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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	CASE NO. 94A00023
DAVID JENKINS, Respondent.	)	

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

I. *Procedural Background*

On February 5, 1994, the United States Department of Justice's Immigration and Naturalization Service ("INS" or "Complainant") filed a complaint with the Chief Administrative Hearing Officer ("CAHO") alleging that David Jenkins ("Jenkins" or "Respondent") hired for employment in the United States Rolando Mizael Santos-Hernandez ("Santos-Hernandez") after November 6, 1986 but failed to prepare the employment eligibility verification form ("Form I-9" or "I-9 form") and/or on May 12, 1993 failed to make available for inspection to the INS the Form I-9 of Santos-Hernandez as required by the the Immigration Reform and Control Act ("IRCA"), in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B).

On March 11, l994, Respondent filed his answer to the complaint, in which he admits that no form I-9 was prepared for Santos-Hernandez but denies that he hired Santos-Hernandez for employment in the United States after November 6, 1986. Respondent also asserts five affirmative defenses: (1) that an intent to hire Santos-Hernandez never existed; (2) that no work of any nature was performed because Santos-Hernandez was arrested prior to commencing any physical or

manual labor; (3) that even if work was commenced the nature of the work was not such as to require an INS Form I-9; (4) that Complainant's actions constitute a violation of the Fourth Amendment to the United States Constitution because of an unlawful search and seizure and (5) that Complainant's actions constitute a violation of Respondent's Fifth Amendment right to due process of law.

On April 11, l994, Complainant filed a seven-page motion to strike Respondent's affirmatives defenses with supporting points and authorities. Complainant relies on U.S. v. Samuel J. Wassem, General Partner, dba Educated Car Wash, OCAHO Case No. 89100353 (10/25/89)(Order Granting in Part and Reserving in part Complainant's Motion to Strike Affirmative Defenses) (unpublished) for precedent in determining whether I should strike an affirmative defenses. In that case, I stated that (1) I would first determine the "prima facie viability" of the legal theory underlying the affirmative defense; and (2) if the legal theory was not "clearly insufficient on its face," I would make a second examination to determine whether there was a factual underpinning that went beyond mere "conclusory allegations."

On April 25, 1994, Respondent filed an opposition to Complainant's motion in which relying on U.S. v. 187.40 Acres of Land, More or Less, situated in Huntington County, Commonwealth of Pennsylvania, Tracts Nos. 1843 and 1844, 381 F. Supp. 54 (M.D. Pa. 1974) and Linker v. Customs-Built Machinetry, Inc., 594 F. Supp. 894 (E.D. Pa. 1984), Respondent argues that federal courts hold that motions to strike should be denied if the sufficiency of the defense depends on disputed issues of fact or there is a disputed or unclear question of law. Respondent further argues that my decision in Educated Car Wash places a substantially different and higher burden on Respondent than does common law precedent because it requires both a viable theory of law and supporting facts which are not mere conclusory allegations.

Respondent argues that he is prejudiced by this substantially higher burden because: (1) discovery has not commenced; and (2) the unpublished decision in Educated Car Wash was unavailable at the time his answer was filed. Moreover, he argues that the instant case, in which only one violation is alleged is distinguishable from Educated Car Wash, which involved 15 record-keeping violations. Respondent also asserts that because the government arrested Santos-Hernandez before any work commenced, the record-keeping allegations were premature. The parties' arguments as to each affirmative defense and my findings on the motion to strike are set forth below.

II. *Discussion*

A. Legal Standard for Motions to Strike Affirmative Defenses

Although the rules of practice and procedure for administrative hearings in cases involving allegations of unlawful employment of aliens provides that Complainant may file a reply responding to each affirmative defense asserted in an answer, they do not expressly provide for motions to strike. See 28 C.F.R. § 68.9(d). The Federal Rules of Civil Procedure, however, may be used as a guideline in any situation not provided for or controlled by the rules. 28 C.F.R. § 68.1.

Rule 12(f) of the Federal Rules of Civil procedure provides that "(u)pon motion . . . the court may order stricken from any pleading any insufficient defense . . . ." This rule has been utilized by the administrative law judges in this office as a guideline in considering motions to strike affirmative defenses. See, e.g., United States v. Applied Computer Technology, 2 OCAHO 306 (3/22/91).

