No. 13-36058

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

GLOBAL HORIZONS, INC., d/b/a
Global Horizons Manpower, Inc.;
Green Acre Farms, Inc.; Valley Fruit
Orchards, LLC, and DOES 1-10 Inclusive,
Defendants-Appellees.

On Appeal from the United States District Court
For the Eastern District of Washington
Hon. Edward F. Shea, Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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INTRODUCTION

This case presents an issue of critical importance to the effective enforcement of Title VII. 42 U.S.C. § 2000e et seq. The EEOC alleges that Global Horizon, Green Acre Farms, Inc. and Valley Fruit Orchards, LLC subjected a newly-immigrated class of Thai workers to a pattern or practice of disparate treatment and a hostile work environment based on their national origin and race as well as retaliation in violation of Title VII. In its opening brief, the EEOC argued that the district court erred when it ordered the EEOC to disclose the immigration status of claimants because that information is privileged and irrelevant to whether the defendants discriminated against the claimants based on their race and/or national origin, or any potential defenses the defendants may assert.

Initially the EEOC argued that the district court's order requiring the EEOC to release to the defendants the claimants' immigration information is immediately appealable under the collateral order doctrine. The EEOC further argued that the district court's order to disclose the confidential immigration status of these Title VII claimants falls into the narrow category of cases immediately appealable under 28 U.S.C. §1291 pursuant to the collateral order doctrine because: 1) it is conclusive; 2) it resolves an important issue separate from the merits; and, 3) it is effectively unreviewable on appeal. See Mohawk Indus., Inc. v. Carpenter, 558 U.S.

100, 106 (2009) (citing, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-46 (1949)).

On the merits, the EEOC urged this court to reverse the district court's order to disclose the claimants' immigration status because 1) disclosure by the EEOC of the claimants' immigration documents is inconsistent with statutory and regulatory confidentiality provisions; 2) the information is irrelevant to whether the defendants discriminated in violation of Title VII or to any potential defenses to a Title VII claim; and 3) even if relevant, any relevance is outweighed by the chilling effect of disclosure which would directly impede the vindication of workers' Title VII rights.

In their appellee brief, the defendants argue that the district court's order does not meet the requirements of the collateral order doctrine. According to the defendant, the ruling is "not conclusive" because it "does not define the scope of discovery or conclusively determine whether information disclosed is ultimately admissible at trial." Br. at 21. Further, the defendants argue that the order does not resolve an important question separate from the merits because immigration documents may contain information relevant to the claims of employment discrimination and retaliation. Br. at 21-22. And finally, defendants argue the order is reviewable after trial because even if the disclosure of immigration status

creates "injustice," that injustice would be sufficiently ameliorated by the granting of protective orders. Br. at 25-27.

On the merits, the defendants argue that the district court's disclosure order was proper because the information sought is "highly relevant" and "non-privileged." Br. at 27. The defendants state that the information is necessary to determine which defendant is being accused by which claimant of violating Title VII and to attempt to undermine claimants' credibility. According to their brief, the defendants' interests in obtaining the immigration information for credibility purposes outweighs the chilling effect of disclosing immigration status information because there is only minimal burden on or prejudice to the EEOC or claimants. Br. at 27-32. Finally, the defendants argue that although Congress imposed confidentiality on government entities with access to T-Visa applications and supporting documentation to assure applicants that the government would not expose their immigration status if they assisted in the government's efforts to bring human traffickers to justice, the confidentiality does not extend to the EEOC and, therefore, the EEOC must disclose the same information other government actors must keep confidential. Br. at 33-40.

For the reasons expressed below and in the EEOC's opening brief, this Court should grant review of this exceptionally important order to disclose immigration information, and reverse the district court's order.

ARGUMENT

1. The Commission argued in its opening brief that, when denying the EEOC's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b), the district court, on the one hand ordered the EEOC to disclose the contested information subject to a protective order but then, on the other hand acknowledged that the EEOC's request for interlocutory review had merit because "serious legal questions" are at issue and the "effects of disclosure cannot be completely undone." E.R.[1] at 11. The court therefore imposed a stay to permit the EEOC to seek relief from this Court. The district court's order to disclose immigration-related material is immediately appealable under 28 U.S.C. § 1291 because it satisfies all three requirements of the collateral order doctrine. The defendants' arguments to the contrary are unpersuasive.

