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Flaum Appetizing Corp. and Local 460/640, Industrial Workers of The World a/k/a Industrial Workers of The World, New York City General Membership Branch. Cases 29–CA–28502, 29–CA–28675, 29–CA–28854, and 29–CA–28951

December 30, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

Pending before the National Labor Relations Board are the Acting General Counsel's motion for partial summary judgment and motion to strike portions of the Respondent's amended answer and bill of particulars, and the Respondent's opposition thereto. We address those motions in turn below.

I. THE MOTION FOR PARTIAL SUMMARY JUDGMENT

Procedural Facts

On June 2, 2009, the Board issued an Order adopting, in the absence of exceptions, the administrative law judge's decision finding that the Respondent, Flaum Appetizing Corp., had violated the National Labor Relations Act by, among other actions, discharging 17 of its employees for engaging in protected protest activity. As a consequence, the Board ordered the Respondent, its officers, agents, successors, and assigns, to reinstate and make whole the 17 employees, specifically, Olga Maria Fabian Alonso, Bulmaro Arenas, Maria Corona, Herlinda Cortez, Micaela Cortez, Veronica Cortez, Irma Juarez, Nataniel Nava, Felipe Romero Perez, Justino Romero Perez, German Romero, Jose Juan Romero, Placido Romero, Gloria Torres, Juan Torres, Isidro Vargas, and Gustavo (last name unknown),¹ in addition to fulfilling certain other remedial obligations. On August 6, 2009, the United States Court of Appeals for the Second Circuit issued a judgment enforcing that Order in full.

On August 2, 2010, a controversy having arisen over the amount of moneys owing under the Board's Order, the Regional Director of the Board for Region 29 issued a compliance specification and notice of hearing, to which the Respondent filed an answer on August 20, 2010. On August 26, 2010, the Regional Director filed an amended compliance specification and notice of hearing, and the Respondent filed an answer on September

¹ Gustavo was later listed as Perez Gustavo in the amended compliance specification.

14, 2010. In the amended compliance specification, the Regional Director alleged that the Respondent owed varying amounts of backpay to 15 of the discriminatees.²

By letter dated September 15, 2010, counsel for the Acting General Counsel advised the Respondent's attorney that its September 14, 2010 answer did not satisfy the standards set forth in Section 102.56(b) of the Board's Rules and Regulations. Counsel for the Acting General Counsel further advised the Respondent's attorney that if the Respondent did not file an amended answer by September 22, counsel would seek partial summary judgment from the Board covering the gross backpay allegations and computations contained in the amended specification.

On September 20, 2010, the Respondent filed an amended answer to the amended compliance specification. The Respondent's amended answer admits the backpay period as alleged in paragraph I of the amended compliance specification. Accordingly, we grant the Acting General Counsel's motion for partial summary judgment as to paragraph I.

The Respondent's amended answer denies the allegations in paragraph II of the amended compliance specification concerning the discriminatees' gross backpay. For the following reasons, we grant the Acting General Counsel's motion for partial summary judgment as to paragraph II.

Analysis

Section 102.56(b) and (c) of the Board's Rules and Regulations provides that:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. . . . As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specifi-*

² The Acting General Counsel is not currently seeking backpay for Nava or Gustavo.

cation.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Respondent's amended answer does not meet these criteria with respect to the gross backpay allegations in the amended compliance specification. The amended answer is simply a general denial of most of the allegations regarding the gross backpay. A general denial is not sufficient to refute allegations pertaining to gross backpay calculations. See *South Coast Refuse Corp.*, 337 NLRB 841 (2002); *U.S. Service Industries*, 325 NLRB 485, 486 (1998). As the Board has stated:

It is well settled that a respondent's general denial of the backpay computations contained in a compliance specification will be deemed insufficient if the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so.

Mining Specialists, Inc., 330 NLRB 99, 101 (1999), citing *Best Roofing Co.*, 304 NLRB 727 (1991); accord: *Robincrest Landscaping & Construction*, 303 NLRB 377 (1991).

As set forth above, the Respondent's amended answer generally denies the gross backpay calculations as alleged in paragraph II of the amended compliance specification. The amended answer does not specify the basis for its disagreement with the backpay computation. Nor does the amended answer offer any alternative formula for computing backpay, furnish appropriate supporting figures for the amounts owed, or offer an explanation for its failure to provide an adequate answer. Because the Respondent has failed to deny the allegations in paragraph II of the amended compliance specification as prescribed in Section 102.56(b) of the Board's Rules, and its failure to do so has not been adequately explained, we deem those allegations to be admitted to be true under

Section 102.56(c). Accordingly, the Board grants the Motion for Summary Judgment as to allegation II of the amended compliance specification, entitled Computation of Gross Backpay. See *Ybarra Construction Co.*, 347 NLRB 856, 857 (2006); *Paolicelli*, 335 NLRB 881, 883 (2001); *Baumgardner Co.*, 298 NLRB 26, 27(1990) (partial summary judgment appropriate where respondent's answer to compliance specification fails to set forth an alternative number of applicable hours), *enfd. mem.* 972 F.2d 1332 (3d Cir. 1992).

