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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA RODRIGUEZ, MARIA RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE YANG, and XHUE YANG, on behalf of themselves and all those similarly situated,

Plaintiffs,

v.

NIBCO, INC., an Indiana corporation, and R. M. WADE & CO., an Oregon corporation,

Defendants.

No. CIV F-99-6443 AWI SMS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE CONDUCT OF DEFENDANTS' DEPOSITIONS OF PLAINTIFFS

[Fed.R.Civ.P. 30(d)(4), 26(c); Civ.L.R. 26-252(d)]

Date: June 8, 2001
Time: 10:30 a.m.
Ctrm: 4

[Hon. Sandra M. Snyder]

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I. INTRODUCTION

Pursuant to the parties' telephonic conference with the Court on May 14, 2001, plaintiffs move for a protective order limiting the scope of defendants' questioning, and the disclosure of certain other information obtained, in the depositions of the 25 plaintiffs in this case.

II. FACTUAL BACKGROUND

This case alleges national origin discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and the California Fair Employment and Housing Act ("FEHA"), arising from the use of a non-job related, written English proficiency test to terminate 25 limited-English-proficient employees from their jobs at a Fresno manufacturing facility owned, first, by defendant NIBCO, Inc., and now by defendant R.M. Wade & Co.

The issue presently before the Court arises from defendants' stated intent to depose each of the 25 plaintiffs regarding a number of areas which are of disputed relevance to this action and/or have the potential for adverse immigration or other consequences to plaintiffs. Specifically, at the opening deposition taken by defendants, plaintiff Martha Rivera was repeatedly asked *inter alia* questions relating to her places of marriage[1] and birth.[2] After defense counsel declined to withdraw those questions, plaintiffs' counsel thereupon instructed Ms. Rivera, pursuant to Fed.R.Civ.P 30(d)(1),[3] not to respond in order to allow the parties to consider and discuss a protective order that

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[1] Defense counsel refused to explain the basis for this question, other than to respond that it was "[j]ust preliminary questions, discovery, background information." Deposition of Martha Olivia Rivera ("Rivera Depo."), 18:25-19:1. Despite this failure to state any rationale for it, defense counsel persisted in asking the same question two more times. Rivera Depo., 19:5-6, 21:7-10. The cited excerpts from this deposition are appended hereto as Exhibit A.

[2] Rivera Depo., 21:15-16, 27:8. During a colloquy, plaintiffs' counsel stated that "we are happy to give you Plaintiff's national origin. However, it is not necessary to identify the country of birth, the length of residence in the United States, where they were married, or those types of questions in order for us to tell you Plaintiff's national origin." (*See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973)). This offer was, likewise, summarily rebuffed without any explanation by defense counsel. Rivera Depo., 26:3-10. Defense counsel was then reminded that defendants had in fact already stipulated as to each plaintiff's national origin. *See* fn. 18, *infra* and associated text. Defense counsel ignored this information as well. Rivera Depo., 26:18-27:7.

[3] Rule 30(d)(1) provides in relevant part: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)"; Wright, Miller & Marcus, 8A Federal Practice and Procedure, Civil 2d, § 2113 (same); Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) (same); Detoy v. City and County of San Francisco, 196 F.R.D. 362, 367 (N.D. Cal. 2000) (same).

would set out the purposes for which such plaintiffs' testimony on these and other potentially sensitive issues could be used.[4] When the parties were unable to agree upon such a protective order, plaintiffs' counsel advised that she wished to temporarily adjourn the deposition in order to seek an appropriate protective order from the Court.[5]

Since the Rivera deposition, defendants have indicated they plan to ask each plaintiff a wide range of *additional* questions of a potentially highly sensitive nature, including but not limited to the places of plaintiffs' ancestors' birth, "follow-up questions relating to the national origin issues," "residency in the United States and/or place of birth," and "general background information of each individual which will include every name they have used in the past, the dates they have used the names . . . and other identifying information."[6]

III. THE REQUESTED PROTECTIVE ORDER

Fed.R.Civ.P. 30(d)(4) states that "[a]t any time during a deposition . . . upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court . . . may limit the scope and manner of taking the deposition as provided in Rule 26(c)." The latter rule provides that such protective orders as justice requires may be issued by the court "for good cause shown," and may mandate "that the disclosure or discovery may be had only on specified terms and conditions," or "that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." Fed.R.Civ.P. 26(c)(2), (4).