First, in arguing that the order in this case does not fit within the collateral order doctrine, the defendants grossly exaggerate the breadth of the standard as articulated in Mohawk, 558 U.S. at 106. The defendants suggest that the Supreme Court in Mohawk required that, for purposes of the collateral order doctrine, the class of claims to which the order applies be defined exceedingly broadly. According to the defendants, whenever an order is in any way related to discovery, Mohawk mandates

[1] "E.R." refers to the EEOC's Excerpts of Record.

that the class of claims at issue necessarily includes all "disputed discovery orders." Br. at 22.

The EEOC obviously is not contending that immediate appeal is appropriate for all adverse discovery rulings. As the EEOC argued in its opening brief, this case involves the atypical situation of the forced disclosure of immigration materials Congress specifically denoted as entitled to confidentiality protections. And the disclosure is being ordered in a case where the confidential materials are irrelevant to the underlying discrimination claims at issue. Therefore, the EEOC contends only that immediate appeal is necessary for the class of cases in which civil rights plaintiffs are compelled to disclose their immigration status in discovery at an early stage in the litigation where that information is wholly irrelevant to a determination of liability under Title VII. EEOC br. at 9-13.

Moreover, the defendants mischaracterize the rule of Mohawk. Br. at 18. In Mohawk, the Supreme Court held that "[t]he determinative question . . . [is] whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" Mohawk, 558 U.S. at 107. Examining the attorney-client privilege for purposes of collateral appeal, the Court held that the privilege failed to meet the test because it simply involved "the routine application of settled legal principles;" a typical matter related to the attorney-client privilege. Mohawk, 558 U.S. at 106.

The Court made clear that, although important, the attorney-client privilege is among the "routine" and broad category of cases in which the litigants' rights can be protected post-judgment. The effect of disclosure before final judgment would cause no "discernible chill" on the privilege. Mohawk, 558 U.S. at 110. The Court explained that "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." Id. at 109. The privilege would not be significantly chilled because "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." Id. at 110. Consequently, in the attorney-client context any improper disclosure is subject to meaningful correction through a retrial. No such correction is possible when immigration status is disclosed.

Unlike the attorney-client class of claims at issue in Mohawk, in this case, the disclosure of immigration status, where it is irrelevant to the merits of the underlying civil rights claims, implicates real and serious harm to the claimants and to the public interest. This Court has expressly recognized the gravity of the harm, citing "substantial case law" emphasizing the fear held by undocumented workers that if they assert their workplace rights, their employer may use or abuse their immigration information. See Rivera v. NIBCO, 364 F.3d 1057 (9th Cir. 2004). To this the defendants offer no response.

The defendants similarly have no response to the Commission's argument that, unlike the claim of attorney-client privilege, the district court's disclosure order is effectively unreviewable on appeal. In the attorney-client privilege case, improper disclosure can be remedied by a retrial excluding the protected material, but the disclosure of immigration information cannot be so readily mitigated. There is no correction possible for the erroneous disclosure of immigration status. A new trial would not help because once the claimants' immigration status is out, it is out and it cannot be effectively "re-secreted."

Also in contrast with the attorney-client privilege, disclosing the details of a worker's immigration status would have a profound chilling effect. Disclosing such sensitive and confidential information can deter and chill victims of alleged trafficking and other abuses from coming forward if they believe they risk exposure in a public forum. Possible flaws in their immigration status could be exposed, leading to their deportation. The inherently intimidating effect of disclosing immigration information in a public forum is unquestionable. See supra, at 19-20. And, even if the information were released only to the defendant employers, the claimants would reasonably fear that the information could be

misused or abused, particularly because the claimants have accused them of human trafficking in another proceeding. [2]

Disclosure would also seriously impact public law enforcement interests. Although defendants contend that the Rivera "chilling effect" is inapposite in this case because the EEOC is the plaintiff (br. at 30), this argument misapprehends the EEOC's law enforcement role and its attendant interest in this issue. The EEOC's interests extend beyond the immediate case to the chilling effect that all the immigration-related rulings could have on its ability to enforce the law. Under Title VII, the EEOC cannot simply begin investigating and/or litigating a claim of discrimination; it ordinarily needs a complaint, or "charge," from an aggrieved individual. 42 U.S.C. § 2000e-5. Thus, the EEOC's enforcement of the law depends upon "the cooperation of employees who are willing to file complaints and act as witnesses." See Burlington No. & Santa Fe Ry. V. White, 548 U.S. 53, 67 (2006) ("'Plainly, effective enforcement could . . . only be expected if employee felt free to approach officials with their grievances.'") (internal citation omitted).