A motion to strike is a drastic remedy and therefore is not favored. 5A C. Wright and A. Miller, Federal Practice and Procedure (hereinafter "C. Wright and A. Miller") § 1380 at 647; Stewart Investment Co. v. Bauer Dredging Const. Co., 323 F. Supp. 907, 909 (D. Md. 1971). More specifically, a motion to strike insufficient defenses, "should not be granted when the sufficiency of the defense depends upon disputed issues of fact or unclear questions of law." United States v. Marisol, Inc., 725 F. Supp. 833, 836 (M.D. Pa. 1989) (a CERCLA case). "The court must review with extreme scrutiny a motion to strike which seeks the opportunity to determine disputed and substantial questions of law, particularly when no significant discovery has occurred in the case." U.S. v. Hardage, 116 F.R.D. 460, 463 (W.D. Okl. 1987) (a CERCLA case). Such questions of law "quite properly are viewed as determinable only after discovery and a hearing on the merits." 5A C. Wright and A. Miller, § 1381 at 674-76. Thus, "even when technically appropriate and well-founded, [a motion to strike is] often not granted in the absence of a showing of prejudice to the moving party." 5A C. Wright and Miller, § 1381 at 672.

It is important to recognize that a motion to strike insufficient defenses "serve[s] a useful purpose by eliminating insufficient defenses and saving the time and expense which would otherwise be spent in litigating issues which would not affect the outcome of the case." Marisol, 725 F. Supp. at 836. "[A] defense that might confuse the issues in the case and would not, under the facts alleged, constitute a

valid defense to the action can and should be deleted." 5A C. Wright and A. Miller, § 1381 at 665; see also F.D.I.C. v. Isham, 782 F. Supp. 524, 530 (D. Col. 1992) ("An affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstances.").

I will strike only those defenses so legally insufficient that "it is beyond cavil that Respondent could not prevail upon them." United States v. Kramer, 757 F. Supp. 397, 410 (D. N.J. 1991). "[A] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.[1] . . . The underlining 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." Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986).

In disposing of a motion attacking affirmative defenses as insufficient on their face, the court must construe defenses in a light most favorable to defendants, but in this regard allegations of the complaint are not conclusively binding on the defendants and do not bar them from asserting defenses based upon their version of the facts. McCormick v. Wood, 156 F. Supp. 483 (D.C. N.Y. 1957).

I intend to follow the guidelines of these federal decisions in determining the merits of Complainant's motion to strike. In sum, I shall strike defenses which cannot succeed under any set of circumstances; however, where there is any question of fact or any substantial question of law, I shall refrain from acting until a later time when I can more appropriately address those issues.

B. Analysis

In the case at bar, there has been little or no opportunity for discovery and therefore little or no opportunity to develop the factual background. I thus conclude that it is premature to strike defenses that

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[1] My approach in this case is not inconsistent with my prior pronouncements in Educated Car Wash. As the instant case involves different legal issues and is at the early pleading stage, I will not apply the legal doctrine enunciated in Educated Car Wash as it would be overly restrictive in this case. To do otherwise would invite error. This is an administrative proceeding with a relatively new statute and respondents should be allowed an opportunity to test and develop the viability of the law under a variety of legal theories. Unless it is clear that a respondent does not have any legal theory supported by some facts or evidence, I will permit a respondent to develop his or her defense.

have any possible merit, based upon the facts alleged in Respondent's answers.

1. First Affirmative Defense

Respondent's first affirmative defense is that he never intended to hire Santos-Hernandez. Complainant, citing Fleming v. Kane County, 636 F. Supp. 742 (N.D. Ill. 1986), asserts that "[u]nder federal law, an affirmative defense admits allegations in the complaint and then asserts facts that would defeat recovery." Complainant argues that Respondent's first affirmative defense is not based on any legal theory. Complainant further argues that the affirmative defense admits nothing; and therefore, is insufficient on its face and should be stricken.

Respondent argues that whether he lacked intent to hire Santos-Hernandez is a factual issue and whether an intent to hire is a required element of the case is a legal issue. Respondent further states that both issues are critical to this case because the complaint alleges that Respondent (1) owns and resides at property in California; (2) hired an individual; and (3) failed to prepare an I-9 form or failed to make available an I-9 form at a subsequent inspection.

