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

JOSE A. SALAZAR Charging Party, and	)	
UNITED STATES OF AMERICA, Complainants,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 20B00120
DESERT PALACE, INC., D/B/A CAESARS PALACE, A WHOLLY-OWNED SUBSIDIARY OF PARK PLACE ENTERTAINMENT CORP., Respondent	)	Judge Robert L. Barton, Jr.

ERRATA

(*May 1, 2001*)

A number of typographical errors appear in this court's April 26, 2001, Order Granting Respondent's Motion to Amend Answer and Denying Complainant's Motion to Strike Affirmative Defenses. These errors are identified and corrected as follows:

(1) The second sentence of the first paragraph of section I, headed "**BACKGROUND**," includes an incorrect citation reading "8 U.S.C. 1324b(1)(6)." The correct citation is 8 U.S.C. § 1324b(a)(6).

(2) The first sentence of section II.A.1., headed "OCAHO Rules and Federal Rule of Civil Procedure 15," misquotes 28 C.F.R. § 68.9(e) by indicating that it permits amendments to pleadings "upon such conditions as are necessary to avoid prejudicing the public interest or the other party." The correct quotation is "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties..."

(3) The first sentence of the second paragraph of section II.A.2., headed "Ninth Circuit Standards," states as follows: "According to Leighton, '[r]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality.' 833 F.2d at 186 (quoting Webb, 655 F.2d at 979), regardless of whether the amendment seeks to add parties or claims. 833 F.2d at 186." The correct phrasing is: "According to Leighton, '[r]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality,' regardless of whether the amendment seeks to add parties or claims. 833 F.2d at 186 (quoting Webb, 655 F.2d at 979)."

(4) The third sentence of the first paragraph of section IV., headed "**ANALYSIS**," states as follows: "Respondent's answer should be liberally construed in order to provide Respondent with every reasonable opportunity to present any and all of its defenses this cause of action." The correct phrasing is: "Respondent's answer should be liberally construed in order to provide Respondent with every reasonable opportunity to present any and all of its defenses to this cause of action."

SO ORDERED.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

UNITED STATES DEPARTMENT OF JUSTICE
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JOSE A. SALAZAR Charging Party, and UNITED STATES OF AMERICA, Complainants, v. DESERT PALACE, INC., D/B/A CAESARS PALACE, A WHOLLY-OWNED SUBSIDIARY OF PARK PLACE ENTERTAINMENT CORP. Respondent	8 U.S.C. § 1324b Proceeding OCAHO Case No. 20B00120 Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO AMEND ANSWER AND DENYING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(April 26, 2001)

I. BACKGROUND

On May 26, 2000, the charging party, Jose A. Salazar (Mr. Salazar), filed a charge of discrimination with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). On December 20, 2000, the United States of America (Complainant or United States) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which it alleges that Desert Palace, Inc. (Respondent) violated section 274B(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. 1324b(1)(6), which prohibits certain discriminatory documentary practices in connection with the employment eligibility reverification process. At the time of the alleged incidents herein, Mr. Salazar was an asylum applicant authorized to work in the United States, and on June 13, 2000, his status was adjusted to lawful permanent resident.

The Complaint contains two counts. Count I alleges that on or about December 30, 1999, Respondent violated INA §274B(a)(6) when it required Mr. Salazar to produce an Immigration and Naturalization Service (INS) issued Employment Authorization Document (EAD) for reverification purposes. According to the Complaint, this requirement constitutes a request "for more or different

documents" than are required for the purpose and with the intent of discriminating against Mr. Salazar on the basis of his national origin and/or citizenship status. Count II alleges that Respondent engaged in a pattern or practice of demanding specific documents from only those applicants who were not United States citizens, and in requiring lawful permanent residents to undergo reverification of their employment authorization upon the expiration of their resident alien cards.

