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

September 8, 2000

In re TROPICANA CASINO AND RESORT — OCAHO Investigative Subpoena No. 20S00092

ORDER DENYING PETITION TO REVOKE OR MODIFY SUBPOENA AND CONDITIONAL AUTHORIZATION FOR OSC TO SEEK ENFORCEMENT

I. Procedural History

On August 2, 2000, at the request of the Office of the Special Counsel for Immigration Related Unfair Employment Practices (OSC), I signed and issued OCAHO investigative subpoena number 20S00092 in aid of OSC's investigation of Tropicana Casino and Resort. That subpoena directed that Tropicana produce certain documents to OSC on or before the close of business on August 15, 2000. Tropicana filed a timely[1] petition to revoke or modify the subpoena accompanied by the affidavit of George Wackenheim; OSC responded opposing the petition, and Tropicana filed its reply on September 5, 2000. The petition is ripe for adjudication.

The only portion of the subpoena Tropicana challenged is paragraph one, which requests the production of "[c]opies of all INS Form I-9s collected by the Company from January 1, 1997 to June 30, 1999 and from January 1, 2000 to the present, together with supporting documentation and any attachments (if applicable)."[2] Tropicana seeks to revoke or modify this portion of the subpoena on the dual grounds that it is overly broad and unduly burdensome.

II. Standards Applicable to Administrative Subpoenas

It is long established that the requirements for enforcement of an administrative subpoena are minimal. See United States v. Westinghouse Electric Corp., 788 F.2d 164, 166 (3rd Cir. 1986). An administrative subpoena will ordinarily be enforceable if 1) the investigation is within the

---

[1] While neither party offered a copy of the certificate of service of the subpoena as part of the record, OSC's brief recites that the subpoena was served on August 4, 2000.

[2] Copies of the I-9s for the period July 1, 1999 to December 31, 1999 have already been produced.

statutory authority of the agency, 2) the subpoena is not too indefinite, and 3) the information sought is reasonably relevant to the charge under investigation. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); see also EEOC v. University of Pennsylvania, 850 F.2d 969, 981 (3rd Cir. 1988) aff'd 493 U.S. 182 (1990). If it is shown that those three criteria have been met, the subpoena will be enforced unless the party being investigated proves that the inquiry is unreasonable because it is overbroad or unduly burdensome. See EEOC v. Children's Hospital Medical Center, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (citing cases). Cf. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 217 (1946).

It is similarly well established in such proceedings that the measure of relevance is exceedingly generous, see EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984), and that the showing required to establish undue burden is one not easily made, see Investigation of Florida Azalea Specialists, 3 OCAHO no. 523, 1252, 1255 (1993)[3], enforcement aff'd 19 F.3d 620 (11th Cir. 1994); EEOC v. Maryland Cup Corp., 785 F.2d 471, 477 (4th Cir.), cert. denied 479 U.S. 815 (1986). In general the costs of complying with government subpoenas are a normal cost of doing business which should be borne by the company. See Hurt v. Dime Savings Bank, 151 F.R.D 30, 31 (E.D.N.Y. 1993) (citing FTC v. Rockefeller, 591 F.2d 182, 191 (2nd Cir. 1979)).

That some burden may be placed on a responding party is ordinarily not enough to avoid compliance. See EEOC v. University of Pittsburgh, 487 F.Supp. 1071, 1077 (W.D. Pa. 1980), aff'd 643 F.2d 983 (3rd Cir. 1980), cert. denied 454 U.S. 880 (1981) ("[e]ven if production of evidence imposes some burden, we believe that so long as the information is relevant and material, the cost is 'part of the social burden' of our present day society"); Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 1991 WL 111040 *2 (E.D. Pa. June 17, 1991) (mere fact that compliance with request will cause significant expense does not justify denial of request). In order to avoid compliance with an investigative subpoena, the resisting party must prove that producing the documents would seriously disrupt its normal business operations. See EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313 (7th Cir. 1981); In re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO no. 751, 238, 243 (1995).

III. The Submissions of the Parties

The parties' dispute as to overbreadth rests on argument alone. The only evidence in the record is the affidavit of George Wackenheim which speaks only to the allegation of undue burden. As to the allegation of overbreadth, Tropicana's petition asserted only that "the request to (sic) what

---

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 7 reflect the volume number and the number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents when a decision has not yet been reprinted in a bound volume are to pages within the original issuances; the beginning page number of an unbound case is omitted from the citation.

amounts to over three years of I-9s is well beyond the 180 day Statute of Limitations imposed by 8 USC § 1324b(d)(3)" and is therefore unreasonable. In response, OSC asserted that it is investigating two counts of pattern and practice behavior, that the possibility of continuing violations warrants consideration of Tropicana's employment eligibility verification practices over the three year period of time, and that the determination of what evidence OSC needs is within the agency's, not the respondent's, authority to determine.

