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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,

Plaintiffs,

v.

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

Defendants.

No. CIV F-99-6443 AWI SMS

PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR RECONSIDERATION BY THE DISTRICT COURT OF MAGISTRATE JUDGE'S RULING

[Fed.R.Civ.P. 72(a); L.R. 72-303]

[Hon. Anthony W. Ishii]

)
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I. INTRODUCTION

Plaintiffs file this Opposition to defendants' Request for Reconsideration of Magistrate Judge Sandra M. Snyder's Order Granting Plaintiffs' Motion for a Protective Order. That motion originally came before Judge Snyder on May 21, 2001,[1] because the parties disagreed about the proper scope of defendants' questioning of plaintiffs during their depositions.[2] In finding good cause to limit discovery and granting the protective order, Judge Snyder carefully balanced the relative burdens to the parties to reach a correct and equitable result. Defendants' Request for Reconsideration should therefore be denied.

II. STANDARD OF REVIEW

The sole issue before this Court is whether the Magistrate Judge's thoroughly reasoned decision that good cause existed under prevailing law for granting the protective order was in clear error or contrary to law. Civ L.R. 72-303; *see* Fed.R.Civ.P. 72(a).

III. THE COURT CORRECTLY RULED THAT THE INFORMATION SOUGHT BY DEFENDANTS IS NOT DISCOVERABLE

Defendants maintain they require highly sensitive information pertaining to plaintiffs' immigration status. In considering plaintiffs' motion for a protective order, Magistrate Judge Snyder properly weighed the legitimate discovery needs of defendants against the plaintiffs' right to bring their claims free from unnecessary annoyance, embarrassment or oppression. Fed.R.Civ.P. 30(d)(4).[3] In considering the necessity for a protective order the courts balance the need, if any, of the discovering party of the information sought against the prejudice or burden that the discovery

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[1] Plaintiffs respectfully request that the Court take judicial notice of plaintiffs' submissions in connection with this matter to Magistrate Judge Snyder. Request for Judicial Notice, filed herewith; Fed.R.Evid. 201(b).

[2] Plaintiffs note their disagreement with defendants' persistent mischaracterization of the conduct of plaintiffs' counsel during Ms. Rivera's deposition, but refrain from taking up the Court's time with a lengthy rebuttal thereto, as those matters are not germane to the matter presently before it.

[3] Defendants cite two cases for the bold, and incorrect, proposition that protective orders are "disfavored" as a general rule. Neither case so holds. In General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204 (8th Cir. 1973), the court actually states that "[s]ince the granting or denial of a protective order is within the discretion of the trial court [citation omitted] . . . only an abuse of that discretion would be cause for reversal." Id. at 1212. The court in American Ben. Life. Ins. Co. v. Ille, 87 F.R.D. 540 (D.C. Okl. 1978), merely reiterates the Rule 26(c) requirement that good cause be shown for a protective order to be issued.

would impose upon the responding party. *See, e.g.,* Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (district court's duty was to balance defendant's interest in obtaining information concerning plaintiffs against interest in keeping that information confidential); United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.9 (D. Del. 1960) ("discovery has limits and . . . these limits grow more formidable as the showing of need decreases") (*citing* Hickman v. Taylor, 329 U.S. 495 (1947)); In re Adobe Systems, Inc. Securities Litigation, 141 F.R.D. 155 (N.D. Cal. 1992).

In reaching its carefully reasoned result, the Court found that while information regarding the plaintiffs' place of birth and immigration status is of no legitimate utility in this case, the prejudicial effect of its disclosure would be great. Quite properly, the Court thus concluded that this information was not discoverable.

A. The Information Defendants Seek Has Neither Probative Value Nor Legitimate Purpose

1. The Plaintiffs' National Origins Have Already Been Established, Rendering Their Places of Birth Irrelevant

The Order recognizes there is no dispute that all of the plaintiffs are members of identifiable national origin minority groups for the purposes of Title VII.[4] The decision notes that plaintiffs have already identified their national origins through their interrogatory responses.[5] The Court properly concludes that plaintiffs' place of birth is of no additional relevance to this action, and bars further inquiries.