[2] For this same reason, the defendants' argument that the protective order is adequate to protect the claimants is unpersuasive. It is reasonable to assume that an employer accused of human trafficking would have interests adverse to the accuser and, if the employer were armed with immigration information, claimants would fear potential consequences. See, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886-87 (1984) (after five undocumented workers voted in favor of union representation, employer reported those workers to authorities).

Undocumented workers who become aware that their immigration status will be revealed if they seek to vindicate their civil rights will necessarily be placed in the untenable position of having to decide between pursuing their legal rights and risking deportation because of the forced disclosure of their immigration status. Given those choices, it is highly probable that these workers will not seek redress of their rights. And, armed with the knowledge that workers will not pursue their legal remedies, unscrupulous employers would be encouraged to take full advantage of this class of workers because it is a foregone conclusion that their actions would go unchecked. Impeding enforcement of federal anti-discrimination laws in this manner "unacceptably burdens the public interest" by chilling litigants from redressing their injury and "'also vindicat[ing] the important congressional policy against discriminatory employment practices.'" See Rivera, 364 F.3d at 1065 (internal citation omitted).

The defendants suggest that this Court's ruling denying interlocutory review under §1292 of a similar question in EEOC v. Evans Fruit Co., No. 10-cv-3033 (E.D. Wash.), No. 11-80235 (9th Cir.), compels rejection of this collateral order appeal. But defendants ignore the distinctions between the two avenues to review. Br. at 24-25. Unlike interlocutory review under §1292, which requires, in part, that the issue involve "a controlling question of law as to which there is a substantial ground for difference of opinion," direct review under §1291 pursuant

to the collateral order doctrine involves a separate and distinct three-part test, as discussed. Therefore, analysis under §1292 does not inform analysis under §1291. Further, defendants misread this Court's decision in Perry v. Schwarzennegger, 591 F.3d 1147, 1157 (9th Cir. 2010), to say discovery orders are generally non-appealable under §1291 or §1292(b). Br. at 24. This Court in Perry expressly declined to rule on the availability of collateral order review of an order denying claims of First Amendment privilege, and instead relied on mandamus to hear that "exceptionally important case." Id. at 1156. The Commission did not petition for mandamus in this case but instead contends that Mohawk, as construed by Perry, does not foreclose collateral order review of the exceptionally important issue.

The defendants suggest that the district court's order does not meet the standard for collateral order review because it is not conclusive. However, they do not challenge the Commission's argument that once disclosed, the information cannot be undisclosed. Rather, the defendants suggest that the order is not conclusive because it "does not define the scope of discovery or conclusively determine whether information disclosed is ultimately admissible at trial." Br. at 21. Defendants miss the point. Disclosure is the harm. Defendants will have the information. Whether the information can be later admitted at trial so that, in addition to the defendants, the public-at-large also has access to the claimants' immigration information is a separate issue, and a separate harm. Even if it is not

admitted at trial, the information will be out and the chilling effect produced by the fear that powerful entities with interests adverse to their own may be able to interfere with their immigration status cannot be mitigated through retrial or any other action.

Finally, the defendants assert that collateral order review is unavailable because immigration status and discrimination claims are "inextricably intertwined," citing the district court's conclusion that applications for T-Visas likely include discussions of the claimants' treatment and such a discussion may impact their credibility. However, as a plethora of courts have found, immigration status is completely separate from underlying discrimination or labor law claims.

The claims and defenses here involve factual questions about defendants' policies and practices regarding terms and conditions of employment and the defendants' treatment of workers who opposed these practices. They do not involve questions about what happened to the workers after they left the farms. Inquiries into their immigration status after they were no longer employed have no cognizable relevance to any element of the EEOC's Title VII claims seeking relief for these claimants. See e.g., EEOC v. Fair Oaks Dairy Farms, 2:11-cv-265, 2012 WL 3138108 (N.D. Ind. Aug. 1, 2012) (denying employer's discovery request for visa, passport, and birth certificate in Title VII, sexual harassment case); EEOC v. First Wireless Group, Inc., No. 03-cv-4990, 2007 U.S. Dist. LEXIS 11893 at *13

