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CLERK, US DIST. COURT
EASTERN DISTRICT OF CALIF.
BY: [Signature]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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| MARTHA RIVERA, <u>et al.</u> , |) | CV-F 99-6443 AWI/SMS |
| Plaintiffs, |) | |
| v. |) | ORDER GRANTING PLAINTIFF'S |
| |) | MOTION FOR PROTECTIVE ORDER |
| NIBCO, INC., <u>et al.</u> , |) | (Doc. No. 33) |
| Defendants. |) | |

The above motion came on regularly for hearing on Friday, June 8, 2001, at Courtroom 4, before the Hon. Sandra M. Snyder, United States Magistrate Judge. Christopher Ho, Esq., and Donya Fernandez, Esq., of the Employment Law Center, appeared on behalf of plaintiffs Martha Rivera, et al.; William Haesy, Esq., and Brian Enos, Esq., of Sagaser, Franson & Jones, appeared on behalf of defendants NIBCO, Inc., and R.M. Wade & Co. (NIBCO).

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1 **FACTS AND PROCEDURAL HISTORY:**

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3 Plaintiffs are "limited-English-proficient production workers
4 who have been terminated from or otherwise disadvantaged in the
5 terms and conditions of employment at [NIBCO's] facility"
6 First Amended Complaint ¶ 34. Plaintiffs initiated this action on
7 Oct. 1, 1999, and filed their First Amended Complaint on Feb. 24,
8 2000. Plaintiffs allege NIBCO hired plaintiffs knowing of their
9 lack of English proficiency. Id. ¶ 42. Plaintiffs' job
10 descriptions did not require English proficiency, and plaintiffs
11 performed their respective jobs without incident for years. Id. ¶¶
12 42 and 47. In 1997 or 1998, NIBCO required plaintiffs to take an
13 examination given in the English language. Id. ¶ 43. Plaintiffs
14 allege they performed poorly on the examination, and their poor
15 performance on the examination initially led to adverse
16 consequences, i.e., being required to take English as a second
17 language classes, undesirable job assignments, et al., and
18 thereafter terminations. Id. ¶¶ 50-52. The Court emphasizes that
19 at this stage of the litigation the above are allegations only.

20 NIBCO deposed plaintiff Rivera on May 14, 2001. Sagaser Decl.
21 Exh. D. At deposition, counsel for Rivera objected to certain
22 questions asked by counsel for NIBCO regarding where Rivera was
23 married and where Rivera was born, and directed Rivera not to
24 answer such questions. Id. 18:22-24, 19:5-8, 21:7-12, 21:14-16, et
25 al. This matter was not resolved, even after the parties sought
26 assistance from Magistrate Judge Dennis Beck. Id. 27:14 et seq.

1 Plaintiffs' motion for protective order followed.

2 Plaintiffs filed their motion for protective order on May 21,
3 2001. NIBCO filed opposition on May 29, 2001. Plaintiffs filed a
4 reply on June 4, 2001, and an errata reply on June 5, 2001.

5
6 **DISCUSSION:**

7
8 "Upon motion by a person responding to a discovery request,
9 and for good cause shown, the court is authorized to make any order
10 which justice requires to protect the person from annoyance,
11 embarrassment, oppression, undue burden or expense." Schwarzer,
12 Tashima & Wagstaffe, Fed. Civ. Proc. Before Trial ¶ 11:84 (2001).
13 Factors for determining the existence of good cause include whether
14 the information is sought for a legitimate purpose, whether
15 disclosure will violate any privacy interest, whether disclosure
16 will cause a party embarrassment, whether disclosure is important
17 to public health and safety, whether sharing of information among
18 litigants will promote fairness and efficiency in the litigation,
19 and whether the case involves issues of public importance. Id. ¶
20 11:89.1. The court must balance the interests in allowing
21 discovery against the relative burdens to the parties. Id. ¶
22 11:90. At issue here are two categories of questions -- background
23 questions such as where plaintiffs were born and married, and
24 questions related to the after-acquired-evidence doctrine such as
25 whether or not plaintiffs may legally work in the United States.
26 //

