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

United States of America, Complainant v. ABC Roofing & Waterproofing, Inc., Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100389.

ORDER DENYING MOTION TO COMPEL DISCOVERY CONCERNING SELECTIVE PROSECUTION

ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL

Procedural Background

There are presently pending two discovery disputes, the first being Respondent's motion to compel discovery regarding its affirmative defenses of discriminatory enforcement and selective enforcement, and secondly, Complainant's motion to compel answers to interrogatories and request for admissions.

1. Respondent seeks to discover from the Immigration and Naturalization Service information pertaining to all complaints regarding unlawful employment brought by the Harlingen District office between September 1, 1988 and August 31, 1989, as well as the files relating to inspections conducted by that office pursuant to 8 C.F.R. Section 274a.9(b), during the same time period. Respondent also demands the INS make available for inspection and copying the files of all cases in which complaints have been filed against employers by the Harlingen District office, and those files pertaining to inspections where irregularities were discovered but no complaints were filed.

On January 3, 1990, Complainant filed objections to Respondent's discovery requests on the grounds of relevance and privilege. Complainant seeks a protective order preventing Respondent from obtaining the requested material.

On January 17, 1990, Respondent filed its opposition to Complainant's motion for protective order and filed a motion to compel a response to its discovery requests.

Thereafter, the parties briefed the issue of the relevance of the discovery requests. Respondent filed a memorandum stating its case for selective prosecution and discriminatory enforcement. Complainant filed a memorandum of law in response to Respondent's memorandum. Respondent then replied to the Complainant's memorandum. Finally, Complainant filed a reply to the Respondent's reply.

In support of its discovery request Respondent asserts that the instant enforcement action has been undertaken for discriminatory reasons. Respondent claims that it, and other businesses owned by non-whites, have been the subject of a disproportionately greater number of inspections for undocumented aliens than have businesses owned by white people, in the Harlingen area.

Respondent next asserts that it has been the subject of selective enforcement due to Respondent's active support for, and continued employment of, its ``grandfathered'' employee, Marcos Saul Zamora-Morel (hereinafter referred to as ``Zamora'').[1] Zamora is the subject of a pending deportation proceeding, which is on appeal to the Fifth Circuit Court of Appeals. Further, Respondent asserts that the INS investigators were improperly influenced by the discovery that Respondent was conducting a survey of area businesses to buttress its allegations of discriminatory enforcement.

2. Separately, on May 25, 1990 Complainant filed a motion to compel responses to two unanswered interrogatories and to deem admitted matters contained in a request for admissions.

Respondent served its opposition to the complainant's motion on May 31, 1990.

The subject interrogatories pertain to Respondent's assertion that the purported employee Julian Olivera was an independent contractor and therefore Respondent was not required to maintain a Form I-9 for that individual. The subject request for admission seeks an admission that certain attached copies of Form I-9 are ``true and accurate copies'' of the documents presented by Respondent during an inspection.

Statement of Relevant Facts

In support of the relevance of its discovery requests Respondent makes the following showing through the declarations of its owners

[1]Under section 101(a)(3) of the Immigration Control and Reform Act of 1986 (Pub. L. 99-603, 100 Stat. 3372), an employee hired prior to the effective date of the Act cannot be the subject of a violation even though the employee does not have employment authorization. Zamora, having been hired in 1983, falls within this exemption.

Adolfo and Olga De Lafuente, and its undocumented alien employee Zamora.

According to the affidavits, on August 19, 1988, INS Agent Trevino reviewed Respondent's compliance with the verification requirements. With regard to the Forms I-9 for former employees, including employees whose forms are the subject of the instant enforcement action, Agent Trevino informed Olga De Lafuente that ``we were alright on those records, even though there was some information missing.'' For one of the individuals, Julian Olivera, Respondent did not complete a Form I-9 because it considered him to be an independent contractor. For the other individuals, Mrs. De Lafuente gave various reasons for the improper completion of the Forms I-9. Respondent assumed that its procedures had been approved by the INS since Trevino did not issue a citation at that time.

A second inspection of employee records was conducted by INS Agent Leal following the May 16, 1989 detention of Zamora during a jobsite inspection. Agent Leal served a notice of inspection and subpoena for all employee records dating back to November 6, 1986. Following this inspection, the Complainant issued a Notice of Intent to Fine for the paperwork violations, which Respondent asserts had been previously reviewed by Agent Tevino.

