IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

LAM VAN "TOMMY" NGUYEN,
Plaintiff,
v.
QUALITY SAUSAGE COMPANY, LLC,
Defendant,
and
IMMIGRATION REFORM LAW INSTITUTE,
Amicus Curiae.

No. 4:19-cv-00150-P

BRIEF OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL

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INTRODUCTION

Amicus curiae Immigration Reform Law Institute ("IRLI") files this brief pursuant to leave of the Court for the reasons set forth in the accompanying motion for leave to file.

Plaintiff Lam Van "Tommy" Nguyen sues his former employer, Quality Sausage Company, LLC ("QSC"), for retaliatory discharge in violation of the whistleblower protections, 21 U.S.C. § 399d(a), enacted for the food industry by the FDA Food Safety Modernization Act, PUB. L. NO. 111-353, 124 Stat. 3885 (2011) ("FSMA"). Specifically, Mr. Nguyen expressed health and safety concerns about QSC's employing illegal aliens[1] for its food-processing facility, and QSC terminated his employment. As part of this dispute, QSC has cited multiple different rationales for Mr. Nguyen's termination. In his whistleblower suit here, Mr. Nguyen seeks to compel discovery on the immigration status of QSC's workers and the true rationale for QSC's terminating his employment. *Amicus* IRLI files this brief in support of his motion to compel (ECF #26).

STANDARD OF REVIEW

The Federal Rules of Civil Procedure allow discovery of "'any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [inter alia] the importance of the issues at stake in the action.'" *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 281 (5th Cir. 2019) (Ho., J., concurring in judgment) (quoting FED. R. CIV. P. 26(b)(1)). "Relevance 'encompasses any matter that bears on, or that could reasonably lead to other matter that could bear on, any issue that is or may be in the case.'" *Id.* (Ho., J., concurring in judgment) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)) (alterations omitted).

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[1] *Amicus* IRLI uses the term "illegal alien" to refer to aliens unlawfully present in the United States under the terms of the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA").

I. THERE IS A NEXUS BETWEEN THE HEALTH AND SAFETY ASPECTS OF IMMIGRATION LAW AND THOSE OF FOOD-SAFETY LAW.

As explained in the following three subsections, a nexus exists between the health-and-safety concerns of federal laws on immigration and food safety. *Amicus* IRLI first outlines federal concerns in each body of law independently, then demonstrates the nexus between the two.

A. Immigration law addresses important health and safety concerns.

Immigration law has long considered an arriving alien's health as a criterion for whether to admit that alien into the United States. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., IMMIGRATION POLICIES AND ISSUES ON HEALTH-RELATED GROUNDS FOR EXCLUSION, at 2 (2014) ("exclusion of aliens on the basis of health or communicable diseases dates back to the Immigration Act of 1891"). After the terrorist attacks on New York City and Washington, DC, on September 11, 2001, immigration law's pre-existing concern with public safety was expanded to terrorist threats: "As the terrorist attacks of September 11, 2001 reminded us starkly, this country's border-control policies are of crucial importance to the national security and foreign policy of the United States." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004); *see generally* Homeland Security Act of 2002, PUB. L. NO. 107-296, 116 Stat. 2135. Both strands of current immigration law are relevant here.

1. Immigration law protects alien health and public health.

As indicated, the exclusion of aliens based on health has a long history. *See* Act of March 3, 1891, § 1, 26 Stat. 1084 (excluding "persons suffering from a loathsome or a dangerous contagious disease"). Currently, INA § 212(a)(1)(A) makes aliens inadmissible based on, *inter alia*, having a "communicable disease of public health significance," 8 U.S.C. § 1182(a)(1)(A)(i), as well as for failing "to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella,

polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B." *Id.* § 1182(a)(1)(A)(ii). A "communicable disease of public health significance" is defined at 42 C.F.R. § 34.2(b), and that definition includes references to additional lists:

- Communicable diseases that may pose a public health emergency of international concern under 42 C.F.R. § 34.3(d). *See* 42 C.F.R. § 34.2(b)(2).
- "Communicable diseases as listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act." 42 C.F.R. § 34.2(b)(1). Significantly, the government's authority to test and quarantine infected individuals is greater for those who come here from a foreign country than for those who have not. *Compare* 42 U.S.C. § 264(c) *with id.* § 264(d).

Obviously, an alien who enters illegally bypasses governmental scrutiny of the inadmissibility of that alien based on his or her health.

