



2. Provide all documents supporting or relating to your written response and all documents regarding the charging party's employment with the Company, including employment applications, job performance evaluations, Immigration and Naturalization Service (INS) Form I-9, layoff notices and termination notices.
3. State the Company's legal name and state the total number of persons it employed on November 11, 1993.
4. Provide copies of all INS Forms I-9 collected or reverified by the Company since November 1, 1993, together with photocopies of supporting documentation, if made.
5. Provide copies of all documents describing the Company's policies and procedures since November 1, 1993 regarding completion and reverification of INS Forms I-9.
6. Provide the names, addresses and dates of discharge for all employees discharged by the Company since November 1, 1993 for reasons related to INS Form I-9 requirements.

On March 13, 1995, petitioner filed a pleading captioned Petition to Revoke Subpoena and Motion Requiring the Office of Special Counsel to Prove Jurisdiction, requesting therein that the undersigned issue an order revoking OCAHO Investigative Subpoena No. 95-2-00017 until OSC has demonstrated that it has jurisdiction in this proceeding.

On March 22, 1995, OSC filed its Memorandum in Opposition to Petition to Revoke Subpoena and Motion Requiring the Office of Special Counsel to Prove Jurisdiction, in which it requested the undersigned "to deny the Petition and to order the information and documents requested to be produced no later than ten days after issuance of the order."

The pertinent procedural rule governing the issuance of subpoenas in unfair immigration-related employment practice cases provides that an administrative law judge may issue subpoenas prior or subsequent to the filing of a complaint. 28 C.F.R. § 68.25(a). That rule further provides that "[a]ny person served with a subpoena issued by an Administrative Law Judge who intends not to comply with it shall, within ten (10) days after the date of service of the subpoena . . . , petition the Administrative Law Judge to revoke or modify the subpoena." 28 C.F.R. § 68.25(c).

On February 27, 1995, petitioner was served, via certified mail, with OCAHO Investigative Subpoena No. 95-2-00017. Under the governing procedural rule, petitioner had ten (10) days in which to petition the undersigned to revoke or modify that subpoena. See 28 C.F.R. § 68.25(c). Accordingly, Hyatt's petition was due by March 9, 1995, and

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was not filed until March 13, 1995, or four (4) days after the statutory filing date.

Therefore, as OSC has correctly noted in its Memorandum in Opposition, Hyatt's petition was not filed in a timely manner as required by 28 C.F.R. Section 68.25(c). On this ground alone, petitioner's March 13, 1995 Petition to Revoke OCAHO Investigative Subpoena No. 95-2-00017 is deficient and must be denied for its untimeliness, as well as for these additional reasons.

The scope of issues that may be challenged pertaining to the issuance of an administrative subpoena is necessarily limited "because of the important governmental interest in the expeditious investigation of possible unlawful activity." Federal Trade Comm'n v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977); In re Investigation of Strano Farms, 3 OCAHO 521, at 2 (1993); In re Investigation of Florida Azalea Specialist, 3 OCAHO 523, at 2 (1993). The Ninth Circuit emphasized "that the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid power to investigate the activities of the entities over which it has jurisdiction and the right under the appropriate conditions to have district courts enforce its subpoenas." Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975).

As noted by the United States Supreme Court, an administrative agency has a power of inquisition which is not derived from any judicial function. This power 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 violated, or even because it wants assurance that it is not." United States v. Morton Salt, 338 U.S. 632, 642-43 (1950). The Court further stated that "[w]hen investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is a probable violation of the law." Id. at 643.

The standards governing the enforceability of an administrative subpoena are well established. An administrative subpoena should be enforced provided that: (1) Congress promulgated the authority to investigate to the agency; (2) certain procedural requirements have been met; and (3) the information sought is reasonably relevant to the investigation. Equal Employment Opportunity Comm'n v. Children's Hosp. Medical Ctr. of N. Cal., 719 F.2d 1426, 1428 (9th Cir. 1983); see also United States v. Powell, 379 U.S. 48, 57-58 (1964); Morton Salt,

338 U.S. at 652-53; Federal Trade Comm'n v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977); In re Investigation of Strano Farms, 3 OCAHO 521, at 2 (1993); In re Investigation of Florida Azalea Specialist, 3 OCAHO 523, at 2 (1993). In the event that these three (3) criteria are met, the investigative subpoena should be enforced unless the individual or entity under investigation demonstrates that "the inquiry is unreasonable because it is over broad or unduly burdensome." Children's Hosp. Medical Ctr., 719 F.2d at 1428.

