

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

IN RE INVESTIGATION OF)
ABM INDUSTRIES, INC., and) OCAHO Investigatory
ABM JANITORIAL SERVICES.) Subpoena No. 95-2-00024
_____)

ORDER DENYING PETITION TO REVOKE
SUBPOENA AND MODIFYING SUBPOENA
(May 19, 1995)

I. Procedural History

On March 29, 1995, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a request for issuance of a subpoena captioned in this investigation.¹ The subpoena demands eleven categories of data from ABM Industries, Inc. and ABM Janitorial Services (ABM or Petitioner). I signed and issued the subpoena on April 3, 1995.²

On April 13, 1995, ABM filed a Petition to Revoke Subpoena (Petition) which argues that (1) the subpoena is not within OSC's authority because there is no "reason to believe" that petitioners have engaged in or are engaging in company-wide unfair immigration-related employment practices, (2) the subpoena is unduly burdensome, and (3) the subpoena is unenforceable because "it seeks material so remote in time as to have no possible relevance to any immigration-related employment practice that properly could be made the subject of a timely complaint." Petition at 1.

¹ See 28 C.F.R. § 25(a). 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].

² The date on the subpoena recites the year of issuance as 1994, a typographical error. The correct year is 1995.

On April 21, 1995, OSC filed a Memorandum in Opposition to the Petition (Opposition) which argues that the subpoena complies with all legal requirements. However, in light of information in the Petition regarding the extent of ABM's operations, OSC acknowledges that certain modifications to three of its subpoena requests may be appropriate. OSC volunteers to effect those modifications, limiting the time and the geographic applicability of subpoenaed information responses to ABM operations in California.

On April 24, 1995, I convened an emergency telephonic prehearing conference in order to discuss the Petition and Opposition. Both parties stated their desire to file further responses to each others' filings. Along with these further responses, they agreed, however, to fashion proposed further modifications to the subpoena without compromising their relative positions. Petitioner's Response was filed on May 1, 1995; OSC's Response was filed on May 8, 1995.

II. Discussion

The subpoena at issue is tangentially related to a pending case involving the same parties based on a Complaint alleging document abuse and citizenship status discrimination by ABM against Luis Alberto Carrera (Carrera), and alleging pattern or practice of such discrimination at its operations in metropolitan Washington, D.C. United States v. ABM Industries, Inc., OCAHO Case No. 94B00199 (complaint filed Nov. 22, 1994). Because of the relation between the investigation at issue and the "Carrera case," ABM argues that the subpoena is predicated "on the strength of one charge alleging violations by one manager at one ABM Industries subsidiary on one occasion and apparently nothing else. . . ." Petition at 2. Consequently says Petitioner, OSC has not met its own standard for investigation of "reason to believe." 28 C.F.R. § 44.304(a). In essence, ABM argues that OSC cannot base a company-wide discrimination investigation involving 8 U.S.C. § 1324b on allegations of an isolated incident.

A. Denial of Petition to Revoke

OCAHO subpoenas are issued pursuant to 8 U.S.C. § 1324b(f)(2) in investigations upon the unilateral application of OSC. OCAHO case law makes clear that the viability of investigatory subpoenas "are to be construed in context of the investigation in which they issue." In re Investigation of Valley Crest Tree Company, Inc., 3 OCAHO 579 at 2 (1993). Moreover, "it is well-settled that the role of the adjudicative forum is 'sharply limited' in an investigatory subpoena enforcement

proceeding." In Re Investigation of Valley Crest Tree Company, 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, 785 F.2d 471, 475 (4th Cir. 1986)). In light of that oft repeated limitation on judicial scrutiny, the issues to be addressed in assessing the fairness and reasonableness of OSC's subpoena request are simply stated. First, whether OSC is acting within its authority and is requesting information relevant to a reasonable belief that the discrimination alleged has occurred; second, whether the subpoena requests are unduly burdensome. See In re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO 751 at 3 (1995) (citations omitted).