In a second declaration, Mrs. De Lafuente states:

> ``The case of Marcos Saul Zamora Morel had created some local notoriety because we have assisted him in fighting his deportation order all the way up to the 5th Circuit. The Immigration and Naturalization Service was obviously displeased with the fact that we continued to employ [Zamora] after he was released on bond; and, although they finally accepted our argument that, that was legal [sic], because he had been with us since before 1983, we were left with the very strong impression that we were being fined in these other cases to punish us for maintaining Marcos Saul Zamora in our employment.''

In his declaration Zamora says that he had been released on bond from the custody of the INS on April 5, 1989, with the assistance of Mr. De Lafuente. He was later arrested by the INS on May 16, 1989, while working for Respondent. Zamora states that he was questioned by Agent Leal and was ``paraded around the office by Mr. Leal, all the while he was saying how he had picked up one of Adolfo [De Lafuente]'s workers.'' Agent Leal inquired of Zamora how much he was paid, whether there was discrimination by his employer, whether his wife had applied for residency in the U.S. and whether his children were born in the U.S. Zamora was released later that day.

Zamora adds that Agent Leal had investigated his status five to six times since he was hired by Respondent in 1983. Following his detention on May 16, Zamora asserts that he obtained a work

permit. But on December 26, 1989, INS agents again investigated the status of Respondent's employees. According to Zamora, these agents knew him and said that they would detain him because he did not have work authorization. Mr. De Lafuente intervened and the agents left.

Mr. De Lafuente stated during the December 26 investigation he informed the two INS agents that he had conducted his own informal inquiry of Anglo businesses in the area, which showed that they had not been audited or educated concerning compliance with IRCA. Mr. De Lafuente states that INS Agent Martinez told him that he had been selected for inspection by Washington.

In a second declaration, Mr. De Lafuente discussed his inquiry into the INS' enforcement of IRCA in the Harlingen area. He states that from the time when IRCA went into effect until May 1989, he made inquiries of:

> other hispanic and anglo businesses, as to whether they had been visited by Immigration officers, handing out the I-9 Employers Handbook; and, also whether they had ever been raided by INS at their job sites. Many of the anglo businessmen I spoke to had not even the slightest idea of what it was I was talking about. If any had received their Employers Handbook, it was sent to them by mail, and not personally delivered to them, as we had received ours. Also, none of the anglo businessmen had been raided as frequently, or none at all. Since this is a small community it is quite possible that my inquiries could have gotten back to someone in the Immigration and Naturalization Service.
>
> After the raid of May 16, 1989, my daughter, Della De Lafuente, made a more formal telephone survey asking the same questions, and she received the same answers.

Attached to Mr. De Lafuente's declaration is a form prepared for the formal telephone survey conducted by his daughter after the May 16 investigation, entitled, ``Measuring the Effectiveness of New INS Procedures.'' The form provides space for the name of the responding company, its type of business, and the answers to six questions; whether the INS has ever visited the company to explain the terms of IRCA; whether the company is familiar with IRCA's requirements; whether an INS representative has ever visited the company to explain how to complete the Form I-9; whether their I-9 forms had been audited; whether the INS had ever conducted an unannounced visit to a job site; and how many hispanics are employed by the company, broken down by their legal status.

In response to the Respondent's factual presentation in support of its position, Complainant provided the declarations of INS officials, George Gonzalez, David Leal, Pedro Martinez, and Assistant District Director Roy G. Sutton, as well as a copy of Zamora's voluntary sworn statement.

Agent Gonzalez states that the May 16, 1989 arrest of Zamora was prompted by an anonymous telephone call on the ``Employer Sanctions Hotline'' from a woman who reported illegal aliens working on the roof of an apartment building. Agents Gonzalez and Leal then went to the reported location and conducted an ``immigration survey.'' When one of the employees, Zamora, could not produce any work authorization papers, but only presented immigration bond papers, he was taken to the INS office. At the office, Zamora was questioned, photographed, fingerprinted and then released.

In his statement Zamora stated that he entered the United States in 1983 by swimming across a river, that he did not have a work permit and had never applied for amnesty. He stated that his attorney had told him he could work.

Agent Leal states in his declaration that Zamora had been taken into custody on May 16, 1989 in order to verify his status because he did not possess work authorization papers. Zamora's sworn statement was taken by Agent Gonzalez, after which Agent Leal decided to release Zamora. Agent Leal states that to the best of his recollection and knowledge, he had never previously inspected Zamora concerning his immigration status.

In a second declaration, Agent Leal states that prior to his detention of Zamora on May 16, 1989, he had no knowledge that Zamora's deportation case was on appeal to the 5th Circuit, that he was employed by Respondent or that Mr. De Lafuente was assisting Zamora in his deportation proceedings. He states that this fact had no impact on his recommendation to conduct an I-9 inspection of Respondent's business. Further, Agent Leal states that at the time of the May 16th investigation, he was unaware that Mr. De Lafuente had undertaken to investigate the INS enforcement practices in the area. He denies having made any derogatory comments regarding Zamora.

Senior Border Patrol Agent Martinez states that on December 26, 1989, he and another agent decided to conduct an immigration survey of a job site where they observed individuals, whom he believed to be undocumented aliens, working on a building. He recognized Zamora from a previous investigation of marijuana activity and when Zamora could not present work authorization, Agent Martinez intended to detain Zamora. But Mr. De Lafuente convinced Agent Martinez and Zamora's status had previously been investigated by Agent Leal.

Agent Martinez informed Mr. De LaFuente, in response to his inquiry, that I-9 audits were usually initiated after the apprehension of an unauthorized employee or after an educational visit by INS

agents. He also told Mr. De Lafuente that businesses are randomly selected from Washington under the ``General Administrative Plan.''

Assistant District Director for Investigations, Roy Sutton states in his declaration that the decision to conduct an I-9 inspection is made by the supervisor of an agent who conducts the preliminary investigation. If upon inspection, an agent discovers a violation, the supervisor will present the case to District Counsel who reviews it for its legal sufficiency. The decision to initiate an enforcement action, beginning with the issuance of a Notice of Intent to Fine, rests with the District Counsel.

Discussion and Analysis

A. PROSECUTORIAL DISCRETION

1. Jurisdiction over Affirmative Defense of Selective Prosecution

As a threshold issue, Complainant challenges the jurisdiction of an administrative law judge to consider a constitutional defense which is not specified in the statutory and regulatory framework of IRCA.

Complainant asserts that in the absence of statutory or regulatory permission, I am without authority to consider an affirmative defense which challenges the discretion of the government administrative prosecutors to initiate this matter.

This issue has previously been visited in the context of employer sanction proceedings, where, in an interlocutory order, an administrative law judge decided that the regulations permit him to decide issues involving the constitutional rights of a Respondent. United States v. Law Offices of Manulkin, Glaser, and Bennett, OCAHO Case Number 89100307, ``Order Staying Ruling on Motion to Dismiss For Selective Enforcement and Directing Further Discovery,'' 10/27/89.

Despite some uncertainty as to the propriety of this position, this issue need not be resolved in light of the determination I make below.

2. Elements of Selective Prosecution

Respondent seeks discovery of information from Complainant for the purpose of building its affirmative defenses of selective prosecution and discriminatory enforcement. This initial step in developing a constitutional defense requires a lesser showing than that needed to obtain an evidentiary hearing on a motion to dismiss. Respondent need only demonstrate a ``colorable basis'' for its claim.

United States v. Kerlev, 787 F.2d 1147, 1150 (7th Cir. 1986), United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985). As noted in Justice Marshall's dissent in Wayte v. United States, 470 U.S. 598 (1985), the Respondent must establish facts sufficient ``to take the question past the frivolous stage.'' Wayte, supra, at 623.

> In order for the defendant to show a `colorable basis' entitling him to discover the requested government documents, he must introduce `some evidence tending to show the existence of the essential elements of the defense.'

Mitchell at 1277, quoting United States v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974).

This legal standard serves to balance a party's right to develop all relevant facts against the need to protect the government from attempts to use discovery for purposes of delay or harassment.

To establish the elements of a defense of selective prosecution, a respondent must thereafter make a prima facie showing that other similarly situated are not being prosecuted for the same conduct. Second, the government's discriminatory conduct must be motivated by an impermissible motive. United States v. Aguilar, 871 U.S. F.2d 1436, 1474 (9th Cir. 1989); United States v. Lee, 786 F.2d 951 (9th Cir. 1986).

An affirmative defense of selective prosecution or enforcement seeks to pierce the shield of prosecutorial discretion to establish that the government's decision to prosecute was based on arbitrary reasons or for protected conduct. Wayte v. United States, 470 U.S. 598, 607 (1985).

> . . . Although prosecutorial discretion is broad, it is not unfettered' (citation omitted) . . . [T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, (citation omitted), including the exercise of protected statutory and constitutional rights.''

Wayte, at 608.

In the instant case, the Respondent attempts to establish two interrelated defenses. First, that the government is engaging in discriminatory enforcement on the basis of race by targeting hispanic employers. Second, that the government selectively targeted Respondent in retaliation for its constitutionally protected acts of aiding its alien employee's legal defense and for seeking to establish its first affirmative defense through an informal survey of other are businesses. This second affirmative defense is more accurately identified as vindictive prosecution, as Respondent claims that the government is retaliating against it for its protected acts. United States v. Napue, 834 F.2d 1311 (7th Cir. 1987).

> A prosecution is vindictive and a due process violation if it is undertaken `to punish a person because he has done what the law plainly allows him to do.' (cita-

> tion omitted.) The government may not penalize an individual for exercising a protected statutory or constitutional right.

Napue at 1329.

The evidence offered by Respondent is not adequate to meet its burden to establish a colorable claim of discriminatory enforcement. Respondent must first demonstrate some evident that others similarly situated are receiving unequal treatment. Respondent compares its treatment by the INS to a group defined as ``businesses run by Whites.'' Rather the proper comparison requires a more subtle distinction than merely canvassing other businesses to determine if they have been contacted or investigated by the INS. A ``similarly situated'' comparison group should be defined as businesses run by whites who have also violated IRCA but not have not been prosecuted. If there is a disparity in prosecution, Respondent must make a showing that race is the motivating factor.

In support of its allegations of race conscious enforcement, Respondent asserts that Mr. De Lafuente contacted ``many . . . anglo businessmen'' whose businesses had not been raided by the INS. ``[N]one of the anglo businessmen had been raided as frequently, or not at all.'' Respondent asserts that the daughter of Mr. De Lafuente made a ``more formal telephone survey'' and received the same responses.

The results of Respondent's survey do not raise an issue of discriminatory prosecution based upon the race of the individuals who run similarly situated businesses. Respondent's survey lacks any demographic data from which a conclusion could be drawn that hispanic run businesses have been targeted by the INS. Additionally, Respondent's data fails to address to the issue of whether the INS has prosecuted violations of IRCA by non-white run businesses while disregarding similar violations by white run businesses. In short, Respondent's evidence does not raise a ``colorable claim'' that the INS has unequally targeted non-white businesses or that Respondent was investigated because it is run by hispanics.

Respondent further asserts that its case of discriminatory treatment is buttressed by the fact that the prosecution in this case was instigated in violation of internal INS guidelines which decline ``paperwork only'' cases if there is no evidence of unlawful employment of unauthorized aliens. Such internal guidelines offer no support to Respondent as they are not a source of substantive rights upon which employers may rely. U.S. v. Mitchell, supra, at 1276 [An internal guideline for the exercise of prosecutorial discretion does not create a substantive right for a defendant which he may enforce.], United States v. Samuel J. Wasem, Gen'l Partner, d/b/a Educated Car Wash, OCAHO Case No. 89100353, Order Granting in

Part and Reserving in Part Complainant's Motion to Strike Affirmative Defenses, 10/25/89.

As for the second affirmative defense of selective prosecution based upon the exercise of constitutionally protected rights, Respondent asserts that this action was initiated to retaliate against Respondent's continued employment and legal assistance to its employee Zamora, as well as Respondent's own efforts to investigate the INS's discriminatory enforcement policy.

Respondent's evidence is purely speculative and again fails to raise a ``colorable basis'' to support the affirmative defense. Respondent offers Zamora's statement that he has been investigated by INS Agent Leal five or six times since Zamora began working for Respondent in 1983; that he was treated derogatorily by the INS agents who arrested him on May 16, 1989; that an additional inspection of Respondent's employees was conducted in December of 1989; that Complainant admitted it would not have conducted the audit of Respondent's IRCA compliance if Zamora had not been detained on May 16th.

Respondent further asserts that the INS was motivated by the fact that Respondent was investigating the INS's own enforcement policy. Respondent's only evidence in this regard is the inference by Mr. De Lafuente that because ``this is a small community it is quite possible that, [sic] my inquiries could have gotten back to someone in the Immigration and Naturalization Service.''

Complainant's evidence asserts that the May 16th survey of Respondent's job site was instigated by an anonymous telephone tip that aliens were employed by Respondent. Agent Leal states that prior to this investigation he had no knowledge that Zamora was employed by Respondent, that his deportation case was on appeal, that Respondent was aiding his legal defense. Further, he did not know, prior to the May 16th investigation, that Mr. De Lafuente had been calling businesses in the area to investigate the INS.

The December 1989 job site survey, which was conducted after the Complaint in this action was filed, is not colorably the result of vindictiveness on the part of the INS. Rather, two INS agents exercised their discretion to investigate upon viewing a job site where they suspected undocumented aliens were employed. Zamora was singled out by an agent only because he did not have a work permit. Further the fact that the agent could identify Zamora does not indicate a retaliatory effort, since the agent recognized Zamora from a previous criminal investigation.

Respondent has not offered sufficient probative evidence in support of its conspiracy theories to rise to the level of a ``colorable claim'' of selective prosecution.

Therefore, Respondent's motion to compel responses to its first set of interrogatories and request for production seeking information on INS Harlingen District office's enforcement efforts will be denied.

B. COMPLAINANT'S MOTION TO COMPEL

The second discovery issue to be decided is the Complainant's motion to compel Respondent to answer interrogatories and requests for admissions, or to have the matters deemed admitted.

The following interrogatories were served upon Respondent on January 11, 1990:

> 6. Please list the name and last known address of each individual whom the Respondent asserts to be an independent contractor and not an employee of the Respondent.
>
> 7. For each individual listed in response to Interrogatory 6 above, please state:
>
> (a) The period during which such individual performed work or rendered services to the Respondent, worked on property owned or controlled by the Respondent, or used equipment or materials owned or controlled by the Respondent.
>
> (b) Each and every fact upon which Respondent relies in claiming that each such individual was an independent contractor and not an employee of the Respondent.

Respondent contests Interrogatory 6 as too vague, and it refuses to answer the subparts of Interrogatory 7 unless there is greater specificity in 6.

With regard to the documents sought to be authenticated through the request for admission, Respondent denied the request stating that while the five documents are ``true and accurate,'' they are not ``true, complete, and accurate,'' and therefore it would be ``misleading'' to admit the request. Respondent contends that each of the files from which the Forms I-9 were taken contained either a correctly completed form or the information necessary to complete the form correctly.

1. Interrogatories 6 & 7

Respondent argues in support of its ``vagueness'' objection that the request fails to specify the relevant time period in which it employed independent contractors. Respondent queries whether Complainant seeks information dating back as far as the effective date of the Act or just the year 1989. Respondent suggests that Complainant should have filed follow up interrogatories to clarify the scope of the information it sought.

As noted by Complainant, Respondent asserts, in answers to the same set of interrogatories, that it is not liable for failing to com-

plete a Form I-9 for one of the individuals named in the Complaint because that individual is an independent contractor.

I find Respondent's objections to Interrogatory numbers 6 and 7 to be without foundation, as it is clear that the scope of information sought by Complainant is limited to that which is relevant to the issues raised by Respondent's own asserted defense, that Julian Olivera is not an employee, but an independent contractor. Relevancy means having any tendency to prove the existence of any fact of consequence to the determination of the action. Rule 401 Fed R. Evid. As the Complaint alleges the failure to complete Forms I-9 for six specific individuals, any attempt to discover information beyond these violations would fail the test of relevancy.

2. Request for Admissions

I find Respondent's explanation for its refusal to admit the authenticity of the documents, as requested in Request for Admission 1, to be without support. Respondent objects to a simple request to authenticate documents. The declaration of INS Agent David Leal establishes that the documents attached to the Request for Admissions were provided to him by Respondent's agent during the inspection. Respondent's argument that the admission would be misleading because the documents are not legally sufficient, overlooks the purpose of the Request for Admission. Complainant is merely seeking to determine whether the attached Forms I-9 are the same documents which Respondent provided in response to Complainant's subpoena, not whether the Forms I-9 are accurately completed. The legal sufficiency of the documents was not raised by the discovery request. By merging the genuiness issue with the legal sufficiency issue, Respondent only obscures the matter.

Complainant seeks the imposition of the sanction provided for in 28 C.F.R. 68.21(a), that where a party interposes unjustified objections to a Request for Admission, the Administrative Law Judge may deem the matter admitted, or order an amended answer be served.

Under the circumstances, Respondent will be given an additional period of fourteen days from the date of this order to amend its answers to Complainant's interrogatories and request for admission. If it fails to do so, the sanction request will be reconsidered.

ORDER

Respondent's Motion to Compel Discovery is denied.

Complainant's Motion to Compel Responses to Interrogatories is granted. Further, Complainant's motion to compel Respondent to answer its request for admissions is granted.

IT IS FURTHER ORDERED that Respondent provide amended answers to Complainant's Interrogatories 6 and 7, and Request for Admission 1, within fourteen days from the date of this order.

October 10, 1992

JAMES M. KENNEDY
Administrative Law Judge
San Francisco, California