

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

June 15, 1992

IN RE INVESTIGATION OF	)	
FLORIDA RURAL LEGAL	)	
SERVICES,	)	
Charging Party,	)	
	)	
v.	)	OCAHO Investigatory
	)	Subpoenas Nos.
IMMOKALEE AGRICULTURAL	)	
WORKERS I.D., INC.,	)	92-2-00067
Respondent.	)	92-2-00068
_____	)	

ORDER DENYING RESPONDENT'S PETITION TO QUASH  
SUBPOENAS AND ENJOIN FURTHER INVESTIGATION

On April 28, 1992, at the request of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the undersigned issued two (2) investigatory subpoenas, Nos. 92-2-00067 and 92-2-00068, which were subsequently delivered to respondent's office manager and corporate secretary/treasurer, Ms. Ann Winters, by an overnight courier service, Federal Express, on May 22, 1992.

Subpoena No. 92-2-00067 contained the information that Ms. Winters was to appear at 8:30 a.m. on Thursday, June 11, 1992, in the Lee County Justice Building, Suite 3116, in Fort Meyers, Florida in order to testify in this investigative proceeding. The wording in Subpoena No. 92-2-00068 advised Respondent's custodian of records to make available to OSC those documents and information described on a separate sheet attached to that subpoena.

On June 1, 1992, respondent filed a pleading captioned Petition to Quash Subpoenas and Enjoin Further Investigation, in which it objects to the issuance of Subpoena No. 92-2-00067 because that subpoena: (1) is defective for lack of proper service; (2) seeks to secure the deposition testimony of Ms. Winters in the absence of any showing of any need to do so and in advance of the filing of a complaint which

would trigger discovery requests permitted under the pertinent procedural rules; and (3) seeks to impose an undue burden on respondent.

Respondent also objects to the issuance of Subpoena No. 92-2-00068 because that subpoena: (1) is defective for lack of proper service; (2) requests the production of evidence which is not relevant to the charge filed; and (3) seeks to impose an undue burden on defendant.

Respondent also noted in its petition that in issuing his May 15, 1992, Order Denying Petition to Quash Subpoena and Denying Petition for Authority to Seek Enforcement in OCAHO Investigatory Subpoena No. 92-2-00058, which had been issued and served upon respondent earlier, Judge Marvin H. Morse had stated that respondent had not raised the issue therein of OSC's failure to have given proper notice of the charge of discrimination, as required under the provisions of 8 U.S.C. §1324b.

Respondent's June 1, 1992, petition was accompanied by a 17-page memorandum which, together with its attachments, provides the following facts and argumentation.

Immokalee Agricultural Workers, I.D., Inc. (respondent), was incorporated as a for-profit Florida corporation in August 1987 for the purpose of providing employment verification and payroll support services to an unspecified number of subscribing area fruit and produce growers, who, as customers and shareholders of respondent, have designated respondent as their agent for purposes of rendering those services.

Day workers seeking employment with area growers are initially referred to respondent's office in Immokalee for preparation of the required Employment Eligibility Verification Form, Form I-9, and for payroll processing purposes. Respondent issues such workers a white identification card bearing the worker's photograph and a bar code strip.

The identification card is used to verify the employability of a largely transient and shifting pool of day workers who routinely work for different growers in the Immokalee, Florida area and the card also assists the member growers in preparing their payrolls.

By letter dated March 16, 1992, OSC advised respondent that on March 6, 1992, some 10 days earlier, OSC had accepted a charge of employment discrimination filed by the Florida Rural Legal Services,

Inc. (Legal Services), under 8 U.S.C. §1324b namely, that respondent had violated the provisions of 8 U.S.C. §1324b by requiring the production of additional documents than those required by 8 U.S.C. §1324a(b).

That correspondence further advised respondent that OSC had some 120 days, or until July 6, 1992, in which to investigate the charge in order to determine whether there was reasonable cause to believe that the charge was true and to file a complaint with an administrative law judge.

Respondent was further advised therein that the pertinent provisions of IRCA provide that OSC must be granted reasonable access to examine the evidence of any person or entity being investigated, including the production of such evidence by way of subpoena.

In that letter, also, OSC advised respondent that it preferred to proceed informally at that stage of the investigation. To that end, OSC requested that respondent make available to OSC that information and/or copies of those documents described in the five (5) specific requests enumerated therein and to have done so by March 31, 1992.