Despite the plain logic of the Court's order, Defendants still insist that a plaintiff's place of

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[4] In fact, defendants *themselves* provided plaintiffs' national origin information to the EEOC in their submissions regarding the plaintiffs' EEOC discrimination charges. *See, e.g.,* Exhibit D (T. Grice July 27, 1999 letter to F. Melara, EEOC, and excerpts from attachments thereto) to plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Protective Order re Conduct of Defendants' Depositions of Plaintiffs ("Pltfs.' MPA"). The Pltfs.' MPA is appended as Exhibit B to plaintiffs' Request for Judicial Notice. Why they nonetheless require the information at issue is, at best, murky.

[5] *See, e.g.*, Exhibit C, Pltfs.' MPA (interrogatory response of plaintiff Martha Rivera) ("Plaintiff is of Mexican ancestry."). Defendants suggest that the standard objections prefacing plaintiffs' interrogatory responses somehow dilute the significance of the responses. Despite the absence of any legal basis for defendants' concern, however, plaintiffs are willing to modify those objections in the interest of resolving this issue, should the Court deem that appropriate and necessary.

birth is absolutely and unequivocally required to determine national origin [Defendants' Request for Reconsideration by the District Court of Magistrate Judge's Ruling, hereinafter "Request", 3:17-19], and complain that the Court has erroneously prohibited discovery on an element of the plaintiffs' case [Request, 3:22.]. However, they provide the Court with *no* authority whatever for the propositions that an individual's national origin *must* be identified by reference to her geographical birthplace, [6] or that it *cannot* fully be identified either by reference to one's family's countries of origin or some other closely related trait. [8] To the contrary, the Title VII cases have consistently refused to tie national origin exclusively to the country of a plaintiff's birth, looking instead to broader ethnic, ancestral, and linguistic characteristics as well.[10]

Contrary to defendants' contentions, the Court clearly has not ruled that plaintiffs' national origin is irrelevant, only that it has already been established. [11] The Order correctly recognizes the

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[6] The very case defendants cite in support of their alleged need to know plaintiffs' physical places of birth states that national origin includes "the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 88 (1973).

[8] Instead, defendants resort to the "argument" that because this specific question appears in form interrogatories approved by the Judicial Council of California, it is not only relevant, but immune from limitations imposed by a valid protective order. As the Court is well aware, there is no Federal court counterpart to California form interrogatories. In addition, defendants' related assertion that the question is proper because it is "routine" and "particularly appropriate as a lead-in to … work status issues" [Defts.' Request for Reconsideration, 5:24-28] is inherently flawed, as the Court's order clearly finds that questions about plaintiffs' work status are *im*proper.

[10] The Hmong plaintiffs in this case, who have no country yet are Hmong regardless of their place of birth, are a good example of why the courts have defined national origin more broadly. *See, e.g.*, Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist., 154 F.3d 1117, 1119 (9th Cir. 1998) ("we have no trouble concluding that discrimination against Hopis constitutes national origin discrimination under Title VII."); Botello v. County of Alameda Social Services Agency, 1995 U.S. Dist. LEXIS 19532 (N.D. Cal. 1995) (rejecting employer's claim that plaintiff could not state a Title VII national origin discrimination claim because she was born in the United States); Roach v. Dresser Indus. Valve & Instrument Div., 494 F.Supp. 215, 218 (W.D. La. 1980) (person of Acadian or "Cajun" descent could maintain national origin discrimination claim); Gilbert v. Babbitt, 1993 U.S. Dist. LEXIS 15467, 8-10 (D. D.C. 1993) (upholding statutory coverage of Caucasian plaintiff who alleged discrimination because of her Hispanic national origin, court stated that it "resists the parties' invitation to rule on whether or not -- as a matter of law or as a matter of fact -- Ellie Gilbert is Hispanic. Such a ruling is not sensibly required by Title VII or the EEOC Guidelines, perhaps because Courts have no business deciding such matters. . . . Title VII must not be used to promote further racial and ethnic categorization," and citing Plessy v. Ferguson, 163 U.S. 537 (1896), as a negative example thereof).

[11] Defendants cite to two cases in support of their argument that plaintiffs' interrogatory responses somehow do not suffice to establish their national origin but, once more, those cases do not stand for the propositions asserted. In both Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134 (D.C. W. Va. 1970), and Needles v. F.W. Woolworth Co., 13 F.R.D. 460 (D.C. Pa. 1952), the question was whether the interrogatories at issue had to be answered at all, or should be redrafted to focus more closely on underlying facts. Neither case held that interrogatories were insufficient means of reaching those facts, or that other forms of discovery were required to in order to elicit credible information.

potential intimidating effect of further inquiry into place of birth on those plaintiffs whose immigration status may be open to question. There is abundant evidence to support the Court's conclusion, despite defendants' selective interpretation of the law and of their own admissions. The Court's bar on additional irrelevant questioning regarding plaintiffs' place of birth is unequivocally proper, and should be upheld.

