

1 Christopher Ho, SBC No. 129845
 2 Donya Fernandez, SBC No. 190976
 3 Julia Figueira-McDonough, SBC No. 200452
 4 The EMPLOYMENT LAW CENTER,
 5 A Project of the LEGAL AID
 6 SOCIETY OF SAN FRANCISCO
 7 1663 Mission Street, Suite 400
 8 San Francisco, California 94103
 9 Telephone: (415) 864-8848
 10 Facsimile: (415) 864-8199

11 William J. Smith, SBC No. 056116
 12 Melvin M. Richtel, SBC No. 056036
 13 RICHTEL & SMITH
 14 2350 West Shaw Avenue, Suite 154
 15 Fresno, California 93711
 16 Telephone: (559) 432-0986
 17 Facsimile: (559) 432-4871

Alan L. Schlosser, SBC No. 49957
 AMERICAN CIVIL LIBERTIES UNION
 FOUNDATION OF NORTHERN
 CALIFORNIA
 1663 Mission Street, Suite 460
 San Francisco, California 94103
 Telephone: (415) 621-2493
 Facsimile: (415) 255-8437

18 Attorneys for Plaintiffs
 19 (Additional counsel on next page)

20 **IN THE UNITED STATES DISTRICT COURT**
 21 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

22 MARTHA RIVERA, MAO HER, ALICIA) No. CIV F-99-6443 AWI SMS
 23 ALVAREZ, EVA ARRIOLA, PEUANG)
 24 BOUNNHONG, ROSA CEJA, CHHOM CHAN,) **PLAINTIFFS' OPPOSITION TO**
 25 BEE LEE, PAULA MARTINEZ, MARIA) **DEFENDANTS' REQUEST FOR**
 26 MEDINA, MAI MEEMOUA, MARGARITA) **RECONSIDERATION BY THE DISTRICT**
 27 MENDOZA, BAO NHIA MOUA, ISIDRA) **COURT OF MAGISTRATE JUDGE'S**
 28 MURILLO, MARIA NAVARRO, VATH) **RULING**
 RATTANATAY, OFELIA RIVERA, SARA)
 RIVERA, MARIA RODRIGUEZ, MARIA RUIZ,) **[Fed.R.Civ.P. 72(a); L.R. 72-303]**
 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.)

[Hon. Anthony W. Ishii]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

_____)
Marielena Hincapié, SBC No. 188199
NATIONAL IMMIGRATION LAW CENTER
1212 Broadway, Suite 1400
Oakland, California 94612
Telephone: (510) 663-8282
Facsimile: (510) 663-2028

1 **I. INTRODUCTION**

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

9 **II. STANDARD OF REVIEW**

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

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

15 Defendants maintain they require highly sensitive information pertaining to plaintiffs’
16 immigration status. In considering plaintiffs’ motion for a protective order, Magistrate Judge Snyder
17 properly weighed the legitimate discovery needs of defendants against the plaintiffs’ right to bring
18 their claims free from unnecessary annoyance, embarrassment or oppression. Fed.R.Civ.P.
19 30(d)(4).³ In considering the necessity for a protective order the courts balance the need, if any, of
20 the discovering party of the information sought against the prejudice or burden that the discovery

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

23 ² Plaintiffs note their disagreement with defendants’ persistent mischaracterization of the conduct of plaintiffs’
24 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.

25 ³ Defendants cite two cases for the bold, and incorrect, proposition that protective orders are “disfavored” as a
26 general rule. Neither case so holds. In General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204 (8th Cir.
27 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.

1 would impose upon the responding party. *See, e.g., Farnsworth v. Procter & Gamble Co.*, 758 F.2d
2 1545, 1547 (11th Cir. 1985) (district court’s duty was to balance defendant’s interest in obtaining
3 information concerning plaintiffs against interest in keeping that information confidential); United
4 Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.9 (D. Del. 1960) (“discovery has limits and . . .
5 these limits grow more formidable as the showing of need decreases”) (*citing Hickman v. Taylor*,
6 329 U.S. 495 (1947)); In re Adobe Systems, Inc. Securities Litigation, 141 F.R.D. 155 (N.D. Cal.
7 1992).

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

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

14 1. **The Plaintiffs’ National Origins Have Already Been Established,**
15 **Rendering Their Places of Birth Irrelevant**

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

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

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

28 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.