II. THE MOTION TO STRIKE THE RESPONDENT'S BILL OF PARTICULARS AND PORTIONS OF ITS AMENDED ANSWER

Procedural Facts

In its amended answer to the amended compliance specification, the Respondent asserts a series of affirmative defenses. Specifically, the Respondent pleads, *inter alia*:

First Affirmative Defense

The Compliance Specification, and each claim purported to be alleged therein, is barred as the alleged discriminatees are undocumented aliens and therefore, subject to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), not entitled to any backpay amount as set forth in the Compliance Specification.

Second Affirmative Defense

The Compliance Specification, and each claim purported to be alleged therein, is barred as the alleged discriminatees have willfully violated the Immigration Reform and Control Act of 1986 (8 U.S.C. § 1324a, *et seq.*) ["IRCA"] by perpetrating a fraud upon the Respondent and therefore are not entitled to be lawfully employed in the United States.

Third Affirmative Defense

The Compliance Specification, and each claim purported to be alleged therein, is barred as the alleged discriminatees had unclean hands.

On September 23, 2010, counsel for the Acting General Counsel filed a motion for a bill of particulars, requesting that the Respondent plead with specificity the facts in support of its affirmative defenses. On October 5, 2010, the associate chief administrative law judge issued an Order in which he required that the Respondent show cause as to why counsel for the Acting General Counsel's motion should not be granted. On October 6, 2010, the Respondent filed its opposition to the motion for a bill of particulars, and on October 15, 2010, counsel for the Acting General Counsel filed a reply to the Respondent's opposition. On October 15, 2010, the associ-

ate chief administrative law judge granted counsel for the Acting General Counsel's motion and ordered that the Respondent provide counsel for the Acting General Counsel with a bill of particulars separately setting forth the names of the discriminatees and stating which affirmative defenses apply to each of them, together with a brief statement of the facts constituting the offense each discriminatee allegedly committed and when. By supplemental order dated October 21, 2010, the associate chief administrative law judge ordered that the Respondent provide its bill of particulars to counsel for the Acting General Counsel by November 2, 2010.

On November 2, 2010, the Respondent submitted its bill of particulars. In that document, the Respondent alleges that, at the commencement of their employment, none of the discriminatees was entitled to work in the United States under IRCA and therefore none was entitled to backpay under *Hoffman Plastics*, supra. The Respondent further asserted that each discriminatee provided it with facially valid but fraudulent documentation and photo identification, thereby committing a willful violation of IRCA and demonstrating "unclean hands." Finally, the Respondent asserted that it "did not learn of said fraudulent activity until a previous Board hearing(s) when a number of the alleged discriminatees testified under oath . . . that the documentation they proffered to Respondent was in fact falsified, said conduct was perpetrated upon Respondent at the time of each alleged discriminatee's hire." (Emphasis added.)³

By letter dated November 8, 2010, counsel for the Acting General Counsel advised the Respondent that its bill of particulars did not provide sufficient information to satisfy its obligation under the associate chief administrative law judge's order, and requested that the Respondent file an amended bill of particulars within 2 days from the date of the letter.

The Respondent did not respond to that letter. Thereafter, on November 24, 2010, counsel for the Acting General Counsel filed its motion for partial summary judgment and its motion to strike portions of the Respondent's amended answer and its bill of particulars.⁴

³ The Respondent also asserted that each of the discriminatees had "failed to mitigate" damages. That assertion is not relevant at this stage of the proceeding.

⁴ It is readily apparent that the Respondent failed to file the bill of particulars contemplated by the associate chief administrative law judge's order. The Respondent failed to provide dates on which the discriminatees allegedly committed the wrongdoings attributed to them and failed to describe the nature of the documentation and photo identification submitted by each of the discriminatees or explain why it was fraudulent. The Respondent did not name the discriminatees who allegedly admitted at Board hearings that they proffered false documents and provided no description of their individual testimony beyond what is quoted above. In fact, 11 of the 17 discriminatees had testified at the

In the meantime, on October 15, 2010, after the parties had begun litigating the propriety of the bill of particulars, the Respondent served identical subpoenas duces tecum on each of the discriminatees. Each subpoena sought the following items:

