

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

IN RE CHARGE OF)
PAUL KHATAMI)
)
UNITED STATES OF AMERICA,)
Complainant,)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 92B00217
GUARDSMARK, INC.,)
Respondent.)
_____)

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION FOR ADOPTION OF ORDER TO
PRODUCE DOCUMENTS AND PROTECTIVE ORDER AND
GRANTING IN PART AND DENYING IN PART RESPONDENT'S
CROSS-MOTION FOR ADOPTION OF ITS PROPOSED ORDER TO
PRODUCE DOCUMENTS AND PROTECTIVE ORDER

I. *Background and Procedural History*

On January 31, 1994, the Office of Special Counsel ("OSC" or "Complainant") filed a Motion for Adoption of Order to Produce Documents and Protective Order ("OSC's Mot.") and a proposed Order to Produce Documents and Protective Order ("OSC's Prop. Order"). In its motion, OSC states that the parties have been negotiating for the purpose of filing with this office a joint proposed protective order and obtaining limited discovery.¹ OSC's Mot. at 1. Despite repeated

¹ During a telephonic conference call with the parties held on December 3, 1993, I suggested that Respondent voluntarily provide Complainant with sufficient factual and documentary information to show that Respondent was not engaged in a pattern or practice of document abuse. The purpose of this suggestion was to provide sufficient information for OSC to use as a basis in reaching a fair settlement of this case and to avoid costly and time-consuming discovery. On December 7, 1993, I issued an order directing that "in the interest of settlement of this case, the parties should submit to this
(continued...)

discussion, the parties have been unable to reach agreement on the content of the proposed order as well as the documents to be produced pursuant to that order. OSC requests that I resolve this matter by adopting the proposed order to produce documents and protective order that is attached to its motion. OSC argues that its proposed order assures that this case will begin to proceed expeditiously toward a final outcome by achieving three specific objectives: (1) OSC receives the documents it needs to fairly evaluate the extent of Guardsmark's violations; (2) those documents that Guardsmark submits to OSC are protected from disclosure to the general public including Guardsmark competitors; and (3) OSC's statutory right to review the Immigration and Naturalization Service Employment Eligibility Verification Forms ("Forms I-9") collected by Guardsmark is ensured, while at the same time setting a date by which that inspection is to begin. OSC's Mot. at 2.

On February 3, 1994, Respondent filed its opposition to Complainant's motion for adoption of order to produce documents and protective order and a Cross-Petition for Adoption of its Proposed Order ("Resp.'s Mot."), along with the proposed order ("Resp.'s Prop. Order"). In its opposition, Respondent states that there are five principal issues in dispute with respect to what should be produced under the protective order: (1) Guardsmark's Rule Book; (2) Guardsmark's request for a certification form; (3) a request by Guardsmark that the protected documents be used only in connection with this litigation; (4) whether various hiring-related documents should be confined to the hiring of non-citizens, as distinct from all employees generally, and (5) OSC's request for all I-9 forms.

On February 18, 1994, OSC filed a response to Guardsmark's Cross-Petition for Adoption of its Proposed Order. ("OSC's Resp.")

II. *Discussion*

A. Standard for Issuance of a Protective Order

The regulations that govern these proceedings provide for protective orders in the following circumstances:

Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the Administrative Law Judge ["ALJ"] may make any order which

¹(...continued)
office a proposed protective order with respect to limited discovery."

justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression or undue burden of expense, including one or more of the following: (1) The discovery not be had; (2) The discovery may be had only on specified terms and conditions, including a designation of the time, amount, duration, or place; (3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery; or (4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters.

28 C.F.R. § 68.18(c).

This regulation is similar to Rule 26(c) of the Federal Rules of Civil Procedure, except that the federal rule lists eight types of protective orders that may be issued, including the four in the regulation.² The federal decisions that discuss the purpose, use and application of a protective order are a useful guideline in resolving the pending motions. Federal district courts are not limited to the eight types of orders specified in Fed. R. Civ. P. 26(c). Instead, they have "power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense" Herbert v. Lando, 441 U.S. 153, 177, 99 S.Ct. 1635, 1649 (1979) (quoting Fed. R. Civ. P. 26(c)); see 8 C. Wright & A. Miller, Federal Practice and Procedure ("Federal Practice and Procedure") sec. 2036 at 269. The harassment or oppression should be unreasonable to justify restricting discovery. In re Estelle, 516 F.2d 480, 484 (5th Cir. 1975). Discovery, however, has limits which become more difficult to overcome as the showing of need decreases. Federal Practice and Procedure at 270 (citation omitted).