For the reasons that follow, plaintiffs seek a protective order which: 1) bars defendants from asking questions in specified subject matter areas that closely relate to plaintiffs' immigration status and/or authorization to work in the United States, and are irrelevant to the substance of this action; and 2) prohibits, *inter alia*, the disclosure to nonparties of plaintiffs' responses to questions relating

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[4] Rivera Depo., 20:13-16, 27:19-23.

[5] Defense counsel noted at this point that "until the issue is cleared up, then there is no point in going forward with the other depositions as well, because we will encounter the same problems." Rivera Depo., 28:4-7.

[6] Correspondence from Howard Sagaser to Christopher Ho, May 16, 2001 (copy appended as Exhibit B).

to other specific areas. A copy of the proposed order is lodged herewith.

IV. ARGUMENT

For the reasons set out below, plaintiffs' proposed protective order is appropriate and should be entered by the Court.

A. Plaintiffs Are Covered By Title VII and the FEHA Irrespective Of Their Immigration Status or Authorization to Work

As a threshold matter, it is well-established that plaintiffs are entitled to the protections of Title VII, whether or not they are legally present in the United States. *See, e.g.,* EEOC v. Tortilleria "La Mejor," 758 F.Supp. 585 (E.D. Cal. 1991) ("the protections of Title VII were intended by Congress to run to aliens, whether documented or not"); EEOC v. Switching Systems Div. of Rockwell Intl. Corp., 783 F.Supp. 369 (N.D. Ill. 1992) ("Title VII's protections extend to aliens who may be in this country either legally or illegally"); *see also* Sure-Tan v. NLRB, 467 U.S. 883 (1984) (undocumented persons are "employees" within meaning of National Labor Relations Act, and are thus protected against retaliatory employer reporting to the Immigration and Naturalization Service); EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999 ("unauthorized workers are protected [by Title VII] to the same degree as all other workers").[7] The same holds true for the FEHA.[8] Thus, inquiries into plaintiffs' immigration status or authorization to work are entirely irrelevant to their coverage by these statutes, and cannot be justified.

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[7] These authorities are consistent with numerous other decisions holding similar statutory protections to apply with equal force to both documented and undocumented employees. *See, e.g.,* NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180, 1184 (9th Cir. 1979) (finding that undocumented workers are "employees" within the meaning of the National Labor Relations Act; then-Circuit Judge Kennedy, concurring, noted, "If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices"); Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1101 (1989) (undocumented workers entitled to protections of federal Fair Labor Standards Act ("FLSA") for minimum wage and overtime violations); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053, 1058 (N.D. Cal. 1998) ("The Ninth Circuit has also consistently held that analogous [to the FLSA] labor laws protect undocumented and documented workers equally").

[8] *See, e.g.,* Murillo v. Rite Stuff Foods, Inc., 65 Cal.App.4th 833, 849 (Cal. Ct. App. 2. Dist. 1998) (in Title VII and FEHA action, "plaintiff's status as an undocumented alien does not bar her from the protections of employment law," *citing* Tortilleria, *supra*).

B. The Courts Have Been Sensitive to the Chilling Effect of Questions Bearing Upon Plaintiffs' Immigration Status

With good reason, the courts have acted where necessary to limit the scope of discovery with respect to plaintiffs in employment cases whose immigration status or work authorization may be open to question. This has been due both to the irrelevance of such questions to the issue of employer liability, as well as to their chilling and intimidating effect upon the willingness of such persons and others like them to assert their workplace rights. The Fifth Circuit, in granting a writ of mandamus to reverse a district court's order permitting discovery *inter alia* into plaintiffs' citizenship status, places of birth, and immigration status, has reasoned that such information:

> was completely irrelevant to the case before it and was information that could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case.

In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (action under Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act). *See also* Montelongo v. Meese, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (district court barred inquiry into the immigration status of class members in an action under Farm Labor Contractor Registration Act).