On April 7, 1992, the parties' counsel conferred by telephone and it was agreed that respondent would submit a preliminary Statement of Position concerning whether the information which OSC had requested in its March 16, 1992, letter, which pertained to Forms I-9 and information regarding respondent's shareholders, was in fact relevant to the allegations under investigation.

On April 13, 1992, respondent forwarded an eight-page Statement of Position to OSC, and respondent states that OSC has not replied to that correspondence. Instead, OSC requested that this office issue an investigatory subpoena and Judge Morse did so, issuing the previously-mentioned Subpoena No. 92-2-00058 on April 28, 1992.

On May 14, 1992, respondent filed a Petition to Quash or Revoke Subpoenas, in which it asserted that Subpoena No. 92-2-00058 should have been quashed or revoked because that subpoena: (1) did not comply with the requirements of 28 C.F.R. §68.25; (2) was served improperly; (3) requested evidence which is not relevant to the allegations at issue; and (4) sought to impose an undue burden upon respondent.

On May 15, 1992, OSC filed a petition requesting that Judge Morse authorize OSC to petition an appropriate U.S. District Court for the

issuance of an order requiring respondent's compliance with the subpoena.

On May 15, 1992, also, Judge Morse issued an order denying respondent's Petition to Quash Subpoena and also denying OSC's Petition for Authority to Seek Enforcement.

Respondent's objections to Subpoenas Nos. 92-2-00067 and 92-2-00068 are threefold: (1) OSC has failed to properly notify respondent of the nature of the charge involved, in violation of the pertinent provisions of IRCA, those found at 8 U.S.C. §1324b(b)(1), which provide that "The Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days. (*Emphasis added*); (2) those subpoenas should be quashed owing to the undue burden having been placed on respondent; and (3) the subpoena which seeks to depose respondent's office manager, Ms. Ann Winters, constitutes discovery practice which is premature, unnecessary, unreasonable, and irrelevant in the absence of OSC's having failed to file a formal charge of an unfair immigration-related employment practice(s) against respondent.

Respondent acknowledges that OSC must investigate and prosecute discrimination claims under IRCA and must be granted some discretion in doing so, but also urges that its investigative powers, including the inspection of Forms I-9, are limited and are not to be abused.

Respondent maintains that the subpoenas at issue "are not reasonable in scope, relevant in purpose, or specific in direction," and resultingly "are unreasonably burdensome and must be quashed."

In asserting that proposition, respondent relies upon the ruling in See v. Seattle, 387 U.S. 541, 18 L.Ed. 20 943, 87 S.Ct. 1737 (1967), which involved the reversal of a conviction of a business person who had refused to permit a representative of the City of Seattle Fire Department to enter and inspect that person's locked commercial warehouse without either a warrant or reasonable cause to believe that a violation of any municipal ordinance had occurred therein. In so ruling, the U.S. Supreme Court held that the Fourth Amendment forbids warrantless inspections of commercial structures, as it had held previously in ruling upon such searches of private residences.

More specifically, respondent relies upon this pronouncement in that ruling:

It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

387 U.S. 541, 544.

On June 10, 1992, OSC filed its Response in Opposition to Petition to Quash Investigatory Subpoenas and Enjoin Further Investigation, reiterating that on March 6, 1992, OSC had received a class action charge filed by Legal Services on behalf of seven (7) named individual farm workers and all other similarly situated farm workers in the Immokalee, Florida area.

Legal Services' charge involved respondent's employment verification and hiring process as well as its completion of the Forms I-9. Specifically, Legal Services alleges that at the time of hire, respondent's member growers, which number approximately 50 farms in the Immokalee, Florida area, required farm workers to produce more and different documents than those which are required by the provisions of 8 U.S.C. §1324a(b), and in doing so, amounts to an unfair immigration-related employment practice namely, document abuse, a practice which violates the 1990 amendments to IRCA, specifically those set forth at 8 U.S.C. §1324b(a)(6).

More specifically, Legal Services alleges that respondent's use of the white identification cards in hiring day workers for its member/ shareholder area fruit and produce growers violates the provisions of 8 U.S.C. §1324b in several respects: (1) at the time of hire, class members are required to produce the white card, which is an additional document to those required by the Form I-9 and is therefore, in violation of 8 U.S.C. §1324b(a)(6); (2) class members were wrongfully not hired, even though they were in possession of either a List A or a List B and C document or had a previous Form I-9 on file and were eligible for reverification; and (3) in the course of preparing the pertinent Forms I-9, respondent's member growers' request for more or different documentation than that required under the provisions of 8 U.S.C. §1324a constitutes a violation of the terms of 8 U.S.C. §1324b(a)(6).