1. Authority of OSC and Relevance of Information Sought

Putting aside the question whether OSC may conduct a comprehensive review of company employment practices on the basis of a single charge, OSC urges that I find it has reason to believe that its investigation is not based solely upon evidence surrounding the Carrera Complaint. OSC states that, besides the information obtained in the case of Carrera which involves ABM's Washington D.C. location, additional information provided by ABM's San Francisco office during an unrelated investigation provides OSC with the necessary reason to believe that the pattern or practice discrimination alleged in the Carrera Complaint extends at the very least to other ABM locations and possibly to a company policy implemented nationwide. Opposition at 2.

OSC contends that Forms I-9 obtained from ABM's San Francisco office "evidence that 90% of non-U.S. citizens who completed the I-9 forms [from July 29, 1991 to August 28, 1994] produced INS-issued documents." Opposition at 8. OSC claims also that Petitioner's I-9 forms for all employees hired in the Washington metropolitan area from January, 1992 through approximately August, 1994 demonstrate that of 700 aliens hired, all 700, **100%**, showed INS-issued documents (sometimes in addition to other I-9 documents), while the 79 U.S. citizens hired showed various documents from columns B and C of the I-9 form. Opposition at 9. From this, OSC argues that it has sufficient evidence to believe ABM has engaged in a pattern or practice of discriminatory conduct. OSC notes that OCAHO case law supports reliance on such evidence to prove pattern or practice cases. See, e.g., United States v. Strano Farms, 5 OCAHO 748 (1995); United States v. A.J. Bart, Inc., 3 OCAHO 538 (1993).

While I understand Petitioner's position that use of Forms I-9 provided to OSC by ABM in a nonrelated investigation (which purportedly was not intended to implicate wrongdoing by ABM) to predicate an investigation of ABM may seem "duplicitous," I am unable to conclude that OSC is engaging in any wrongdoing. No principle of, or application of, estoppel militates against enforcement of the subpoena.

Petitioner makes numerous arguments to discredit OSC's evidence in support of the subpoena. Petitioner ask that I stay enforcement of the subpoena until discovery in the Carrera case can be completed. However, none of the issues to be resolved on a petition to revoke or modify the investigatory subpoena need address the relative strength or weakness of OSC's factual underpinning on the merits either of the Carrera Complaint or of a broader cause of action.

I am satisfied that OSC has established prerequisites for the investigation at issue, i.e., it has the requisite reason to believe and the information sought is relevant to said investigation. Petitioner relies to a great extent on a potential finding that Carrera may have violated a duty owed to the District of Columbia when he obtained ABM employment while drawing workmen's compensation from an earlier employment. OSC argues that Carrera did not act improperly by obtaining ABM employment while continuing to draw workmen's compensation. Whatever nourishment Petitioner will be able to draw from that scenario in the case on the merits in respect of impeaching Carrera's credibility, ABM's claim of his misconduct is speculative and immaterial to this subpoena practice. In any case, Carrera's conduct at worst would not infect OSC's ABM's California I-9s. Accordingly, I decline to grant Petitioner's Motion to Revoke the Petition.

2. Burdensomeness of Subpoena

As currently fashioned, the subpoena is overly burdensome to accomplish the initial investigation necessary in order to determine whether to file a complaint. Accordingly, for the reasons which follow, I make the following modifications to certain requests in OSC's subpoena.