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

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

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

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

21 ¹⁰ The Hmong plaintiffs in this case, who have no country yet are Hmong regardless of their place of birth, are a
22 good example of why the courts have defined national origin more broadly. *See, e.g., Dawavendewa v. Salt River
23 Project Agricultural Improvement and Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1998) ("we have no trouble
24 concluding that discrimination against Hopis constitutes national origin discrimination under Title VII."); Botello v.
25 County of Alameda Social Services Agency, 1995 U.S. Dist. LEXIS 19532 (N.D. Cal. 1995) (rejecting employer's claim
26 that plaintiff could not state a Title VII national origin discrimination claim because she was born in the United States);
27 Roach v. Dresser Indus. Valve & Instrument Div., 494 F.Supp. 215, 218 (W.D. La. 1980) (person of Acadian or "Cajun"
28 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.

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

6 **2. Plaintiffs’ Immigration Status Is Irrelevant to This Litigation**

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

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

10 It is well-established that plaintiffs are entitled to the protections of Title VII, whether
11 or not they are legally present in the United States. *See, e.g., EEOC v. Tortilleria “La Mejor,”* 758
12 F.Supp. 585 (E.D. Cal. 1991) (“the protections of Title VII were intended by Congress to run to
13 aliens, whether documented or not”); *EEOC v. Switching Systems Div. of Rockwell Intl. Corp.,* 783
14 F.Supp. 369 (N.D. Ill. 1992) (“Title VII’s protections extend to aliens who may be in this country
15 either legally or illegally”); EEOC Enforcement Guidance on Remedies Available to Undocumented
16 Workers Under Federal Employment Discrimination Laws, No. 915.002, issued October 26, 1999
17 (“unauthorized workers are protected [by Title VII] to the same degree as all other workers”).¹² The
18 same holds true for the FEHA.¹³

19 _____
20 ¹² These authorities are consistent with numerous decisions in other statutory contexts establishing that both
21 documented and undocumented employees are protected by the federal workplace laws. *See, e.g., Sure-Tan v. NLRB,*
22 467 U.S. 883 (1984) (undocumented persons are “employees” within meaning of National Labor Relations Act, and are
23 thus protected against retaliatory employer reporting to the Immigration and Naturalization Service); *NLRB v. Apollo*
24 *Tire Co., Inc.,* 604 F.2d 1180, 1184 (9th Cir. 1979) (finding that undocumented workers are “employees” within the
25 meaning of the National Labor Relations Act; then-Circuit Judge Kennedy, concurring, noted, “If the NLRA were
26 inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from
27 exploitative employer practices”); *Patel v. Quality Inn South,* 846 F.2d 700 (11th Cir. 1988), *cert. denied,* 489 U.S. 1101
28 (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”).

26 ¹³ *See, e.g., Murillo v. Rite Stuff Foods, Inc.,* 65 Cal.App.4th 833, 849 (1998) (in Title VII and FEHA action,
27 “plaintiff’s status as an undocumented alien does not bar her from the protections of employment law,” *citing Tortilleria,*
supra).

1 Defendants' suggestion that IRCA somehow renders an undocumented worker not
2 "qualified"¹⁴ for the protections of Title VII and FEHA ignores the plentiful case law extending
3 coverage to employees regardless of immigration status. It also reflects a basic misunderstanding of
4 all three statutes. The courts have consistently recognized that IRCA "does not reduce the
5 protections and remedies for undocumented workers under the law ... and was 'not intended to limit
6 in any way the scope of the term 'employee.''" NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134
7 F.3d 50, 56 (2d Cir. 1997);¹⁵ Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F.Supp.2d 1053,
8 1057-58 (N.D. Cal. 1998) (harmonizing IRCA with workplace protections of the Fair Labor
9 Standards Act, and noting that "IRCA's legislative history strongly suggests that Congress believed
10 undocumented aliens would continue to be protected by the FLSA," *citing* Patel v. Quality Inn
11 South, 846 F.2d 700, 704 (11th Cir. 1988); *see also* August 10, 1999 decision granting a materially
12 identical protective order in Acevedo-Valdovino v. Vander Houwen, No. CY-98-3074-RHW (W.D.
13 Wash. 1999) (affirming, in case brought under the Migrant and Seasonal Agricultural Worker Act,
14 statutory coverage of workers notwithstanding IRCA, and noting that "[i]f documented and
15 undocumented workers are to be treated identically, their status as documented or undocumented
16 becomes immaterial. Discovery on alienage issues cannot lead to admissible evidence because it
17 cannot lead to relevant evidence.") (citations omitted).¹⁶