2. **Plaintiffs' Immigration Status Is Irrelevant to This Litigation**

Plaintiffs' immigration status has no bearing on the adjudication of their claims.

a. **Plaintiffs' Immigration Status Does Not Affect Their Entitlement to the Protections of Title VII or the FEHA**

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"); 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").[12] The same holds true for the FEHA.[13]

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[12] These authorities are consistent with numerous decisions in other statutory contexts establishing that both documented and undocumented employees are protected by the federal workplace laws. *See, e.g.*, 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); 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); Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001) (*en banc*); 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").

[13] *See, e.g.*, Murillo v. Rite Stuff Foods, Inc., 65 Cal.App.4th 833, 849 (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*).

Defendants' suggestion that IRCA somehow renders an undocumented worker not "qualified"[14] for the protections of Title VII and FEHA ignores the plentiful case law extending coverage to employees regardless of immigration status. It also reflects a basic misunderstanding of all three statutes. The courts have consistently recognized that IRCA "does not reduce the protections and remedies for undocumented workers under the law … and was 'not intended to limit in any way the scope of the term 'employee.'" NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997);[15] Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053, 1057-58 (N.D. Cal. 1998) (harmonizing IRCA with workplace protections of the Fair Labor Standards Act, and noting that "IRCA's legislative history strongly suggests that Congress believed undocumented aliens would continue to be protected by the FLSA," *citing* Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988); *see also* August 10, 1999 decision granting a materially identical protective order in Acevedo-Valdovino v. Vander Houwen, No. CY-98-3074-RHW (W.D. Wash. 1999) (affirming, in case brought under the Migrant and Seasonal Agricultural Worker Act, statutory coverage of workers notwithstanding IRCA, and noting that "[i]f documented and undocumented workers are to be treated identically, their status as documented or undocumented becomes immaterial. Discovery on alienage issues cannot lead to admissible evidence because it cannot lead to relevant evidence.") (citations omitted).[16]

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[14] Despite defendants' mischaracterization, plaintiffs' allegation in the Complaint that they are "qualified" clearly does not refer to plaintiffs' immigration status or work authorization, because neither is relevant to their qualifications -- *i.e.*, their objective ability to actually perform the tasks required by their jobs. Defendants' ambiguous usage of "qualified" ignores not only its plain meaning, but also case law interpretation of the term. *See* Mardell v. Harleysville Life Insurance Co., 31 F.3d 1221, 1230 (3d Cir. 1994) ("[W]hat is relevant to the inquiry is the employer's subjective assessment of the plaintiffs' qualifications, not the plaintiff's objective one if unknown to the employer."). Although Mardell pre-dated McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), on remand the Third Circuit reaffirmed its position in this regard, Mardell v. Harleysville Life Insurance Co., 65 F.3d 1072, 1073 (3d Cir. 1995) . The Court clearly adopts the correct definition of the term in the Order [Order, 7:11-19].

[15] *See also* Hoffman Plastic Compounds, *supra*, 237 F.3d at 649 ("IRCA makes it unlawful for employers to knowingly *hire* undocumented aliens, 8 U.S.C. § 1324(a) … IRCA does *not* explicitly make it unlawful for undocumented aliens to *work*.") (emphasis supplied). Contrary to defendants' characterization, Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998), is consistent with A.P.R.A. and Hoffman, and does not stand for the proposition that undocumented workers are not covered by Title VII. Egbuna only addressed the remedies issue of reinstating workers known to be undocumented, and does not reach the issue of statutory coverage. Indeed, had the plaintiff in Egbuna not been covered by Title VII, his case would clearly have been dismissed on that ground itself.

[16] This decision in Acevedo-Valdovino is appended hereto as Exhibit [ ] for the convenience of the Court. Plaintiffs respectfully request that the Court take judicial notice of this decision, pursuant to Fed.R.Evid. 201.

