

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

May 13, 1993

IN RE INVESTIGATION OF)
)
STRANO FARMS) OCAHO Investigatory
) Subpoena No. 93-2-00023
_____)

ORDER DENYING PETITION TO REVOKE SUBPOENA AND GRANT-
ING IN PART REQUEST TO
PERMIT ENFORCEMENT OF SUBPOENA

On April 20, 1993, at the request of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the undersigned issued OCAHO Investigatory Subpoena No. 93-2-00023, which was delivered to Robert Hustead, Esquire, as legal representative for Strano Farms (petitioner) on April 21, 1993, by Federal Express.

By the terms of the written instructions set forth in that subpoena and its attachment, petitioner was directed to produce certain information and documents concerning petitioner's organizational structure and its hiring practices, in particular, petitioner's alleged refusal to hire Pascual Tasej Cacatzum, Pedro Tasej Cacatzum, Mariano Marcos Francisco, Marion Miguel Mendez, Bernardo Hernandez Velaquez, and Lucas Pascual Lucas. Petitioner was to have provided the requested information and documents to OSC no later than 5:00 p.m. on Monday, May 3, 1993.

On April 30, 1993, petitioner filed a Petition to Revoke, in which it sought to revoke OCAHO Investigatory Subpoena No. 93-2-00023.

On May 10, 1993, OSC filed its Memorandum in Opposition to Petition to Revoke Subpoena and Request to Permit Enforcement of Subpoena, wherein it requested that the undersigned deny petitioner's motion to quash and permit it to seek subpoena enforcement in United States District Court.

In its Petition, petitioner asserted that it complied with OSC's discovery requests prior to the issuance of the subpoena at issue to the best of its ability, except for OSC's request for Employment Eligibility Verification Forms (Forms I-9) for individuals other than the charging parties. Further, petitioner alleged, the subpoena at issue purports to be issued pursuant to 28 C.F.R. §68.23, which, petitioner contends, relates to pending administrative cases only, not to investigations, and which, petitioner asserts, does not authorize the issuance of subpoenas (sic). Petitioner also noted that the subpoena was served, not on it, but on its legal counsel, and asserted that since the notice of charge is deficient in specifying the circumstances of the charges, as required by 28 C.F.R. section 44.301 and 8 U.S.C. §1324(b)(1), the investigation is not lawfully commenced.

The scope of review applied to administrative subpoenas is necessarily limited because of the government's "interest in the expeditious investigation of possible unlawful activity." In Re Investigation of Florida Azalea Specialist, OCAHO Investigatory Subpoena No. 92-2-00123 (Order Denying Motion to Quash, Order Denying Motion for Oral Argument and Change of Venue and Order Granting Request to Permit Enforcement of Subpoena)(1/8/93) (quoting FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977)). As the Supreme Court has noted, the investigatory power of the administrative agency:

...is analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion the law is being violated, or even because it wants assurance that it is not....

United States v. Morton Salt, 338 U.S. 632, at 652, 94 L.Ed. at 403, at 411 (1950).

Complainant correctly notes that the standards governing the enforceability of an administrative subpoena are well established, indicating enforcement where:

- (1) The purpose of the investigation is within the statutory authority of the agency;
- (2) The information sought is reasonably relevant to the inquiry; and
- (3) Procedural requirements have been observed.