(E.D. N.Y. 2007) (denying order to set aside protective order prohibiting discovery into immigration status because such evidence is not relevant in liability phase of national origin and retaliation Title VII case); EEOC v. The Restaurant Co., 448 F. Supp. 2d 1085, 1086-88 (D. Minn. 2006) (holding immigration status irrelevant where no claim made for back pay or front pay in Title VII case for sexual harassment and retaliatory discharge); also see, Reyes v. Snowcap Creamery, Inc., 898 F. Supp. 2d 1233, 1235 (D. Col. 2012) (denying request for employee's entire immigration file, noting "the weight of authority clearly holds that Plaintiff's immigration status is irrelevant in an FLSA action").[3] Therefore, this Court should not countenance the argument that the claimants' immigration documentation, compiled after employment with defendants, has any relevance to the claimants' workplace discrimination claims.

2. As the EEOC argued in its opening brief, federal law mandates strict confidentiality regarding T-Visa applications and related information. In conjunction with its determination that prosecuting human traffickers is a matter of

[3] The defendants also suggest, somewhat disingenuously, that rather than advancing a collateral appeal, the EEOC should have petitioned this Court to appeal the July 31, 2013, under Fed. R. App. P. 5. Br. at 25-27. The district court's order denied certification. In so doing, it precluded the Commission from petitioning this Court for permission to appeal under Rule 5. See Credit Suisse v. U.S. District Ct., 130 F.3d 1342, 1346 (9th Cir. 1997) (permissive interlocutory appeal is not available absent written certification from the district court).

the highest order, Congress sought to encourage workers to come forward to provide the government information about their inhumane treatment without fear of retribution. For that reason, in 2006, Congress amended the law pertaining to T-Visa (victim of human trafficking) and U-Visa (victim of crime) holders to protect the confidentiality of the applications. 8 U.S.C. § 1367(a) (2).

These prohibitions on disclosure apply equally to the EEOC. See 8 C.F.R. § 214.4(e) (2) ("agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. § 1367"). Section 214.4(e) (2) thus states the EEOC cannot disclose any information it receives incident to processing of U-Visa applications. Since the EEOC is authorized by 8 C.F.R. § 214.4(e) (2) to be a certifying agency for purposes of U-Visa applications, it is obviously and directly bound by the confidentiality requirements of 8 U.S.C. §1367. The same statutory confidentiality requirements apply to applications for T-Visas but because the EEOC is not authorized to grant T-Visa applications, it is not directly prohibited from disclosure of related information.

The regulation pertaining to T-Visas states only that the Department of Homeland Security may make T-Visa information available to authorized law enforcement agencies in accordance with Department of Justice policies. 8 C.F.R. § 211(e). Such disclosure may not be made to the EEOC. To the extent the EEOC

has come into possession of such information, it is bound to treat it with the same confidentiality protections it applies to U-Visa information. To do otherwise would eviscerate the broad protections from disclosure that Congress enacted in 8 U.S.C. § 1367.

Defendants argue for a narrow construction of the confidentiality provisions, permitting employers under investigation to gain access to the same information the government is required to keep confidential under the statute. However, the restrictive reading of the provision defendants propose would violate a basic canon of statutory construction by failing to give full meaning to all the statute's provisions. For example, although defendants argue that the claimants themselves are not prohibited from disclosing information connected with the visa applications, that assumption cannot be squared with the language of 8 U.S.C. § 1367 as a whole. The statute provides that, under certain conditions, a beneficiary of the statute can waive the confidentiality requirements. See 8 U.S.C. § 1367(b) (4). An individual can only waive a privilege he has. By giving individuals who seek T-Visas the ability to waive confidentiality, Congress necessarily gave them the privilege in the first instance. Any other reading would render the provision superfluous. See e.g., Padash v. I.N.S., 358 F.3d 1161, 1170-71 (9th Cir. 2004) (statutes must be analyzed "in the context of the governing statute as a whole, presuming congressional intent to create a coherent regulatory

scheme" and, in that regard, courts "must 'mak[e] every effort not to interpret [the] provision [at issue] in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous'") (internal citations omitted).