The Order properly deems immigration status irrelevant to the protections extended undocumented workers under Title VII and FEHA. Defendants' attempts to conflate coverage under these acts with their own semantic gloss about employment "qualifications" should be rejected.

b. Plaintiffs' Immigration Status is Patently Irrelevant to Mitigation

The doctrine of mitigation of damages in Title VII cases requires an injured party to make a reasonably diligent effort to obtain substantially equivalent employment. 42 U.S.C. § 2000e-5(g)(1). A plaintiff satisfies the requirement of due diligence by demonstrating a "continuing commitment to be a member of the work force and remain ready, willing, and available to accept employment." Booker v. Taylor Milk Co., Inc., 64 F.3d 860, 865 (3d Cir. 1995). Whether plaintiffs are documented is irrelevant to this inquiry. *See* Bertelsen, Inc. v. ALRA, 23 Cal.App. 4th 759, 767 ("[G]eneral undocumented status does not render workers "unavailable" and ineligible for ALRB backpay relief.").

In this case, the only relevant inquiry is whether the plaintiffs looked for and found subsequent employment, and at what rate of compensation -- information that plaintiffs propose to provide defendants in deposition testimony under the terms of the protective order.[17] *See* Hoffman Plastic Compounds, Inc., *supra*, 237 F.3d at 650 (finding that the discriminatee, known to be undocumented, had fulfilled his duty to mitigate by seeking and obtaining interim employment, and subtracting his interim earnings from his back pay award). Plaintiffs' immigration status has no conceivable bearing on the straightforward factual determination of whether the plaintiffs looked for and found work.

c. Defendants Need No Discovery Concerning Plaintiffs' Immigration Status to Determine Remedies

Defendants would have the Court believe that the after-acquired evidence doctrine requires discovery into plaintiffs' immigration status in order to determine their available remedies. But as discussed in greater detail below, the after-acquired evidence doctrine (and its specific application in

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[17] Plaintiffs have already produced documentation of their job searches and earnings subsequent to termination by defendant NIBCO.

McKennon) has no bearing on the discovery dispute at hand for the simple reason that no such evidence is in the record. This Court should not accept defendants' invitation to engage in an abstract analysis of a doctrine that is not even germane at this juncture.

Curiously, while defendants devote eight pages to discussing a doctrine of no application to the matter before the Court, they fail altogether to address the controlling case on the specific issue of whether immigration status affects the determination of remedies. In NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., *supra*, the Second Circuit affirmed the National Labor Relations Board's order providing that undocumented employees were entitled to back pay and reinstatement. In approving the Board's backpay award, the court explains:

> The backpay order provides that Benavides and Guzman be paid from the date of their unlawful discharge until either their qualification for future employment or the expiration of the reasonable time allowed for them to comply with IRCA [i.e., presentation of I-9 and supporting documents]. . . . [P]recluding the [back pay] remedy would increase the incentives for employers to hire undocumented aliens. . . . Finally, the backpay order does not require the reestablishment of an employment relationship in contravention of IRCA. Instead, it merely compensates Benavides and Guzman for the economic injury they suffered as a result of the Company's unlawful discrimination against them.

Id., 134 F.3d at 58. The court similarly upheld the Board's order of conditional reinstatement:

> The Board ordered the Company to offer reinstatement to Benavides and Guzman, "provided that they present within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the [Company] to meet its obligations under IRCA." The reinstatement order, accordingly, does not require the Company to violate IRCA. To the contrary, the Board's order quite clearly tailors the remedy for the violation of the NLRA to the restrictions of [IRCA]." . . . We also note that the remedy felicitously keeps the Board out of the process of determining an employee's immigration status, leaving compliance with the IRCA to the private parties to whom the law applies.

Id., 134 F.3d at 57. [18] *See also* Hoffman Plastic Compounds, Inc., *supra*, 237 F.3d at ____ (following A.P.R.A., and noting that IRCA permits reinstatement after unlawful discharge without requiring reverification of the employee's work authorization status). The EEOC has explicitly

[18] Egbuna is not inconsistent with A.P.R.A. as to reinstatement, since the A.P.R.A. court did not sanction employment relationships involving undocumented workers. Instead, it simply provided the employees at issue with a reasonable time within which to produce I-9 forms and supporting documents.

adopted the A.P.R.A. analysis for purposes of determining remedies under Title VII.[19]

