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

United States of America, Complainant v. Samuel J. Wasem, General Partner, d.b.a. Educated Car Wash, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100353.

ORDER GRANTING IN PART AND RESERVING IN PART
COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On September 1, 1989, Respondent filed an Answer to the Complaint alleging fifteen record-keeping violations of § 1324a. In its Answer, Respondent generally denied the allegations contained in the Complaint and plead eight affirmative defenses.

On September 25 1989, Complainant filed a Motion to Strike Affirmative Defenses. In its Motion, Complainant argues that seven of eight of Respondent's affirmative defenses are insufficient because they 1) are not supported by a specific enough statement of facts; see, 28 C.F.R. § 68.6(c)(2); and, 2) rely on a legal theory that is incorrect, i.e. that an Employer's Sanctions Field Manual utilized by the United States Immigration and Naturalization Service (``INS'') confers upon employers substantive rights.

Respondent filed a Response to the Motion to Strike on October 5, 1989. In its Response, Respondent argues that it has ``provided sufficient information in answer to the Complaint to support the affirmative defenses with sufficient specificity to advise the Complainant of the nature and the substance of each and every affirmative.'' In addition, Respondent argues in more detail that the Field Manual ``itself does confer rights upon employers who may be subject to inspection and of both civil and criminal penalties.''

Thus, there are, as I see it, two issues presented by the parties. The first is whether the INS Field Manual for the employer sanctions program is a source of substantive legal rights for employers. If so, the second is whether, pursuant to 28 C.F.R. § 68.6(c)(2), Respondent plead a statement of facts that is prima facie sufficient to support its affirmative defenses.

LEGAL ANALYSIS

Both of these issues are important in continuing the ongoing effort to understand and clarify the nature, availability and applicability of affirmative defenses to employer sanctions proceedings, especially with respect to the more limited instances in which only allegations of record-keeping violations are involved.

A. Suggested Standards for Assessing Motions to Strike Affirmative Defenses as Derived from Case Law Analysis

In general, motions to strike are often looked on with disfavor because of the tendency for such motions to be asserted for dilatory purposes. See, Wright and Miller, Federal Practice and Procedure, vol. 5, § 1380, at 783. A persistent exception, however arises in those instances ``where the motion may have the effect of making a trial less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion will be well taken.'' See, State of California ex rel. State Lands Commission v. United States, 512 F. Supp. 36 (D.C. N.D. Ca. 1981), citing, Narragansett Tribe v. So. R.I. v. So. R.I. Land Devel., 418 F. Supp. 798, 801-802 (D.R.I. 1976).

Neither the regulations governing these proceedings nor any OCAHO decisions discuss or analyze the quantum and quality of facts necessary to support a pleading of an affirmative defense as required by 28 C.F.R. § 68.6(c)(2). Nor is it clear, from the regulations, what is meant by a ``statement'' of facts, or under what set of legal/factual circumstances the pleading of an affirmative defense is specifically insufficient.

Neither of the parties in their respectively helpful but limited legal memorandum address exactly the balance of this issue. Both conclusorily assert their respective arguments without stating what standard(s) they are using to support their conclusions. Complainant states categorically that Respondent did not plead a sufficient statement of facts in support of its affirmative defenses. Similarly, Respondent contends that it has plead a sufficiently specific statement of facts. The knot of the question, however, is what is sufficient?

In trying to understand this question more thoroughly, fruitful analogies might be derived from examining interpretations of Rule 12(f) of the Federal Rules of Civil Procedure (``FRCP''). See also, Wright and Miller, Federal Practice and Procedure, vol. 5, § 1381, at 789. Rule 12(f) deals with the practice and procedure of motions to strike and includes among its many grounds ``insufficient defense.'' Id.

