IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1947
(1:15-cv-00869-GLR)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner-Appellant,
v.

MARITIME AUTOWASH, INC.,
Respondent-Appellee.

On Appeal from the United States District Court
for Maryland

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTRODUCTION

In its opening brief, the Equal Employment Opportunity Commission ("EEOC" or "Commission") argued that the district court committed reversible error when it denied the agency's second application for enforcement of its subpoena because of the charging party's immigration status. Specifically, the Commission asserted that it had the authority to investigate the charge of discrimination because the plain language of Title VII encompasses all workers – documented and undocumented – in its scope of statutory protections and permits the EEOC to determine whether there is any validity to the complaints of aggrieved persons. The Commission also argued that this Court's en banc decision in *Egbuna v. Time–Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (per curiam), a hiring case concerned with the plaintiff's qualifications and ability to obtain individual relief, does not preclude the EEOC's investigation of an undocumented worker's charge. Further, the Commission asserted that *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), favors enforcement of the subpoena, as the Court held that undocumented

workers are covered by federal labor laws and are entitled to some relief, albeit not to backpay for work not performed.

In arguing against enforcement of the subpoena, Maritime mixes three distinct questions: whether Elmer Escalante may file a charge, whether the EEOC may investigate that charge, and whether Escalante would be entitled to relief if he were to sue. Maritime contends that the answer to the third question must be "no" based on *Egbuna*, and that the "no" answer means that the other two questions likewise must be answered in the negative. *See* Maritime Br. at 2 ("Since Mr. Escalante was admittedly not authorized to work in the United States, he is ineligible to file a Charge or seek remedies under Title VII, and the EEOC does not have jurisdiction to investigate this Charge."). Maritime's arguments are misplaced because whether Maritime has a defense if Escalante were to bring suit does not determine whether the EEOC's subpoena should have been enforced. Regardless of his documented status, Escalante may file a charge and the EEOC may investigate that charge.

ARGUMENT

Maritime essentially argues, as it did in the district court, that the EEOC cannot determine whether Maritime has violated Title VII because Escalante was an undocumented (or falsely documented) worker when he filed his charge. Maritime Br. at 2. This position is not supported by the plain language of the statute or case law.

Nothing in Title VII prohibits an undocumented worker from filing a charge. To the contrary, Title VII broadly states that a charge of discrimination may be "filed by or on behalf of a person claiming to be aggrieved[.]" 42 U.S.C. § 2000e-5(b). Nor is there any judicial authority restricting the ability to file a charge. Thus, there is no merit to Maritime's assertion that undocumented workers are "ineligible" to file charges. Maritime Br. at 2.

Likewise, nothing in Title VII limits the EEOC's authority to investigate charges filed by undocumented workers. Rather, Title VII directs that once a charge is filed by an aggrieved person, the Commission "shall make an investigation thereof" to determine whether Title VII has

been violated. 42 U.S.C. § 2000e-5(b). As part of its investigation, the EEOC also is authorized to issue and seek enforcement of subpoenas when a respondent, such as Maritime, refuses to produce requested relevant information. 42 U.S.C. §§ 2000e-5(b); 2000e-8(a); 2000e-9; *see also United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) ("When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.").

Here, Escalante filed a charge alleging national origin discrimination against him and a class of Hispanic employees in Maritime's workplace that caused him to be aggrieved. JA 33. He asserted that he was subjected to "harassment, intimidation, . . . a hostile work environment, unequal terms and conditions of employment [regarding] assignment, discipline, promotion, wages, and . . . retaliat[ion] for having engaged in protected activity." Because Escalante's allegations implicate a prohibited basis (national origin) protected by Title VII and unlawful employment practices set forth in sections 2000e-2 and 2000e-3, his charge was valid. The EEOC

is therefore statutorily authorized to investigate his allegations to determine whether Maritime has violated Title VII in its treatment of Escalante and other Hispanic workers.

Maritime also insists that this Court's ruling in *Egbuna*, 153 F.3d at 187, that the employee had to be "qualified" for employment in order to pursue his claim, defeats the Commission's authority to exercise its subpoena or investigative authority over Escalante's charge. Maritime Br. at 4. Given the procedural posture of this action, Maritime's (and the district court's) reliance on *Egbuna* is misplaced. As the EEOC noted in its opening brief, *Egbuna* was a hiring case brought by a foreign national who sued to recover relief when he was refused re-employment with Time-Life. EEOC Br. at 16. The focus of that *merits* action was whether Time-Life acted illegally when it refused to hire Egbuna after his visa expired and whether Egbuna was entitled to relief. Here, in contrast, Escalante has filed a charge placing the EEOC on notice of potential discrimination concerning his employment tenure at Maritime. The relevant inquiry in this summary *subpoena* enforcement proceeding is whether the EEOC was acting within

its statutory role when it attempted to investigate Escalante's allegations of national origin discrimination by Maritime against Escalante and a class of Hispanic employees, and whether the information it requested is relevant to determining if Maritime violated Title VII. In other words, the focus in this proceeding should be on the information the Commission seeks, not on the charging party or his immigration status.