United States v. Powell, 379 U.S. 48, 57-58, 13 L.Ed.2d 112, 119, 85 S.Ct. 48 (1964); Morton Salt, 338 U.S. 652-53, 94 L.Ed. 416; EEOC v. Maryland Cup Corp., 785 F.2d 471, 475 (4th Cir. 1985); EEOC v. Children's Hosp. Medical Ctr. of N. California, 719 F.2d 1426, 1428 (9th Cir. 1983); Federal Election Comm'n v. Larouche Campaign, 644 F.Supp. 120 (S.D.N.Y. 1986), aff'd 817 F.2d 233 (2d Cir. 1987); EEOC v. Delaware State Police, 618 F.Supp. 451, 452-53 (D.Del. 1985); Florida Azalea, at 2 (1/8/93); In re Investigation of Carolina Employers Ass'n., 3 OCAHO 455, at 2 (9/17/92); In re Investigation of Florida Rural Legal Servs. v. Immokalee Agric. Workers, 3 OCAHO 437 at 6 (6/15/92). See also EEOC v. Tempel Steel Co., 814 F.2d 482, 485 (7th Cir. 1987); United States v. Westinghouse Corp., 788 F.2d 164, 166 (3d Cir. 1986); Federal Election Commission v. Florida for Kennedy Committee, 681 F.2d 1281, 1284 (11th Cir. 1982). See generally United States v. McAnlis, 721 F.2d 334, 336 (11th Cir. 1983); Matter of Newton, 718 F.2d 1015, 1018-19 (11th Cir. 1983) (tax summons enforcement proceedings).

The investigation for which the subpoena was issued stems from charges filed on March 10, 1993 by the charging parties, who alleged that when they interviewed for positions with petitioner their INS-issued work documents were rejected as not being genuine, in violation of 8 U.S.C. §1324b(a)(6). Under IRCA and the implementing regulations, OSC is obliged to investigate charges of unfair immigration employment practices, such as those filed by the charging parties. 8 U.S.C. §§1324b(c)(2), 1324b(d)(1); 28 C.F.R. §44.303(a); 28 C.F.R. §68.4(b). See Immokalee Agric. Workers, 3 OCAHO 437, at 7. Accordingly, the purpose of the investigation was clearly within the statutory authority of OSC.

The information sought in the subpoena must also be relevant to the investigation for the subpoena to be enforceable. The term "relevant" has been construed in the employment discrimination context to include "virtually any material that might cast light on the allegations against the employer." Carolina Employers, 3 OCAHO 455, at 4 (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 68-69, 104 S. Ct. 1621, 1631 (1984)). See also Texaco, 555 F.2d at 874 ("the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation").

All of the subpoena requests are relevant to OSC's investigation of the charging parties' allegations of discrimination and document abuse. Particularly relevant to OSC's investigation is its request for

copies of all of the Forms I-9 collected by petitioner since October 1, 1992 and a termination report for all persons terminated since that date, in light of the nature of the charge. The charging parties allege that petitioner refused to accept valid immigration documents as proof of their employment eligibility. It is readily apparent that, therefore, OSC's investigation would focus upon the Forms I-9 collected by petitioner in the course of fulfilling its employment eligibility verification responsibilities. However, the remaining subpoena requests are also relevant, to OSC's jurisdiction over the charges, to identification of employer's workforce and applicant pool by citizenship status and national origin, to the petitioner's hiring and employment eligibility verification procedures, to the length of employment of those individuals hired by petitioner, and to the circumstances surrounding petitioner's alleged failure to hire the charging parties, all of which in turn is relevant to OSC's duty to determine whether to bring a complaint with respect to the charge before this Office.

OSC has also demonstrated that it has satisfied the statutory requirements of due process to obtain the information it seeks.

OSC commenced its investigation upon receipt of charges of unfair immigration related employment practices from the charging parties. 8 U.S.C. §1324b(d)(1). To this end, OSC is entitled to reasonable access to examine evidence of any person or entity being investigated. 8 U.S.C. §1324b(f)(2). To facilitate this access, the undersigned has been granted the authority to compel by subpoena the production of evidence at any designated place. Id.

On March 16, 1993, OSC requested the information sought in the subpoena at issue by letter to petitioner. When that information was not forthcoming, OSC sought and obtained the subpoena at issue in accordance with the provisions of IRCA, id., and the pertinent procedural regulation, 28 C.F.R. section 68.25. That subpoena was properly served on petitioner's legal representative on April 21, 1993, by Federal Express. 28 C.F.R. §68.25(a). See Immokalee Agricultural Workers, 3 OCAHO 437, at 7-8. Finally, petitioner has been granted the opportunity for administrative review of the of the subpoena in question, as provided for in the procedural regulations. See 28 C.F.R. §68.25(c).