- All United States passports ("USA") or from other countries identifying you as the owner of that passport.
- All permanent resident cards of United States identifying you as the owner of that card.
- All receipts of registration card issued by United States identifying you as the owner of that card.
- Every photograph issued by the government (federal, state or local) identifying you as the owner of that card.
- Every driver license issued by any state identifying you as the owner of that license.
- All other documents from the department of motor vehicle.
- Every authorization issued by the department of Homeland Security identifying you as the owner.
- Your Social Security card.
- Your birth certificate.
- Your marriage license (if you are married).
- Your vote registration.
- Your naturalization certificate issued by the United States.
- Your documents verifying your education level.
- All documentation from the government submitted to Flaum Appetizing during your employment in Flaum Appetizing.
- Every identification forms (visa, work permit, etc.) submitted to Flaum Appetizing during your employment.
- All documentation identifying the country of your citizenship.

unfair labor practice hearing, and only 4 of them testified that the signatures on the green cards they had provided to the Respondent were not theirs. The remaining seven verified that the signatures on the cards were genuine.

Nevertheless, we do not reach the motion to strike the bill of particulars in its entirety as the striking of the affirmative defenses, see below, renders it moot. As further specified at the end of this order, regarding the four employees in relation to whom we do not strike the affirmative defenses—employees Bulmaro Arenas, Felipe Romero Perez, Justino Romero Perez, and Jose Juan Romero—we deny the motion but order the Respondent to serve an amended bill of particulars complying with the judge's October 15, 2010 order.

- All documentation about your trips outside of the United States since 2004.
- Documentation of your citizenship of the United States.
- Every correspondence related with your citizenship of the United States.
- Every correspondence from the United States confirming your right to work in the United States.
- All documentation related with your right to work in the United States.

Analysis

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that IRCA barred the Board from awarding backpay to an employee who was not authorized to work in this country during what would otherwise have been the backpay period. The Court held that such an award “lies beyond the bounds of the Board’s remedial discretion.” *Id.* at 149.⁵ However, the Supreme Court’s decision did not address, much less resolve, the procedural questions raised by the holding. Those questions include which party has the burden of pleading lack of authorization, under what circumstances may a party inquire into immigration status through compelled production of documents or examination of witnesses, and which party has the burden of proof on this issue. See, e.g., *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011).

In its decision in *Domsey*, the Second Circuit did not view the procedural questions at issue in that case as resolved by *Hoffman Plastics*. Rather, it analyzed the judge’s exclusion of evidence concerning immigration status under the generally applicable abuse of discretion standard. *Id.* at 38. In *Domsey*, the employer pleaded immigration status as an affirmative defense, and no party moved to strike the defense. *Id.* at 35. Thus, the question before the court was what limitations could be placed on a party’s efforts to adduce evidence relevant to what was concededly a properly pleaded affirmative defense. The court held that the Board abused its discretion by permitting the exclusion of all evidence potentially relevant to the defense. In so holding, the court stated that, “[w]hile relevance is certainly not the only consideration when deciding what evidence is admissible, an affirmative defense would be illusory if all evidence that could be used to prove it were categorically excluded.”

⁵ Contrary to the dissent’s use of the term “jurisdictional,” the Court did not hold that the Board lacks jurisdiction (as that term is ordinarily understood in the law) to award backpay under these circumstances, but rather that the Board’s discretion to do so is eliminated by the policies underlying IRCA.

Id. at 38. But, the court did not hold that the Board was precluded from structuring the inquiry into immigration status according to its ordinary rules of pleading and evidence. To the contrary, the court made clear that in a case where the employer had pleaded lack of work authorization as an affirmative defense, “we find that employers may question discriminatees about their immigration status, while also underscoring the Board’s legitimate interest in fashioning rules that preserve the integrity of its proceedings.” *Id.* at 39.⁶

The Board itself has already addressed some of the procedural questions raised by *Hoffman Plastics*. Of particular importance to the question before us in this case, the Board has held that lack of authorization to work during the backpay period is an affirmative defense, and several courts of appeals have agreed. See *Tortilleria La Poblanita*, 357 NLRB No. 22, slip op. 4 fn. 7 (2011); *Domsey*, supra, 636 F.3d at 37; *NLRB v. C&C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009).

The procedural context in which the question is presented in this case is different from *Tortilleria La Poblanita* and *Domsey*. Here, the Acting General Counsel has moved to strike the affirmative defenses. The question before us here, then, is whether a party must articulate a basis for pleading an affirmative defense, thereby opening up an avenue through which to subpoena documents and examine witnesses in order to discover evidence to support its defense. Without such a requirement, a party can plead an affirmative defense with the mere hope of discovering evidence to support it. We do not believe generally applicable rules of pleading permit a pleading to be interposed for the purpose of engaging in such open-ended inquiry, and we believe that permitting such tactics in this specific context is contrary to the policies underlying *both* IRCA and the NLRA.