The National Labor Relations Board expressed identical concerns when, in connection with a complaint of unfair labor practices, the employer's counsel inquired into employees' length of residence in the United States, places of education, previous employment, and also subpoenaed their passports, "green cards," and employment authorization cards. In finding that this "intimidation of witnesses" constituted an unfair labor practice, the Board concluded that:

> The only excuse which counsel could proffer [for the subpoenas] was that he wanted to test the credibility of all those witnesses by calling into question whether they signed their proper names on their pretrial affidavits . . . He offered no other evidence tending to show that any one of them, other than Figueroa, was working or testifying under an assumed name. His pretext for seeking these documents for this purpose was a transparent fiction.

> . . . [T]he effect upon the General Counsel's witnesses of this wholly irrelevant probe into their immigration status which [the administrative law judge] observed at the hearing ranged from unsettling to devastating and certainly affected their ability to testify.

Accordingly, the Board's consequent cease and desist order enjoined the employer from "[t]hreatening employees with deportation or calling into question their immigration status in order to discourage them from giving testimony under the Act." John Dory Boat Works., Inc., 229 N.L.R.B. 844 (1977). The critical importance of minimizing the potential for adverse consequences to employees who might invoke their statutory workplace rights is, of course, well established:

> Plainly, effective enforcement [of the FLSA] could thus only be expected if employees felt free to approach officials with their grievances. . . . [I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.

Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 292 (1960).

C. Defendants' Proposed Lines of Questioning Are Not Only Irrelevant, But Also Raise the Specter of Adverse Immigration Consequences

Defendants have indicated they intend to undertake a broad range of questioning in the depositions of each of the 25 plaintiffs in this case. As stated to plaintiffs' counsel at the Rivera deposition and in later correspondence[9], defendants plan to question each plaintiff *inter alia* as to the following areas: 1) educational background; 2) current employment, 3) past employment; 4) place of birth; 5) places of birth "of each plaintiff's ancestors"; 6) "residency in the United States and/or place of birth"; 7) "follow-up questions relating to the national origin issues"; 8) "past and future earning claims"; 9) "[g]eneral background information of each individual which will include every name they have used in the past, the dates they have used the names, their date of birth, and other identifying information"; and 10) "[a]ny admissible evidence relating to any impeachable criminal convictions."[10]

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[9] Exhibit B.

[10] As the Court will note, a number of these enumerated inquiry areas are potentially breathtaking in their scope, *e.g.*, areas 7 and 9. Still others are stated so ambiguously as to preclude a reliable assessment of the types of questions

Each of these areas of inquiry has the potential to lead to adverse consequences as to any of the plaintiffs whose immigration status and/or work authorization may thereby be called into question.[11] Such questions thus plainly fall within the scope of Rule 26(c) protective orders, which are properly entered in the interests of justice "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

D. Plaintiffs' Proposed Protective Order Balances the Legitimate Discovery Interests of Defendants With the Need to Limit Irrelevant and "Chilling" Inquiries

The protective order sought by plaintiffs recognizes that although each of the areas noted above may implicate immigration-related concerns, different levels of protection may suffice to safeguard against the intimidating effect -- decried by the courts in Mitchell, Reyes, Montelongo, and the other cases cited, *supra* -- that such questions may have. Those protections also appropriately reflect the relevance of, and thus the legitimate needs of defendants to question plaintiffs about, those particular matters that are genuinely germane to this case.

1. Good Cause Exists For A Bar on Certain Areas of Questioning

a. Questions Regarding Plaintiffs' Past or Current Immigration or Citizenship Status or Employment Authorization

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that will be propounded, *e.g.*, areas 5, 6, and 10. Plaintiffs have requested that defendants provide more specificity as to most of these areas.

[11] By this representation, plaintiffs do not concede that any of them are in fact undocumented and/or lack proper work authorization, or that they have ever been present and working unlawfully in the United States. Nor do they represent that that any such issues, should they exist, obtain as to each plaintiff (or even to a significant number of the plaintiffs). However, the mere fact that defendants will propound such questions at all would have a deterrent effect on particular individual plaintiffs who would eventually be asked such questions -- and even upon those plaintiffs whose status is entirely lawful yet who may have reasonable concerns about any aspersions which, however unjustifiably, could be cast upon their immigration and work status. On this fear by legal immigrants of adverse immigration actions, *see* Gordon**,** *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. Rev. 407, 417 n.38 (1995) ("because of their fear of deportation, immigrants are terrified to request the government for help with employment problems and thus rarely complain about exploitation at work"); Chung, *Proposition 187: A Beginner's Tour Through A Recurring Nightmare*, 1 U.C. Davis J. Int'l. L. & Pol'y 267, 279 (1995) ("there is no visible distinction between people of "legal" and "illegal" immigration status. . . . [O]n occasion, the Border Patrol has been known to remove United States citizens to Mexico based solely on their ethnic characteristics," *citing* Suzanne Espinoza, *"Born in the U.S.A. -- But Deported,"* San Francisco Chronicle, October 22, 1993, at A1 (Ralph Lepe, a native-born resident of Santa Barbara, California, arrested by U.S. Border Patrol while working on his house and deported)).