Consequently, to give all the provisions meaning, the confidentiality mandates set forth 8 U.S.C. § 1367(a)(2) must be read more broadly to include not only the named governmental entities, but also the claimants and the EEOC, which seeks to vindicate their independent right to be free from discriminatory terms and conditions of employment.[4] The EEOC's acquisition of the claimants' privileged information while consulting with them about their discrimination charges requires that the EEOC treat the information as privileged. See, e.g., EEOC v. Johnson & Higgins, 1998 WL 778369 (S.D.N.Y. Nov. 6, 1998) (confidentiality privilege extends to the deliberative process between the EEOC and the employees upon whose behalf it sues); EEOC v. ChemTech Int'l Corp., No. 94-2848, 1995 WL 608333 at *1-2 (S.D.Tex. May 17, 1995) (communications between the EEOC and private individual privileged because they "were in connection with and pertained

[4] Contrary to the defendants' argument, the fact that the Thai CDC submitted immigration information for some of the claimants does not demonstrate that confidentiality provisions do not apply to the Thai CDC or the claimants. Rather, the disclosure simply demonstrates that the statute's waiver provisions apparently were utilized, permitting release of the information. See 8 U.S.C. § 1367(b) (4). And the fact that some claimants chose to waive their rights to confidentiality does not curtail or in any way impact the rights of others to keep their information private.

to the EEOC's prosecution of the present lawsuit"); see generally, General Tel. Co. of the Northwest v. EEOC, 446 U.S. 318, 326 (1980) (Congress intended EEOC to "implement the public interest as well as to bring about more effective enforcement of private rights").

Moreover, disclosure of the claimants' T-Visa applications in civil rights cases would subvert the purpose of those visas and undermine law enforcement efforts to investigate human trafficking and other crimes. T-Visas require law enforcement investigation and prosecution.[5] If discoverable in civil rights cases, the pursuit of civil rights would be turned into a venue for trapping undocumented workers. After being encouraged to assist law enforcement in exchange for confidential information, victims would find that they (or in this case the EEOC) are forced to disclose that same information divulged only under the promise of confidentiality.

Even if the immigration statute is read not to preclude discovery of the claimants' T-Visa applications and supporting materials, this Court should bar the

[5] The T-Visa is only available where the Secretary of Homeland Security and the Attorney General determine that the alien has been a victim of a severe form of trafficking, is physically present in the United States on account of such trafficking, has complied with reasonable requests for assistance from law enforcement investigation or prosecuting trafficking-related crimes, and would suffer extreme hardship upon removal from the United States. See 8 U.S.C. §1101(a)(15)(T)(i). Cooperation with a criminal investigation or prosecution is mandatory for T-Visa applicants.

discovery because the information sought has no relevance to any issue in this discrimination suit. Further, even if the information could be shown to be marginally relevant, the prejudicial effect of its disclosure far outweighs any probative value it might have, and thus the discovery should be barred.

The defendants assert that the forced disclosure of workers' immigration status is "highly relevant" to this Title VII lawsuit, suggesting that this Court's holding in Rivera, 364 F.3d at 1064, should be artificially constrained to reach only "the plaintiffs *in that case*." Br. at 28 (emphasis in original). However, as the EEOC pointed out in its opening brief, this Court made clear in Rivera, that Courts must be mindful of the chilling effect of requiring immigration status to be disclosed. Disclosure would undermine the enforcement of Title VII because undocumented workers would hesitate to fulfill their statutory role as "private attorneys general" if to do so increases the risk of deportation (EEOC br. at 19), and the EEOC's ability to vindicate statutory goals of eradicating discrimination would be impeded if workers were afraid to come forward.

Moreover, despite their assertion that the information is "highly relevant," the defendants fail to demonstrate how the legal status since leaving the growers' farms of any named claimant has any relevance whatsoever to the claim for relief under Title VII. That is because, simply put, immigration status is irrelevant to employment discrimination.

The application for a T-Visa is a wholly separate process conducted by the U.S. Citizenship and Immigration Service ("USCIS"), and has nothing to do with this civil proceeding. Title VII's protections are available equally to documented and undocumented workers. See Rivera, 364 F.2d at 1063, n.4 ("'the protections of Title VII were intended by Congress to run to aliens, whether documented or not, who are employed within the United States'") (internal citation omitted). Current immigration status is not at issue with regard to how the claimants were treated when they worked for defendants. Defendants have not and cannot identify a fact at issue in this case that depends on any individual worker's legal status.

The defendants argue that this information is relevant because they need access to immigration information to understand what the claimants accuse the growers, as opposed to Global representatives who were also on the farms (E.R. at 19), of having done. The defendants' reasoning is flawed. The defendants, all of whom were involved in the growing operations at-issue in this case, may be held liable as a "joint employer," making it immaterial for purposes of Title VII liability which defendant(s) the workers may have identified in their T-Visa applications. See EEOC v. Pacific Maritime Ass'n, 351 F.3d 1270, 1274 (9th Cir. 2003) (discussing joint employer theory of liability in Title VII cases).