The most closely analogous Board precedent is the decision in *Murcel Mfg. Corp.*, 231 NLRB 623 (1977). In that case, the employer pleaded, as an affirmative defense to a refusal-to-bargain charge, that the union engaged in race and sex discrimination, and the employer further served a subpoena seeking supporting evidence. The General Counsel moved for a bill of particulars and then, when the employer responded with unsupported, general allegations, moved to strike the affirmative defense. *Id.* at 624. While the Board held that an affirmative defense of union discrimination did not lie in a re-

⁶ For convenience, and because the party challenging the immigration status of employees in NLRA cases is generally an employer, we refer to that party as the employer. The same principles would apply when the party contesting a reinstatement or backpay remedy is a union.

fusal-to-bargain proceeding, it also expressly upheld the judge's decision to strike the affirmative defense as without factual foundation.

In *Murcel*, supra, the Board stated that the employer was "in effect, contending that this Agency is under a fundamental disability in the processing of this case" and that therefore it was incumbent upon the employer to "disclose the particular facts on which the disability is based so that an intelligent evaluation of the contention could be made." *Id.* at 625 fn. 10. In *Murcel*, the employer argued that the Board could not grant relief in favor of a union that engaged in discrimination barred by Federal law, just as here, the Respondent argues that the Board cannot grant backpay to an employee who has violated IRCA. Yet when the employer could not articulate the basis for its defense in *Murcel* and, instead, served a subpoena "whose provisions clearly indicated [r]espondent was embarking on an investigatory proceeding akin to discovery procedures for which the National Labor Relations Act makes no provision," the judge properly struck the affirmative defense. *Id.* *Murcel* is squarely on point.⁷

Federal courts have similarly granted motions to strike affirmative defenses, holding that defendants "will not be permitted to use the affirmative defense to engage in a 'fishing expedition'" to discover the evidence needed to support the defense. *Securities & Exchange Commission v. Rosenfeld*, 1997 WL 400131 (S.D.N.Y. 1997).⁸ In an analogous context, a backpay action brought by a Federal employee, the Court of Claims held, "the trial commissioner should require the Government to 'demonstrate that it has some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some

⁷ The Board's holding in *Murcel* followed a line of cases in which the Board struck affirmative defenses pleaded solely in the hope of finding supporting evidence through service of subpoenas. See, e.g., *Master Slack and/or Master Trousers Corp.*, 221 NLRB 894, 897 (1975).

⁸ See also *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *5 (W.D. Va. 2010) (striking certain affirmative defenses); *Hayne v. Green Ford Sales*, 263 F.R.D. 647, 651–652 (D. Kan. 2009) (striking affirmative defenses on grounds that allegations must show "that the pleader at least has some valid premise for asserting the defense and is not merely tossing it into the case like a fish hook without bait"); *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F.Supp.2d 395, 408 (D. Del. 2009) ("a court is not required to accept affirmative defenses that are mere 'bare bones conclusory allegations,' and may strike such inadequately pleaded defenses"); *Mission Bay Ski & Bike, Inc.*, 2009 WL 2913438, at *4 (Bankr. N.D. Ill. 2009) ("To allege a defense, a defendant must assert that the plaintiff's claim is barred because certain affirmative matters are true, not merely that the claim will be barred if they turn out to be true."); *Qarbon.com Inc. v. eHelp Corp.*, 315 F.Supp.2d 1046, 1049–1050 (N.D. Cal. 2004) (striking estoppel defense where, inter alia, defendant failed to set forth the factual basis for it).

substance to its (affirmative defense) and [it] is not a mere fishing expedition' or a method of discouraging employees from seeking back pay on meritorious claims because of the cost of proving readiness, willingness and ability to perform since the adverse action." *Piccione v. U.S.*, 407 F.2d 866, 876 (Ct.Cl. 1969) (footnote omitted) (quoting *Missouri Pac. R. Co. v. U.S.*, 338 F.2d 668, 672 (Ct. Cl. 1964), which applied that standard in determining whether to permit the Government to interpose a set-off claim in an income tax refund case). Moreover, the Respondent's first, second, and third affirmative defenses allege fraud or analogous conduct.⁹ It is well-established that a party alleging fraud—or claims sounding in fraud—must do so with particularity, regardless of whether the allegation is made in a complaint or an affirmative defense. See Fed.R.Civ.P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); see also *Tyco Fire Products LP v. Victaulic Co.*, 777 F.Supp.2d 893, 901 (E.D.Pa. 2011) ("[T]he only exceptions to the general pleading rule for affirmative defenses 'are the defenses that fall within the special pleading provisions in Rule 9, especially Rule 9(b).'" (quoting 5 Charles Alan Wright et al., *Federal Practice & Procedure*, § 1274 (3d ed.2010); *United Fixtures Co. v. Base Mfg.*, No. 6:08-cv-506-Orl-28GJK, 2008 WL 4550212, at *5 (M.D.Fla. 2008) (striking an affirmative defense of fraud where the defendant's answer stated only the "conclusory allegation[]" of "fraud/inequitable conduct").

