

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

In re INVESTIGATION OF
UNIVERSITY OF SOUTH
FLORIDA

OCAHO Investigative
Subpoena No. 20S00060

**ORDER DENYING PETITION TO REVOKE OR MODIFY
SUBPOENA AND CONDITIONAL AUTHORIZATION FOR
OSC TO SEEK ENFORCEMENT**

I. PROCEDURAL HISTORY

On April 7, 2000 at the request of the Office of Special Counsel (OSC) I signed and issued an investigative subpoena addressed to the custodian of records for the respondent University of South Florida (USF) directing that the university provide certain specified documents to OSC prior to the close of business on April 24, 2000 in aid of the investigation of Charge No. 197-17M-105 filed with OSC by Dr. Donald Maynard, in which it was alleged that USF engaged in certain acts which violated the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b.

On April 25, 2000, the university filed its Petition to Revoke or Modify OCAHO Investigative Subpoena No. 20S00060, to which OSC responded in opposition on April 28, 2000 with various attachments. Because neither party indicated when the subpoena was actually served on USF, it is impossible for me to discern with certainty from the record whether the petition was filed within the ten day period provided by OCAHO procedural rules.¹ Exhibit 6 attached to OSC's response indicates that it received the Petition

¹ 28 C.F.R. Pt. 68 (1999). The rule set out at 28 C.F.R. §68.25(c) provides that a person intending not to comply with a subpoena must file a petition within 10 days after the date of service. Rule 68.8(c)(2) provides that when a party is served by ordinary mail, 5 days will be added to the response time. Attachments to OSC's opposition suggest that the subpoena was probably mailed to USF with a letter dated April 11, 2000, but no certificate of service for the subpoena accompanied OSC's response.

to Revoke or Modify on April 21, 2000. The petition was filed with this office on April 25, 2000.²

OSC's response to the petition set out in detail the timetable of its investigation, its various requests to USF for information, and the events leading to its request for the subpoena. OSC challenged the grounds for revocation raised by USF and implicitly suggested that time is of the essence in resolving this matter because the investigatory period ends on or about June 15, 2000. OSC stated that any delay may prejudice its ability to evaluate the charging party's allegations and to timely make the determination required of it by 8 U.S.C. § 1324b(d)(1).

Unfortunately OSC's attachments did not include a copy of Dr. Maynard's charge. The submission and attachments, however, indicate that the charge alleged that USF discriminated against Dr. Maynard on the basis of his national origin and his citizenship status and retaliated against him because he asserted rights protected under 8 U.S.C. § 1324b. Correspondence between the parties attached to OSC's response indicates that Dr. Maynard was a fourth year medical resident at USF in the General Surgery Residency Program, who evidently was not selected as a fifth year resident. Because of his nonselection as a fifth year resident, he alleged that he lost an opportunity for a fellowship in colorectal surgery. The precise location of the fellowship is not reflected in the record.

II. ANALYSIS AND DISCUSSION

It is well settled in the Eleventh Circuit that an administrative subpoena should be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Florida Azalea Specialists*, 19 F.3d 620, 623 (11th Cir. 1994) (quoting *Federal Election Comm'n v. Florida for Kennedy Comm.*, 691 F.2d 1281, 1284 (11th Cir. 1982) and citing *Burlington R.R. Co. v. Office of Inspector General, R.R. Retirement Bd.*, 983 F.2d 631, 638 (5th Cir. 1993)). It is also well settled that the role of the administrative law judge or the district court in such a proceeding is sharply

² In a letter dated April 21, 2000 (Exhibit 6), counsel for OSC notified USF it had received the petition but was unsure whether it had actually been filed with this office because it lacked a certificate of service. The copy originally received in this office on April 25, 2000 lacked a certificate of service as well. It was accepted for filing only after receipt of a faxed certificate of service later that same day.

limited. *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 450 (11th Cir. 1996); *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) (citing cases).

