UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP, Plaintiff, v. **ELAINE CHAO, Secretary of Labor, and the United States Department of Labor,** Defendants.	**Civil Action No. 08-1387 (RMU)**

THE PARTIES' JOINT STATUS REPORT

Plaintiff, Fragomen, Del Rey, Bernsen & Loewy, LLP and Defendants, Elaine Chao, Secretary of the Department of Labor, and the Department of Labor ("DOL"), hereby submit their joint status report in accordance with the Court's September 5, 2008 Minute Order. The parties have met and conferred and are able to report the following:

Plaintiff's Position

Plaintiff Fragomen believes that its arguments concerning First Amendment issues are not moot, and that no other aspect of the Motion for a Preliminary Injunction dated August 8, 2008 (the "Motion") is moot. The basis for this position is set forth in detail in Part I-A of the Reply Brief plaintiff will be filing today. While the Court stated that plaintiff would have until September 19 to file reply papers, plaintiff is filing those papers today because of the seriousness of the irreparable harm it continues to suffer and its urgent need for a prompt resolution of the Motion.

Fragomen's moving papers assert that defendants have imposed unconstitutional and otherwise unlawful restrictions on attorney-client communication. The restrictions challenged include both (1) a prohibition on attorney-client discussions about worker qualifications in situations where the employer has made a preliminary determination that an applicant appears to be qualified (the "First Restriction"); and (2) a prohibition on attorneys making or communicating to clients "assessments" or "comments" about applicant qualifications in the context of résumé screening (the "Second Restriction").

In the Restatement of Program Guidance Bulletin the Department issued on August 29, 2008, the Department announced that it was abandoning the First Restriction. However, it continues to enforce the Second Restriction, and Fragomen still believes (as argued in its moving papers) that the Second Restriction violates the First Amendment (as well as the Department's statutory authority and regulations and the Administrative Procedure Act ("APA")).

In addition, the Department continues to enforce the First Restriction against Fragomen by perpetuating the unprecedented and highly stigmatizing mass audit of all labor certification applications filed by Fragomen. When the Department commenced the mass audit program, it announced in a public press release that it was doing so based on a suspicion that Fragomen had violated the First Restriction. Defendants have refused to rescind the mass audits even though they have tacitly conceded that the policy on which the audits were premised – the now-abandoned First Restriction – was unconstitutional.

Accordingly, there remains a live controversy as to the lawfulness (under the First Amendment, the relevant statute and regulations, and the APA) of both restrictions challenged in

Fragomen's moving papers and as to all of the requests in its Motion, including the requests that the Court bar the Department from:

--- enforcing the challenged regulation (20 C.F.R. § 656.10(b)) "to prohibit employers from consulting with attorneys concerning *any* aspect of the labor certification process" (Motion ¶ 1, emphasis added);

--- "[e]nforcing the Regulation to prohibit attorneys from communicating with their employer clients at the time résumés or applications are received about whether applicants may be 'qualified' for the position within the meaning of the governing regulations" (Motion ¶ 2);

--- "[e]nforcing the interpretations outlined in the June 2 Press Release, the June 4 Information Paper, and the June 13 Bulletin" (Motion ¶ 3)[1];

--- retaliating against Fragomen based on its exercise of constitutionally protected rights (Motion ¶ 5); and

--- proceeding with mass audits that were based on the now-abandoned unlawful First Restriction (Motion ¶¶ 6-7).

These points are explained in greater detail, with an explanation of the legal authorities and facts that support Fragomen's position, in Part I-A of Fragomen's reply brief.

Defendants' Position

Defendants contend that several of the arguments made in plaintiff's motion for a preliminary injunction have been rendered moot by recent events. Specifically, for the reasons

[1] While the Department purports to have withdrawn these three documents, and asserts that it will not treat them as governing guidance on a prospective basis, the Department continues to enforce the interpretations reflected in the withdrawn documents through (among other measures) the mass audits, the certification procedure (Fragomen Moving Brief. p. 10), and the July 16 Agreement (*id.*).

set forth in defendants' opposition to plaintiff's motion for a preliminary injunction ("Defs.' Opp'n"), defendants' view is that plaintiff's arguments found on pages 12-17, 27-36, and 37-38 (regarding the loss of First Amendment freedoms) are now moot.

Specifically, while plaintiff continues to assert a First Amendment challenge, defendants believe that such a challenge has been wholly rendered moot by the DOL's issuance on August 29, 2008 of the Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 C.F.R. 656.10(b)(2) ("the August 29th Guidance"). The August 29th Guidance in no way prohibits attorneys from communicating with their clients. The August 29th Guidance does, however, continue to enforce the requirement, which has been in existence since at least 1980, that an employer's attorneys not "pre-screen" the resumes of U.S. applicants prior to the employer considering such resumes, unless the attorney normally serves in such a role in regard to positions for which labor certifications are not filed.

Defendants further contend that plaintiff's challenge to the June 2 Press Release, the June 4 Information Paper, and the June 13 Bulletin is moot in light of the issuance of the August 29th Guidance. As defendants stated in their opposition, these documents have been withdrawn and replaced with new guidance that establishes an employer's right to consult with and receive advice and guidance from its attorneys at all stages of the labor certification process. Defs.' Opp'n at 17.

Finally, defendants agree that the issue concerning the audits of plaintiff's labor certification applications is not technically moot although the decision to audit, or continue to audit, does not implicate any of plaintiff's First Amendment rights.[2] As defendants asserted,

[2]Defendants further agree that plaintiff's APA challenges, found on pages 17-25 of plaintiff's motion for a preliminary injunction, require a ruling by the Court.

Defs.' Opp'n at 10, the decision to audit plaintiff's labor certification applications is an appropriate one because plaintiff improperly pre-screened resumes. This provided the DOL with an ample basis to continue to audit, which defendants contend is not final agency action, or alternatively, is not judicially reviewable. Defs.' Opp'n at 18-23.[3]

Respectfully Submitted,

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[3]Undersigned counsel for defendants note that the parties have agreed that the certification forms sent to plaintiff's clients will not have to be returned until after the Court rules on plaintiff's pending motion. Furthermore, counsel for DOL has recently informed undersigned counsel for defendant that revised certification forms, in accordance with the August 29th Guidance, will be sent. Further, DOL is not continuing to enforce any alleged unconstitutional restriction through the July 16 Agreement because plaintiff voluntarily entered into this agreement to prevent automatic designation of its applications for audit. See Complaint, Ex. G at 1.

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