After all, Rule 11 of the Federal Rules of Civil Procedure, applies to "[e]very pleading," including answers and affirmative defenses.¹⁰ Rule 11 provides that the required signature on such pleadings certifies that, to the best of the signer's knowledge, the factual contentions in such pleading "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed.R.Civ.P. 11(a), (b)(3). Violation of Rule 11 may subject the signer to sanctions, and Federal courts have sanctioned defendants for pleading frivolous affirmative defenses. See, e.g., *Heller Financial, Inc. v. Midwhye Powder*, supra, 883 F.2d at 1295.

⁹ The second affirmative defense expressly alleges fraud, and the third, in referring to "unclean hands," clearly relies on the fraud allegation of the second. The first affirmative defense expressly invokes *Hoffman Plastic*, in which the Court held that backpay could not be awarded "for a job obtained in the first instance by a criminal fraud," 535 U.S. at 149; the defense thus incorporates by reference an allegation of criminal fraud.

¹⁰ *Heller Financial, Inc. v. Midwhye Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989) ("Affirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure.").

Even in the absence of available evidence, a reasonable belief that evidentiary support exists and can be obtained through investigation and discovery (or, in the case of Board proceedings, through trial subpoenas), requires some articulable reason to believe that is the case. Courts have thus sanctioned defendants for pleading affirmative defenses without any factual basis or articulable reason to believe one can be established. For example, in *Gargin v. Morrell*, 133 F.R.D. 504, 504–506 (E.D. Mich. 1991), the district judge sanctioned an attorney under Rule 11 for not having, at the time of pleading, a factual basis for multiple affirmative defenses, including one for which the attorney admitted she did not have a factual basis “but hoped to find some [evidence] on discovery.” *Id.* at 505. The judge stated that it was improper to plead affirmative defenses without a factual basis merely to avoid waiver because the pleading must have a factual basis at the time of filing. See also *MHC Investment Co. v. Racom Corp.*, 323 F.3d 620, 624–625 (8th Cir. 2003) (Rule 11 sanctions warranted in part because claims “did not have any basis in fact”).

Thus, ordinary rules of pleading support striking the affirmative defenses here to the extent the Respondent articulated no factual support (or reason to believe it could obtain such factual support) for their application to specific employees.

If we were, contrary to the foregoing precedent, to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason for the Respondent to believe the discriminatees were not authorized to work, we would contravene the policies underlying *both* IRCA and the NLRA. In order to understand why this is so, it is important to remember that the Respondent had a legal obligation to verify that the discriminatees were eligible to work in the United States prior to hiring them and, thus, presumably, did so. If, at any time after that, the Respondent had some reason to believe any of its employees (including the discriminatees here) were, in fact, not so eligible, it would have been free, and, under certain circumstances, would have been legally required, to reverify those specific employees’ work eligibility. But the Respondent adduced no evidence of any such doubt, or evidence that it sought to reverify the status of any of the discriminatees before this proceeding commenced. Thus, it was the filing of the unfair labor practice charge, the discriminatees’ participation in this case, and the Board’s order of reinstatement and award of backpay to the discriminatees that motivated the pleading at issue and the inquiry that will follow if the pleading is permitted.

However, IRCA specifically provides that employers are not required to reverify under these circumstances. Regulations promulgated under IRCA make clear that while an individual remains employed, the employer has no obligation to reverify, and further make clear that an individual is deemed to be “continuing” in his employment when the individual is reinstated after “wrongful termination, found unjustified by any . . . administrative body.” 8 CFR § 274a.2(b),(1),(viii),(A),(5). More pertinently, while an individual remains employed, IRCA provides that reverification may be an unfair immigration-related employment practice. Specifically, IRCA provides, “A person’s or other entity’s request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).” 8 U.S.C. § 1324b(a),(6). Paragraph 1, 8 U.S.C. § 1324b(1), (A), and (B), makes it an unfair immigration-related practice for a person to discriminate in respect to hiring or discharging an individual because of such individual’s national origin or citizenship. Requesting additional documents not required by IRCA on the basis of national origin makes it more difficult for individuals to gain employment (or, in this case, to be reinstated to employment) and thus violates these provisions of IRCA. Cf. *Robison Fruit Ranch, Inc. v. U.S.*, 147 F.3d 798, 802 (9th Cir. 1998).

With that legal background in mind, it is evident that the two most obvious courses of actions employers might follow if permitted to plead immigration status as an affirmative defense without any articulable basis would contravene the policies underlying *both* IRCA and the NLRA.