The primary rationale for seeking this confidential information proffered by defendants is that it would bear on the credibility of the claimants. Br. at 40.

Credibility is always an issue. That, in and of itself, does not justify inquiry into immigration status and documents. See Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (concluding that testing credibility "does not by itself warrant unlimited inquiry into the subject of immigration status when such examination would impose an undue burden on private enforcement of employment discrimination laws").

Moreover, as pointed out in the EEOC's opening brief, the defendants have ample opportunity to challenge the workers' testimony and credibility without access to confidential information elicited by the government for the purpose of ferreting out and prosecuting human trafficking. Defendants have the opportunity to test plaintiffs' credibility on issues truly relevant to their employment by questioning them through depositions, affidavits, or other means. In short, defendants have access to substantial evidence about the claims and can evaluate the claimants' credibility through legitimate means.

And, even if there were some conceivable relevance of the information sought, defendants' legitimate discovery needs are far outweighed by the real *in terrorem* effect on complainants. See, e.g., Sanchez v. Creekstone Farms Premium Beef, LLC, No. 11-4037, 2011 WL 5900959 (D. Kan. Nov. 23, 2011) (barring discovery into immigration status in FLSA action on grounds that any benefit to defendant would be far outweighed by the damage and prejudice to plaintiffs if

discovery were permitted). The damage and prejudice that could result from discovery of this information far outweighs its probative value with respect to the EEOC's Title VII claims seeking relief for these immigrant workers. Courts have recognized, in a variety of contexts, the overwhelming detrimental impact of potential harassment, intimidation, and threats against plaintiffs posed by such disclosure. See, e.g., Loranzo v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (42 U.S.C. § 1981 and Fair Housing Act); Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002) (trafficking and involuntary servititude under Alien Tort Claims Act, 28 U.S.C. § 1350). As a result, undocumented workers are reluctant to report unlawful employment practices. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation").

Despite this generally recognized *in terrorem* effect of forced disclosure of immigration status, the defendants dismissively characterize this burden as "minimal." Br. at 30. Further, the defendants argue that there would not be a chilling effect in this case because the claimants' immigration status is known. According to the defendants, because it is known that the claimants were in the United States on guest-worker visas, it is also known that they no longer had those visas after they left their employment with the grower defendants.

However, the claimants' legal status is not self-evident. It is known that some of them sought T-Visas but their current status is not known. Some may never have sought or may have been denied T-Visas. Acquiring information about which claimants were granted T-Visas would necessarily, by a process of elimination, reveal those whose status is unclear. Therefore, the chilling effect of granting the defendants the right to inquire into the claimants' immigration status would not be less in this case than in any other. Moreover, even if the claimants were properly documented, they may nonetheless be chilled by this type of discovery because it could expose immigration problems of others with whom they are close. See Rivera, 364 F.3d at 1065 ("documented workers may be chilled . . . [because] their status would reveal the immigration problems of family or friends").

The end result is that inquiring into a worker's immigration status when not relevant presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights." Liu v. Donna Karan Int'l Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (citations omitted).[6]

[6] The suggestion that the complainants filed charges of employment discrimination with EEOC not to vindicate their civil rights but rather as a devious way to gain legal access to the United States is entirely speculative. See E.R. at 24 (information contained in T-Visa applications helps "assess the credibility and motivation of a Claimant to file a Charge of Discrimination"). T-Visas are granted to victims of trafficking, not to victims of alleged employment discrimination. Filing a charge of discrimination with the EEOC thus would not enhance a worker's ability to meet the USCIS standards for granting a T-Visa.

CONCLUSION

For the reasons stated above and in its opening brief, the EEOC respectfully asks this Court to reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), and Ninth Circuit Rule 32-1. This brief contains 4,531 words, from the Introduction through the Conclusion, as determined by the Microsoft Word 2007 word processing program, with 14-point proportionally spaced type.

s/ Susan L. Starr

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CERTIFICATE OF SERVICE

I, Susan L. Starr, hereby certify that on this 16th day of April, 2014, I submitted the foregoing Brief electronically in PDF format through the Electronic Case File (CM/ECF) system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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