On February 6, 2001, Respondent filed an Answer to the Complaint with the court. In addition to denying each of the substantive allegations set forth in the Complaint, Respondent's Answer contains Four Affirmative Defenses. The First Affirmative Defense alleges that "all actions taken by Respondent with respect to Mr. Salazar were based on legitimate, non-discriminatory reasons," and that it "acted in good faith at all times." The Second Affirmative Defense alleges that Mr. Salazar's claim is barred by the doctrine of estoppel due to his conduct, "including his intentional failure to verify his employment eligibility as required by federal law." The Third Affirmative Defense alleges that "the Complaint fails to state a claim upon which relief can be granted to the extent that it fails to allege each and every element of each and every cause of action Complainant attempts to plead." The Fourth Affirmative Defense states "Respondent avers and alleges as an affirmative defense the requirement of requesting specific documentation when the employer has constructive or actual knowledge of an individual's lack of employment authorization."

On February 26, 2001, Complainant filed a Motion to Strike Affirmative Defenses, Or In the Alternative, to Require Respondent to Amend its Answer (Motion to Strike) on the grounds that the affirmative defenses are "incomplete, legally insufficient, and fail to set forth a statement of facts in support of each affirmative defense as required by the OCAHO rules." In the alternative, Complainant argued that Respondent should be required to amend its answer to provide statements of facts to support its affirmative defenses.

On March 16, 2001, Respondent filed a Response to Complainant's Motion to Strike. Respondent asserted that motions to strike were disfavored by the courts, and further conceded that Complainant was correct when it asserted that Respondent's affirmative defenses should include a statement of facts in support of each affirmative defense. Respondent requested that its Amended Answer, which includes the requisite statements of facts, be accepted by the Court.

Complainant requested and was granted an extension until April 9, 2001, to file its Reply to Respondent's Response to the Motion to Strike. In its Reply, Complainant stated that it had met the appropriate standard for striking Respondent's affirmative defenses "because they either fail to plead sufficient facts or because they lack prima facie validity." Complainant further stated that if Respondent's Amended Answer was accepted by the Court, the affirmative defenses in the Amended Answer should be stricken because they were legally insufficient. Complainant objects to Respondent's First Affirmative Defense because Respondent failed to establish how it was acting in good faith. Complainant objects to Respondent's Second Affirmative Defense, that the claim should be barred by the doctrine of estoppel, on

the ground that the Complaint was brought by the United States, not by the charging party, although he is a party in the case. Complainant objects to Respondent's Third Affirmative Defense that the Complaint failed to state a claim upon which relief could be granted on the ground that the defense is "legally devoid of merit" and is "only appropriate as a motion to dismiss for failure to state a claim, and not as an affirmative defense." Complainant objects to Respondent's Fourth Affirmative Defense because Respondent had failed to state facts in support of its allegation that it possessed "constructive or actual" knowledge that Mr. Salazar was no longer authorized to work in the United States," and had not "cited any authority which would allow it to demand specific documents from Mr. Salazar under such circumstances, much less to discharge him from his job."

II. STANDARDS OF REVIEW

A. Motions to Amend Pleadings

1. OCAHO Rules and Federal Rule of Civil Procedure 15

The OCAHO Rules permit amendments to pleadings "upon such conditions as are necessary to avoid prejudicing the public interest or the other party." See 28 C.F.R. § 68.9(e). This OCAHO rule is analogous to and is modeled upon Rule 15(a) of the Federal Rules of Civil Procedure (FRCP), and accordingly it is appropriate to look for guidance to the case law developed by the federal courts in determining whether to permit requested amendments under Rule 15(a). United States v. WSC Plumbing, Inc., 8 OCAHO no. 1045, 696, at 701 (2000), 2000 WL 831834, at *4; United States v. Agripac, Inc., 8 OCAHO no. 1028, 399, at 400-01 (1999), 1999 WL 1295207, at *1-2. Because this action arose in the State of Nevada, decisions of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) are pertinent. However, to the extent that those decisions concern Rule 15 of the FRCP, rather than the OCAHO Rules, those decisions are persuasive but not binding authority.

2. Ninth Circuit Standards

The dominant Ninth Circuit case governing Rule 15(a) is DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987), which continues to be binding authority. See United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981); Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999); Royal Ins. Co. of America v. Southwest Marine, 194 F.3d 1009, 1016 & n. 9 (9th Cir. 1999).