1 1. Background Questions

2
3 A. Place of Birth

4
5 NIBCO seeks to ask each plaintiff where s/he was born.
6 Although each plaintiff has responded through interrogatories
7 identifying their national origin (i.e., of "Mexican Ancestry" for
8 plaintiff Rivera), NIBCO contends where each plaintiff was born is
9 still nevertheless relevant, citing to Espinoza v. Farah Mfg. Co.,
10 414 U.S. 86, 88 [94 S.Ct. 334, 38 L.Ed.2d 287] (1973): "'national
11 origin' in Title VII refers to 'the country where a person was
12 born, or more broadly, the country from which his or her ancestors
13 came.'" NIBCO further refers to the fact that this question is set
14 forth as a form interrogatory by the Judicial Council of
15 California.

16 Plaintiffs contend such questions bearing upon plaintiffs'
17 immigration status have a chilling effect upon plaintiffs and
18 similarly situated individuals pursuing their workplace rights.
19 This Court agrees. Insofar as there appears to be no dispute that
20 each plaintiff is a member of a protected class, and further
21 questions regarding where each plaintiff was born has no further
22 relevance to this action, plaintiffs' request that NIBCO be
23 precluded from asking such questions is hereby GRANTED. See
24 Botello v. County of Alameda, 119 WL 779115, *4 (N.D. Cal. 1995).

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1 B. Place of Marriage

2
3 NIBCO seeks to ask plaintiffs where they were married, citing
4 the marital privilege and issues of credibility as to its possible
5 relevance. See Hadded v. Lockheed, 720 F.2d 1454 (9th Cir. 1983)
6 (marital privilege sought in discrimination case). Plaintiffs
7 concede this question, along with each plaintiff's educational
8 background, current and past employment, damages, date of birth,
9 other names used, and criminal convictions may be relevant, and
10 accordingly request such matters be subject to a "limitation on its
11 disclosure to anyone other than the parties, their attorneys, and
12 agents (including experts)." P&A 9:18-21 and P&A Exh. B. Insofar
13 as plaintiffs' proposed limitation as to these topics appears to
14 satisfy NIBCO's need and use for such information, and NIBCO has
15 not objected to this proposal in their opposition, plaintiffs'
16 motion is GRANTED as to these items.

17
18 2. Employment Status

19
20 NIBCO seeks to inquire into plaintiffs' respective past and
21 present employment status. NIBCO concedes, only for purposes of
22 this motion, that Title VII applies to undocumented aliens. NIBCO
23 Oppo. P&A 12 n.17; see also EEOC v. Hacienda Hotel, 881 F.2d 1504,
24 1517 n.10 (9th Cir. 1989) (court found persuasive, without ruling on
25 issue, EEOC's argument that Title VII applies to undocumented
26 aliens), overruled on other grounds, Burrell v. Star Nursery, Inc.,

1 170 F.3d 951 (9th Cir. 1999), EEOC v. Tortilleria "La Mejor", 758 F.
2 Supp. 585 (E.D. Cal. 1991) (Title VII extends protection to
3 undocumented workers), and Murillo v. Rite Stuff Foods, Inc., 65
4 C.A.4th 833, 849 [77 C.R. 12] (1998) (FEHA applies to undocumented
5 aliens). NIBCO seeks such information for purposes of the "after
6 acquired evidence" doctrine, which could limit a plaintiff's
7 damages and preclude reinstatement.¹ Plaintiffs, in turn, concede
8 the application of this doctrine, but contend NIBCO must obtain
9 such evidence through other means rather than from plaintiffs
10 directly through discovery.