First, as appears to be the case here, employers are likely to plead the affirmative defense, serve subpoenas, and elicit testimony whenever a discriminatee has a Hispanic surname. As explained above, such discrimination in the selection of employees for reverification of employment status is unlawful under IRCA. Just as “awarding backpay to illegal aliens runs counter to policies underlying IRCA,” as the Court held in *Hoffman Plastics*, supra, 535 U.S. at 149, adopting a procedural rule that encourages violation of IRCA “runs counter to policies underlying IRCA.”

Alternatively, employers might respond to a decision permitting the pleading of these affirmative defenses in the absence of any factual foundation by pleading it in every compliance case and then resorting to the service of subpoenas and examination of adverse witnesses at trial, in the hope of discovering evidence supporting the defense. In other words, in every case in which the Board has found that employees' rights have been violated, in order to obtain any remedy for the injuries suffered, the employees would potentially be subject to what is often an embarrassing and frightening inquiry into their immigration status.¹¹

Numerous Federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights. For example, the Ninth Circuit observed, "[e]ven documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied 544 U.S. 905 (2005).¹²

In our view, subjecting every employee whose rights have been violated to such an intrusive inquiry,¹³ even when the party that has already been adjudged to have violated the law can articulate no justification for the inquiry, contravenes the purposes of the NLRA. Effectuation of the purposes of the Act requires the Board to vindicate public rights and to "neutralize discrimination"

by restoring "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192–194 (1941). Under Section 10(c) of the Act, the Board has wide discretion in ordering affirmative action in order to "expunge" the "effects of unfair labor practices." *Virginia Electric Co. v. NLRB*, 319 U.S. 533, 539 (1943). Allowing employers, with no justification, to place hurdles in front of employees who come to the Board to vindicate their rights and those of the public is contrary to the purposes of the Act. Moreover, permitting the pleading of immigration status affirmative defenses in every compliance case, even in the absence of any factual foundation, would inevitably lead to unwarranted delay, abuse of the Board's processes, and a waste of administrative resources.

Nothing in our decision today contravenes any express provision of or policy underlying IRCA. As the Supreme Court held in *Hoffman Plastics*, IRCA bars the Board from ordering the reinstatement of and awarding backpay to a discriminatee who was not authorized to work in the United States during the backpay period. But IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted. To the contrary, as discussed above, we believe that permitting such reverification and intrusive inquiry without sufficient factual basis for doing so would invite a form of abuse expressly prohibited by IRCA, and would contravene ordinary rules of procedure and undermine the policies of our Act.

Despite several opportunities to provide a factual basis for its first, second, and third affirmative defenses, the Respondent has failed to show sufficient justification for raising those defenses with respect to discriminatees Olga Maria Fabian Alonso, Maria Corona, Herlinda Cortez, Micaela Cortez, Veronica Cortez, Irma Juarez, German Romero, Placido Romero, Gloria Torres, Juan Torres, and Isidro Vargas. Accordingly, we grant the Acting General Counsel's motion to strike the first, second, and third affirmative defenses from its amended answer as they apply to those discriminatees. We also grant the Acting General Counsel's motion to strike the Respondent's bill of particulars. However, we shall not, at this time, strike the Respondent's first, second, and third affirmative defenses as to Bulmaro Arenas, Felipe Romero Perez, Justino Romero Perez, and Jose Juan Romero, who testified at the unfair labor practice hearing that the signatures on the resident alien cards that they presented to the Respondent were not theirs. Rather, we shall give the Respondent another opportunity to attempt to justify raising immigration-related affirmative defenses as to those four discriminatees. Accordingly, we shall direct

¹¹ While the dissent suggests the judge can limit the scope of inquiry, mere service of a subpoena, such as those served in this case, combined with the knowledge that such an inquiry may be made in every case and will have to be contested, would have a chilling effect on the exercise of the fundamental right to file a charge with the Board.

¹² See also *Flores v. Amigon*, 233 F.Supp.2d 462, 464–665 (E.D.N.Y. 2002), in which the court granted a protective order precluding discovery of the plaintiff's immigration status in a suit for compensation for work already performed. The court recognized "the potential for prejudice," noting that other courts have "found that discovery into the plaintiffs' immigration status . . . posed a serious risk of injury to the plaintiffs, outweighing any need for disclosure." *Id.* at 464 (citations omitted). The court emphasized that, "[e]ven if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery . . . , there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights." *Id.* (quoting *Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002)).

¹³ The subpoenas served in this case provide a good example of what victims of discrimination might be subjected to. See *supra*.

the Respondent to file, within 14 days of the date of this Order, an amended bill of particulars providing the information specified by the associate chief administrative law judge's October 15, 2010 order as to those four employees. If the Respondent fails to provide an adequate bill of particulars as to Bulmaro Arenas, Felipe Romero Perez, Justino Romero Perez, and Jose Juan Romero as set forth above, the Respondent's first, second, and third affirmative defenses as to them shall be stricken by the administrative law judge upon a motion by the Acting General Counsel.