B. The Disputed Items in the Proposed Protective Orders

1. Guardsmark's Rule Book

Complainant requests that Guardsmark be ordered to produce "[a] complete and unabridged original of Guardsmark's Rule Book." OSC's Prop. Order at 3. Respondent, however, asserts that because its "Rule

² The four additional types of protective orders are:

(5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Book" is highly confidential and proprietary," it has never provided it to anyone outside the company. Resp.'s Mot. at 3. Respondent further asserts that because its Rule Book addresses numerous subjects well beyond the issues of this litigation, it should not have to disclose the complete Rule Book to OSC. Id. Guardsmark thus offers a counter-proposal, requesting that it produce only "[a]ll portions of Guardsmark's Rule Book that pertain to the hiring, screening and employment of non-citizens." Resp.'s Prop. Order at 1. Respondent further suggests that if, after receiving those documents, "OSC has a reasonable basis to believe that all pertinent pages of the Rule Book have not, in fact, been produced, [OSC] may request that the undersigned Administrative Law Judge conduct an in camera inspection of the complete book for the purpose of determining whether any additional portions of the book should be produced." Resp.'s Prop. Order at 1.

OSC argues that it should not be limited to inspecting parts of the Rule Book that deal specifically with the hiring of non-citizens. OSC's Resp. at 4. OSC further argues that Guardsmark's concern about the release of proprietary information is the very reason why a protective order is appropriate in this case, pointing out that "[n]owhere does Guardsmark assert that the Rule Book cannot be adequately protected by a protective order." Id. (footnote omitted). In addition, OSC notes that Guardsmark's proposal of an in camera inspection does not resolve the issue of what documents are relevant for discovery purposes. Id. at n.1.

I agree with OSC that it should not be limited to inspecting parts of the Rule Book that deal specifically with the hiring of non-citizens and conclude that Complainant's discovery request for Respondent's Rule Book is within the scope of reasonable discovery. OSC's discovery need not be limited to information or evidence bearing solely on Respondent's hiring practices with respect to non-U.S. citizens, nor even based solely on Respondent's hiring practices. As Complainant has a heavy burden of proving discrimination under IRCA, I will allow Complainant to have the opportunity to discover evidence which will provide information regarding Respondent's overall employment and screening policies. See Morrison v. City and County of Denver, 80 F.R.D. 289, 292 (D. Colo. 1978) ("Since direct evidence of discrimination [in Title VII cases] is rarely obtainable, plaintiffs must rely on circumstantial evidence . . . , and evidence of an employer's overall employment practices may be essential to plaintiff's prima facie case.")

It is therefore unnecessary to further delay these proceedings by limiting OSC's access to certain portions of Respondent's Rule Book. Discrimination can be very subtle and proof of it may require imaginative discovery techniques. Certainly nothing could be more helpful than a company's Rule Book on hiring and employment policies. In order to fully appreciate whether Respondent disparately treats non-citizens in its hiring procedure, it is reasonable for OSC to fully understand Respondent's entire employment practices and polices.

I thus find that it is unnecessary to delay this case by providing OSC with a part of the Rule Book and then, if it is not satisfied with the limited inspection, performing an in camera inspection of the documents. As I find Complainant's request for Guardsmark's complete Rule Book relevant and within the scope of reasonable discovery, Complainant's motion is GRANTED with regard to paragraph 1 of its proposed Order to Produce Documents and Protective Order and Respondent's counter-proposal with regard to paragraph 1 of its proposed order is DENIED.

2. The Certification Form

Guardsmark requests that certain individuals who gain access to its Protected Documents sign a certification form, verifying that they are familiar with the provisions of the Protective Order and that they agree to abide by it. Resp.'s Prop. Order at 4; see id. at Ex. A at 4 [certification form]. Guardsmark, without any supporting rule or case law, asserts that this is a routine provision in protective orders involving confidential or proprietary documents. Resp.'s Prop. Order at 4. Guardsmark proposes that OSC attorneys and direct employees of OSC who gain access to Protected Documents would not be obligated to sign the certification form, but that the certification would be signed by any outside consultant, expert witness or other third party who, for whatever reason, might be provided with any of the Protected Documents. Id.

OSC states that the demand for certification is offensive because "[i]t implies that officers of the court will release protected information without apprising the person who receives the information of the terms of an order protecting that information. OSC's Resp. at 3. OSC further states that "[a]s officers of the court, counsel are ethically obliged to advise persons who may be granted access to protected information of the existence and terms of any order protecting that information. Id.