With respect to the burden of compliance, the Wackenheim affidavit states that the affiant is the Executive Director of Human Resource Management for Tropicana, that by Tropicana's count there were 5314 new hires during the period, that 700 I-9s have already been produced for the period July 1, 1999 through December 31, 1999, and that the number of additional employees for whom I-9s would have to be produced therefore appears to be more than 4600. The affidavit states further that because Tropicana keeps its I-9 Forms in the individual personnel files of the employees, producing the requested documents would disrupt normal business operations. The affidavit states that by Wackenheim's calculation 384 man-hours would be required to complete the project, which would translate to 11 weeks of time if assigned to one individual. The affidavit also states that numerous employees are scheduled for vacations in the summer and fall, reducing the amount of staff to perform his department's normal assignments.

With respect to the burden on Tropicana to comply with the request, OSC asserted in response that any burden presented is not undue in light of the size and profitability of the respondent (5,000 employees, $368 million in sales and $10,000,000 expended in advertising last year). However, no evidence was offered to support the allegations about Tropicana's size, sales volume or advertising expenditures.

IV. Discussion

Tropicana does not contend that the investigation is outside OSC's statutory authority or that the subpoena is too indefinite. Its assertion of overbreadth does, by implication, raise the question of relevance. However the sole rationale offered in support of the allegation of overbreadth is the assertion in Tropicana's petition that because 8 U.S.C. § 1324b(d)(3) states that no complaint may be filed respecting an unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge, OSC's investigation must therefore be limited to that period.

A. Overbreadth

Although often recited, the canard that the relevant period for an OSC investigation (or even for discovery after a complaint has been filed) is limited by the 180 day filing period has received short shrift in OCAHO jurisprudence. See, e.g., United States v. Agripac, Inc., 8 OCAHO no. 1012, at 8 (1998); United States v. Robison Fruit Ranch, 6 OCAHO no. 855, 285, 335-36 (1996), rev'd on other grounds, 147 F.3d 798 (9th Cir. 1998) (potential for liability beyond 180

day period); United States v. Zabala Vineyards, 6 OCAHO no. 830, 72, 75 n.3 (1995) (potential for liability); In re Investigation of ABM Industries, Inc. and ABM Janitorial Services, 5 OCAHO no. 763, 354, 358 (1995). Tropicana's petition provides no reason for me to depart from that approach. Employment practices outside the limitations period are always potentially relevant because they may demonstrate evidence of an ongoing policy or practice. See generally Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982). As was pointed out in Miles v. Boeing Co., 154 F.R.D. 117, 119 (E.D. Pa. 1994) moreover, even the scope of discovery in an individual discrimination case

> is commonly extended to a reasonable number of years prior to the defendant's alleged illegal action and also for periods after the alleged discrimination. Clarke v. Mellon Bank, No. 92-4823, 1993 WL 170950, *2, 1993 U.S. Dist. LEXIS 6680, *5 (E.D. Pa. May 11, 1993). See e.g., McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 63 (E.D. Pa. 1979) (five years prior to plaintiff's termination) and Milner v. National School of Health Tech., 73 F.R.D. 628 (E.D. Pa. 1977) (two years after termination).

Cf. Miller v. Hygrade Food Products Corp., 89 F. Supp. 2d 643, 657 (E.D. Pa. 2000) (it is "well established that discovery of conduct predating the liability period . . . is relevant, and courts have commonly extended the scope of discovery to a reasonable number of years prior to the liability period"). Here OSC asserts that it is investigating two charges of pattern and practice violations; such an investigation is a fortiori broader than that of an individual charge. Relevance in an administrative investigation, moreover, is even more broadly construed than in discovery, compare Shell Oil, 466 U.S. at 68-69 ("virtually any material that might cast light on the allegations") to F.R.C.P. 26 ("any matter, not privileged, which is relevant to the subject matter involved in the pending action").

B. Undue Burden

The heart of the dispute between the parties, and the one upon which their attention is principally focused, is whether Tropicana's evidence is sufficient to meet the rigorous standard for proving undue burden. Analysis of that proposition requires consideration first, of the nature and volume of the documents requested; second, of the adequacy of Tropicana's evidence to demonstrate the burden of compliance; and third, of whether the burden shown is undue.