18 ¹⁴ Despite defendants' mischaracterization, plaintiffs' allegation in the Complaint that they are "qualified" clearly
19 does not refer to plaintiffs' immigration status or work authorization, because neither is relevant to their qualifications --
20 *i.e.*, their objective ability to actually perform the tasks required by their jobs. Defendants' ambiguous usage of
21 "qualified" ignores not only its plain meaning, but also case law interpretation of the term. *See* Mardell v. Harleysville
22 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
23 Mardell pre-dated McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), on remand the Third Circuit
24 reaffirmed its position in this regard, Mardell v. Harleysville Life Insurance Co., 65 F.3d 1072, 1073 (3d Cir. 1995) .
25 The Court clearly adopts the correct definition of the term in the Order [Order, 7:11-19].

26 ¹⁵ *See also* Hoffman Plastic Compounds, *supra*, 237 F.3d at 649 ("IRCA makes it unlawful for employers to
27 knowingly *hire* undocumented aliens, 8 U.S.C. § 1324(a) ... IRCA does *not* explicitly make it unlawful for
28 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.

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

4 **b. Plaintiffs' Immigration Status is Patently Irrelevant to
5 Mitigation**

6 The doctrine of mitigation of damages in Title VII cases requires an injured party to make a
7 reasonably diligent effort to obtain substantially equivalent employment. 42 U.S.C. § 2000e-
8 5(g)(1). A plaintiff satisfies the requirement of due diligence by demonstrating a "continuing
9 commitment to be a member of the work force and remain ready, willing, and available to accept
10 employment." Booker v. Taylor Milk Co., Inc., 64 F.3d 860, 865 (3d Cir. 1995). Whether plaintiffs
11 are documented is irrelevant to this inquiry. See Bertelsen, Inc. v. ALRA, 23 Cal.App. 4th 759, 767
12 ("[G]eneral undocumented status does not render workers "unavailable" and ineligible for ALRB
backpay relief.").

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

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

23 Defendants would have the Court believe that the after-acquired evidence doctrine requires
24 discovery into plaintiffs' immigration status in order to determine their available remedies. But as
25 discussed in greater detail below, the after-acquired evidence doctrine (and its specific application in
26

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

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

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

10 The backpay order provides that Benavides and Guzman be paid from the
11 date of their unlawful discharge until either their qualification for future
12 employment or the expiration of the reasonable time allowed for them to comply
13 with IRCA [i.e., presentation of I-9 and supporting documents]. . . . [P]recluding
14 the [back pay] remedy would increase the incentives for employers to hire
15 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.

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

17 The Board ordered the Company to offer reinstatement to Benavides and
18 Guzman, "provided that they present within a reasonable time, INS Form I-9 and
19 the appropriate supporting documents, in order to allow the [Company] to meet its
20 obligations under IRCA." The reinstatement order, accordingly, does not require
21 the Company to violate IRCA. To the contrary, the Board's order quite clearly
22 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.

23 Id., 134 F.3d at 57.¹⁸ See also Hoffman Plastic Compounds, Inc., *supra*, 237 F.3d at ____
24 (following A.P.R.A., and noting that IRCA permits reinstatement after unlawful discharge without
25 requiring reverification of the employee's work authorization status). The EEOC has explicitly

26 ¹⁸ Egbuna is not inconsistent with A.P.R.A. as to reinstatement, since the A.P.R.A. court did not sanction
27 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.

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

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

11 ¹⁹ EEOC Enforcement Guidance on Remedies at n.3 and associated text ("The A.P.R.A. rationale . . . applies
12 equally to the federal employment discrimination statutes."). *See also* Lorance v. AT&T Technologies, Inc., 490 U.S.
13 900, 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?]

14 ²⁰ The Order's bar on immigration-related questions is consonant with A.P.R.A.'s holding that, for purposes of
15 reinstatement and back pay, any needed determinations of an employee's work authorization status are properly made in
16 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*.