Respondent further argues that whether he had an intent to "hire" the individual presents substantial issues of both fact and law, and if the Respondent affirmatively proves the allegations of this defense, then the underlying charge would fail since an essential element of Complainant's case in chief would be missing. Respondent further argues that it is irrelevant whether the allegations of the defense are subsumed in Respondent's denials in his answer to the complaint, because the critical issue is that Respondent's lack of intent, if proven, is a complete defense in and of itself. I disagree with Respondent.

The complaint alleges that Respondent failed to prepare the Form I-9 and/or failed to make available for inspection the Form I-9 for Santos-Hernandez as required by IRCA, in violation of § 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B). The complaint further alleges that Respondent violated 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) or, in the alternative, § 1324a(b)(3) and §274a.2(b)(2)(ii).

IRCA's provisions apply to all individuals hired for employment. The terms "hire" and "employment" are defined by the regulations. "Hire" means "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. § 274a.1(c)(1993). "Employ-

ment" means "any service or labor performed by an employee for an employer within the United States, including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, or otherwise included within the provisions of the Anti-Reflagging Act codified at 46 U.S.C. 8704, but not including duties performed by nonimmigrant crewmen defined in sections 101(a)(10) and (a)(15)(D) of the Act." 8 C.F.R. § 274a.1(h) (1993).

The INS regulations governing the employment of aliens specify when employment exists for IRCA purposes. The regulations acknowledge an exception for "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular of intermittent." Id. Part-time employees are covered, regardless of the number of hours of regular employment. The regulations provide for other exceptions as well, including independent contractors. 8 C.F.R. § 274a.1(f) (1993). Respondent, however, does not allege as an affirmative defense that Santos-Hernandez fits into any of these exceptions.

IRCA requires proper completion and retention of the Employment Eligibility Verification Form ("Form I-9") for each covered employee. 8 U.S.C. § 1324a(a)(1)(B). The statute does not state when the documents must be seen by the employer or when the form must be completed.[2]

The regulations, however, provide guidance on when the two sections of the form must be completed. I interpret these regulations to say that an individual is hired when the individual begins employment for remuneration (8 C.F.R. § 274a.1(c) (1993)) and that prior to such time, the individual must complete section 1 of the Form I-9 (8 C.F.R. § 274a.2(b)(1)(i)(A) (1993)). The employer may grant the employee up to three business days from the commencement of employment to produce the documents for the inspection by the employer. § 274a.2(b)(1)(ii)(A). The employer has until the end of the third business day from the first day of employment to complete section 2 of the I-9. 8 C.F.R. §

[2] One legal commentator, however, states that "[t]he only direction must be inferred from the requirements that the form be available for government inspection beginning on the date of the hiring (INA § 274A(b)(3)), and that no person be "hired" without complying with the verification obligations (§ 274A(a)(1)(B)of the INA)." See Frye and Klasko, Employment Immigration Compliance Guide, § 3.03[3][d] (Matthew Bender 1992).

274a.2(b)(1)(ii)(B), § 274a.2(b)(1)(iv) (1993).[3] The "three-day" period may be extended to 90 days after the hire if an employee presents "receipt for application" of an acceptable replacement document or documents within the first three days but is not applicable to an alien who indicates that he or she does not have work authorization at the time of hire. 8 C.F.R. § 274a.2(b)(1)(vi) (1993). The completed I-9 form must be retained and made available for inspection by the INS or the Department of Labor for a minimum of three years after the date of hire or one year after the date the individual's employment terminated, whichever is later. See INA §§ 274A(b)(3)(B) and 274a.2(b)(2).

As IRCA's verification requirements are triggered only after an employer has hired a covered individual, that Respondent hired Rolando Mizael Santos-Hernandez for employment in the United States after November 6, 1986 is an essential element of the charge. Respondent's asserted affirmative defense is that he did not intend to hire Santos-Hernandez. Intent to hire, however, is not an element of an IRCA paperwork violation. Regardless of Respondent's intent, the issue is whether Respondent in fact hired Santos-Hernandez.[4] Because I find Respondent's affirmative defense insufficient as a matter of law, Complainant's motion to strike this affirmative defense is GRANTED.