11 Other courts have similarly struggled with the application of
12 the after acquired evidence doctrine. See, i.e., Mardell v.
13 Harleysville Life Ins., 31 F.3d 1221, 1226-28 (3d Cir. 1994)
14 (discussion of different treatments by different circuits),
15 vacated, 514 U.S. 1034, 115 S.Ct. 1397, 131 L.Ed.2d 286 (1995), on
16 remand, 65 F.3d 1072 (per curiam). In most such cases, however,
17 the defendant-employer's method of discovering such evidence was
18 not in dispute. See Murillo, 65 C.A.4th @ 839 (plaintiff
19 volunteered at deposition she was undocumented); cf. Tortilleria,

21 ¹ NIBCO cites to 8 U.S.C. § 1324a in support of their position
22 regarding reinstatement and in support of counsel's position that he
23 has an obligation to protect his client from criminal exposure. Oppo.
24 P&A 3:17-23, 3:26-27, 15:2-5, and 15:21-25. With respect to the
25 latter, section 1324a only subjects an employer to criminal exposure
26 if the employer knowingly hires an alien who is unauthorized to work
in the United States. As noted by plaintiffs, § 1324b(a)(6) limits
an employer from requesting further documents which establish
employability. Also, § 1324a(b) says nothing about allowing an
employer to investigate an employee's immigration status through the
civil discovery process.

1 758 F. Supp. @ 586 (plaintiff refused to respond to discovery
2 regarding her immigration status for purposes of whether or not
3 Title VII applied to undocumented workers).

4 At tension here are the possible and alleged misdeeds by both
5 parties. Plaintiffs argue, which NIBCO and this Court accept for
6 purposes of this motion, that Title VII nevertheless offers
7 protection to employees without such documentation. As NIBCO
8 points out, it is illegal for an individual to work without the
9 proper documentation. Plaintiffs and the Court acknowledge that
10 such evidence is relevant.

11 In reaching a resolution to this issue, the Court compares an
12 employee's fraud during the application for employment (application
13 fraud) with the employee's fraud during employment (résumé fraud).
14 With regard to the former, of which the instant case is allegedly
15 an example, the applicant is qualified to do the job, but, had the
16 employer known of the fraud, the applicant would not have been
17 hired. With regard to the latter, the applicant was not qualified
18 to do the job but, due to the applicant's fraud, was nevertheless
19 hired.

20 Mardell, a pre-McKennon case (McKennon v. Nashville Banner
21 Publishing Co., 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852
22 (1995)), addressed the fairness of allowing an employer to find and
23 to use after acquired evidence for purposes of precluding or
24 capping the employee's damages. Mardell noted that allowing an
25 employer to escape liability altogether after discovering a
26 legitimate reason for terminating that employee would be tantamount

1 to awarding the employer for engaging in the discriminatory
2 wrongdoing. 31 F.3d @ 1229-30. Mardell found such a result was
3 ruled out by the language of Title VII, which granted standing to
4 "any individual" rather than "any qualified individual". 31 F.3d @
5 1231. However, like McKennon, Mardell held: "The plaintiff's
6 deceit or misconduct toward the employer is most appropriately
7 considered in the remedies stage" 31 F.3d @ 1233. In
8 comparison to McKennon, Mardell was quicker to realize the chilling
9 effect upon potential discrimination claims that an employer's
10 "thorough inquiry into the details of a plaintiff's pre- and post-
11 hiring conduct" would bring. 31 F.3d @ 1236. Although Mardell did
12 not discuss the manner in which such evidence was acquired, Mardell
13 did voice concerns that such evidence would have the stain of
14 retaliation. 31 F.3d @ 1238 n.31.