17 ²¹ Defendants misconstrue Judge Snyder's analysis of the reverification issue and misunderstand IRCA. Neither
18 plaintiffs nor the Court suggest that employers are "require[d] to expend additional resources in verifying the integrity or
19 content of an employee's immigration documents." (Defendants' Request for Reconsideration at 11: 12-13.) Quite to
20 the contrary, IRCA makes it an unfair immigration-related employment practice for an employer to request "more or
21 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
22 process, and rejecting respondent's defense of good faith compliance with statute). Reverification is permitted only
23 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. §
24 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
25 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
26 "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
27 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
28 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.

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

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

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

15
16 ²² In focusing on the Court's reference to "independent investigation," defendants again privilege semantics over
17 plain meaning. The Court clearly does not impose requirements beyond the initial I-9 verification, and defendants'
18 insistence on what amounts to reverification is perplexing, as it could only reasonably be based on a lack of compliance
19 at the time of hiring.

20 ²³ A.P.R.A.'s affirmation of remedies to those who -- like the plaintiffs in this case -- have fully satisfied IRCA's
21 requirements echoes numerous cases decided prior to IRCA's enactment, several of which A.P.R.A. expressly draws
22 upon, *see, e.g.*, 134 F.2d at 54-58. Those decisions, including many by the Ninth Circuit, uniformly held that orders of
23 reinstatement and backpay to undocumented workers were entirely proper, and indeed *furthered* the purposes of the
24 immigration laws, where -- as here -- no violation of the immigration laws was necessitated as a result. *See, e.g., Local*
25 *512, Warehouse & Office Workers' Union v. NLRB (Felbro)*, 795 F.2d 705, 719 (9th Cir. 1986) (noting that the
26 discriminatees were all presently working in the United States, and that provision of full remedies would deter employer
27 abuses); *NLRB v. Ashkenazy Property Mgmt. Corp.*, 817 F.2d 74 (9th Cir. 1987) (following Local 512); *Bevles Co. v.*
28 *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 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.

1 The critical importance of minimizing the potential for adverse consequences to employees
2 who might invoke their statutory workplace rights is, of course, well established:

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

6 Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 292 (1960). The Court’s order correctly
7 recognizes the chilling and intimidating effect of inquiries into the immigration status upon the
8 willingness of plaintiffs to assert their workplace rights. Contrary to defendants’ astounding
9 dismissal of the possible drastic consequences of such inquiries (deportation and criminal
10 prosecution among them) as a mere “notion” [Request, 12:6-8], the Court finds ample support in the
11 case law to give them considerable weight.

12 The Fifth Circuit, in granting a writ of mandamus to reverse a district court’s order
13 permitting discovery *inter alia* into plaintiffs’ citizenship status, places of birth, and immigration
14 status, has reasoned that such information:

15 was completely irrelevant to the case before it and was information that could
16 inhibit petitioners in pursuing their rights in the case because of possible collateral
17 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.

18 In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (action under Fair Labor Standards Act and Migrant
19 and Seasonal Agricultural Workers Protection Act), *cert. denied sub nom. McAllen v. Reyes*, 487
20 U.S. 1235 (1988). The Ninth Circuit, in reversing a NLRB decision conditioning backpay on proof
21 of work authorization, expressed identical concerns: “The knowledge that deportation proceedings
22 are a likely consequence of filing a successful unfair labor practice charge would chill severely the
23 inclination of any unlawfully treated undocumented worker to vindicate his or her rights before the
24 NLRB.” Local 512, Warehouse & Office Workers’ Union v. NLRB, 795 F.2d 705, 719 (9th Cir.
25 1986).

26 In light of the abundant authority acknowledging the irrelevance of plaintiffs’ immigration
27 status and the pronounced chilling effect of its discovery, defendants’ assertion that “[t]he possibility
28

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

6 **IV. THE AFTER-ACQUIRED EVIDENCE DOCTRINE DOES NOT AUTHORIZE** 7 **UNFETTERED DISCOVERY**

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

15 **1. To the Extent That McKennon Addresses Discovery at All, It** 16 **Operates to Limit Defendants' Ability to Engage in Excessive** 17 **Discovery.**

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

25 ²⁴ The National Labor Relations Board, in a recent opinion of its General Counsel, objected to "the compliance
26 proceeding being used as a fishing expedition to try to determine whether someone is lawfully in the country."
27 Memorandum GC 98-15, "Reinstatement and Backpay Remedies in Light of Recent Board and Court Precedent,"
28 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].