The Immigration Reform and Control Act of 1986, (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), establishes that it is an unfair immigration-related employment practice to discriminate against an authorized individual with respect to the hiring, recruitment or referral for a fee of the individual for employment or the discharging of the individual from employment because of that individual's national origin or citizenship status. 8 U.S.C. § 1324b(a)(1). Congress also made it an unfair immigration-related employment practice to retaliate against an individual for asserting rights protected under Section 1324b, as well as engaging in certain document abuse practices. 8 U.S.C. §§ 1324b(a)(5); 1324b(a)(6).

In enacting IRCA, Congress created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). See 8 U.S.C. § 1324b(c). IRCA vests OSC with broad powers to: (1) investigate charges of unfair immigration-related employment practices; (2) issue complaints pursuant to 8 U.S.C. Section 1324b, and (3) prosecute all such complaints before administrative law judges. 8 U.S.C. § 1324b(c)(2).

The investigation for which the subpoena in question was issued stems from a charge filed by Juan Carlos Cuni Baro with OSC on January 9, 1995. That charge alleged that petitioner required Mr. Baro to produce a specific work authorization document, and subsequently discharged him when he produced the requested document.

Under IRCA, OSC is required to investigate every charge which is received and to make a determination as to whether it will file a complaint based upon any charge. 8 U.S.C. § 1324b(d)(1). To assist in performing its investigatory duty, Congress mandated that OSC "shall have reasonable access to examine evidence of any person or entity being investigated." 8 U.S.C. § 1324b(f)(2).

Towards that end, OSC may request an administrative law judge to issue a subpoena, as under this factual scenario, compelling an individual or entity under investigation to produce evidence. The subpoena in question was issued by the undersigned pursuant to Section 1324b(f)(2), upon OSC's request in the course of conducting its statutorily mandated investigation of the unfair immigration-related employment practice charge filed against petitioner by Mr. Baro. There is no question that the purpose of the pertinent investigation is clearly within OSC's statutory authority.

The procedural requirements for enforcing this subpoena have also been clearly established. OSC commenced its investigation of petitioner after receiving the charge filed on January 9, 1995. See 8 U.S.C. § 1324b(d)(1). After petitioner failed to provide OSC with the requested documents and information, OSC sought and obtained the subpoena in question from the undersigned in accordance with the provisions of 8 U.S.C. § 1324b(f)(2). The subpoena was properly served upon petitioner on February 27, 1995 via certified mail, an accepted method of service. See 28 C.F.R. § 68.25(a). Additionally, the subpoena conforms with the content requirements set forth at 28 C.F.R. Section 68.25(b). Accordingly, OSC has complied with the procedural requirements necessary for enforcing a subpoena.

Finally, the information requested by OSC must be reasonably relevant to the investigation. As noted previously, OSC sought the following six (6) items in OCAHO Investigative Subpoena No. 95-2-00017:

1. Provide a detailed statement explaining your position regarding the allegations contained in the charge as described in paragraph two of the letter dated January 12, 1995 from the Office of Special Counsel to the Hyatt Regency Lake Tahoe ("the Company").
2. Provide all documents supporting or relating to your written response and all documents regarding the charging party's employment with the Company, including employment applications, job performance evaluations, Immigration and Naturalization Service (INS) Form I-9, layoff notices and termination notices.
3. State the Company's legal name and state the total number of persons it employed on November 11, 1993.
4. Provide copies of all INS Forms I-9 collected or reverified by the Company since November 1, 1993, together with photocopies of supporting documentation, if made.
5. Provide copies of all documents describing the Company's policies and procedures since November 1, 1993 regarding completion and reverification of INS Forms I-9.

6. Provide the names, addresses and dates of discharge for all employees discharged by the Company since November 1, 1993 for reasons related to INS Form I-9 requirements.

The Supreme Court has construed the term "relevant" in the employment discrimination context to include "virtually any material that might cast light on the allegations against the employer." Equal Employment Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54, 68-69 (1984); see also In re Investigation of Strano Farms, 3 OCAHO 521, at 3 (1993); In re Investigation of Florida Azalea Specialist, 3 OCAHO 523, at 3 (1993). The first two (2) subpoena requests are directly relevant to the charge received by OSC because they pertain to the circumstances surrounding the termination of the charging party.

The third request, that of determining the number of individuals employed by petitioner at the time of the alleged unfair immigration-related employment practice(s) is relevant to the applicability of IRCA. Finally, subpoena requests four (4) through six (6) are relevant to petitioner's employment practices, particularly whether petitioner is engaging in any unfair immigration-related employment practices. All six (6) of the subpoena requests being sought by OSC are unequivocally relevant and material to the discrimination and/or document abuse charge(s) being investigated.

Hence, OCAHO Investigative Subpoena No. 95-2-00017 is valid and enforceable and will be enforced unless petitioner demonstrates that "the inquiry is unreasonable because it is over broad or unduly burdensome." Equal Employment Opportunity Comm'n v. Children's Hosp. Medical Ctr. of N. Cal., 719 F.2d 1426, 1428 (9th Cir. 1983). Petitioner has failed to meet this lofty burden.

Demonstrating that a subpoena is over broad or unduly burdensome is a difficult task. See Equal Employment Opportunity Comm'n v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir. 1985); Federal Trade Comm'n v. Rockefeller, 591 F.2d 182, 190 (2nd Cir. 1979); Strano Farms, 3 OCAHO 521, at 5; Florida Azalea Specialist, 3 OCAHO 523, at 4; In re Investigation of Carolina Employers Ass'n, Inc., 3 OCAHO 455, at 5 (1992). In order to make a showing that responding to an administrative subpoena would be unduly burdensome, petitioner "must show that producing the documents would seriously disrupt its normal business operations." Maryland Cup, 785 F.2d at 477; see also Federal Trade Comm'n v. Jim Walker Corp., 651 F.2d 251, 258 (5th Cir. 1981); Rockefeller, 591 F.2d at 190.

Petitioner has failed to demonstrate that compliance with the subpoena would seriously disrupt or hinder the normal operations of its business. Instead, petitioner argues that "compliance with this subpoena will involve Hyatt Regency's time, money and human resources," and "before the Hyatt Regency is required to allocate resources to this matter, fundamental fairness requires OSC to prove its jurisdiction." Petitioner's March 13, 1995 Petition to Revoke, at 3-4.

Petitioner's argument that OSC may not have jurisdiction to investigate this charge "plainly falls within the prohibition against raising what normally would be a defense to an action by the agency." Equal Employment Opportunity Comm'n v. Children's Hosp. Medical Ctr. of N. Cal., 719 F.2d 1426, 1430 (9th Cir. 1983); see also United States v. Morton Salt, 338 U.S. 632, 642-43 (1950); Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 434 (9th Cir. 1975). In order to make a determination of whether it has jurisdiction over the matter being investigated, OSC has the statutory authority to obtain the information necessary from any person or entity being investigated to assist in making that determination. See Port of Seattle, 521 F.2d at 434; 8 U.S.C. § 1324b(f)(2).

The Ninth Circuit stressed that as long as the information requested is relevant and there is some 'plausible' ground for jurisdiction, or put another way, unless jurisdiction is 'plainly lacking,' an administrative subpoena should be enforced. See Children's Hosp. Medical Ctr., 719 F.2d at 1430; Marshall v Burlington Northern, Inc., 595 F.2d 511, 513 (9th Cir. 1979); Casey v. Federal Trade Comm'n, 578 F.2d 793, 799 (9th Cir. 1978). As previously stated, OSC is required to investigate each unfair immigration-related employment practice charge filed, 8 U.S.C. § 1324b(d)(1), and acting in accordance with that congressional mandate, OSC requested the undersigned to issue the subpoena in question. Thus, OCAHO Investigative Subpoena No. 95-2-00017 will not be invalidated on a mere suspicion that OSC may lack jurisdiction to investigate this charge.

Accordingly, for these reasons, petitioner's motion to revoke the subpoena in question is hereby denied, and also because petitioner failed to file its petition in a timely manner.

In view of this ruling, petitioner is hereby ordered to provide to OSC the information and documents requested in OCAHO Investigative Subpoena No. 95-2-00017, and to have done so within ten (10) days of its acknowledged receipt of this Order.

In the event that petitioner fails to comply with those six (6) requests set forth in OCAHO Investigative Subpoena No. 95-2-00017, OSC is hereby authorized, in accordance with the provisions of 8 U.S.C. § 1324b(f)(2), to seek enforcement of this subpoena in the appropriate United States District Court.

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JOSEPH E. MCGUIRE  
Administrative Law Judge