2. Second Affirmative Defense

Respondent's second affirmative defense is that Santos-Hernandez was arrested prior to commencing any physical or manual labor. Complainant argues that this affirmative defense is an issue of fact--basically a restatement of the denial of the allegations--which is insufficient on its face and therefore should be stricken.

Respondent, citing appropriate regulations, states that the term "hire" means the actual commencement of employment. He further states that 8 C.F.R. § 274a.1(h) provides in part that the term "employment" means "any service or labor performed by a employee for an employer." Respondent argues that if, as alleged in his defense, the alien was arrested before any labor has been undertaken then no

[3] An exception is provided for employment which will last less than three business days; in such a case, the employer is required to review the documents and complete the Form I-9 no later than the end of the employee's first day at work. 8 C.F.R. § 274a.2(b)(1)(iii) (1993).

[4] An affirmative defense to the charge would be that Respondent did not hire Santos-Hernandez, but Respondent has not made such an assertion.

employment would have commenced and Respondent cannot be held liable for a violation of a law which requires the affirmative act of hiring. Respondent also argues that Complainant admits that an issue of fact is alleged in this affirmative defense. Respondent therefore states that assuming Respondent is found to have the requisite intent to hire, an affirmative showing that no hiring had actually taken place would negate Complainant's case. Finally, Respondent asserts that Complainant's argument that this affirmative defense "constitutes surplusage or a repetition of the contents of the denial" is not prejudicial and the motion to strike this defense becomes "dilatory and frivolous."

It is clear that if Respondent did not hire Santos-Hernandez the charge in this case would have to be dismissed. If Santos-Hernandez was hired by Respondent but was arrested prior to his first day of work, arguably this would be an affirmative defense to Respondent's obligation to complete section 2 of the form. It would not be an affirmative defense to Respondent's obligation to complete section 1 of the form. At any rate, because Santos-Hernandez's arrest may be an affirmative defense to the charges in the complaint, Complainant's motion to strike is DENIED.

3. Third Affirmative Defense

Respondent's third affirmative defense is that "even if the work was commenced, which respondent denies, the nature of the work was not such as to require an INS form I-9." Complainant argues that this defense is vague and that it is unclear whether it is based on any legal theory. Respondent asserts that the legal issue involves the proper regulatory definition of employment and any exceptions thereto and the factual issue is whether the activities that occurred in this case constitute "employment."

If the job at issue does not fall within the definition of "employment" under IRCA, then Respondent would not have had the duty to prepare and maintain a Form I-9 for Santos-Hernandez and the case should be dismissed. As Respondent's assertion would serve as an affirmative defense to an employer's obligations regarding preparation of the Form I-9 and keeping the form for inspection, Complainant's motion to strike is DENIED.

4. Fourth Affirmative Defenses

Respondent's fourth affirmative defense is that Complainant's actions constitute a violation of the Fourth Amendment. Complainant concedes that the Fourth Amendment exclusionary rule may apply to administrative searches but argues that Respondent has failed to assert sufficient facts to support this defense. Although I agree that Respondent could have provided a more detailed explanation of his Fourth Amendment affirmative defense, I find, taking into consideration all the pleadings filed herein, that Complainant has stated sufficient facts to formulate a viable theory under the Fourth Amendment.

The facts that form the basis of Respondent's Fourth Amendment argument are that in April of 1993 Respondent was the subject of surveillance and was followed by officers of the INS to his home. The INS officers entered Respondent's property, accosted two persons and arrested, detained and charged one of them as an illegal alien. An INS officer returned to Respondent's home several days later and demanded to inspect certain documents related to the individual previously arrested.

Although Respondent does not state with specificity his legal theory and the evidence or documents he thinks should be suppressed, I infer from the pleadings in this case that Respondent contends that the INS agents' entry into his premises was without probable cause, that whatever evidence was obtained as a result of that entry (including statements of Respondent and employees and proof that one of those arrested was an illegal alien) is not admissible, and that the inspection of Respondent's business thereafter was tainted because it violated the Fourth Amendment's prohibition against unreasonable search and seizure. I further infer that Complainant argues that consequently, the evidence consisting of documents, books or records that were seized from Respondent's business premises on May 12, 1993, the date of the inspection, was the result of an unconstitutional search and seizure.