A defense can be ``insufficient'' for either legal or factual reasons. See e.g., United States v. 187.40 Acres of Land, More or Less, situated in Huntingdon County, Commonwealth of Pennsylvania, Tracts Nos. 1843 and 1844, 381 F. Supp. 54 (D.C. Pa. 1974). In the elegantly appellated 187.40 Acres of Land, More or Less, the District Court helpfully sketched out some of its views on deciding motions to strike affirmative defenses:

> The duty of this court is to determine whether such defenses as presented do indeed present substantial questions of law or fact which may not be stricken. Carter-Wallace, Inc. v. Riverton Laboratories, 47 F.R.D. 366 (S.D.N.Y. 1969). If any such substantial questions exist, the motion cannot be granted. Angel v. Ray, 285 F. Supp. 64 (C.D. Wis. 1968); United States v. Pennsalt Chemical, 262 F. Supp. 101 (E.D. Pa. 1967). Neither will it be granted if the insufficiency of the defense is not clearly apparent on the face of the pleadings, Ryer v. Harrisburg-Kohl Bros., Inc., 53 F.R.D. 404 (M.D. Pa. 1964), nor can reasonably be inferred from any state of facts in the pleadings. M.L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (E.D. Pa. 1964). The purpose of such narrow standards is `. . . to provide a party the opportunity to prove his allegations if there is a possibility that his defense or defenses may succeed after a full hearing on the merits.' Carter-Wallace Inc. v. Riverton Laboratories, supra, 47 F.R.D., at 368.

In another Pennsylvania District Court decision, it was found that a motion to strike is not appropriate in two circumstances. See. Linker v. Custom-Bilt Machinery, Inc. 594 F. (Supp. 894 (D.C. Pa. 1984). First, a motion to strike should not be granted when the sufficiency of the defense depends upon disputed issues of fact. Linker, supra, citing, Mohegan Tribe v. State of Conn., 528 F. Supp. 1359, 1362 (D.C. Conn. 1982); American Oil Co. v. Cantelou Oil Co., 41 F.R.D. 143, 145-47 (W.D. Pa. 1966). Second, a motion to strike is not the appropriate procedure to determine disputed or unclear questions of law. Linker, supra, citing, Mohegan, supra, at 1362; see also, 2A J. Moore, Moore's Federal Practice, 12.21 at 2437 (``A motion to strike a defense will be denied if the defense is sufficient as matter of law or if it fairly presents a question of law or fact which the court ought to hear.'').

From these helpful approaches, I derive my own view of how to resolve the issues presented in the case at bar. I am inclined to examine first the prima facie viability of the legal theory upon which the affirmative defense is premised. Second, if the affirmative defense is based on a legal theory which is not ``clearly insufficient on its fact,'' then it is necessary, as I see it, to proceed with an analysis of whether the supporting statement of facts presents something more than ``mere conclusory allegations.'' See, Mohegan, supra; see also, Kohen v. H.S. Crocker Co., 260 F.2d 790, 792 (5th Cir. 1958). If the legal theory on which the affirmative defense is not ``clearly insufficient,'' and the supporting statement of facts

presents something more substantial than ``mere conclusory allegations,'' I intend to deny the motion to strike.

B. Prima Facie Viability of Respondent's Legal Theories

As stated, Complainant has moved to strike seven of Respondent's eight pleaded affirmative defenses. In order to rule on Complainant's Motion, I find that it is necessary to examine each opposed affirmative defense and precisely analyze the applicability of a motion to strike in terms of the standards I have suggested above.

The legal theory upon which Respondent's first affirmative defense is based requires a conclusion that the INS Field Manual, supra, has the force of law in such a way as to confer substantive legal rights on individuals. See, Respondent's ``Answer,'' 4A. Similarly, four of Respondent's other affirmative defenses are also premised on Respondent's view that the Field Manual is a source of substantive rights. Id. 4E, 4F, 4G, 4H.

In its Response to Complainant's Motion, Respondent argues that the ``Field Manual itself does confer rights upon employers who may be subject to inspection and of both civil and criminal penalties resulting from violations . . . .''