OSC states that the investigation of Legal Services' charges has been prolonged by respondent's refusal to grant OSC reasonable access to

inspect the pertinent Forms I-9, which OSC has the right and duty to inspect, according to the provisions set forth at 8 U.S.C. §1324a(b)(3), and also by Respondent's refusal to disclose to OSC the identity of those employers for which Respondent acts as agent in the verification of employment eligibility process, as well as the identities of those growers who allegedly deny employment to individuals despite their possessing List A or List B and C documentation.

In its June 10, 1992 response, OSC noted that on May 21, 1992, it sought the issuance of the two (2) subpoenas at issue, No. 92-200067, which required that Ms. Ann Winters, respondent's office manager and corporate secretary/treasurer, appear, as noted previously, in the Lee County Justice Building in order to testify in this investigative proceeding and 92-2-00068, which requires that respondent make available to OSC its Forms I-9, and any documents which were photocopied in the course of preparing those Forms I-9, and also requires that respondent disclose to OSC the identity of all employers for whom respondent acts as an agent in the employment eligibility verification process.

OSC next contends that respondent's attack upon the validity of these subpoenas is without merit, noting that "administrative subpoenas are subject only to limited judicial review." EEOC v. Maryland Cup Corp., 785 F.2d 471, 475 (4th Cir.), cert. denied, 479 U.S. 815 (1986).

OSC also argues that the reason for the limited review of administrative subpoenas is that the power of an administrative agency to conduct an investigation:

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 that the law is being violated, or even just because it wants assurance that it is not. . . the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity.

FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.) (in banc), cert. denied, 431 U.S. 974 (1977), quoting in part U.S. v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

OSC has provided additional decisional authority in order to support its contention that to enforce an investigatory subpoena, the following three questions must be answered affirmatively:

(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

EEOC v. Children's Hosp. Medical Center, 719 F.2d 1426, 1428 (9th Cir. 1983) (in banc); accord U.S. v. Morton Salt Co., 338 U.S. 632, 652 (1950).

It is further urged that in the event that the foregoing three questions are so unanswered, the subpoenas should be enforced unless respondent "proves the inquiry is unreasonable because it is overbroad or unduly burdensome." Children's Hosp. Medical Center, 719 F.2d at 1428 (emphasis added).

OSC then addresses the question of whether Congress has granted the authority to investigate and notes that OSC is tasked under the pertinent provisions of IRCA to investigate charges of unfair immigration-related employment practices. 8 U.S.C. §§1324b(c)(2), 1324b(d)(1). Towards that end, OSC is specifically granted "reasonable access to examine evidence of any person or entity being investigated" and an administrative law judge is empowered to "compel the attendance of witnesses and the production of evidence at any designated place" by virtue of the following IRCA provisions, at 8 U.S.C. §1324b(f)(2):

In conducting investigations and hearings under this subsection and in accordance with the regulations of the Attorney General, the Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated. The administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing.

OSC maintains that it cannot accurately and fairly assess the merits of Legal Services' charge without being allowed to continue its investigation as requested, despite respondent's assertions that it has already provided to OSC all facts necessary to make that determination. In support of its position, OSC has cited to the transcript of the show cause proceedings before U.S. District Court Judge Frederick Motz in United States v. Whitney, Bailey, Cox and Magnani, Docket No. JFM 88-3456 (E.D. Maryland Dec. 16, 1988), to the effect that in the course of conducting an investigation, OSC may properly secure deposition testimony, as here, from the respondent, or from the respondent's representative, rather than having to secure that information indirectly through respondent's counsel.

OSC next examined the second element which it feels must be affirmatively shown namely, that the applicable procedural require-

ments have been followed in connection with the issuance and service of the two subpoenas in question.

It is noted that respondent has attacked the mode of service of these subpoenas, urging that OSC did not comply with those requirements set forth at 28 C.F.R. §68.6(a). In doing so, respondent has erred inasmuch as that section of the applicable procedural rules deals with the service and filing of complaints. Instead, subpoena practice, as noted by Judge Morse in his May 15, 1992 order, is controlled by the provisions of 28 C.F.R. §68.25, which provides, in pertinent part, that "A subpoena may be served by overnight courier service or overnight mail, certified mail, or by any person who is not less than 18 years of age." 68.25(a). Accordingly, the service of the two subpoenas in question by way of an overnight courier service, Federal Express, on May 22, 1992, comported with the governing procedural rule.