IRCA requires that employers retain the I-9 form of each covered employee and "make it available for inspection by officers of the [INS] or the Department of Labor during a period beginning on the date of the hiring . . . of the individual." 8 U.S.C. § 1324a(b)(3). Although the employer is given three days notice before the inspection, IRCA does not require that an inspection be supported by a warrant or subpoena. See 8 U.S.C. § 1324a(e)(2)(allowing the INS or any administrative law judge "reasonable access" to evidence of any person or entity under investigation and authorizing administrative law judges to compel by subpoena the attendance of witnesses and the production of evidence

at any designated place or hearing); 8 C.F.R. § 274a.2(b)(2)(ii) (stating that "[n]o [s]subpoena or warrant shall be required for such inspection, but the use of such enforcement tools is not precluded.").[5]

The Fourth Amendment provides that:

> [t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

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[5] It has been argued that:

> the [Employment Verification System] creates and provides a built-in system of personnel evidence and documentation that can be used to construct a proper record for legal affidavits and warrants. This extensive regulatory system would not only support the criminal probable cause standard and the warrant requirement, but would also seem to support requiring even stricter scrutiny of the reasons for issuance and enforcement of a search warrant.

Barbara A. Susman, "The Immigration and Control Act of 1986 ('IRCA'): Impact Upon Employer/Employee Fourth Amendment Protections Against Unreasonable Search and Seizures," 5 Hofstra Labor Law Journal 1, 36-37 (internal footnote omitted) (1987).

That law review article discusses IRCA and its impact upon and relationship to the Fourth Amendment. It concludes that IRCA's new procedures, exclusive far-reaching regulatory system and severe penalties and sanctions creates new Fourth Amendment concerns and warrant stricter adherence to now heightened Fourth Amendment standards in all phases of government contact with employers and employees .

Several other notes and law review articles have addressed IRCA and its Fourth Amendment implications. See, e.g., Che Dawn Williamson, "The Fourth Amendment and Warrantless Employer Searches Under the Immigration Reform and Control Act", 30 South Texas Law Review 165 (1988) (discussing IRCA's enforcement provisions allowing warrantless inspection of employee's records by any INS officer or agent or the Department of Labor and allowing the INS or an administrative law judge reasonable access to evidence of any person or entity under investigation and the Fourth Amendment issue raised by these provisions and proposing changes in the Act's regulatory scheme to protect employers from unreasonable government intrusion); Lisa A. DiPoala, "Immigration Reform and Control Act of 1986: A License for Warrantless Searches", 40 Syracuse Law Review 817 (1989) (note discussing (1) the Fourth Amendment and the standard applied to administrative searches; (2) section 101 of the Act as it relates to INS inspection of employer's documents required to be kept by the Act, demonstrating that its treatment of all United States employers is an intolerable Fourth Amendment violation); Steven L. Miller, "Fourth Amendment Right or Fourth Amendment Wrong: INS Power After the Immigration Reform and Control Act of 1986," 36 Cleveland State Law Review 455 (1988) (note examining the legal system's scrutiny of the Fourth Amendment implications of INS workplace sweeps, suggesting that the recent adoption of IRCA and its criminal sanctions dictate the development of a higher standard for upholding the constitutionality of workplace raids).

U.S. Const. Amend. IV.

The purpose of the Fourth Amendment is to shield citizens from unwarranted intrusions upon their privacy. Camara v. Municipal Court, 387 U.S. 523, 428 (1967). Because it is essential to this purpose, courts have generally held that, absent a few recognized exceptions, a search without a warrant is unreasonable. Michigan v. Tyler, 436 U.S. 499 (1978); Colonnade Catering Corp. v. United States, 397 U.S. 311 (1972).

Although the Supreme Court has held that the Fourth Amendment warrant requirement applies to administrative searches, the Court has refused to hold that all administrative searches conducted without warrants are invalid. See Camara v. Municipal Court, supra; See v. City of Seattle, 387 U.S. 541 (1967). Instead, the Court has applied a balancing test to determine the validity of warrantless administrative inspections weighing the government's interests in the regulated area against the individual's right to privacy in that space. See v. City of Seattle, 387 U.S. at 546.