According to Leighton, "[r]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality." 833 F.2d at 186 (quoting Webb, 655 F.2d at 979), regardless of whether the amendment seeks to add parties or claims. 833 F.2d at 186. However, the Leighton Court made clear that motions for leave to amend should not be granted automatically. Specifically, the court identified five factors relevant to determining the propriety of granting a motion for leave to amend: (1) bad faith by the

movant, (2) undue delay, (3) prejudice to the party being added; (4) whether the plaintiff had previously amended the complaint, and (5) futility of the amendment. Id. & n. 3. Of these five factors, bad faith, prejudice and futility appear most important. Indeed, undue delay appears to be mere evidence of prejudice or bad faith, rather than an independent factor, and is therefore insufficient in itself to justify denying a motion to amend. Leighton, 833 F.2d at 187-88; similarly, recidivism in the filing of motions to amend-which the Leighton court raises in a footnote-seems to constitute a basis for denial of a motion to amend only insofar as it reflects bad faith on the part of the movant; it is not a dispositive factor in itself and is only "occasionally considered." Id. at n. 3.

Rule 15(a)'s bias in favor of granting leave to amend is reflected in the Ninth Circuit's conclusion that a trial court's denial of a motion for leave to amend a complaint must be supported by "contemporaneous specific findings" either of prejudice, bad faith, or futility. Id. at 186-87. Indeed, a trial court's failure to set forth such findings constitutes an abuse of discretion warranting reversal. Id. at 187.

B. Motions to Strike Affirmative Defenses

The OCAHO Rules contain no express provision authorizing Administrative Law Judges (ALJ's) to entertain motions to strike affirmative defenses. However, the OCAHO Rules do provide that the FRCP "may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." See 28 C.F.R. § 68.1. Thus, it is well established that FRCP 12(f), which governs the adjudication of motions to strike affirmative defenses in the United States District Courts, may be used as a "general guideline" when an OCAHO ALJ is confronted with such a motion. See, e.g., Toussaint v. Tekwood Assocs., Inc., 6 OCAHO no. 892, 784, at 787-88 (1996), 1996 WL 670179, at *3; United States v. Dominguez, 6 OCAHO no. 876, 560, at 562-63 (1996), 1996 WL 559637, at *2.[1]

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[1] OCAHO precedents appearing in bound volumes or on OCAHO's website are cited according to the following format:

Ruan v. United States Navy, 8 OCAHO no. 1046, 714, at 716 (2000).

(1) "Ruan v. United States Navy" refers to the case name.
(2) "8 OCAHO" refers to the volume number of the relevant bound volume containing OCAHO precedents. Decisions published on OCAHO's website are also catalogued according to these volume numbers.
(3) "no. 1046" refers to the reference number assigned to the specific decision. Each published OCAHO decision bears a chronological reference number. In the example, "no. 1046" simply reflects that Ruan is the 1,046th OCAHO decision that has been published.

(continued...)

FRCP 12(f), incorporated into the OCAHO Rules as a general guideline by 28 C.F.R. § 68.1, states that,

> [u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Motions to strike affirmative defenses are disfavored and are infrequently granted. See Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986). The Ninth Circuit Court of Appeals applies an abuse of discretion standard to trial court decisions regarding motions to strike affirmative defenses. See Federal Savings & Loan Ins. Co. v. Gemini Management, 921 F.2d 241, 244 (9th Cir. 1990).

The OCAHO Rules indicate that a Respondent's Answer "shall include ... a statement of the facts supporting each affirmative defense." See 28 C.F.R. § 68.9(c)(2). By requiring respondents to provide a statement of facts in support of each affirmative defense, the OCAHO rule deviates from the more liberal pleading requirement of FRCP 8(c), which permits affirmative defenses to be pleaded with only a minimal degree of specificity. Therefore, if a responding party in an OCAHO proceeding fails to include a statement of facts in support of an affirmative defense, an OCAHO ALJ may, on motion, strike that defense from the Answer. United States v. A & A Maintenance Enter., Inc., 6 OCAHO no. 852, 265, at 267 (1996), 1996 WL 382262, at *2. In the alternative, an ALJ may, either on motion or *sua sponte*, require a defending party to supplement its affirmative defenses with the required statements of facts. Cf. United States v. Mark

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[1](...continued)

(4) "714" refers to the page number of the relevant bound volume upon which the cited decision begins. Thus, in the example, Ruan begins on page 714 of bound volume 8.