Contrary to its contentions before the Magistrate Judge, therefore, defendant Wade would not be required to violate IRCA were it ordered to provide remedies to any of the plaintiffs in compliance with A.P.R.A.'s reasoning.[20] Defendants have fully ensured their compliance with IRCA: *they have already ascertained, via the established I-9 process under IRCA, the employment eligibility of each of the 25 plaintiffs.* Thus even the reverification required of the employer in A.P.R.A., who hired the discriminatees knowing they were not authorized to work, would not be required of plaintiffs in this case.[21] The Order recognizes that IRCA obviates the need for employer "rechecking" of employees' status, and in fact is intended to prevent such "rechecking" under

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[19] EEOC Enforcement Guidance on Remedies at n.3 and associated text ("The A.P.R.A. rationale . . . applies equally to the federal employment discrimination statutes."). *See also* Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 909 (1989) ("We have often observed that the NLRA was the model for Title VII's remedial provisions, and have found cases interpreting the former persuasive in construing the latter"). [quote about deference to EEOC admin interps?]

[20] The Order's bar on immigration-related questions is consonant with A.P.R.A.'s holding that, for purposes of reinstatement and back pay, any needed determinations of an employee's work authorization status are properly made in reliance upon the standard I-9 process once such remedies are ultimately ordered. Id., 134 F.3d at 57-58. Defendants' invocation of McKennon and Murillo does not affect this conclusion, since both cases only address the remedies-limiting result of te after-acquired evidence; they do not create an affirmative entitlement for a defendant to conduct a search for such evidence in the context of discovery. *See* additional discussion of McKennon and Murillo, *infra*.

[21] Defendants misconstrue Judge Snyder's analysis of the reverification issue and misunderstand IRCA. Neither plaintiffs nor the Court suggest that employers are "require[d] to expend additional resources in verifying the integrity or content of an employee's immigration documents." (Defendants' Request for Reconsideration at 11: 12-13.) Quite to the contrary, IRCA makes it an unfair immigration-related employment practice for an employer to request "more or different documents than are required [by the I-9 form] . . . if [the request is] made for the purpose or with the intent of discriminating against an individual." 8 U.S.C. § 1324b(a)(6). This provision applies to reverification. *See* U.S. v. Padnos Iron & Metal Co., 3 OCAHO 414, 1992 WL 535554 (finding document abuse committed during reverification process, and rejecting respondent's defense of good faith compliance with statute). Reverification is permitted only when: 1) an employee's work authorization has expired, either because an expiration date is indicated in section one of the I-9 form and/or because the employee presented an INS document with an expiration date (8 C.F.R. § 274a.2(b)(1)(vii)); or 2) an employer obtains constructive knowledge that an employee is not authorized to work in the United States (and must verify authorization in order to avoid penalty under 8 U.S.C. § 1324a(a)(2).) Any attempt to reverify and employee's employment eligibility when these circumstances are not present while an individual is "continuing in employment" would constitute actionable document abuse under IRCA. An individual is deemed "continuing in his or her employment" when he or she "is on strike or in a labor dispute… [or] is *reinstated after* disciplinary suspension [or] *wrongful termination, found unjustified by any court*… or otherwise resolved through reinstatement or settlement." 8 C.F.R. § 274a.2(b)(viii)(A)(4)-(5) (emphasis supplied). *See also* Hoffman, *supra* note 13 (citing to same); EEOC Enforcement Guidelines on Remedies at n.21 and associated text (stating that except under narrow circumstances, "employers may not request or reexamine I-9 documents of workers returning from a discriminatory discharge," and citing to same). Permitting defendants to effectively do the same thing through the discovery process would be tantamount to sanctioning a violation of these provisions of IRCA.

circumstances that might give rise to an inference of improper motivation. Indeed, it is unclear why defendants nonetheless apparently would invite a quandary for themselves that could be occasioned by their strenuous demands for such discovery, when they are now effectively immunized by IRCA and their prior compliance with the I-9 process.[22]

The Order permits all remedies-related discovery to the extent that it does not inquire into plaintiffs' immigration and employment authorization status *per se*. At least with respect to plaintiffs' immigration status and work authorization, defendants' determination of the extent of remedies need go no further than what they have already done in compliance with the law. As seen, the pertinent case law and regulatory authority clearly counsel against any further inquiries into immigration status.[23] As defendants have no legitimate need for this information, the Order in no way places defendants in an adverse position in regards to determining remedies or compliance with IRCA, and should be upheld.