ORDER

It is ordered that the Acting General Counsel's motion for partial summary judgment is granted with respect to paragraphs I and II of the compliance specification.

IT IS FURTHER ORDERED that the Acting General Counsel's motion to strike portions of the Respondent's amended answer is granted in part and the Respondent's first, second, and third affirmative defenses are stricken as to discriminatees Olga Maria Fabian Alonso, Maria Corona, Herlinda Cortez, Micaela Cortez, Veronica Cortez, Irma Juarez, German Romero, Placido Romero, Gloria Torres, Juan Torres, and Isidro Vargas.

IT IS FURTHER ORDERED that, within 14 days of the date of this Order, the Respondent shall provide the Acting General Counsel with an amended bill of particulars providing the information specified by the associate chief administrative law judge's October 15, 2010 order relating to discriminatees Bulmaro Arenas, Felipe Romero Perez, Justino Romero Perez, and Jose Juan Romero.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 29 for further action consistent with this Supplemental Decision and Order, including arranging a hearing before an administrative law judge limited to the issues of interim earnings, expenses, and the Respondent's net backpay liability for all of the discriminatees, and issues relating to the Respondent's fourth affirmative defense alleging the discriminatees' failure to mitigate damages. In addition, if the Respondent provides the Acting General Counsel with an adequate amended bill of particulars as ordered above, the hearing may also include issues relating to the Respondent's first, second, and third affirmative defenses with respect to discriminatees Bulmaro Arenas, Felipe Romero Perez, Justino Romero Perez, and Jose Juan Romero.

IT IS FURTHER ORDERED that following the hearing, the administrative law judge shall prepare and serve on the parties a decision containing findings, conclusions, and recommendations based on all the record evidence. Following the service of the administrative law judge's deci-

sion on all the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Contrary to my colleagues, I would deny the Acting General Counsel's motion to strike the Respondent's first affirmative defense as to all the discriminatees. I find, instead, that this defense—that the discriminatees are precluded from backpay by *Hoffman Plastics Compound v. NLRB*, 535 U.S. 137 (2002)—was sufficiently pled to warrant a hearing, where a judge can determine the appropriate scope of inquiry into the discriminatees' legal resident status during the backpay period under the usual rules of evidence.¹ My colleagues' contrary view, which subjects any *Hoffman* defense to extraordinary requirements of proof in support of pleading, is an obvious attempt to minimize the impact of what they clearly view as an erroneous decision by the Supreme Court. That is an exercise for Congress to undertake, not this administrative agency.

In *Hoffman Plastics*, *supra*, the Supreme Court held that the Board was barred from awarding backpay to an employee who was not authorized to work in this country. *Id.* In *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2011), the Second Circuit stated that “[a]fter *Hoffman*, it is now clear that undocumented immigrants are ineligible for backpay under the NLRA and, therefore, that immigration status is relevant to the question of backpay eligibility.” *Domsey*, *supra*, 636 F.3d at 38. The Board has recently endorsed this view, recognizing that “the Court’s opinion in *Hoffman* forecloses backpay awards for undocumented workers *regardless* of the circumstances of their hire.” *Mezonos Maven Bakery*, 357 NLRB No. 47, slip op. at 4 (2011) [emphasis added]. Thus, it is clear that the *Hoffman Plastics* decision precludes the Board, essentially, as a jurisdictional matter, from remedying unlawful conduct against undocumented discriminatees by awarding them backpay. See also my

¹ For the reasons stated by my colleagues, I would grant the Acting General Counsel's motion for summary judgment as to allegation II of the amended compliance specification, entitled Computation of Gross Backpay.

dissenting position in *Tortilleria La Poblana*, 357 NLRB No. 22, slip op. at 4 fn. 7 (2011).

So long as the Board lacks jurisdictional authority to remedy unlawful conduct by awarding backpay to undocumented workers, immigration status is relevant to backpay eligibility for discriminatees. Accordingly, it is sufficient for an employer to generally plead a *Hoffman Plastics* affirmative defense. Nonetheless, citing to Board and Federal court cases for support, the majority applies general principles to find that a general denial is insufficient. By doing so, the majority fails to acknowledge that, as described above, *Hoffman Plastics* changed the landscape for determining backpay eligibility where the legal status of discriminatees is at issue. The cases cited by the majority do not deal with *Hoffman Plastics* issues. Further, there are numerous circumstances in which a general pleading of an affirmative defense, without more, is sufficient to preserve the issue for hearing. I note in particular that the Board requires no factual showing in support of the affirmative defense of willful loss of earnings. The rationale that facts relevant to this issue are generally within the knowledge of the discriminatee is equally applicable to the issue of legal residency.