(5) "at 716" refers to the pinpoint citation for the language or concept that is being cited.

(6) When citing looseleaf opinions that have been published on OCAHO's website but that have not yet been paginated for publication in a bound volume, no first page is indicated in the citation. Instead, such cases are cited only by reference number and pinpoint citation. Thus, in the following citation, United States v. Allen Holdings, Inc., 9 OCAHO no. 1059, at 2 (2000), "at 2" refers to the pinpoint citation within the looseleaf opinion.

Published OCAHO decisions are available on Westlaw (database identifier FIM-OCAHO), or on OCAHO's website (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

Carter d/b/a Dixie Indus. Serv. Co., 6 OCAHO no. 865, 458, at 467 (1996), 1996 WL 455009, at *7.

IV. ANALYSIS

Generally, a motion to strike an affirmative defense should not be granted unless the insufficiency of the defense is clearly apparent or the moving party shows that it will be prejudiced if the motion is not granted. The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where the factual background for a case is largely undeveloped. See Cipollone, 789 F.2d at 188 (internal citations omitted). Respondent's answer should be liberally construed in order to provide Respondent with every reasonable opportunity to present any and all of its defenses this cause of action. See United States v. Valencia and Sons, Inc., 2 OCAHO no. 387, 724, 725 (1991).

Moreover, even if the case had advanced to the stage where substantive adjudication of the defenses were possible, I would be disinclined to address them, as a prudential matter, until they became the subject of a motion to dismiss. Many courts hold that motions to strike affirmative defenses should be granted only if (1) the movant shows that the defense lacks any conceivable relation to the controversy, and (2) the continued presence of the defense in the pleading will be unfairly prejudicial to the movant. See, e.g., American Buying Ins. Servs. v. S. Kornreich & Sons, Inc., 944 F. Supp. 240, 250 (S.D.N.Y. 1996); Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244, 1249 (M.D. Fla. 1996). On the basis of the record before me, I simply cannot conclude with any confidence that Respondent's affirmative defenses lack any conceivable relation to the controversy. Further, Complainant has not shown that the continued presence of the defenses in Respondent's Answer will be unfairly prejudicial to Complainant.

1. Respondent's First Affirmative Defense

In the First Affirmative Defense, Respondent asserts that all actions taken with respect to Mr. Salazar were based on legitimate, non-discriminatory reasons, and that Respondent acted at all times in good faith. Complainant contends that Respondent's good faith defense should be stricken because it is both unnecessary and legally deficit.

Respondent's affirmative defense raises mores than a general statement of good faith. Respondent asserts that the actions taken with respect to Mr. Salazar were based on legitimate, non-discriminatory reasons. In fact, in paragraphs 30 and 31 of its Amended Answer, Respondent details the actions taken to reverify the Form I-9 in accordance with the law. This is more than an assertion of good faith; it is an assertion of compliance with federal law. This states a facially valid defense, and thus the motion to strike is denied.

2. Respondent's Second Affirmative Defense

Respondent's Second Affirmative Defense asserts that Mr. Salazar's claim is barred by the doctrine of estoppel, based upon his conduct, including his intentional failure to verify his employment eligibility as required by federal law. The United States argues that the estoppel claim fails to state the four elements necessary to make a traditional estoppel claim and also that, even if respondent set forth facts to claim traditional estoppel, the government may not be estopped because the respondent has failed to plead the facts necessary to meet the much higher standard of establishing estoppel against the United States.

As to the point that the Respondent has not pled or shown the four elements necessary to make a claim of estoppel, the Rules of Practice require a statement of facts supporting each affirmative defense; the Rules do not require that a brief be filed in support of the affirmative defense. Respondent has the burden of showing estoppel but it does not have to do so in its affirmative defense. Respondent has set forth in its affirmative defense facts in support of its affirmative defense which provide Complainant with sufficient notice of the nature of the defense. See United States v. Valencia and Sons, Inc., supra.