To persuade that a subpoena is "unduly burdensome," Petitioner "must show that producing the documents would seriously disrupt its normal business operations." Hyatt Regency, 5 OCAHO at 6 (citing Maryland Cup, 785 F.2d at 477). In defining this standard, the Court of Appeals for the Ninth Circuit has stated "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." Hyatt Regency, 5 OCAHO at 7 (citing EEOC v. Children's Hosp. Medical Ctr. of N. Cal., 719 F.2d 1426, 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)).

a. Requests Left As Is

The subpoena contains 11 requests for documents and information. It appears that, for the most part, ABM has complied with subpoena requests 1, 5, 6, and 7. As ABM states, "[t]hese documents relate generally to Petitioners [sic] corporate structure, and company-wide policies, guidelines and procedures for implementation of 8 U.S.C. 1324a and 1324b." Petitioner's Reply at 23. OSC notes, however, that "because of numerous objections raised in their discovery response (e.g., as to time frame) it is not clear whether Petitioners have fully complied with these requests." OSC's Response at 31. Accordingly, to the extent that Petitioner has withheld information reasonably embraced within the cited subpoena requests, I reject Petitioner's claims that they need not fully comply. I disagree that the information sought is irrelevant or unnecessarily far-reaching. Petitioner's argument that such information cannot be the subject of a complaint because temporally, it goes back too far past the § 1324b 180-day time limitation for filing of charges overlooks that its compliance history can inform whether it has engaged or is engaging in a pattern or practice of immigration-related unfair employment practices.

Subpoena request 2 asks for information pertaining to the "head" of every ABM facility in the United States. Petitioners argue that the request is irrelevant and overly burdensome. As with requests 1, 5, 6, and 7, I find this information pertinent to determining who is in charge of implementing ABM's employment policies and reasonably could lead to information on whom OSC needs to depose. Petitioner also object to request 2 because the term "head" is undefined and therefore "could extend to supervisors at many of the thousands of buildings under service contracts to Petitioners." Petitioner's Reply at 24. As OSC correctly notes in reply, "Petitioner's assertion . . . is belied by their own usage of the term on page 25 of the their Reply, which informs us that . . . [ABM's] regional offices are "headed" by a senior or regional vice president." OSC Reply at 32. OSC explains that the "word is meant in its common usage, as applied by Petitioners themselves. Moreover, it is clear that the request is not directed toward Petitioners' clients' facilities, i.e., the buildings in which Petitioners perform their contracts, but Petitioners' own company facilities, such as their regional or

branch offices." Id. The term "head" is not unclear but instead is understood to fairly describe a category of ABM managerial personnel. This request does not impose an irrelevant or overly burdensome requirement on ABM.

As with 2, request 8 asks for information regarding managerial staff, specifically those individuals in charge of implementation of § 1324a employment verification requirements. This request is patently relevant and not overly burdensome. Essentially, responses to requests 1, 2, 5, 6, 7, and 8 can provide a premise from which OSC can gauge Petitioner's compliance disposition which, judging by ABM's protests, should be all to the good from its viewpoint. The remaining requests address ABM operational characteristics and are the subject of slight modifications.

b. Modifications to the Subpoena

As suggested above, I am satisfied that OSC has demonstrated "reasonable cause to believe that an unfair immigration-related employment has occurred within 180 days from the date of the filing of the . . ." charge.³ 28 C.F.R. § 44.304(b).⁴

Upon investigating the predicates for a potential company-wide pattern or practice discrimination complaint, it is not necessary at the outset for OSC to have evidence that every location of a multi-state enterprise engages in discriminatory practices. For this reason, it is

³ Petitioner argue that the information requested in the subpoena is irrelevant because most of the individuals for whom OSC wants information could not be the subject of a § 1324b complaint as they fail to meet the statute of limitations requirement. See 8 U.S.C. § 1324b(d)(3). Petitioner's argument is unavailing. While some of the individuals for whom OSC seeks information may not procedurally qualify for an individual complaint against Respondents, OCAHO case law makes clear that they may nevertheless be the subject of a pattern or practice complaint. See United States v. Mesa Airlines, 1 OCAHO 74, 527 (1989), (holding that "[b]y advert[ing] to the generic meaning of . . . [pattern or practice], the House Judiciary Committee has imparted the understanding that such conduct is legally actionable without the prerequisite of a given number of individuals who could maintain a discrimination action in their own right"), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991).