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

5 In so much as McKennon speaks to discovery at all, it is to emphasize the "concern that
6 employers might as a routine matter undertake extensive discovery into an employee's background
7 or performance on the job to resist claims under the Act," and to propose that the provisions of the
8 Federal Rules of Civil Procedure be used to limit such abuses, McKennon, 513 U.S. 352, 363
9 (1995), clearly inviting the use of measures such as protective orders. McKennon most certainly
10 does not grant any special dispensation to defendants to ignore the normal limitations upon
11 discovery provided by the Federal Rules of Civil Procedure, and defendants distort McKennon in
12 claiming that it gives them a license to engage in unrestrained discovery in order to search for any
13 trace of wrongdoing by plaintiffs.

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

18 **2. The After-Acquired Evidence Doctrine Does Not Offer a Defense to** 19 **Liability Under Title VII or FEHA.**

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

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

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

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

9 First, and perhaps most importantly, defendants neglect to mention that Murillo's discussion
10 of the after-acquired evidence doctrine as it relates to the plaintiff's termination claim is *dicta*, since
11 the plaintiff dismissed that claim before the appeal was heard. Murillo, 65 Cal. App. 4th 833, 841.
12 Second, Murillo's attention to balancing the equities, along with its affirmation that the
13 undocumented plaintiff was indeed entitled to recovery under FEHA, makes clear that different facts
14 may mandate different results. The defendants' literal interpretation of Murillo requires the Court to
15 deprive plaintiffs of FEHA's protection, a clearly inequitable result inconsistent with the decision's
16 reasoning²⁷ Lastly, given that the Murillo court does not specifically address the facts presented by
17 this case, it is advisable to look to federal authorities that are more on point. California courts
18 consistently look to Title VII in interpreting FEHA. Kohler v. Inter-Tel Technologies, 244 F.3d
19 1167, 1172 (9th Cir. 2001)("In an area of emerging law, such as employment discrimination, it is
20 appropriate to consider federal cases interpreting Title VII."(citations omitted)). The extensive
21 discussion of Title VII, *infra*, clearly demonstrates that coverage under its anti-discrimination

22
23 ²⁶ See, e.g., O'Day (finding that "later-discovered evidence that the employee could have been discharged for a
24 legitimate reason does not immunize the employer from liability."); Vichare (quoting with approval District Court
25 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).

26 ²⁷ "Courts must tread lightly in applying the after-acquired evidence doctrine to discrimination claims," because it
27 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).

1 provisions is unaffected by after-acquired evidence.

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

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

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

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

25 _____
26 ²⁸ The Magistrate Judge noted three considerations explored by Massey and Mardell. The first such consideration
27 involved the potential of the "defendants' thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct" to
28 "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

1 **V. CONCLUSION**

2
3 In granting plaintiffs’ proposed protective order, Judge Snyder carefully balanced the
4 defendants’ need for the protected information against the profound chilling effect requiring its
5 disclosure would have on the plaintiffs’ ability to enforce their workplace rights, and the entitlement
6 of all employees to benefit from the full enforcement of anti-discrimination laws. Despite the
7 obvious propriety of the Magistrate Judge’s decision, defendants insist the Court should overturn it,
8 granting them full access to the powerful tools of discovery in their relentless quest for irrelevant,
9 highly prejudicial information. The Order as is stands is the plainly equitable result of a
10 sophisticated balancing of the interests of both parties, and should be upheld. For the foregoing
11 reasons, plaintiffs respectfully request that the Magistrate Judge’s decision be affirmed, and that this
12 Court enter plaintiffs’ proposed protective order.

13
14 Dated: July 3, 2001

Respectfully submitted,

15 Christopher Ho
16 Donya Fernandez
17 Julia Figueira-McDonough
18 The EMPLOYMENT LAW CENTER,
A Project of the LEGAL AID
SOCIETY OF SAN FRANCISCO

19 William J. Smith
20 Melvin M. Richtel
RICHTEL & SMITH

21 Alan L. Schlosser
22 AMERICAN CIVIL LIBERTIES UNION
23 FOUNDATION OF NORTHERN CALIFORNIA

24 Marielena Hincapié
25 NATIONAL IMMIGRATION LAW CENTER

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