1. The Volume and Nature of the Documents Sought

With respect to the character of the documents, it must first be noted that I-9 forms are not ordinary business records, but rather records which every employer in the United States is specifically required by law to retain and to make available upon request to the appropriate agencies for examination. 8 U.S.C. § 1324a(b)(3). Employers must retain an I-9 form for each employee for a period of three years after the date the employee is hired, or one year after the

employee is terminated, whichever is later.[4] Id. Regulations promulgated pursuant to 8 U.S.C. § 1324a set forth in detail the responsibilities of employers under the employment eligibility verification system, and direct that:

> [a]ny person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the Forms I-9 by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor. At the time of inspection, Forms I-9 must be made available in their original form or on microfilm or microfiche at the location where the request for production was made.[5]

8 C.F.R. § 274a.2(b)(2)(ii).

The statute and regulations thus appear to direct that, after three days notice, an employer will produce the I-9 Forms in one of the acceptable versions. No special exception is carved out for large employers and no temporal or numerical limitations (other than the retention period itself) are expressed. Rather, the regulations provide that

> **[a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act.**

Id. (emphasis added).

It thus appears that any failure to present, within three days of a request by one of the designated agencies, all the I-9 forms which an employer is required at that time to maintain, would potentially violate the Act.

2. The Sufficiency of the Wackenheim Affidavit to Show the Burden

An affidavit, like any other testimonial evidence, must set forth specific facts such as would be admissible in evidence, and should show affirmatively that the affiant is competent to testify to the matters stated. See Maldonado v. Ramirez, 757 F.2d 48, 50 (3rd Cir. 1985). Statements prefaced by the qualification "I believe" or ""upon information and belief" or "based upon my understanding" are not statements of fact meeting this standard. See Turiano v. Schnarrs, 904 F.Supp. 400, 407 (M.D. Pa. 1995) (quoting Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa.

---

[4] OSC did not contest Tropicana's assertion that approximately 4600 I-9 Forms are in issue. It is not entirely clear that this is the case because there has been no consideration of how many of the persons hired during the period were still employed as of one year ago.

[5] Standards are provided for the readability of microfilm or microfiche records. 8 C.F.R. § 274a.2(b)(2)(iii).

1980), aff'd 659 F.2d 1065 (3rd Cir. 1981) (table)). To the extent an affidavit is made solely upon understanding or belief, it is inadequate to establish facts.

OSC did not object to or move to strike any portion of the Wackenheim affidavit. Ordinarily formal defects in an affidavit will be held to have been waived where the opposing party does not object or move to strike the defective matter. See Munoz v. International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators, 563 F.2d 205, 214 (5th Cir. 1977). Here, however, the defects are not merely formal or technical. While I consider the whole affidavit, I must consider as well the probative value of each statement. Tested against the appropriate evidentiary standard, it is apparent that some of the statements in the Wackenheim affidavit must be disregarded as an expression of belief rather than fact.[6] Cf. Mid-State Electric, Inc. v. H.L. Libby Corp, 787 F. Supp. 494, 498 (W.D. Pa. 1992) (citing Maldonado, 757 F.2d at 51). The following statements are not probative evidence of anything other than Wackenheim's state of mind:

> I believe that it will take, on average, 5 minutes per individual to obtain the file, locate the I-9, copy the I-9, return the file to its original order and organization and replace the file.
>
> I believe that responding . . . would seriously disrupt the normal business operations of Tropicana.
>
> I believe that a reasonable alternative . . . would be for the Office of Special Counsel to review the printout of all new hires . . . and to identify a reasonable sampling of individuals from that list for whom we may obtain . . . I-9 Forms.

Wackenheim's calculation that it will take 384 man-hours to complete the project appears to be predicated entirely upon his estimate of 5 minutes to process each I-9, and accordingly must also be regarded as a statement of belief rather than a fact.

The affidavit also states,

> The policy and procedure of Tropicana is to keep completed I-9s in employee files. To the best of my knowledge, information and belief, all I-9s are contained within the personnel file of the employee who completed that document (emphasis added).