B. The Chilling Effect of Questions Bearing Upon Plaintiffs' Immigration Status Is Beyond Reasonable Dispute

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[22] In focusing on the Court's reference to "independent investigation," defendants again privilege semantics over plain meaning. The Court clearly does not impose requirements beyond the initial I-9 verification, and defendants' insistence on what amounts to reverification is perplexing, as it could only reasonably be based on a lack of compliance at the time of hiring.

[23] A.P.R.A.'s affirmation of remedies to those who -- like the plaintiffs in this case -- have fully satisfied IRCA's requirements echoes numerous cases decided prior to IRCA's enactment, several of which A.P.R.A. expressly draws upon, *see, e.g.*, 134 F.2d at 54-58. Those decisions, including many by the Ninth Circuit, uniformly held that orders of reinstatement and backpay to undocumented workers were entirely proper, and indeed *furthered* the purposes of the immigration laws, where -- as here -- no violation of the immigration laws was necessitated as a result. *See, e.g.*, Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro), 795 F.2d 705, 719 (9th Cir. 1986) (noting that the discriminatees were all presently working in the United States, and that provision of full remedies would deter employer abuses); NLRB v. Ashkenazy Property Mgmt. Corp., 817 F.2d 74 (9th Cir. 1987) (following Local 512); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986) (upholding arbitrator's award to undocumented workers who "have not been subject to any INS proceedings"); NLRB v. Apollo Tire Co., *supra*, 604 F.2d at [ ] (ordering reinstatement for undocumented workers who were available for work in the United States); Rios v. Enterprise Assn. Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988) (affirming backpay award to undocumented employees in Title VII action whose employment violated no immigration law). Like A.P.R.A., those cases also found that the status of such workers was not a proper matter for determination by the courts, but was instead was better left to the processes established under the federal immigration laws. Apollo Tire Co., 604 F.2d at 1182-84; Local 512, 795 F.2d at 720-22. Although the Ninth Circuit has not yet addressed the remedies issues adjudicated in A.P.R.A., its prior cases, as well as its historically expansive view of the rights to which undocumented workers are entitled, *see, e.g.*, Contreras, *supra*, 25 F.Supp.2d at 1057-58 ("The Ninth Circuit has . . . consistently held that analogous [to the FLSA] labor laws protect undocumented and documented workers equally"), strongly indicate that it would join the Second Circuit's analysis in that regard.

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). The Court's order correctly recognizes the chilling and intimidating effect of inquiries into the immigration status upon the willingness of plaintiffs to assert their workplace rights. Contrary to defendants' astounding dismissal of the possible drastic consequences of such inquiries (deportation and criminal prosecution among them) as a mere "notion" [Request, 12:6-8], the Court finds ample support in the case law to give them considerable weight.

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), *cert. denied sub nom.* McAllen v. Reyes, 487 U.S. 1235 (1988). The Ninth Circuit, in reversing a NLRB decision conditioning backpay on proof of work authorization, expressed identical concerns: "The knowledge that deportation proceedings are a likely consequence of filing a successful unfair labor practice charge would chill severely the inclination of any unlawfully treated undocumented worker to vindicate his or her rights before the NLRB." Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 719 (9th Cir. 1986).

In light of the abundant authority acknowledging the irrelevance of plaintiffs' immigration status and the pronounced chilling effect of its discovery, defendants' assertion that "[t]he possibility

of such ramifications arising from one's own conduct should not act to . . . shield discovery of admittedly relevant information" [Request, 12:9-11] is simply baffling. Permitting defendants, contrary to that authority, to pursue irrelevant information under the present circumstances would allow them to undertake precisely the kind of "fishing expedition"[24] that would be so destructive of the ability of plaintiffs and others like them to assert their legally protected workplace rights.[25]

IV. THE AFTER-ACQUIRED EVIDENCE DOCTRINE DOES NOT AUTHORIZE UNFETTERED DISCOVERY

The Court need not reach the issue of after-acquired evidence, because the issue has not been brought before it. The current case involves a dispute over discovery, and may easily be decided without reference to the after-acquired evidence doctrine at all. Moreover, because McKennon operates to limit discovery, not to open season on victims of discrimination; because the after-acquired evidence doctrine does not provide a defense to liability; and because the Magistrate Judge properly relied upon Massey and Mardell, defendants' reliance on McKennon to authorize irrelevant inquiries via discovery must fail.