It is unclear from the Petition whether petitioner contests the effectiveness of service of the subpoena on the ground that it was served, not on respondent, but on its counsel. The pertinent proce-

dural regulation governing subpoenas, 28 C.F.R. section 68.25, does not specify upon whom the subpoena must be served, and therefore, because petitioner has not alleged that it did not receive or know of the subpoena, service on petitioner's counsel will not prevent enforcement. Consequently, OSC has complied with the due process requirements of IRCA and its implementing regulations, satisfying the third condition of the subpoena enforcement test.

Accordingly, the subpoena at issue is valid and enforceable, and enforcement is indicated unless petitioner demonstrates that the subpoena is "unduly burdensome." Maryland Cup, 785 F.2d at 475; Children's Hosp., 719 F.2d at 1428; Carolina Employers, 3 OCAHO 455, at 5; Immokalee Agricultural Workers, 3 OCAHO 437, at 9. This standard, however, is not easily met. Florida Azalea Specialist, at 4. In order to demonstrate that the subpoena is "unduly burdensome," petitioner must show that compliance threatens to unduly disrupt or seriously hinder normal operations of its business. FTC v. Jim Walter Corp., 651 F.2d 251, 258 (5th Cir. Unit A July 1981). Petitioner may not merely "utter" the claim, it must persuade the undersigned. Id.

Although petitioner asserted in its April 8, 1993 response to OSC's initial information request that "the volume of extraneous I-9's would be several hundred" (letter from Hustead to Briceno of 4/8/93, at 2), petitioner has failed to satisfy this standard. Accordingly, petitioner's assertion fails.

Petitioner has asserted additional objections to requests in the subpoena and in the information and document request which preceded it.

In subpoena Request 1, OSC requested that petitioner describe the corporate and organizational structure of the Company, and state the number of persons employed by the Company on February 25, 1993. Request 4 seeks the names, titles, national origin, citizenship status, and employment addresses and telephone numbers of all individuals having knowledge of the facts and circumstances surrounding and underlying the charges of the charging parties. In Request 6, OSC seeks that petitioner provide a complete explanation for its refusal to employ the charging parties, including the date those individuals were not hired. In Request 7, OSC asked petitioner to identify the persons selected for the positions for which the charging parties were not hired, by name citizenship status, national origin, and business telephone number and address; requested that petitioner state why

the successful applicants were selected; and requested the successful applicants' employment applications. In Request 8, OSC asked petitioner to describe the company's policy regarding the hiring of non-citizens for employment since November 6, 1986, and to provide all documents referring or relating to such policy.

Petitioner objects to all of these requests on the same ground, namely, that OSC may not use a subpoena to compel petitioner to create documentary evidence, but may only use a subpoena to compel production of existing documents. Because responses to Requests 1, 4, 6, 7 and 8 do not currently exist in documentary form, petitioner asserts, it cannot be compelled to produce them.

Petitioner's primary contention, that OSC may not require the creation of documentary evidence by subpoena, is in error. As noted previously above, OSC has a duty under IRCA to investigate all charges received by the Special Counsel and to determine within 120 days whether or not the charge is true, and whether or not to bring a complaint with respect to the charge before an administrative law judge in this Office. 8 U.S.C. §1324(d)(1).

To aid OSC in performing its duties, Congress has provided it with reasonable access to examine evidence of any person or entity being investigated, the production of which may be compelled by subpoena obtained from an administrative law judge. 8 U.S.C. §1324(f)(2).

In construing the investigatory powers provision under Title VII of the Civil Rights Act of 1964 (Title VII), section 710 (42 U.S.C. §2000e-9), which is tied to section 11, the investigatory powers provision, of the National Labor Relations Act (29 U.S.C. §161) (a provision more narrowly drawn than 8 U.S.C. §1324b(f)(2)) the Court of Appeals for the Fourth Circuit held that the Equal Employment Opportunity Commission (EEOC) has the authority to compel a subpoenaed party to produce evidence that does not presently exist in documentary form. The court, quoting Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 66 S. Ct. 494, 509, 90 L.Ed. 614 (1946), noted:

...an administrative agency's power to issue subpoenas, a power that is part of its "investigative function, in searching out violations with a view to securing enforcement of the Act is essentially the same as... the court's in issuing other pretrial orders for the discovery of evidence...."