Because of their lack of relevance to the substance of this action, and because of the powerful deterrent effect they would have on plaintiffs' assertion of their workplace rights, there is good cause for the Court to prohibit questions regarding the past or current immigration or citizenship status of the plaintiffs and their family members, their past or current employment authorization, and any and all documents relating to their past or current immigration status or employment authorization.[12]

Information regarding these issues is devoid of any applicability whatever to the issues in this case. *See* §§ IV.A & B, *supra*. Yet, a number of criminal statutes could be implicated by such questioning. *See* 18 U.S.C. § 1015 (prohibiting making a false claim of U.S. citizenship in order to engage in employment); 18 U.S.C. § 1546 (prohibiting false attestation on an employment verification form); 42 U.S.C. § 408(a)(7)(B) (prohibiting false use of a social security number). Employer knowledge of adverse plaintiff testimony in these areas, or other information indicating that an employee lacks current work authorization, could require an employer to terminate the worker. 8 U.S.C. § 1324a(a)(2). Information that an employee at some time in the past lacked work authorization or misrepresented his or her immigration status to the employer could also be grounds for termination. Clearly, even an attenuated possibility that an adverse response might result in such severe job consequences would inhibit many if not most reasonable deponents from continuing to press their case.[13]

b. Questions Regarding Plaintiffs' National Origin and/or Places of Birth

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[12] This prohibition should encompass not only direct questions about immigration status or employment authorization, but also questions that seek to elicit information bearing on these areas. Among other things, questions such as whether individuals ever left the United States and how they returned, whether they ever applied to the INS for a benefit, or whether they ever worked without authorization, or under a different name, or with a false Social Security number or document, should be prohibited as effectively providing alternate means of ascertaining or inferring one's immigration status -- *e.g.*, by viewing her place of birth together with her parents' citizenship status, or by learning her status upon her entry to the United States along with any application to the Immigration and Naturalization Service for adjustment of status.

[13] Plaintiffs additionally note that testimony regarding immigration status in the United States may be protected by the privilege against self-incrimination. U.S. Const., Amend. V. Such testimony may be self-incriminating and could lead to the basis for a criminal prosecution, *see, e.g.*, 8 U.S.C. § 1325(a); as such, the impact of that testimony *inter alia* on one's continued employment warrants the proposed bar on such questions. *See, e.g.*, Estate of Fisher v. Commissioner of Internal Revenue, 905 F.2d 645, 648 (2d Cir. 1990), Escobar v. Baker, 814 F.Supp. 1491, 1495 (W.D. Wash. 1993) (invocation of privilege as to questions concerning plaintiffs' work authorization at time they applied to work on defendant's farm).

Another set of questions -- those in inquiry areas 4 through 7[14] -- deserves particular mention. These areas (and some information included in area 9[15] as well) are all aimed at the issue of plaintiffs' national origins and places of birth. However, for at least three distinct reasons, plaintiffs' national origin is *not* in dispute in this case. First, each plaintiff has already provided her or his national origin to defendants via interrogatory answers.[16] Second, defendants *themselves* provided this information to the EEOC in their submissions regarding the plaintiffs' EEOC discrimination charges.[17] Finally, *defendants expressly stipulated with plaintiffs* nearly one year ago as to plaintiffs' national origins, agreeing to adopt the national origin identifications contained in their aforementioned submission to the EEOC.[18]

For these reasons, defendants' proposed inquiries into these areas have no legitimate purpose, and defendants' aims in attempting to revisit this issue at this late date are thus unclear. Indeed, questions implicating place of birth may be highly sensitive inasmuch as -- in conjunction with information about parental birthplace and citizenship status -- they could lead to adverse inferences about an individual's immigration status or work authorization.[19] *See, e.g.*, Chau v. INS, ___ F.3d ___, 2001 U.S. App. LEXIS 8027, 5 n.5 (9th Cir. 2001) (evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent or deportee to prove citizenship); Murphy v. INS, 54 F.3d 605, 608-09 (9th Cir. 1995) (same).