⁴ Section 44.304(b) provides that, "[t]he Special Counsel may file a complaint with an administrative law judge where there is reasonable cause to believe that an unfair immigration-related employment has occurred within 180 days from the date of the filing of the complaint." (Emphasis added). Obviously, this is a typographical error as it is in clear conflict with the statute which provides that a complaint is timely if filed within "180 days prior to the date of the filing of the charge with the Special Counsel." 8 U.S.C. § 1324b(d)(3) (emphasis added).

reasonable at this time and without further submissions by the parties to extend OSC's willingness to limit requests 3, 4 and 11 to California to embrace also requests 9 and 10.

As to requests 3, 4 and 11, OSC undertakes a scope and time limit with the result that ABM is called upon to produce data on its California operations from April 26, 1993 to the present. ABM argues that even as so modified, OSC's demands remain too burdensome and are irrelevant. As with request 2, requests 3 and 4 seek data regarding who is in charge of formulating and implementing ABM's employment policies; they are relevant to determining whether Petitioner engages in discriminatory employment practices. Again, ABM's argument that these requests, with modifications, are too burdensome is unavailing. ABM itself admits that by limiting these requests to California, they will require information from "corporate headquarters in San Francisco, [i.e.,] . . . three regional offices and sixteen branch offices. . . ." Petitioner's Reply at 25. ABM simply fails to persuade that providing data to OSC will "seriously disrupt" its business such that revocation or further modification of a § 1324b investigatory subpoena is called for.

Although I understand Petitioner's expression of concern that request 11 requiring data about employee rejections/terminations is "oppressive," the information sought appears to be relevant to establishing reasons for rejection/termination, i.e., whether or not applicants were not hired or were discharged because they lacked certain INS-issued documentation. As OSC points out, ABM employment records showing Carrera's termination specifically note that he was terminated for failure to show certain documents. Evidence of other employee terminations and/or rejections would be relevant to determining whether to initiate a pattern or practice cause of action.

Petitioner argues that because as many as 7,963 individuals were hired during the reduced time frame proposed by OSC, and that several applicants were interviewed for each position, well over 8,000 applications would need to be reviewed in order to comply with request 11. I sympathize with Petitioner's plea that this request is burdensome. For that reason, I grant ABM's request that the documents, once produced, be inspected and copied by OSC representatives at the respective ABM building, branch or facility in which the documents are located. In addition, subpoena requests 3, 4 and 11 are modified, limited to California operations from April 26, 1993 to the present.

Requests 9 and 10 ask for information on the number of employees hired at each facility in request 2. OSC contends that "[t]his information is obviously relevant to the number of I-9 forms for various facilities." OSC's Reply at 33. OSC has not explained how this broad demand is relevant. In response, I limit requests 9 and 10 to the same parameters as pertain to request 11.

B. Petitioner's Request for Confidentiality

ABM asks for an order requiring OSC to maintain the confidentiality of all documents and to prohibit disclosure of any documents and information to any other person or government agency. Petitioner says only that its request for confidentiality "stems from Petitioners' concern relative to its cooperation with OSC by supplying documents to it with the understanding that their confidentiality would be maintained in the San Francisco . . . investigation" in which OSC was investigating another unrelated company. Petitioner's Response at 29. I agree with OSC that this rationale is insufficient to satisfy the "good cause" precondition for a protective order. 28 C.F.R. 68.18(c). Petitioner's request for an order of confidentiality is denied.

C. Time-frame for Compliance

Even as modified, a large amount of information and document production is being asked of ABM. This investigation is going forward at the same time as trial preparation goes forward in Carrera, for which hearing dates have been reserved for September 5-8 and September 19-22, 1995. ABM will be expected to arrange with OSC for an agreed schedule by which it will make available the materials called for by the subpoena as modified. Failing agreement, compliance should be completed on or before June 30, 1995.

SO ORDERED.

Dated and entered this 19th day of May, 1995.

MARVIN H. MORSE
Administrative Law Judge