15 In Massey v. Trump's Castle, 828 F. Supp. 314, 321 (D.N.J.
16 1993), the court noted the Eleventh Circuit's analysis that after
17 acquired evidence penalizes the wronged employee twice because such
18 "evidence would not have been discovered had the employer not
19 discriminated against the employee [to begin with]." 828 F. Supp.
20 @ 321. Massey allowed back-pay damages, in an after acquired
21 evidence case, through the time of judgment rather than the time of
22 discovery because "[t]he fact that the misconduct was discovered
23 only as a byproduct of the employer's illegal actions cannot be
24 minimized or overlooked." 828 F. Supp. @ 323-24. However, if the
25 employer could "prove that the information would have inevitably
26 come to light independent of the employer's discriminatory

1 conduct", Massey would then allow damages only through the date of
2 inevitable discovery. 828 F. Supp. @ 324 (emphasis added).

3 This Court adopts the reasoning of Massey for purposes of
4 discovery, i.e., defendants may engage in independent investigation
5 regarding plaintiffs' immigration status but may not ask plaintiffs
6 such questions directly. As noted by plaintiffs and in Massey,
7 such investigation should have been done at the time of hiring, not
8 post-discrimination. 828 F. Supp. 322 n.10. The defendant-
9 employer is not placed in an adverse position because but for the
10 lawsuit the employer never would have had reason to pursue such an
11 inquiry.

12 The Court finds this resolution consistent with McKennon. In
13 McKennon, the plaintiff-employee brought an action alleging
14 discrimination based on age. At plaintiff's deposition she
15 disclosed that she had wrongfully copied confidential documents
16 which would have otherwise resulted in her termination. The
17 Supreme Court held that in such cases "neither reinstatement nor
18 front pay is an appropriate remedy" and further held backpay
19 damages would terminate on the date the information at issue was
20 acquired. 513 U.S. @ 362, 115 S.Ct. @ 886. The Supreme Court
21 further abrogated the inevitable discovery rule, as opposed to
22 acquiring such information during the course of discovery, as set
23 forth in Massey. Id. However, McKennon did not address
24 application fraud committed by undocumented aliens. Further,
25 McKennon has afforded lower courts some discretion in crafting a
26 resolution to cases with different facts: "The concern that

1 employers might as a routine matter undertake extensive discovery
2 into an employee's background . . . to resist claims under the Act
3 is not an insubstantial one, but we think the authority of the
4 courts to award attorney's fees . . . and to invoke the appropriate
5 provisions of the Federal Rules of Civil Procedure will deter most
6 abuses." 513 U.S. @ 363, 115 S.Ct. 887 (emphasis added).

7 This Court agrees with McKennon's suggestion that "the
8 authority of the courts to award attorney's fees . . . will deter
9 most abuses" for cases involving résumé fraud and cases like
10 McKennon where the plaintiff-employee has engaged in wrongdoing
11 warranting termination after being hired. The chilling effect that
12 discovery into the backgrounds of such employees bringing a Title
13 VII action has is limited insofar as those employees merely face a
14 cap on damages. Unlike employees who have committed application
15 fraud or engaged in wrongdoing while employed, however,
16 undocumented employees face a much more serious ramification from
17 background discovery -- possible deportation and criminal
18 prosecution. Accordingly, based on this reasoning and based on the
19 partial immunity granted to undocumented employees regarding their
20 standing to bring a Title VII claim as granted by Hacienda Hotel
21 and Tortilleria, this Court does avail itself to the appropriate
22 provisions of the Federal Rules of Civil Procedure to GRANT
23 plaintiffs' motion for protective order regarding questions related
24 to their documented status. As stated supra, employers have an
25 opportunity to investigate this during the time of application.
26 While a defendant-employer may certainly independently investigate

1 a plaintiff-employee's immigration status, the Court declines to
2 sanction such investigation to include the use of the discovery
3 process from the plaintiff directly.

4
5 DATED: *June 15, 2001*

Sandra M. Snyder

SANDRA M. SNYDER,
United States Magistrate Judge

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United States District Court
for the
Eastern District of California
June 18, 2001

* * CERTIFICATE OF SERVICE * *

1:99-cv-06443

Rivera

v.

Nibco Inc

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 18, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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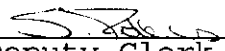
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