Maritime next argues that Escalante is not entitled to Title VII's protections because "this Court properly distinguished and found 'inapplicable' the Supreme Court's prior decision in *Sure-Tan, Inc. v. [NLRB]*, 467 U.S. 883 (1984), which extended National Labor Relations Act ("NLRA") protection to illegal aliens[.]" Maritime Br. at 5. Maritime noted that this Court observed in *Egbuna* that "*Sure-Tan, Inc.* was a pre-IRCA [Immigration and Reform Control Act] case" and that "'IRCA effected a monumental change in our country's immigration policy by criminalizing the hiring of unauthorized aliens[.]'" *Id.* at 5-6. Maritime further argues that the "Supreme Court's subsequent ruling in *Hoffman Plastic Compounds, Inc. v. [NLRB]*, 535 U.S. 137 (2002), reinforced this

Court's reasoning." Maritime Br. at 6. In other words, Maritime argues that undocumented workers are excluded from coverage of the NLRA, and that this IRCA-based exclusion was confirmed by *Hoffman*. This argument is belied by statutory language and case law.

As the D.C. Circuit observed:

> [N]othing in IRCA's text alters the NLRA's definition of "employee." NLRA section 2(3), 29 U.S.C. § 152(3), continues to define "employee" exactly the same way it did when the *Sure–Tan* Court held that "undocumented aliens . . . plainly come within the broad statutory definition of 'employee.' "

Agri Processor Co. v. NLRB, 514 F.3d 1, 3-4 (D.C. Cir. 2008) (quoting *Sure–Tan*, 467 U.S. at 892). Moreover, the *Hoffman* Court explicitly affirmed *Sure–Tan*'s determination that undocumented workers are covered by the NLRA and no federal court, including this one, has stated otherwise. *See Hoffman*, 535 U.S. at 144 & 149-150 n.4; Corrected EEOC Br. at 22 (listing supporting cases). And given the similarity between the NLRA's broad definition of "employee" and Title VII's definition of "employee," *see* EEOC Br. at 23 n.3, *Hoffman* bolsters the understanding that Title VII covers undocumented workers.

Finally, Maritime's argument that the *Hoffman* Court has "expressly found that an illegal alien has no cause of action, and no remedies, *including back pay*, under Title VII," is without merit. Maritime Br. at 7. First, the *Hoffman* Court did not hold that an "illegal alien" has no cause of action as the merits of the NLRA violation were not before it. The Court's review was singularly limited to whether the award of backpay for unperformed work was appropriate. 535 U.S. at 142 n.2. Second, although *Hoffman* informs the interpretation of Title VII, *Hoffman* did not address Title VII, but rather was a case brought under the NLRA. *See Hoffman,* 535 U.S. at 137-52. Third, *Hoffman* did not hold that undocumented workers were not entitled to any relief. To the contrary, as discussed in the Commission's corrected opening brief at pages 24-25, although *Hoffman* rescinded the backpay awards for work not performed, the Court expressly noted that the Board had imposed sanctions and injunctions against the employer. Finally, nothing in *Hoffman* precluded the undocumented worker from filing a complaint or the NLRB from conducting an investigation and finding liability. *See David v. Signal Int'l, LLC*, 257 F.R.D.

114, 123 (E.D. La. 2009) ("The *Hoffman* case . . . concerned remedies available to undocumented workers under the NLRA and not their standing to file a claim before the NLRB.").

CONCLUSION

A plain reading of Title VII permits the EEOC to investigate a charge alleging national origin discrimination regardless of the filer's immigration status. Therefore, the Commission urges this Court to reverse the district court's judgment and remand for enforcement of the EEOC's subpoena.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,527 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: November 18, 2015

CERTIFICATE OF SERVICE

I, Paula R. Bruner, hereby certify that on November 18, 2015, I electronically filed the foregoing reply brief with the Court via the appellate CM/ECF system. I also certify that the following counsel of record, who has consented to electronic service, will be served the foregoing reply brief via the appellate CM/ECF system and provided a hard copy by regular mail:

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