As grounds for revoking or modifying the subpoena the respondent urged that: 1) USF has no position or fellowship in colorectal surgery and could not have denied it to the charging party, 2) the charging party's medical residency does not constitute employment, and 3) the charging party simultaneously filed an EEOC charge so that his OSC charge is statutorily barred by 8 U.S.C. § 1324b(b)(2). USF asserted that OSC lacks jurisdiction, and also that supplying the documents requested would constitute an undue burden on it. Despite its caption as a petition to revoke or modify the subpoena, USF's petition did not, in fact, identify or propose any specific modification, but appears to request instead that the subpoena be revoked in its entirety.

A. The Inquiry is Within the Authority of the Agency

I have reviewed Dr. Maynard's allegations and the requests set out in the subpoena and find that the investigation is within the authority of OSC pursuant to 8 U.S.C. § 1324b(f)(2), which provides that office with "reasonable access to examine evidence of any person or entity being investigated."

While EEOC has exclusive jurisdiction over claims of national origin discrimination involving employers of 15 or more employees under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1999), OSC has the exclusive authority over such claims where the employer has fewer than 15, but more than three employees. 8 U.S.C. § 1324b(a)(2)(A) and (B). The clear intent of the so-called "no overlap" provision is that either EEOC or OSC, but not both, will have the authority as to any given claim of national origin discrimination. However, because EEOC is without jurisdiction over claims of citizenship status discrimination, *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973), the statutory bar applies only to dual claims of national origin discrimination. *Harris v. Hawaii Gov't Employee Ass'n*, 7 OCAHO 937, at 294 (1997).³

³ Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*, reflect consecutive pagination

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OSC is the agency having exclusive investigative authority over claims of citizenship status discrimination regardless of the number of employees, just as OCAHO is the exclusive forum for administrative adjudication of such claims. The assertion that OSC's investigation is barred by statute is accordingly incorrect because the statutory bar has no application to claims of citizenship status discrimination.

USF cites no authority for its assertion that medical residency does not constitute employment, although the Eleventh Circuit appears to have allowed a resident anesthesiologist who was dismissed from a residency program to proceed under Title VII without discussion of the point. *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291 (11th Cir. 1988). See also *Fernando v. Rush-Presbyterian St. Luke's Medical Center*, 1997 WL 428539 *8-14 (N.D. Ill.), *aff'd* 142 F.3d 439 (7th Cir. 1998) (same as to pathology resident). Other cases have treated medical residents as employees for other differing purposes as well. *Thompson v. Regional Medical Center at Memphis, Inc.*, 748 F.Supp 575 (W.D. Tenn. 1990) (medical malpractice), *St. Lukes Hospital Ass'n v. United States*, 333 F.2d 157 (6th Cir. 1964), *cert. denied* 379 U.S. 963 (1965) (medical residents not exempt from social security taxes). Significantly, USF articulates no standard and states no facts, other than its own unilateral declaration, which it used to reach its conclusion. It does not suggest, for example, that USF does not compensate its medical residents or withhold sums from their compensation for federal taxes or for insurance pursuant to the Federal Insurance Contributions Act, 26 U.S.C.A. §3121(d)(2) (FICA), or that it does not provide them health insurance. It does not claim that it lacks the ability to control the hours and location of their work, that it does not offer them vacations and sick leave, that it does not verify their employment eligibility, that it does not provide their tools or equipment or that it does not generally exercise broad authority over the manner and means by which their work is accomplished. It does not allege that it has no potential liability for negligence or malpractice on the part of its residents. It does not contend that it does not have contractual employment agreements with its residents, or otherwise have a relationship with them which bears all the indicia of employment. Its assertion that its medical residents are not employees, in other words, is wholly unsupported.