As to the assertion that the affirmative defense fails to assert facts necessary to meet the higher standard of establishing estoppel against the United States, I would note that the complaint contains two counts; one involves an assertion of alleged documentary abuse committed against Mr. Salazar and the other involves a pattern or practice charge. Although the second affirmative defense does not specify the counts or paragraphs of the complaint to which it is directed, it appears to be directed to the first count involving Mr. Salazar, not the pattern or practice count. To the extent that in Count I the United States is pursuing a claim on behalf of an individual, the traditional standards for estoppel, rather than the higher standards normally applicable to the government, may be applicable.

As to Salazar, the affirmative defense notes that Mr. Salazar failed to present employment verification documents after repeated requests for the same by his supervisor and the Compliance Administrator to provide Human Resources with his present documents to reverify his employment eligibility. The defense asserts that Mr. Salazar's intentional failure to comply with the law bars his action. This states a facially valid defense, and thus the motion to strike is denied.

3. Respondent's Third Affirmative Defense

Respondent's Third Affirmative Defense asserts that the complaint failed to state a claim upon which relief can be granted. Respondent asserts that the complaint does not allege that Respondent did anything other than attempt to comply with federal laws and regulations as they pertain to employment verification for all employees.

Complainant argues, without citing any authority, that an affirmative defense of failure to state a claim is only appropriate as a motion to dismiss, not as an affirmative defense (C.'s Reply at 8). In fact, a number of cases have concluded that "failure to state a claim upon which relief can be granted" is a

permissible affirmative defense. See Middletown Plaza Assocs. v. Dora Dale of Middletown, Inc., 621 F. Supp. 1163, 1164 (D. Conn. 1985); Hanes Dye & Finishing Co. v. Caisson Corp., 309 F. Supp. 237, 242 (D. N.C. 1970); Byas v. New York City Dep't of Correction, 173 F.R.D. 385, 388-89 (S.D. N.Y. 1997); Simon v. Manufactures Hanover Trust Co., 849 F. Supp. 880, 882-83 (S.D. N.Y. 1994). Moreover, in Byas and Simon, the courts determined that the failure to state a claim defense should not be attacked through the motion to strike, given the lack of prejudice associated with retaining it.

Even assuming arguendo that Complainant is correct that this defense, if presented in a motion, would be easily defeated, I see no prejudice to Complainant in allowing the affirmative defense to remain since it has not been presented in a motion. Moreover, since a failure to state a claim defense is based on the legal insufficiency of the complaint, a detailed factual statement may be unnecessary. The motion to strike the third affirmative defense is denied.

4. Respondent's Fourth Affirmative Defense

Respondent's Fourth Affirmative Defense asserts that it had actual, specific knowledge that Mr. Salazar was no longer authorized to work in the United States, and that Mr. Salazar acknowledged this on December 29, 1999. Without such authorization and the employer's knowledge of such lack of authorization, the employer has an affirmative obligation to terminate the employee.

Complainant constructs a straw man by arguing that Respondent "appears to be asserting" that because Mr. Salazar's EAD had expired, Respondent had "constructive or actual" knowledge of his lack of work authorization and was therefore free to demand specific INS issued documents from Mr. Salazar. That is not what the affirmative defense states; rather, the defense states that Respondent had specific knowledge that Mr. Salazar was not authorized to work, and that Mr. Salazar admitted to Respondent that he was unauthorized.

Rule 68.9(c)(2) requires that there be a statement of facts to support each affirmative defense. The rules do not require the filing of a brief in support of each affirmative defense. The rules also do not require that the defense be presented in a form of a motion. Complainant's motion to strike this affirmative defense is premature. Respondent has not developed the defense or presented it in the form of a motion. There is no need for me to address the merits at this time, and I decline to do so. The motion to strike the fourth affirmative defense is denied.

V. CONCLUSION

Respondent's motion to Amend its Answer is GRANTED, and the Amended Answer is accepted for filing.

With respect to Complainant's Motion to Strike, on the basis of the record before me, I cannot conclude that Respondent's affirmative defenses are legally insufficient, and Complainant has not shown that the continued presence of the affirmative defenses in Respondent's Answer will be unfairly prejudicial to Complainant. Thus, Complainant's Motion to Strike is DENIED without prejudice.

It is so ordered.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE