

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

IN RE INVESTIGATION OF)
HORACIO OLVERA-VARGAS')
CHARGE AGAINST) OCAHO Subpoena No. 95-2-00022
WAL-MART STORES, INC.,)
STORE 6036)
_____)

ORDER GRANTING PETITION TO SEEK ENFORCEMENT
OF ADMINISTRATIVE SUBPOENA
(April 18, 1995)

MARVIN H. MORSE, Administrative Law Judge

On March 24, 1995, by written application, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), requested that an administrative law judge issue an investigatory subpoena duces tecum in aid of the above captioned investigation. On March 24, 1995, I issued said subpoena. According to its terms, the subpoena was issued pursuant to 8 U.S.C. § 1324b(f)(2) and pursuant to 28 C.F.R. § 68.25.¹

By written Petition for Authorization to Seek Enforcement of Administrative Subpoena dated April 11, 1995 (filed April 13, 1995), OSC represents that the subpoena was served by mail and that the response of Wal-Mart Stores, Inc. (Wal-Mart), evidenced by its letter dated March 29, 1995 (Exhibit D to OSC's Petition), is insufficient to assure timely compliance. Reciting the need to complete this investigation within statutory time constraints, in support of which OSC undertakes that it "cannot properly complete its investigatory duties without the subpoenaed documents," the Petition requests that I authorize OSC "to seek enforcement of this administrative subpoena."

Title 8 U.S.C. §1324b(f)(2) provides that:

In the case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the administrative law judge, an appropriate

¹ See 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].

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 court as a contempt thereof.

Implementation of § 1324b(f)(2) made clear early in the administration of § 1324b adjudicative processes that the requesting party, and not the administrative law judge, would make the application to the appropriate district court. The implementing regulation, 28 C.F.R. § 68.25(e), provides in pertinent part as follows:

(e) Failure to comply. Upon the failure of any person to comply with an order to testify or a subpoena issued under this section, the Administrative Law Judge may, where authorized by law, apply through appropriate counsel to the appropriate district court of the United States for an order requiring compliance with the order or subpoena.

See also *In re Investigation of Chan's Apparel*, 1 OCAHO 1 (1988), for a discussion of the applicable principles at an early stage in the development of OCAHO jurisprudence.

Wal-Mart has failed to avail itself of the opportunity to petition within 10 days of service of the subpoena to seek its revocation or modification. 28 C.F.R. § 68.25(c); Exhibits C and D to OSC's Petition. I conclude that Wal-Mart has refused to obey the subpoena.

This Order issues upon the unilateral application by OSC, without prior notice to Wal-Mart, recognizing that the requirements of notice and time to answer are only applicable to individuals or entities who have been charged with unfair immigration-related employment practices. 28 C.F.R. § 68.25(b). Individuals and entities so charged are entitled to notice of the subpoena, by service of the subpoena itself. *Id.* There is no provision for notice and service with respect to the Petition at hand.

Counsel for OSC having initiated this subpoena practice and having sought assistance of the administrative law judge in aid of compliance, is found by this Order to be an appropriate counsel to make application to, and is hereby, authorized to apply to the United States District Court for the Eastern District of Texas, or such other district court of the United States as may be appropriate. OSC's request for "assessment of costs against Wal-Mart" is denied as outside the authority of this judge.

SO ORDERED.

Dated and entered this 18th day of April, 1995.

MARVIN H. MORSE
Administrative Law Judge