Other OCAHO administrative law judges have covered various aspects of the Fourth Amendment and IRCA. See U.S. v. Widow Brown's Inn, 3 OCAHO 399 (1/15/92); U.S. v. Moyle, 1 OCAHO 212 (7/30/90); U.S. v. Kuo Liu, 1 OCAHO 235 (9/14/90); U.S. v. Noel Plastering and Stucco Inc., 1 0CAHO 100 (2/12/91). I find, based on the pleadings filed in this case that Respondent has stated sufficient facts to raise an issue of whether his Fourth Amendment rights have been violated.

The rules of practice and procedure governing these proceedings do not list the affirmative defenses that must be plead. I therefore will look for guidance to Rule 8(c) of the Federal Rules of Civil Procedure. Rule 8(c) obligates a defendant to plead affirmatively any of the 19 listed defenses he wishes to assert. Although the rule does not define an affirmative defense, it clarifies that an affirmative defense will defeat a plaintiff's claim if its is accepted by the court.

The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 350, 91 S. Ct. 1434, 1453, 28 L. Ed. 2d. 788 (1971). "Thus, if a plaintiff receives notice of an affirmative defense by some other means other than pleadings, 'the defendant's failure to

comply with rule 8(c) does not cause the plaintiff any prejudice.'" Grant v. Preferred Research, Inc. 885 F2d 795, 797 (llth Cir. 1989) (quoting Hassan v. United States Post Serv., 842 F.2d 260, 263 (llth Cir. 1988). The Fourth Amendment exclusionary rule, for obvious reasons, is not listed as an affirmative defense in Rule 8(c) of the Federal Rules of Civil Procedure.

I conclude that the Fourth Amendment exclusionary rule is not an affirmative defense to the charge in the complaint as the effect of a finding that there was an unlawful search and seizure would not necessarily prevent Complainant from proving its case--it would only be grounds for suppressing some of the evidence. Complainant's motion to strike Respondent's allegation that his Fourth Amendment right was violated as an affirmative defense is therefore GRANTED.[6]

5. Fifth Affirmative Defense

Respondent's fifth affirmative defense alleges that Complainant's actions constitute a violation of his Fifth Amendment rights. Complainant argues that I should strike Respondent's Fifth Amendment affirmative defense because Respondent has failed to state sufficient facts to support this defense.

Respondent argues that few legal theories could have more prima facie viability than a violation of one's constitutional rights, and that Complainant admits in its motion that Respondent's legal theories are sound. Respondent further states that Educated Car Wash recognizes that little regulatory guidance is available to determine the sufficiency of supporting facts. Respondent argues that judicial economy dictates that the allegations of the pleadings as a whole must be taken into account when determining the sufficiency of facts to warrant a hearing and that I am required to view the pleadings in a light most favorable to the pleader. Respondent further argues that the pleadings show: (1) that Complainant is a government agency charged with investigating and prosecuting charges concerning the unlawful employment of aliens; (2) that the INS conducted an inquiry and subsequently arrested an individual on Respondent's property before any labor had commenced; and therefore, before any duty to complete employment verification

[6] Although I am granting Complainant's motion to strike Respondent's alleged denial of his Fourth Amendment protection from an unlawful search and seizure as an affirmative defense, Respondent is not prejudiced by this ruling because he can file a prehearing motion to suppress evidence based upon a violation of his Fourth Amendment rights.

procedures could have been violated; and (3) based upon (1) and (2), the charges alleged in the complaint violate Respondent's Fifth Amendment rights.

Liberally construing Respondent's Fifth Amendment argument, I find that Respondent is asserting that the INS's conduct in this case was inappropriate and is grounds for dismissal. Although governmental misconduct arising to the level of a denial of due process of law is difficult to prove, if proven it is an affirmative defense to the charges in this case. See United States v. Law Offices of Manulkin, Glaser and Bennet, 1 OCAH0 100 (10/27/89). Accordingly, Complainant's motion to strike the affirmative defense that Respondent's Fifth Amendment right was violated, presumably because of governmental misconduct, is DENIED.

Because there may be a number of prehearing motions filed, the parties are directed to follow this schedule:

1. All pretrial motions, including motions for summary decision, shall be filed on or before Monday, July 18, l994.

2. The evidentiary hearing in this case is rescheduled for Monday, August 1, l994 in San Francisco at a place and time to be provided by future order.

SO ORDERED this 15th day of June, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge