

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

IN RE )  
INVESTIGATION OF WAL-MART )  
DISTRIBUTION CENTER #6036 ) Case No. 95-2-00029  
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ORDER GRANTING IN PART AND DENYING IN PART  
RESPONDENT'S PETITION TO REVOKE OR MODIFY  
SUBPOENA  
(August 3, 1995)

I. Introduction

On June 29, 1995, I issued a subpoena as requested by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). The subpoena demands nine categories of information from Wal-Mart Distribution Center #6036 (Wal-Mart or Respondent) located in Tucker, Texas. The subpoena return date was set for July 12, 1995.

On July 17, 1995, Wal-Mart filed a Petition to Revoke or Modify Subpoena (Petition), requesting that several of the categories of information be either eliminated or modified. No response was filed by OSC; the deadline for a response has passed.<sup>1</sup> For the following reasons, I grant in part and deny in part Respondent's request.

II. Respondent's Arguments

A. Paragraph Six of the Subpoena -- Extension of Time

First, Respondent argues that paragraph six of the subpoena, seeking a written statement from Kathy Moore (Moore), an employee of Wal-Mart, should be modified. According to Wal-Mart, Moore is on medical leave of absence and will not return to work until August 15, 1995. Respondent requests an extension of time in which to comply

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<sup>1</sup> See 28 C.F.R. § 68.25(c). See generally Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

with paragraph six until seven days following her return. As OSC has not filed any response indicating prejudice by an extension of time, I grant Respondent's request. Accordingly, a written statement by Moore will be timely if received by OSC no later than August 22, 1995.

**B. Paragraphs Two and Three -- Attorney-Client Privilege**

Wal-Mart also argues that paragraphs two and three of the subpoena should be excluded as violative of the attorney-client privilege. Paragraph two requests a

10/86 memo from "Bentonville" ("headquarters") to Palestine, Texas warehouse and/or other Wal-Mart Stores, Inc. locations explaining that beginning in November, 1986 INS Form I-9's would need to be completed for each new hire and any attachments (memo was referred to by Ms. Kitcher during her interview with OSC attorney Milanec on 6/13/95).

Similarly, paragraph three requests

[a]ll Wal-Mart Stores, Inc. memos, policy statements, or other documents which have been issued to Wal-Mart Stores, Inc. Personnel Depts. which explain and/or instruct said staff on how to complete the INS Form I-9 verification and/or reverification process.

I reject Respondent's argument for two reasons. First, the sort of communication sought cannot be even remotely considered as within the scope of the privilege between attorney and client. See, e.g., Hoffman v. United Telecommunications, Inc., 117 F.R.D. 436, 439 (D.Kan. 1987). Corporate memoranda explaining the I-9 process to employees cannot be considered as attorney-client communications. Such documents relate to Respondent's company-wide policies, guidelines and procedures for implementation of § 1324a and have in the past been upheld as relevant documents for OSC to request during an investigation. See, e.g., In Re Investigation of ABM Industries, 5 OCAHO 763 at 4 (1995) (Order Denying Petition to Revoke Subpoena and Modifying Subpoena) (stating that documents relating to corporate structure, company-wide policies, guidelines and procedures for implementation of 8 U.S.C. § 1324a and § 1324b are relevant to an OSC investigation of a § 1324b discrimination charge). Second, there is no suggestion that such documents "were produced 'in anticipation of litigation.'" United States v. Northwest Airlines, Inc., 3 OCAHO 452 at 8 (1992) (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977)).

**C. Paragraph Eight -- Enforcement of the Subpoena**

Respondent objects to paragraph eight of the subpoena because "[t]he demand for a list of all Wal-Mart locations in Texas and Florida exceeds subpoena power available under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. Section 13246 [sic]." Respondent claims that "[p]aragraph eight . . . seeks Wal-Mart's retail and warehouse locations in Texas and Florida, but the subpoena, on its face, reveals that it concerns an investigation of only one Wal-Mart location . . . located in Palestine, Texas." Wal-Mart contends that "[t]he subpoena arises from a charge filed by Horacio Olivera Vargas, who alleged that he was unlawfully discharged from employment at the Palestine distribution center. . . ." Wal-Mart argues that it follows that the subpoena "is too indefinite and not reasonably material and relevant to Vargas' discharge from employment at the Palestine distribution center. . . ."

The role of the court in an investigatory subpoena enforcement proceeding is "sharply limited." ABM Industries at 2 (quoting In Re Investigation of Valley Crest Tree Co., Inc., 3 OCAHO 579 at 3 (1993)) (citing EEOC v. South Carolina Nat'l Bank, 562 F.2d 329, 332 (4th Cir. 1977); EEOC v. Maryland Cup Corp., 785 F.2d 471, 475 (4th Cir. 1986)). In fact, "administrative subpoenas are subject only to limited judicial review." In Re Investigation of Seafarers International Union, 3 OCAHO 498 at 3 (1993) (quoting Maryland Cup at 475). However, certain standards must nevertheless be met. These include: (1) that the agency requesting the subpoena, in this case OSC, has been granted investigatory authority, (2) that certain procedural requirements have been met and (3) that the information sought is reasonably relevant to the investigation and not unduly burdensome to the Respondent. In Re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO 751 at 3 (1995) (Order Denying Petition to Revoke Subpoena) (citing EEOC v. Children's Hosp. Medical Ctr. of N. Cal., 719 F.2d 1426, 1428 (9th Cir. 1983)).

OCAHO caselaw establishes that OSC is authorized to investigate and prosecute charges of immigration-related employment discrimination under § 1324b. See 8 U.S.C. § 1324b(c); Hyatt Regency, 5 OCAHO 751 at 4. As the subpoena requests information dealing with a charge of discrimination/retaliation, the request for information in conjunction with Vargas' charge is clearly within OSC's investigatory power. In addition, IRCA empowers OSC to investigate, on its own initiative, where it has reason to believe a pattern or practice of discrimination has occurred or is occurring. See 8 U.S.C. § 1324b(d)(2); In Re Investigation of Carolina Employers Association, Inc., 3 OCAHO 455 at 7 (1992) (Order Denying Motion to Revoke OCAHO Investi-

gatory Subpoena). Therefore, even without a charge of retaliation, OSC is authorized to determine whether or not Respondent engages in a policy of discrimination. Accordingly, information pertaining to Wal-Mart's policy of implementation of § 1324a's employment eligibility verification system is within OSC's investigatory powers.

There is no suggestion by Wal-Mart that proper procedure has not been followed. See In Re Investigation of Strano Farms, 3 OCAHO 521 at 3 (1993). See also 8 U.S.C. § 1324b(d)(1).

Finally, the subpoena must be reasonably related to OSC's investigation and not unduly burdensome for the Respondent. Paragraph eight of the subpoena, requesting a list of Wal-Mart locations, is relevant to OSC's pattern or practice investigation.

In addition, Respondent has made no showing that compiling a list of other locations is unduly burdensome, i.e., that "producing the documents would seriously disrupt its normal business operations." ABM Industries at 4 (quoting Hyatt Regency at 6) (citing Maryland Cup at 477).

For the foregoing reasons, I grant Respondent's request to modify paragraph six of the subpoena granting an extension of time until August 22, 1995 in which to comply with the request. I deny all of Respondent's other requests to revoke or modify the subpoena.

**SO ORDERED.**

Dated and entered this 3d day of August, 1995.

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MARVIN H. MORSE  
Administrative Law Judge