I do not agree with Respondent. In my view, the INS Field Manual is not a source of substantive rights for employers because it was, as I see it, promulgated by INS for the purpose of organizing and ``facilitating'' its own internal agency ``housekeeping'' and was not intended to be utilized as a supplemental source beyond the statute and the regulations to confer significant procedural protections. See, American Farm Line v. Black Ball Freight Service, 397 U.S. 532, 538, 90 S. Ct. 1288, 1292, 25 L. Ed. 547 (1970). In American Farm Line, the Court distinguished between functional in-house ``tools'' which ``aid'' an agency (in that case, the Interstate Commerce Commission) in ``exercising its discretion to meet an `immediate and urgent need' '' and ``rules'' which confer important procedural benefits upon individuals. (emphasis added)

While recognizing that the classificatory process of delineating an agency manual as being solely ``in-house'' is becoming an increasingly difficult task in the modern administrative state,[1] it nevertheless is my current view that the INS Field Manual for the

[1]Professor Davis has described the distinction between substantive rules and general statements of policy as a ``fuzzy product.'' See, 1 K. Davis, Administrative Law Treatise, § 5.02, at 294-95; see also, more generally, Note, ``An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures,'' 73 Georgetown L.J. 1007 (1985).

employer sanctions program is more like a discretionary agency ``tool'' than a binding adjudicative ``rule.''

At its outset, the Field Manual discusses, in characteristically deployed terms, its purpose:

> This manual provides INS officers with a reference to the law and regulations and the Service's policy and practices regarding its enforcement. The procedures in this manual are premised upon existing Service line authority and organizational structure. See, U.S. DOJ Field Manual for Employer Sanctions, at section I-1 (emphasis added).

I am not persuaded, and Respondent certainly has not shown, that the purpose of this Field Manual constitutes a source of substantive rights for employers. Rather, I see the Field Manual as being an in-house reference text which attempts to bring together in a coordinated way the statutory, regulatory, and INS policy ``directives'' which INS agents need to know in order to carry out their administrative mandate. This reference text contains, as I see it, not only ``the Service's policy and practices regarding its enforcement'' but also what, according to influential administrative law scholars, is referred to as ``interpretative rules.''[2]

In a comparative context, the Ninth Circuit recently held that an INS operating instruction was a ``general statement of policy'' and was validly promulgated without notice-and-comment proceedings pursuant to 5 U.S.C. 553. See, Mada-luna v. Fitzpatrick, 813 F.2d 1006 (9th Circ. 1987). In reaching this conclusion, the ninth Circuit, in Mada-Luna, states that ``the critical factor to determine wheth-

[2]Professor Davis is instructive on clarifying what constitutes an ``interpretative rule'': ``When Congress enacts a statute and assigns the administration of it to an agency, the agency encounters questions the statute does not answer and the agency must answer them. The agency heads must instruct their staffs what to do about such questions, and the instructions are interpretative rules . . . an inescapable part of administration is to give meaning to the law that the administrators are carrying out. Administration compels not only interpreting such law as bears on any immediate question an administrator must answer, but also deciding what to do when no law answers the question. When an administrator either gives meaning to a statute or answers a question that cannot be answered by finding the meaning in the statute, and when he (sic) states in general terms what he is doing, the statement is called an `interpretative rule' whether or not anything is in fact interpreted'' (emphasis added), 2 K. Davis, supra, § 7.11, at 56; but see, ``An agency's statement that asserts or changes the agency's law by affecting rights or obligations is a rule'' (emphasis added), in 1982 Supplement to Administrative Law Treatise, § 7.5, at 171; and cf., B. Schwartz, Administrative Law § 4.6, at 158-59 (2d ed. 1984) (``An interpretive rule is a clarification or explanation of existing laws or regulations, rather than a substantive modification of them.''); United States Dep't of Justice Attorney General's Manual on the Administrative Procedure Act (1947), at 30, n.3 (defining substantive rules as ``rules, other than organizational or procedural . . . .'') (emphasis added); see also, Saunders, ``Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation,'' 1986 Duke L.J. 346, 349 (1986).

er a directive announcing a new policy constitutes a rule or a general statement of policy is the `extent to which the challenged (directive) leaves the agency or its implementing official, free to exercise discretion to follow, or not to follow, the policy in the individual case.' '' Id., citing, accord, Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983), cert. denied, 466 U.S. 927, 104 S. Ct. 1708 (1984). More specifically, the Mada-Luna court went on to say that ``to the extent that the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make `individualized determinations,' it constitutes a general statement of policy.'' Id. (omit citations) Alternatively, ``to the extent that the directive `narrowly limits administrative discretion' or establishes a `binding norm' that `so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion' it effectively replaces agency discretion with a new `binding rule of substantive law.' '' Id. citing, Ryder, supra, 716 F.2d at 1377.