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[14] These areas are: 4) place of birth; 5) places of birth "of each plaintiff's ancestors"; 6) "residency in the United States and/or place of birth"; 7) "follow-up questions relating to the national origin issues."

[15] Area 9 is described by defendants as "[g]eneral background information of each individual . . . and other identifying information."

[16] *See, e.g.*, Exhibit C (interrogatory response of plaintiff Martha Rivera) ("Plaintiff is of Mexican ancestry.").

[17] *See, e.g.*, Exhibit D (T. Grice July 27, 1999 letter to F. Melara, EEOC, and excerpts from attachments thereto). *See also* fn. 2, *supra*, as to defense counsel's refusal to acknowledge that fact.

[18] Exhibit E (Ho May 31, 2000 letter to Kristi Culver Kapetan, at 3; Brian Enos June 27, 2000 letter to Ho, at 4; Ho July 5, 2000 letter to Enos, at 3).

[19] In any event, for Title VII purposes, "national origin" is not dependent upon one's specific geographical birthplace. "The term 'national origin' on its face refers to the country where a person was born, *or, more broadly, the country from which his or her ancestors came*." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (emphasis supplied). Thus, defendants' question in this regard is misdirected at best. *See also* EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (defining national origin discrimination as including, but not limited to, "the denial of equal employment opportunity because of an individual's, *or his or her ancestor's, place of origin*; or because an individual has the physical, cultural, *or linguistic characteristics* of a national origin group." (emphasis supplied)

In sum, because of the potentially drastic consequences of providing the types of information the above-described inquiries seek, and also due to their patent lack of relevance and utility to the case, questions in those areas should be barred.

2. Good Cause Likewise Exists For Limits on the Disclosure of Certain Deposition Testimony to Non-Parties

Plaintiffs' requested protective order would also prohibit the disclosure to third parties of certain information to the extent that it is not encompassed within the proposed bars on questioning. This category of information includes a great deal of personal and confidential information that could potentially have adverse immigration or other consequences. This includes, for example, questions about educational background and employment history, the plaintiffs' "damage claims" (inquiry areas 1 through 3 and 8), and a myriad of other particular subjects that are potentially encompassed by inquiry area 9 ("general background information").

Plaintiffs strongly disagree with defendants as to the discoverability of much of the information they apparently seek in the above areas -- for instance, places of marriage, places of education abroad, and so forth. However, plaintiffs recognize that defendants have a legitimate basis to inquire into some other aspects of those areas -- *e.g.*, regarding the extent of plaintiffs' monetary losses, their mitigation efforts since their terminations by defendants, and their prior work-related educational background. Therefore, plaintiffs propose that deposition testimony in areas 1, 2, 3, 8, 9, and 10 -- to the extent that they do not involve matters barred from questioning for the reasons discussed in the preceding section -- be subject only to a limitation on its disclosure to anyone other than the parties, their attorneys, and agents (including experts). As long as all questioning regarding immigration status and employment authorization is barred, plaintiffs believe that a simple yet strict agreement that testimony about these other personal matters cannot be disclosed to any non-party persons or entities will adequately protect against any collateral harm that might result from the giving of such testimony.

Defendants have already stated that such limits on disclosure are acceptable to them. Rivera Depo., 22:11-14, 18-20; 24:6-7; 28:16-19.

V. CONCLUSION

Plaintiffs' proposed protective order is tailored to balance and reconcile the two interests at issue here. Defendants will not be prejudiced, since it permits them to inquire into all areas that are relevant to this action and to their defense thereof. Plaintiffs will be required to answer all legitimate and necessary questions, but will not be deterred from "pursuing their rights in the case because of possible collateral wholly unrelated consequences, [or] because of embarrassment and inquiry into their private lives which [is] not justified." In re Reyes, *supra*, 814 F.2d at 170.

For the foregoing reasons and showing of good cause, plaintiffs respectfully ask that the proposed protective order be granted.

Dated: May 21, 2001

Respectfully submitted,

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