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

United States of America, Complainant vs. Nu Look Cleaners of Pembroke Pines, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100162.

ORDER GRANTING WITHOUT PREJUDICE COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW MOTION TO DISQUALIFY JOEL STEWART FROM CONTINUING TO REPRESENT RESPONDENT AS COUNSEL IN THE INSTANT CASE

Statement

1. About March 15, 1990, complainant filed a motion to disqualify Joel Stewart, respondent's attorney, from continuing to represent respondent in the instant proceeding. This motion was based on complainant's then expectation of calling Mr. Stewart to testify at the hearing in the instant case.

2. Therefore, Mr. Stewart filed an opposition to the motion to disqualify, on the ground that ``an attorney-client privilege exists which would prevent [him] from providing any testimony . . . In addition, there exists a work product doctrine which is an independent source of immunity from discovery, distinct from and broader than the attorney-client privilege. In view of the above, there would be no legal basis for Joel Stewart to be called to testify and therefore to be disqualified.'' Mr. Stewart relied on both his status as respondent's attorney and his status as attorney for Sherida Allen, whom the instant complaint names as having been unlawfully hired or unlawfully retained in employment, and as unlawfully unverified, in violation of 8 U.S.C. § 1324a(a)(1)(2).

3. On August 8, 1990, I received from complainant a motion for summary judgment and a motion for leave to withdraw without prejudice its motion to disqualify.[1] As the basis for the motion for

[1] Internal evidence makes it clear that complainant erred in attaching to its motion to disqualify a date of April 30, 1990.

leave to withdraw the motion to disqualify, complainant alleged that because of certain findings of inference made by me on July 20, 1990, complainant was entitled to summary judgment and, therefore, a hearing where Mr. Stewart may be called by complainant to testify against respondent would not be necessary. As the basis for requesting that the motion for leave to withdraw be granted without prejudice, complainant stated that ``in the event Complainant's Motion for Summary Judgment is denied and the case has to proceed to a hearing complainant will not be precluded from submitting a new motion to disqualify which complies with this Honorable Court's July 26, 1990, Order.'' This July 26 order stated, in part, that if complainant's counsel adhered to his motion to disqualify, he was ``ordered to advise me what testimony he expects to elicit from Mr. Stewart which would not be subject to the attorney-client or work-product privilege or, if so subject, counsel for complainant anticipates would not be withheld on the basis of such privilege.''

4. Over date of September 4, 1990, Mr. Stewart, as counsel for respondent, stated that he had no objection to my granting complainant's motion to withdraw, ``but only with prejudice.'' In support of this position, Mr. Stewart stated that complainant had failed fully to comply with my July 26 order in that complainant had neither sought unconditionally to withdraw its motion, nor stated ``what testimony he expects to elicit from Respondent's counsel.'' Mr. Stewart went on to say:

> . . . The Respondent objects to this tactic. Nor has the Respondent [sic] stated a good cause for refiling such a motion. The Respondent feels that the Complainant's motion, if permitted to be withdrawn, should be with prejudice, as it appears that the original motion has been brought only for the purpose of harassing or causing delay or to increase the cost of litigation. The original motion to disqualify Respondent's counsel violates Rule 11 of the Federal Rules of Civil Procedure.

Analysis and Conclusions

1. Initially, I find without merit Mr. Stewart's contention that the motion for leave to withdraw should be granted only with prejudice because complainant's failure to specify ``what testimony he expects to elicit from Respondent's counsel'' constituted a failure fully to comply with my July 26 order. That order was issued about 10 days before complainant filed its now-pending motion for summary judgment. Accordingly, complainant should not be penalized for assuming that should I grant that motion, I would not trouble to consider the validity of Mr. Stewart's contention of attorney-client and work-product privilege.

2. Complainant's March 15, 1990, motion to disqualify stated that complainant expected to call Mr. Stewart as a witness to show
(1)

that at her deportation hearing, Mrs. Allen, through her attorney Mr. Stewart, admitted working for respondent in violation of her immigration status; and (2) that Mr. Stewart prepared an application for alien employment certification which was allegedly filed by respondent on behalf of Mrs. Allen. Mr. Stewart's April 1990 opposition to this motion relied solely on the contention that the testimony thus sought is protected by the attorney-client or work-product privilege. Mr. Stewart's response dated September 4, 1990, to complainant's motion for leave to withdraw motion to disqualify alleges that in his response to my March 23, 1990, order, he ``pointed out . . . that which was obvious to all the parties, that the conversations and other matters are protected by an attorney-client privilege; ``his September 4 response did not refer to a work-product privilege. Mr. Stewart's harassment contention is based solely on his contention of ``obvious'' attorney-client privilege, and this assertion, plus his seemingly abandoned work-product claim, has been his only cited basis for opposing the motion to disqualify. However, no such attorney-client privilege claim is available as to whether particular statements were made by Mr. Stewart during a deportation hearing, in the presence of the immigration judge and the attorney representing the Department of Justice. U.S. v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975); U.S. v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971), cert. denied 404 U.S. 1017 (1972). Nor is it ``obvious'' that the attorney-client privilege would render objectionable any inquiries to Mr. Stewart about whether he had filed the application for alien employment certification for respondent on behalf of Mrs. Allen. U.S. v. Flores, 628 F.2d 521, 523-524, 526 (9th Cir. 1980) (``Obviously it cannot be seriously urged that, because of the privilege the existence of authority on the part of an attorney to file a public document on behalf of a client cannot be required to be revealed''); U.S. v. Mackey, 405 F. Supp. 854, 859 (E.D.N.Y. 1975) (per District Judge Jack B. Weinstein).

3. Whether complainant will ever have good cause for re-filing a motion to disqualify will depend on what happens at later stages of this case, including, but not limited to, my disposition of complainant's pending motion for summary judgment. Accordingly, complainant should not be penalized for failing to specify at this time what may be a good cause for re-filing in the future a motion to disqualify.

For the foregoing reasons, complainant's motion for leave to withdraw, without prejudice, the motion to disqualify Joel Stewart from acting as counsel for respondent in this matter is hereby granted.

Dated: September 14, 1990.

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