OSC then addressed the question of whether the documents and testimony sought by the two subpoenas are relevant and material to the investigation of respondent's activities, noting that the measure of relevance within the context of subpoena enforcement activity is quite broad. See Morton Salt Co., 338 U.S. at 652; see also U.S. v. Westinghouse Elec. Corp., 788 F.2d 164, 170-71 (3rd Cir. 1986). And courts are obligated to enforce subpoenas "if the demand is not too indefinite and the information sought is reasonably relevant." Morton Salt Co., 338 U.S. at 652. It was further noted that "courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 68-69 (1984).

The charge at issue consists of respondent, acting by and through its members/shareholder growers in the Immokalee, Florida area, requesting more documents, for purpose of employment eligibility verification and hiring purposes, than those required under the provisions of 8 U.S.C. §1324a(b).

In resolving that issue, OSC believes that the testimony of Ms. Ann Winters, respondent's office manager in its six-person Immokalee office, is essential since her previously supplied sworn affidavit reveals that she is familiar with the white identification card system which is central to OSC's investigative inquiries.

Similarly, OSC states that its request that respondent furnish the names addresses, and telephone numbers of all persons and businesses for whom and which respondent acts as an agent in completing



Forms I-9, as well as the files containing the completed Forms I-9 and any documents photocopied for their completion, is also relevant to the pending charge. In addition, a review of those Forms I-9 is necessary in order to allow OSC to complete its statutorily mandated investigation.

OSC further notes that respondent's opposition to the issuance and service of these subpoenas has had the effect of delaying OSC's ability to make a timely determination within 120 days of its receipt of the charge, or by July 6, 1992, as mandated under the provisions of 8 U.S.C. §1324b(d)(1).

OSC also contends that in alleging that the two subpoenas at issue should be quashed because compliance thereto would be unduly burdening, respondent must prove that the subpoenas are overbroad, unduly burdensome, and should not be enforced. Children's Hosp. Medical Center, 729 F.2d at 1428.

OSC also notes that "The burden of providing that an administrative subpoena is unduly burdensome is not easily met and in order to meet this burden, the party opposing the subpoena must show "that producing the documents would seriously disrupt its normal business operations." Maryland Cup Corp., 785 F.2d 477.

Finally, OSC states that it has a statutory obligation to investigate Legal Services' charge of document abuse and also urges that respondent has a concomitant statutory responsibility to make the Forms I-9 in question available for OSC's inspection. In that connection, OSC advises that it has informed respondent's counsel that it only wishes to review a reasonable number of Forms I-9, and certainly not the 50,000 quantity which respondent has mentioned in its petition.

OSC concludes its argumentation by noting that it has merely requested access to a reasonable number of respondent's Forms I-9 for inspection purposes, as opposed to requesting copies thereof, and such review would be carried out at respondent's office and without the requested or required presence of respondent's personnel and/or counsel. Should any photocopying of the limited number of Forms I-9 be necessary, OSC would assume the costs of doing so.

In enacting IRCA, Congress specifically provided for the appointment of a Special Counsel, 8 U.S.C. §1324b(c), whose duties included the investigation of charges and the issuance of complaints involving

unfair immigration-related employment practices, 8 U.S.C. §1324b(c)(2).

Special Counsel is charged with the non-delegable duty to investigate each charge received and to determine, within 120 days of the date such charge was received, whether there is reasonable cause to believe that the charge is true and, also whether to bring a complaint based upon such charge before an administrative law judge, 8 U.S.C. §1324b(d)(1).

Accordingly, upon receiving the charge at issue from Legal Services on March 6, 1992, OSC was required to have given notice of that charge, including the date, place and circumstances of the alleged unfair immigration-related employment practice, to the respondent by certified mail within 10 days, or by March 16, 1992, 8 U.S.C. §1324b(b)(1). And OSC was also required to have completed its investigation of that charge within 120 days, or by July 6, 1992. Owing to the nature of the charge namely, alleged document abuse in violation of the provisions of 8 U.S.C. §1324b(a)(6) in the course of preparing Forms I-9, it is readily apparent that such investigation would, of necessity, focus upon the Forms I-9 in question.