An assertion "to the best of my knowledge, information and belief" may be more than mere speculation, but it still falls short of establishing facts in the absence of some articulation of the basis for the affiant's knowledge. This is no more than the foundation which would be required at a hearing. In Mellen v. Hirsch, 8 F.R.D 248, 249, 250 (D. Md. 1948), aff'd on other grounds 171 F.2d 127 (4th Cir. 1948), for example, a recitation based upon "the best of my knowledge"

---

[6] Only the defective portions should be disregarded. See generally 10B Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE, § 2738, n. 3, n. 32, n. 34 (3rd ed. 1998).

was accepted where the remainder of the affidavit set out the facts which showed the basis for the affiant's knowledge. A corporate manager or officer may review books and records of the company and may testify as to the results of an inquiry, even when the source of the witness' knowledge is hearsay. For example, had Wackenheim said he was the person responsible for maintaining Tropicana's I-9s, or identified that person specifically and stated that he or she had told him there were no other copies, that fact might have been established by affidavit. See Thankachen v. Cardone Ind., 1996 WL 84270 *3, n.8 (E.D. Pa., Feb. 27, 1996). In the absence of such information, however, an assertion "to the best of my knowledge" cannot be viewed as conclusive.

Notwithstanding the problems with the Wackenheim affidavit, I will accept for purposes of this petition that the production of approximately 4600 I-9 Forms will impose a substantial burden upon Tropicana, and may even require the employment of additional temporary help to comply in a timely fashion with the subpoena.

3. Whether the Burden Shown is Undue

Whether or not a burden is "undue" must be assessed relative to the respondent's size and the cost of compliance. See Maryland Cup, 785 F.2d at 479 (employer must show "that the cost of gathering this information is unduly burdensome in light of the company's normal operating costs"). As explained in Baine v. General Motors Corp., 141 F.R.D. 328, 331 (M.D. Ala. 1991),

> Scholarly authority clearly perceives the relationship between the enormity of a corporation like General Motors and the paper shield it can erect to discovery. As one treatise has expressed it, "The fact that defendant's size requires it to keep a great amount of records cannot give it immunity which a small organization would not possess." 4A Moore's Federal Practice § 34.19 n. 10.

While OSC made some statements in its brief about Tropicana's sales and its advertising expenditures, neither party furnished any evidence whatsoever respecting the company's normal operating costs. There has accordingly been no showing that the costs of compliance would be excessive when viewed in the context of Tropicana's normal operating costs.

I conclude in any event that whatever burden falls on Tropicana in complying with the subpoena is a result of its own recordkeeping system. Cf. Delozier First National Bank of Gatlinburg, 109 F.R.D. 161, 164 (E.D. Tenn. 1986). If Tropicana chose, in the face of the statutory and regulatory requirements governing retention of I-9 forms, to insert its only copies of the I-9 forms into the individual personnel folders of its employees, it faces a burden entirely of its own making when it cannot produce those forms to regulatory agencies on three days notice. These are documents which OSC has a statutory and regulatory right and duty to inspect, and which Tropicana has a statutory and regulatory duty to maintain and present for inspection after three days notice. The purpose of the records retention requirements would be entirely frustrated if employers could be excused from compliance simply by choosing to keep required records in

such a manner as to make them unavailable to law enforcement agencies without herculean efforts. Cf. Kozlowski v. Sears, Roebuck & Co., 73 F.R.D 73, 76 (D. Mass. 1976) (maintaining inadequate filing system and claiming undue burden would defeat purpose of discovery rules). It is to avoid such choices by employers that the regulations make clear that any failure to present I-9 forms to any of the designated agencies in a timely manner is itself a violation of the Act.

Tropicana could have sought, but did not, to minimize any alleged burden by an offer to make the documents available to OSC for inspection and copying at its place of business. See, e.g., Compagnie Des Bauxites de Guinea (sic) v. Insurance Co. of North America, 651 F.2d 877, 883 (3rd Cir. 1981), aff'd sub nom. Insurance Co. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) (where requested material is so voluminous that copying and transporting it would be oppressive, responding party may request that opposing party inspect the records at its place of business); Investigation of ABM, 5 OCAHO at 360 (company could request OSC to inspect and copy documents at respondent's facility where as many as 7936 hires and well over 8000 applications were involved). Such an offer would have imposed no more burden on Tropicana than the statute and regulations themselves already impose. Tropicana made no such offer, and will not, at this stage, be relieved of the obligation to furnish copies of the I-9s in response to OSC's subpoena.

V. Conclusion

The grounds asserted by Tropicana for revocation or modification of OCAHO Subpoena No. 20S00092 are insufficient to warrant its revocation or modification.

VI. ORDER

Tropicana's Petition to Revoke or Modify OCAHO Subpoena No. 20S00092 is hereby denied. The Office of Special Counsel is authorized without further request to seek enforcement in the appropriate United States District Court in the event the subpoena is not complied with before the close of business on September 20, 2000.

SO ORDERED.

Dated and entered this 8th day of September, 2000.

_____

Ellen K. Thomas
Administrative Law Judge