OSC argues that its assurance to the ALJ should be sufficient to resolve any of Respondent's legitimate concerns. In addition, OSC argues that Respondent's request for a certification procedure is objectionable because (1) it runs only to the OSC; (2) there is no requirement that Respondent's counsel obtain certifications that the ALJ's protective order is being followed; and (3) the proposed written certification is to be given to Respondent instead of the ALJ.

Research has revealed that it is routine to provide a certification form in protective orders involving confidential documents. See, e.g., Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297, Ex. A (N.D. Ill. 1993); The Upjohn Co. v. Hygieia Biological Laboratories, 151 F.R.D. 355, Ex. A (E.D. Ca. 1993). Furthermore, I find that OSC's objection to the certification procedure because it only applies to OSC makes no sense because the discovery requests involved only apply to documents produced by Respondent, not by the government. Moreover, I do not find it unreasonable for third parties to be required to certify that they are familiar with the protective order and that they agree to abide by its terms. The certification by third parties protects the interests of both OSC and Respondent. Copies of all certification forms, however, shall be submitted only to this office. If Respondent requests a copy of any certification, it must make application to the ALJ and, upon a showing of good cause, the request will be granted. Accordingly, Respondent's motion is GRANTED with regard to paragraph A, requiring those persons, other than OSC's attorneys and its direct employees, who are permitted to read or inspect any protected documents, to certify on a form attached hereto, see Exhibit 1, that they are familiar with the provisions of the Protective Order and agree to abide by it. OSC's motion is therefore DENIED with regard to paragraph C of its proposed order.

3. Limiting the Documents to This Litigation

Guardsmark requests that the order to produce documents and protective order contain a clause specifying that the protected documents provided to OSC are to be used "only in connection with this litigation and for no other purpose." Resp.'s Prop. Order at 2. Respondent states that this is a standard clause used in protective orders where litigation involves proprietary company information or trade secrets. Id. Guardsmark further states that because OSC has requested the documents for this litigation, the order should have such a provision to ensure that OSC will not disclose the protected documents to some other party, whether inside or outside the government, to be used for some other purpose outside this litigation.

Id. In addition, Guardsmark states that if OSC has some other intended purpose for requesting its proprietary documents, it should disclose that purpose and, if not, it should have no objection to Guardsmark's proposed language. OSC, in its response, does not object to the inclusion of the clause.

Although the governing regulations provide for protective orders, they do not have a section dealing with commercial information or trade secrets. See supra note 2. Rule 26(c)(7) of the Federal Rules of Civil Procedure, however, provides that on motion and for good cause shown the court can issue an order that protects a party from annoyance, embarrassment, oppression or undue burden including that ". . . a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way."

"It is well established that a court has broad discretion under Rule 26(c)(7) in determining both whether a protective order is warranted and the specific restrictions to be imposed." Aluminum Co. of America v. U.S. Dept. of Justice, Antitrust Division, 444 F. Supp. 1342, 1347 (D.C. 1978). See also Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1975) (in order to guard against possible use of genuinely confidential documents by a third-party, the party ordered to produce documents should move for a protective order); Morrison v. City and County of Denver, 80 F.R.D. 289 (D. Colo., 1978) (plaintiffs in equal employment opportunity case who sought to inspect records of black police officers employed by Denver police department with respect to reasons for termination dates of any and all disciplinary proceedings, reason for each of disciplinary proceedings, and action taken in each proceeding, were entitled to discovery, but by means which gave adequate protection to legitimate interest of defendants in keeping necessary information from being used or abused for any other purpose other than litigation, and burden of preparing a protective order for such purpose was on plaintiffs as parties seeking information).

A protective order limiting the use of documents to the litigation in which the motion for a protective order was filed is commonly used in protective orders involving trade secrets. See Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357 (S.D.N.Y. 1965) (when brokerage firm's operating manual, production of portions of which for inspection and copying was required was confidential, plaintiffs and their attorney would be directed to confine use of discovered items to present litigation and not to disclose in any manner contents of documents to anyone whose knowledge was not essential to preparation of case).

Moreover, protected orders that limit access to certain documents to counsel and experts only are commonly entered in litigation involving trade secrets and other confidential research, development, or commercial information. See, e.g., United States v. Davis, 131 F.R.D. 391, 400 (S.D.N.Y. 1990); Culligan v. Yamaha Motor Corp., 110 F.R.D. 122, 125-26 (S.D.N.Y. 1986); Stillman v. Vassileff, 100 F.R.D. 467, 468 (S.D.N.Y. 1984).

Based upon the foregoing, Respondent's motion to include the clause that the protected documents provided to the OSC are to be used "only in connection with this litigation and for no other purpose" in the protected order is GRANTED and OSC's motion regarding this issue is DENIED.