Maryland Cup, 785 F.2d at 479 (4th Cir. 1986). Under the procedural rule governing discovery in actions involving allegations of unfair

immigration related employment practices before this office, the parties to the action "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 28 C.F.R. §68.18(b) (emphasis added). Accordingly, the fact that the evidence sought in the subpoena at issue does not currently exist in documentary form does not invalidate the subpoena in question.

In addition, petitioner objects to Requests 2, 3, 5, 11 and 12 on the ground that the documents requested do not exist, as petitioner contends it informed OSC. An examination of these requests is necessary for consideration of petitioner's objection.

In Request 2, OSC seeks all documents, letters, notes, memoranda, etc., relating or referring to petitioner's refusal of employment to the charging parties. Request 3 seeks all documents which relate or refer to the facts and circumstances surrounding or underlying the charging parties' charges. In Request 5, OSC requests all documents referring or relating to the positions for which the charging parties were not employed by petitioner, including all documents describing the requirements, qualifications, duties, salary and benefits for the positions.

In Request 11, OSC asks for all documents that relate or refer to petitioner's policies, guidelines, procedures, or criteria relating to the hiring and selection of employees. In Request 12, OSC seeks copies of all documents petitioner gives to job applicants, such as, but not limited to, descriptions of job qualifications, information concerning the interview process, and application forms, including copies of any and all such documents petitioner used at any time between October 1, 1992, and the present.

In subpoena Requests 2, 3, 5, 11, and 12, OSC has requested specific documents. In response, petitioner asserts that the documents sought do not exist. OSC fails to allege that the documents do exist, or that petitioner's assertion is a subterfuge. Because petitioner has fully responded to Requests 2, 3, 5, 11, and 12, there is no reason to revoke or to permit enforcement of those requests.

Finally, petitioner objects to the subpoena on the ground that the notice of charge is deficient in specifying the circumstances of the charges, as required by 28 C.F.R. section 44.301(e) and 8 U.S.C. §1324(b)(1). That section of IRCA provides, in pertinent part:

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(t)he Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged immigration related employment practice) on the person or entity involved within 10 days.

The notice of charge was sent on March 16, 1993, six (6) days after the charges were filed with OSC. The notice to petitioner stated:

The charges allege that on February 25, 1993, all of the above-mentioned individuals (the charging parties) were unlawfully not hired because of document abuse. They claim that their valid immigration documents were not accepted as proof of their employment eligibility.

Petitioner fails to elaborate on its contention that the notice of charge is deficient in specifying the circumstances of the charges. I find that OSC's March 16, 1993 notice to petitioner, concerning the nature of the pending charge, satisfied IRCA's requirements, as set forth in 8 U.S.C. §1324b(b)(1). In giving that notice to petitioner, OSC fully advised petitioner of the facts then in its possession and advised petitioner of its investigation, which had to have been completed by July 8, 1993. That investigation was necessary to OSC in fulfilling its statutorily-mandated duty of determining whether to file a complaint with respect to the charges, and only the investigation would provide OSC with the facts necessary to make that prosecutorial determination. See generally Immokalee Agricultural Workers, 3 OCAHO 437, at 11.

Accordingly, petitioner's Petition to Revoke Subpoena is hereby denied, and OSC's request to permit enforcement of OCAHO Investigative Subpoena No. 93-2-00023 is granted, with respect to Requests 1, 4, 6, 7, 8, 9, 10 and 14 therein.

In the event that petitioner fails to comply with those requests set forth in OCAHO Investigatory Subpoena No. 92-2-00023, OSC is hereby authorized, in accordance with the provisions of 8 U.S.C. §1324b(f)(2), to seek enforcement of OCAHO Investigative Subpoena No. 93-2-00023, Requests 1, 4, 6, 7, 8, 9, 10 and 14, in the appropriate United States District Court.

JOSEPH E. MCGUIRE
Administrative Law Judge