within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

The employment status of an individual is a factual question, varying with the facts and circumstances of each case. *See, e.g., Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37, 45, 46 (D.N.H. 1997) (medical resident's paycheck with Dartmouth-Hitchcock Medical Center's name printed on it was sufficient to create a genuine issue of material fact as to whether hospital which terminated plaintiff's residency in neurology was his employer). That question, however, need not be resolved with respect to Dr. Maynard at this stage of the proceedings. As explained in *Kloster*, the investigating agency need not make a conclusive showing of jurisdiction to justify enforcing a subpoena. The agency must be allowed to investigate the facts, including the facts relevant to jurisdiction as an initial matter. 939 F.2d at 922–24. The determination as to whether there is an employment relationship is committed in the first instance to OSC utilizing the criteria set out in 8 C.F.R. §274a.1(f)-(h),(j), OCAHO case law, and general principles of agency law. *See, e.g., United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO 945, at 383–87 (1997). The authority to investigate alleged violations necessarily includes the authority to investigate coverage under the statute. *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930–32 (8th Cir. 1985), *cert. denied* 475 U.S. 1046 (1986); accord, *Federal Maritime Comm'n v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir. 1975).

USF's objection that it has no fellowship in colorectal surgery is simply unresponsive to the document request. The documents requested in the subpoena pertain for the most part to the denial of a position as a fifth year medical resident. The allegations are that the denial of a fifth year residency to Dr. Maynard led to the loss of an opportunity for a fellowship in colorectal surgery, perhaps at another institution. The requests for documents related to the fellowship is one of 5 subparts to one of 14 requests for documents. The short answer to USF's objection to this request is that if it has no documents which answer the description in the subpoena, regardless of where the fellowship was located, it is not required to produce any. If it does have such documents, they must be produced. That it may not have such documents or that it may not have such a position itself is not grounds for revoking or modifying the subpoena.

B. *The Demand is Not Too Indefinite*

The subpoena requests I–9 forms for USF's medical residents, various documents referring to or related to the charging party

as well as to other medical residents during the period, and general information about the processes and procedures affecting fourth and fifth year medical residents, including their selection and compensation. USF has not suggested that it is unable to discern what documents are requested, and the 14 requests appear reasonably specific, clear and straightforward. While USF asserts that supplying the documents required would constitute an undue burden “in light of the multiplicity of the documents requested and the numerous federal agencies involved,” no affidavit or explanation accompanies this assertion. The number of documents potentially to be produced is not identified, nor are any federal agencies identified other than OSC itself and EEOC.

In order to demonstrate that a subpoena is unduly burdensome, a respondent must show that compliance would threaten disruption or hinder normal business operations. *In re Investigation of Florida Azalea Specialists*, 3 OCAHO 523, at 1255 (1993), *enforcement aff'd*, 19 F.3d 620 (11th Cir. 1994); *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981). Generalized and unsupported claims of undue burden do not meet this standard.

C. The Documents Requested Appear Reasonably Relevant to the Inquiry

Relevance in the context of an investigatory subpoena is given an exceedingly generous construction. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984) (agency afforded “access to virtually any material that might cast light on the allegations against the employer”). The party opposing the enforcement of a subpoena has the burden of showing that it should not be enforced. This burden is not easily met.

The relevance of the specific requests is to be measured against the general purpose of the investigation. *See generally, In re Investigation of Carolina Employers Ass’n, Inc.*, 3 OCAHO 455, at 608–09 (1992). OSC is seeking information and documents which appear to be reasonably related to the allegations in Charge No. 197–17M–105 alleging unlawful discrimination. The requests OSC posed are directed to documents showing the relationship between Dr. Maynard and USF, the relationship between USF and other individuals similarly situated to Dr. Maynard, USF’s decision making processes and other matters which appear to bear on the matters under investigation.

III. *CONCLUSION*

The grounds asserted by USF for revocation or modification of OCAHO Subpoena No. 20S00060 are without merit and are insufficient to warrant revocation or modification.

IV. *ORDER*

The Petition to Revoke or Modify OCAHO Subpoena No. 20S00060 is hereby denied. The Office of Special Counsel is authorized without further request to seek enforcement in the appropriate United States District Court in the event the subpoena is not complied with before the close of business on May 22, 2000.

SO ORDERED.

Dated and entered this 10 th day of May, 2000.

Ellen K. Thomas
Administrative Law Judge