1. To the Extent That McKennon Addresses Discovery at All, It Operates to Limit Defendants' Ability to Engage in Excessive Discovery.

Rather than ignoring McKennon's dictates with regard to discovery, as implied by the defense, the Magistrate Judge complied with the recommendations of the Supreme Court for protecting plaintiffs in discrimination cases such as this. McKennon is a case about the effects of after-acquired evidence in a situation in which evidence of the employee's wrongful copying of confidential papers had emerged long before the case came before the court. The McKennon court did not face a discovery dispute, but a situation in which after-acquired evidence was already on the record. As a result, the Supreme Court simply did not address itself to the question of how such

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[24] The National Labor Relations Board, in a recent opinion of its General Counsel, objected to "the compliance proceeding being used as a fishing expedition to try to determine whether someone is lawfully in the country." Memorandum GC 98-15, "Reinstatement and Backpay Remedies in Light of Recent Board and Court Precedent," December 4, 1998.

[25] Magistrate Judge Snyder's analogy to the purpose of the rape shield law is particularly apt, in that her Order likewise protects victims of discrimination from irrelevant questioning that might otherwise inhibit them from asserting their rights at all. [Transcript, 5:12-21].

evidence may permissibly be obtained. Despite defendants' extravagant claims, McKennon boils down to the uncontroversial proposition that once evidence of wrongdoing has been uncovered during discovery, such evidence need not be ignored for purposes of the after-acquired evidence doctrine.

In so much as McKennon speaks to discovery at all, it is to emphasize the "concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act," and to propose that the provisions of the Federal Rules of Civil Procedure be used to limit such abuses, McKennon, 513 U.S. 352, 363 (1995), clearly inviting the use of measures such as protective orders. McKennon most certainly does not grant any special dispensation to defendants to ignore the normal limitations upon discovery provided by the Federal Rules of Civil Procedure, and defendants distort McKennon in claiming that it gives them a license to engage in unrestrained discovery in order to search for any trace of wrongdoing by plaintiffs.

In the present case, the Magistrate Judge has taken exactly the step recommended by the Supreme Court in McKennon, exercising her discretion to prevent abuse of the after-acquired evidence doctrine by properly granting the order protecting employees from defendants' fishing expedition into their immigration status.

2. The After-Acquired Evidence Doctrine Does Not Offer a Defense to Liability Under Title VII or FEHA.

The defendants' recurrent misuse of the term "defense" in referring to the after-acquired evidence doctrine is highly misleading. The notion that after-acquired evidence provides a defense to liability is flatly contradicted by McKennon and the cases following it.

In McKennon, the Supreme Court overturned a line of cases holding that all relief must be denied to a plaintiff in an after-acquired evidence case, declaring that the conclusion that "after-acquired evidence of wrongdoing which would have resulted in discharge bars employees from any relief.… is incorrect." McKennon, 513 U.S. at 356. Emphasizing the "statutory scheme to protect employees in the workplace nationwide" and the goal of such statutes to achieve the "elimination of

discrimination in the workplace," the court found that cutting off liability would not further the purposes of anti-discrimination statutes. In cases following McKennon, the Ninth, Second, Third, Fifth, and D.C. Circuits have all affirmed that the after-acquired evidence doctrine is not a defense to liability.[26]

Similarly, defendants' contention that Murillo grants them the ability to search for after-acquired evidence to defend against plaintiffs' FEHA claim is inaccurate. The holding in Murillo is a far narrower one, largely limited to its specific facts (which diverge significantly from those of this case), and is therefore not binding on this court.

First, and perhaps most importantly, defendants neglect to mention that Murillo's discussion of the after-acquired evidence doctrine as it relates to the plaintiff's termination claim is *dicta,* since the plaintiff dismissed that claim before the appeal was heard. Murillo, 65 Cal. App. 4th 833, 841. Second, Murillo's attention to balancing the equities, along with its affirmation that the undocumented plaintiff was indeed entitled to recovery under FEHA, makes clear that different facts may mandate different results. The defendants' literal interpretation of Murillo requires the Court to deprive plaintiffs of FEHA's protection, a clearly inequitable result inconsistent with the decision's reasoning[27] Lastly, given that the Murillo court does not specifically address the facts presented by this case, it is advisable to look to federal authorities that are more on point. California courts consistently look to Title VII in interpreting FEHA. Kohler v. Inter-Tel Technologies, 244 F.3d 1167, 1172 (9th Cir. 2001)("In an area of emerging law, such as employment discrimination, it is appropriate to consider federal cases interpreting Title VII."(citations omitted)). The extensive discussion of Title VII, infra, clearly demonstrates that coverage under its anti-discrimination