Alternatively, the Ninth Circuit has, in another context, also discussed the distinction between substantive and procedural rules.

> For purposes of the APA, substantive rules are rules that create extra-statutory obligations pursuant to authority properly delegated by Congress. Alcarez v. Block, 746 F.2d 593, 613 (9th Cir. 1984). Interpretative rules merely clarify or explain existing law or regulations and go `to what the administrative officer thinks the statute or regulation means.' Id. (quoting Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952). See, Southern California Edison Company v. Federal Energy Regulatory Commission, 770 F.2d 779, 782 (9th Cir. 1985).

From this not uncomplicated analysis in Mada-Luna and Southern California Edison Company, I partially and analogously derive my view that the INS Field Manual is a reference text for INS agents; that it contains ``interpretative rules'' and ``general statements of policy,'' not ``directives'' per se but suggested directives, the ``legal'' force of which is primarily internal to the agency's necessary mandate to ``educate and provide direction to those agency personnel in the field who are required to implement its policies and exercise its discretionary power in specific cases.'' Id. and, H. Friendly, The Federal administrative Agencies, 145-46 (1962) (``one of the values of the policy statement is the education of agency members in the agency's work''), quoted in, Noel v. Chapmen, 508 F.2d 1023, 1030 (2d Cir. 1975), cert. denied 423 U.S. 824, 96 S. Ct. 37, (1975); Bonsfield, ``Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy Under the APA,'' 23 Admin L. Rev. 101, 115 (1970-71) (``It may be that `general statements of policy' are rules directed primarily at the staff of an agency describing how it will conduct

agency discretionary functions, while other rules are directed primarily at the public in an effort to impose obligation on them.''), quoted in Noel, 508 F.2d at 1030; also, Cf. Schweiker v. Hansen, 450 U.S. 786, 789, 101 S. Ct. 1468, 1471. (Wherein the Court conclusorily held that a Social Security Administrative Claims Manual was ``not a regulation. It has no legal force, and it does not bind SSA. ``Id).[3]

Accordingly, it is my present view that a decision by an INS investigator not to follow the agency's employer sanctions Field Manual is not, per se, a ``violation'' of ``due process rights'' derivative from a legal source in the Field Manual itself, but instead requires a Respondent to show, at the very least, that the judicability of its defenses, if any, depends on whether the effect of the agency decision not to follow its internal ``housekeeping'' policies is capable of redress pursuant to statute, regulation of some appropriate constitutional ground. In other words, it is not the technical failure to follow the Field Manual that is at issue, but whether the nature of the ``harm,'' if any, which results from the actions taken by the agency subsequent to the decision not to follow the internal guidelines, and whether such a harm is susceptible of substantive redress under a legal theory that is provided for in the statute, regulations of the Constitution. Cf. United States v. Caceres, supra.

> Accordingly, I intend to grant Complainant's Motion to strike Affirmative Defenses 4A, 4E, 4F, 4G, 4H on the grounds that respondent has plead an insufficient defense premised on a legal theory which I find presents No prima facie viability.[4]

Having ruled on five of the seven questioned affirmative defenses, I turn my attention to the remaining two, 4C and 4D. Neither 4C or 4D are premised in any way on a legal theory that is based on the Field Manual.

Affirmative Defense 4C states:

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[3]Also, the Supreme Court, in arguably analogous contexts, has concluded that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants against the Department. See e.g. United States v. Caceres, 140 U.S. 741 (1979); Sullivan v. United States, 348 U.S. 170 (1954).

