality Act, 8 U.S.C. S 1324a (a) (1) (B) and 1324a (b), apply only to employers who 'hire' 'employees' after November 6, 1986. These provisions do not apply to Respondent, regarding the 'unauthorized aliens' named in the July 18, 1994 Notice of Intent to Fine. These persons were not Respon-

dent's 'employees,' but were independent contractors. Respondent therefore was not required to verify the employment eligibility of these persons."

In its third affirmative defense, respondent asserted that "Respondent complied in good faith with the provisions of S 274 A of the Immigration and Nationality Act, 8 U.S.C. S 1324a. Respondent relied in good faith on generally accepted business standards in its field of industry relating to who is an 'independent contractor.' Respondent should therefore not be penalized for its good faith reliance."

For its fourth and final affirmative defense, respondent contends that "Respondent relied on the I.N.S. Employer Handbook to assist it in complying with the new Act. The INS should be estopped from assessing fines against Respondent where Respondent relied on the clear, unambiguous wording in the Handbook which states that employers are not required to complete Form[s] I-9 for independent contractors."

On July 31, 1995, after requesting an extension of time in order to respond to respondent's Answer, complainant filed an unopposed pleading captioned Motion to Strike Answer and Affirmative Defenses, in which it requested that all four (4) of respondent's affirmative defenses be stricken because they are insufficient as a matter of law and fact, since respondent failed to include a statement of facts in support of those assertions.

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.

Accordingly, 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 (FRCP) as a guideline in considering motions to strike affirmative defenses. United States v. Chavez-Ramirez, 5 OCAHO 774, at 2 (1995); United States v. Chi Ling, Inc., 5 OCAHO 723, at 3 (1995); 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).

It is well settled that 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. United States v. Chavez-Ramirez, 5 OCAHO 774, at 3; United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (1993). Thus, 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.

All four (4) of respondent's affirmative defenses are based upon respondent's assertion that the individuals cited in the Complaint were independent contractors, as opposed to employees, per se. Consequently, respondent has argued that it was not required to verify the employment eligibility for those individuals, owing to their status.

Part Seven of the INS Handbook for Employers expressly states that employers are not required to fill out Forms I-9 for independent contractors. Thus, if the individuals cited in the Complaint are in fact shown to be independent contractors, it may be necessary to dismiss the Complaint.

Accordingly, respondent is hereby ordered to file an amended answer within 15 days of its acknowledged receipt of this Order, specifically setting forth in a detailed manner why it believes that the individuals cited in the Complaint should be classified as independent contractors, including the statutory, regulatory, and/or decisional bases upon which it relies. Complainant will be permitted to respond to respondent's pleading pursuant to 28 C.F.R. Section 68.9(d).

In the event that respondent fails to file such an amended answer, complainant's July 31, 1995 Motion to Strike Affirmative Defenses will be granted.

JOSEPH E. MCGUIRE
Administrative Law Judge