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26 See, e.g., O'Day (finding that "later-discovered evidence that the employee could have been discharged for a legitimate reason does not immunize the employer from liability."); Vichare (quoting with approval District Court judge's instructions to jury that "you may not use [plaintiff's] wrongdoing to negate [defendant's] liability for its unlawful acts"); Mardell (concluding that McKennon was consistent with Circuit's earlier decision that after-acquired evidence was no defense to liability); Shattuck (refusing to overturn trial verdict in favor of employee based on after-acquired evidence); Hoffman (upholding liability despite lack of documentation).

[27] "Courts must tread lightly in applying the after-acquired evidence doctrine to discrimination claims," because it has the potential " 'to chill the enthusiasm and frequency with which employment discrimination claims are heard … the likely consequence of the widespread exploitation of after-acquired evidence will be … underdeterrence of discriminatory employment practices.'" Murillo, 65 Cal. App.4th at 849-50(citations omitted).

provisions is unaffected by after-acquired evidence.

In granting the protective order, the magistrate judge did not issue a "ruling barring discovery relating to [a] Title VII defense." Request for Reconsideration, 12: 16-17. Defendants' attempt to portray the after-acquired evidence doctrine as a defense imbues the protected topics with an appearance of relevance that they simply do not have.

3. The Magistrate Judge Correctly Looked to Massey and Mardell in Evaluating the Protective Order.

In granting the protective order, the magistrate judge had to evaluate the question of whether in this case it was appropriate to allow the defense full access to the powerful tools of the court in their relentless quest to "'leave no stone unturned in ferreting out any evidence' of resume fraud or employment misconduct." Mardell 1 note 26 (Quoting with disapproval an article advising defense attorneys on how to defend against employment discrimination claims). Because McKennon gives little guidance regarding this issue, the Magistrate Judge turned to other cases for guidance.

In taking the position (then controversial, now settled) that after-acquired evidence was not relevant to liability, both Massey and Mardell explored in great detail the ramifications and effects of obtaining such evidence, enunciating principles that speak very clearly to how to weigh the values involved in discovery. In their Request for Reconsideration, defendants struggle to make it appear that the Magistrate Judge relied inappropriately on abrogated portions of the holdings of Massey and Mardell. In reality, both Massey and Mardell differed from McKennon only in the treatment of backpay and otherwise remained good law following McKennon. In fact, the Third Circuit, reconsidering Mardell in light of McKennon, was able to "reaffirm and reinstate our original opinion and judgment in all other respects." Mardell 2 at 1073. The Magistrate Judge appropriately relied upon Massey and Mardell to give her otherwise unavailable guidance in evaluating the request for the protective order.[28]

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[28] The Magistrate Judge noted three considerations explored by Massey and Mardell. The first such consideration involved the potential of the "defendants' thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct" to "chill the enthusiasm and frequency with which employment discrimination claims are pursued," and result in "the underenforcement of Title VII and ADEA, and consequently underdeterrence of discriminatory employment practices." Mardell 1 at 1236-1237. This concern was echoed in McKennon when the court described the importance under the

V. CONCLUSION

In granting plaintiffs' proposed protective order, Judge Snyder carefully balanced the defendants' need for the protected information against the profound chilling effect requiring its disclosure would have on the plaintiffs' ability to enforce their workplace rights, and the entitlement of all employees to benefit from the full enforcement of anti-discrimination laws. Despite the obvious propriety of the Magistrate Judge's decision, defendants insist the Court should overturn it, granting them full access to the powerful tools of discovery in their relentless quest for irrelevant, highly prejudicial information. The Order as is stands is the plainly equitable result of a sophisticated balancing of the interests of both parties, and should be upheld. For the foregoing reasons, plaintiffs respectfully request that the Magistrate Judge's decision be affirmed, and that this Court enter plaintiffs' proposed protective order.

Dated: July 3, 2001

Respectfully submitted,

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ADEA of "even a single employee establish[ing] that an employer has discriminated against him or her," and noting the potential industrywide significance of the disclosure of such practices. McKennon, 513 U.S. at 358.

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