[4]My conclusion here is not to be equated with rejecting the possibility that Respondent might file, in the alternative, a pleading or pleadings which incorporate what appears to be its concern about a possible illegal search and seizure, or its belief that there is an issue of ``selective prosecution,'' or its apparent belief that its unspecified due process rights have been implicated in the allegation that INS failed to give proper notice or even an argument premised on a theory of equitable estoppel. I am, without question, interested to hear and consider any relevant legal and factual arguments that Respondent might make in this regard, but nothing in the existing record posits a viable legal theory, supported by requisite facts, which, at this point, merits such consideration.

> Border Agents by letter dated March 15, 1989 [Exhibit B] advised that employees listed in Count I of the Notice of Intent to Fine were not to be rehired or violation of . . . IRCA would occur. These employees were never rehired.

Respondent does not offer, in any of its pleadings, including its ``Response to Motion to Strike Affirmative Defenses,'' the prima facie grounds, legal and factual, for its belief that 4C constitutes an affirmative defense.

Alternatively, Complainant states in its Motion that ``Respondent overlooks the fact that the violations alleged in the notice of intent to fine stem from respondent's failure to verify the employment eligibility of those persons while he employed them, not from his rehiring them after he was notified that they were not eligible to work in this country.''

I agree with Complainant. An examination of Exhibit B reveals that it is, in effect, a warning letter from a Senior Border patrol Agent stationed in Oxnard, California. The gist of the warning contained therein concerns the re-hiring of individuals identified as being aliens unauthorized to work in the United States. The letter in no way says anything about the record-keeping violations that Respondent has been charged with and seems, to me, to be completely irrelevant to the allegations contained in the Complaint as charged.

Accordingly, I find 4C to be a clearly ``insufficient defense,'' and not meritorious of a full hearing. Thus, I intend to grant Complainant's Motion to Strike Affirmative Defense 4C for that reason.

Turning to Affirmative Defense 4D, I again note that Respondent does not offer, in any of its pleadings, the prima facie grounds, legal and factual, which would support its assertion of an affirmative defense. In its totality, Affirmative Defense 4D states:

> Border Agents sent confusing and misleading instructions to the employer by letters dated April 3, 1989, April 4, 1989, and April 6, 1989 [Exhibits C, D, E] and in effect precluded employer from complying with the provisions of 274(a) INA.

This conclusory assertion is, in my view, insufficient both in terms of its stating clearly what legal theory it is proceeding under, and also in terms of its stating facts which support that legal theory. In other words, it does not sufficiently inform me (or Complainant for that matter), even on a prima facie basis, what its defense actually consists of and why it is entitled to affirmative relief from (or dismissal of) the INS charges as lodged in the Complaint against it.

Despite its clearly apparent inadequacy, however, I nevertheless believe that there may be a barely sufficient basis in 4D for me to reserve ruling on Complainant's Motion to Strike with respect to 4D until Respondent has had an opportunity to amend 4D in a way

that is consistent with the standards that I have tried to suggest in this Order.[5]

Accordingly, I am taking under advisement Complainant's Motion to Strike Affirmative Defense 4D until a time subsequent to 5 days, i.e. October 31, 1989, from the date of this Order when I shall consider any amendments or supplemental pleadings which Respondent might want to file pursuant to 28 C.F.R. § 68.6(e), in support of Affirmative Defense 4D.

SO ORDERED: This 25th day of October, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

[5]Apparently, Respondent is asserting some kind of an estoppel argument as the basis for its affirmative defense. While such an argument is based on a legal theory that has prima facie viability, Respondent presents no law or even facts in support of its pleading. See e.g., INS v. Hibi, 414 U.S. 5 (1973); INS v. Miranda, 459 U.S. 14 (1982); Heckler v. Community Health Service, 104 S. Ct. 2218 (1984). At the very least, an affirmative defense based on estoppel requires a prima facie showing of ``affirmative misconduct,'' Bolourchian v. INS, 751 F.2d 979, 980 (9th Cir. 1984) (per curiam), which results in significant injury. See, INS v. Miranda, supra, at 17; see also, Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1100 (9th Cir. 1981).