4. U.S. Citizens and Non-Citizens

Respondent argues that because Guardsmark's hiring practices with respect to U.S. citizens are not at issue in this litigation, OSC's discovery request for documents generally encompassing Guardsmark's hiring practices and policies for the hiring of U.S. citizens as well as non-citizens, is overbroad. Resp.'s Mot. at 4. Respondent thus proposes that the items it produces be limited to Guardsmark's hiring, screening and employment of non-citizens. *Id.* OSC disagrees, however, asserting that in order to determine whether there has been disparate treatment under 8 U.S.C. § 1324b, it must "understand an employer's hiring and employment practice in total." *Id.* at 4-5. OSC further argues that "[a]llowing Guardsmark to limit the scope of relevant documents in the manner it proposes will make it impossible for anyone to accurately determine whether there is a difference in its treatment of citizens versus non-citizens. I agree with OSC and GRANT its motion with regard to this issue, adopting paragraphs two and four of its proposed order and DENY Respondent's cross-motion as to this issue.

5. The Forms I-9

In its opposition to OSC's motion, Respondent states that OSC's proposed order, requiring Guardsmark to provide it with "all Immigration and Naturalization Forms I-9 collected by Guardsmark and all attachments thereto," is overbroad in that it is unlimited as to location and time frame. Resp.'s Mot. at 6. Respondent however agrees to to produce all Forms I-9 from December 1992 to the date of the ALJ's signed protective order covering Guardsmark's San Francisco, San Jose, Los Angeles, San Diego and New York City

locations. Furthermore, Respondent does not object that the order show that the Forms I-9 are not protected documents. In response, OSC states that in view of Respondent's willingness to provide access to the Forms I-9 from those five cities, there is no need to obtain a protective order and "review of the I-9s can begin without further delay." OSC's Resp. at 2. Accordingly, OSC's proposed order is DENIED with regard to the Forms I-9 and Respondent's cross-motion is moot.

III. *Conclusion*

Based upon the foregoing and as a part of the limited discovery allowed by the Order of December 7, 1993, Respondent shall make the following documents available to the Office of Special Counsel in Washington D.C. for inspection and copying, on or before March 14, 1994:

1. A complete and unabridged original of Guardsmark's Rule Book.
2. All documents that explain Guardsmark's hiring practices and policies in effect from November 1990 until the present.
3. All forms of documents currently used by Guardsmark in screening applicants for security guard positions that inquire about an applicant's eligibility to work in the United States.
4. All documents that explain the procedure for processing employment applications or that discuss Guardsmark's hiring policies or practices for United States.

The documents listed above are to be considered Protected Documents. Guardsmark asserts that the Protected Documents contain proprietary information. In reliance on this assertion, it is ordered that neither the Protected Documents, nor the information contained in them, may be disclosed except as follows:

- A. Access to the Protected Documents and the information contained in the Protected Documents shall be limited to the OSC and Guardsmark (hereinafter "the parties"), counsel for the parties, and persons employed by counsel for the parties, except as may be required by federal law or court order. All persons other than counsel for OSC and direct employees of the OSC who, on behalf of the OSC, gain access to Protected Documents shall

execute a certification in the form attached as Exhibit 1. The OSC shall provide executed copies of such certifications to this office. Respondent may obtain a copy of the certifications by filing an application with this office.

B. In the event that OSC receives a request under the Freedom of Information Act ("FOIA") seeking disclosure of the Protected Documents, or any information contained in the Protected Documents, the OSC shall before releasing the Protected Documents or any information contained therein, provide Guardsmark with notice of the FOIA request pursuant to 28 C.F.R. § 16.7. OSC shall further allow Guardsmark a reasonable amount of time to provide a detailed statement of its objections to disclosure, if any, pursuant to 28 C.F.R. § 16.7(f) before releasing any of its Protected Documents.

C. Protected Documents shall be used only in connection with this litigation and for no other purpose. Nothing in this Order shall preclude the use of Protected Documents as evidence in the defense or prosecution of this matter, any subsequent appeals, and in the enforcement of any Order entered by the ALJ subject to appropriate objections made pursuant to the rules of this proceeding or a higher court.

In addition to the Protected Documents, all Forms I-9, and all attachments thereto, collected by Guardsmark at its San Francisco, San Jose, Los Angeles, San Diego and New York City locations for the period from December 1992 to the date of this Order, shall be made available to attorneys and employees of the OSC in Washington D.C. for the purpose of inspection and copying. The Forms I-9 are not Protected Documents. The inspection and, if necessary, the copying of the Forms I-9 shall commence no later than March 28, 1994.

SO ORDERED this 28th day of February, 1994.

ROBERT B. SCHNEIDER
Administrative Law Judge