Therefore, the initial stages of that investigation, if not the overwhelming majority of such efforts, would of necessity consist of reviewing the pertinent Forms I-9 and also interviewing the person or persons at respondent's office who are conversant with the white identification cards which are central to respondent's employment eligibility verification process.

In conducting investigations of this character, Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated and the administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing. In case of contumacy or refusal to obey a subpoena lawfully issued and upon application of the administrative law judge, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such order as a contempt thereof. 8 U.S.C. §1324b(f)(2).

OSC and respondent's counsel agreed to proceed informally without seeking a subpoena(s) in aid of the required investigation. As noted previously, those discussions proved unproductive and on April 28,

1992, or some 53 days into the 120-day investigative period, OSC requested that Investigatory Subpoena No. 92-2-00058 be issued.

Respondent attributes that impasse to OSC's failure to respond to respondent's eight-page Statement of Position, dated April 13, 1992 and OSC blames respondent's refusal to cooperate in the required investigation as the cause of the present deadlock.

Respondent relies heavily upon its assertion that OSC has failed to notify it of the nature of the charge at issue, specifically in not having observed those requirements set forth 8 U.S.C. §1324b(b)(1):

The 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. (Emphasis added).

As noted previously, OSC received Legal Services' charge on March 6, 1992, and within 10 days thereafter, as required, or on March 16, 1992, OSC notified respondent in the initial three paragraphs of a two-page letter which was sent by certified mail, as required, of the following facts then available to OSC:

On March 6, 1992, the Office of Special Counsel accepted a charge of employment discrimination filed by the Florida Rural Legal Services, Inc. under 8 U.S.C. § 1324b.

The charge alleges that Immokalee Agricultural Workers I.D., Inc. has violated 8 U.S.C. § 1324b by requiring the production of additional documents than those required by 8 U.S.C. § 1324a(b).

This Office has 120 days from the date of receipt of the charge, until July 6, 1992, to investigate and determine whether there is reasonable cause to believe that the charge is true, and to bring an exclusive complaint before a specially designated administrative law judge.

Respondent maintains that that notice concerning Legal Services' charge lacks specificity and violates its due process rights since respondent was not made aware of the charge at issue. Further, Respondent asserts, "OSC's failure to adhere to this fundamental precept strips it of the right to invoke the statutory subpoena power."

I find that OSC's March 6, 1992, notification notice to respondent, concerning the nature of Legal Services' pending charge, satisfied IRCA's requirements, as set forth at 8 U.S.C. §1324b(b)(1). Accordingly, I further find that Respondent's due process rights were not abridged in the course of being so informed.

In giving that notice to respondent on that date, OSC fully advised respondent of all facts then in OSC's possession and it also fully advised respondent of its then upcoming investigation which had to have been completed by July 6, 1992. That investigation was obviously necessary in order to allow OSC to reach a decision as to whether it would dismiss the charge or file a complaint based upon that charge. Only the statutorily-mandated investigation would provide OSC with the facts necessary to make that prosecutorial judgment.

In drafting this remedial legislation, Congress was patently aware that OSC would likely find itself in almost every initial charge scenario with a near minimum of facts upon which to base its complaint decisions, and that fact logically accounts for those previously-men-tioned IRCA provisions which provide for a 120-day investigation period, which allows OSC to gather the necessary facts upon which it must properly base its complaint filing judgments.

In summary, IRCA's drafters were acutely aware that OSC could not begin to fairly assess any charge of an unfair immigration-related employment practice without having the necessary facts, which in almost every instance will simply not be available to OSC without an immediate subpoena-assisted investigation.

That is the procedure which OSC has followed under these disputed facts, and in view of the foregoing, respondent's Petition to Quash Subpoenas and Enjoin Further Investigation is hereby ordered to be and is denied.

OSC's investigation of Legal Services' March 6, 1992, charge is hereby ordered to continue with all reasonable dispatch in view of the statutory July 6, 1992, deadline, and that investigation is to include the testimony more fully described in Subpoena No. 92-2-00067, as well as the access to and possible photocopying of a portion of the Form I-9 files, and securing the identities, addresses and telephone numbers of those persons and businesses for whom and which respondent acts as an agent for Form I-9 completion purposes, as more fully particularized in subpoena No. 92-2-00068 and its attachment.

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JOSEPH E. MCGUIRE  
Administrative Law Judge