In any event, the principles cited by the majority cannot be applied to preclude the application of *Hoffman Plastics*. See *Mezonos Maven Bakery*, supra, 357 NLRB No. 47, slip op. at 4 fn. 25 (Board recognizing that the Supreme Court's holding in *Hoffman Plastics* is not limited to the specific facts of that case). *Hoffman Plastics* principles plainly bar the Board from placing constraints on inquiries made into the immigration status of discriminatees, even in the guise of procedural and evidentiary limits as my colleagues have decided. As the *Domsey* court stressed, "an affirmative defense would be illusory if all evidence that could be used to prove it were categorically excluded."² *Domsey*, supra, 636 F.3d at 38.

² I disagree with my colleagues that *Domsey* can be distinguished because the then-General Counsel did not move to strike the employer's affirmative defense based on immigration status. Any fair reading of the court's opinion in that case leads to the conclusion that granting such a prehearing motion would not be viewed any more favorably than was the judge's refusal to permit direct examination of the discriminatees. In particular, the court stated:

Domsey does not argue on appeal that each of the discriminatees was undocumented during the backpay period. Indeed, Domsey would be hard-pressed to make such an argument given that, in most cases, there is no direct evidence in the record concerning the discriminatees' immigration status. Instead, Domsey argues that it was prohibited from eliciting relevant testimony from discriminatees and was therefore unable to prove its affirmative defense; it seeks a remand so that it may be permitted to question discriminatees about their immigration status during the backpay period and to introduce the testimony of its immigration expert. In short, Domsey's "general" objection is actually a very specific objection to the ALJ's immigration-related evidentiary rulings. [636 F.3d at 37.]

In fact, it was precisely for this reason that the Second Circuit in *Domsey* remanded the case back to the Board, stating:

While *Hoffman* was not an evidentiary decision, post-*Hoffman*, the immigration status of discriminatees has become relevant to the issue of whether backpay may be awarded. Although it is by no means a simple issue, we find that employers may question discriminatees about their immigration status, while also underscoring the Board's legitimate interest in fashioning rules that preserve the integrity of its proceedings.

In sum, we find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules **consistent with *Hoffman***.

(Id. at 38–39 (emphasis added).)

The majority's approach here, imposing pre-hearing evidentiary requirements equivalent to the judge's erroneous ruling in *Domsey*, is not "consistent with" *Hoffman*. It subverts the Respondent's right to litigate the discriminatees' legal status through a procedural technicality.

Accordingly, because I find that the Respondent's first affirmative defense has sufficiently raised a *Hoffman Plastics* affirmative defense as to all the discriminatees,³

³ The majority does not grant the motion to strike the Respondent's first, second, and third affirmative defenses as to the four discriminatees who provided testimony at the unfair labor practice hearing that the signatures on the resident alien cards that they presented to the Respondent were not theirs. While I agree that the motion as to these four discriminatees should not be granted, I would not require, as the majority does, that the Respondent submit an amended Bill of Particulars because it is fundamentally inconsistent with my conclusion that a general denial is sufficient under *Hoffman Plastics*. Where the Board finds that a general denial is sufficient (i.e., interim earnings), an answering party need not comply with any additional requirements. This should be the case here as well.

I would deny the Acting General Counsel's motion to strike this defense.⁴ Just as we have done in *Domsey*,⁵ I

⁴ I disagree with my colleagues that the first affirmative defense necessarily rests on proof of fraud by the discriminatees. It rests on whether the discriminatees were not authorized to work in the United States. See *Mezonos Maven Bakery*, 357 NLRB No. 47, slip op. 1 (Court's decision in *Hoffman* also forecloses Board from awarding backpay to undocumented workers where the employer, not the employees, violated IRCA. Without passing on whether they have been sufficiently pled, I would grant the Acting General Counsel's motion to strike the Respondent's second and third affirmative defenses as to all the discriminatees. As to the Respondent's second affirmative defense alleging that the discriminatees violated IRCA, the Board has no authority to enforce or administer IRCA. *Hoffman Plastics*, supra, 535 U.S. at 149. As to the Respondent's third "unclean hands" affirmative defense, established Board law holds that that the "unclean hands" equitable doctrine does not operate against a charging party because

would remand this issue for hearing by an administrative law judge,

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

Board proceedings are brought in the public interest and to effectuate statutory policy, and not for the vindication of private rights. *California Gas Transport, Inc.*, 347 NLRB 1314, 1326 fn. 36 (2006).

Finally, I would leave any issues raised by the Respondent's subpoenas for resolution by the judge at or before the hearing.

⁵ *Domsey Trading Corp.*, 357 NLRB No. 164 (2011).