2. Immigration law considers terrorism.

The concern of immigration authorities over terrorism is of more recent vintage than the concern over infectious diseases. *See Delgado-Garcia*, 374 F.3d at 1345. Nonetheless, the ability of federal authorities to vet aliens before entry is critical to national security. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2403 (2018) (upholding the necessity of "impos[ing] entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks"). As with illegal aliens who evade health screening at ports of entry, potential terrorist who evade inspection by entering the Nation illegally are obviously not vetted. Indeed, when President Bush created the Department of Homeland Security in the wake of the September 11 terrorist attacks, he included the agriculture and food industries among the critical infrastructures needing protection. U.S. GEN'L ACCOUNTING OFFICE, GAO-04-

259T, BIOTERRORISM: A THREAT TO AGRICULTURE AND THE FOOD SUPPLY 1 (2003) (hereinafter, "GAO, BIOTERRORISM").[2]

B. <u>The FFDCA and its whistleblower provision protect the health and safety of the food supply.</u>

The FSMA added the whistleblower protections that Mr. Nguyen invokes. PUB. L. NO. 111-353, Title IV, § 402, 124 Stat. at 3968. Specifically, the FSMA added § 1012 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-399i ("FFDCA"):[3]

> No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—
>
> (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any order, rule, regulation, standard, or ban under this Act;
>
> (2) testified or is about to testify in a proceeding concerning such violation;
>
> (3) assisted or participated or is about to assist or participate in such a proceeding; or
>
> (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act, or any order, rule, regulation, standard, or ban under this Act.

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[2] Available at <u>https://www.gao.gov/products/gao-04-259t</u> (last visited Feb. 14, 2020).

[3] The FMSA makes clear that its amendments were amendments to the FFDCA: "Except as otherwise specified, whenever in this Act an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.)." PUB. L. NO. § 1(b), 124 Stat. at 3885.

21 U.S.C. § 399d(a)(1)-(4). Although meat processors like QSC are subject to regulation by the Department of Agriculture under the Federal Meat Inspection Act, 21 U.S.C. §§ 601-626, they are under the concurrent jurisdiction of the Food and Drug Administration — a component of the Department of Health and Human Services — under the FFDCA. *See* 21 U.S.C. § 321(f)(1) (defining "food" in pertinent part as "articles used for food or drink for man or other animals"); *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 54 n.2 (D.C. Cir. 1984) (discussing concurrent agency jurisdiction over meat industry); *Jones v. Rath Packing Co.*, 430 U.S. 519, 533 (1977) (same).[4] In short, the FFDCA and its whistleblower protections apply to QSC.

As Mr. Nguyen explains, food is adulterated in violation of the FFDCA if, among other things, "'if it has been prepared, packed, or held under insanitary conditions whereby it *may* have become contaminated with filth, or whereby it *may* have been rendered injurious to health.'" Pl.'s Mot. at 5 (quoting 21 U.S.C. § 342(a)(4)) (plaintiff's emphasis). As indicated, the federal government has recognized the need to protect the agriculture and food industries from terrorism. *See* GAO, BIOTERRORISM, *supra*. Similarly, the agencies enforcing food safety in QSC's industry have long been concerned about infectious diseases in the workforce. *See* Food & Drug Admin., FDA FOOD CODE 2017, §2.2 at 32-47, 352-91.[5] Food-safety laws and regulations contemplate the concerns that Mr. Nguyen raised with QSC.

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[4] *See also* Nutrition Labeling & Education Act of 1990, PUB. L. NO. 101-535, § 9, 104 Stat. 2353, 2365 ("The amendments made by this Act shall not be construed to alter the authority of the Secretary of Health and Human Services and the Secretary of Agriculture under the Federal Food, Drug, and Cosmetic Act, the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act.") (note to 21 U.S.C. § 343).

[5] Available at https://www.fda.gov/media/110822/download (last visited Feb. 14, 2020).

C. There is a nexus between the health-and-safety aspects of immigration law and the FFDCA's whistleblower protections

Putting the prior two subsections together, a nexus clearly exists between the INA's health and safety concerns and those of the FFDCA. The FFDCA's definition of adulterated food includes permissive language that applies if food "has been prepared, packed, or held under insanitary conditions whereby it *may* have become contaminated with filth, or whereby it *may* have been rendered injurious to health." 21 U.S.C. § 342(a)(4) (emphasis added). "May means may and 'may' is, of course, 'permissive rather than obligatory.'" *Collins v. Mnuchin*, 938 F.3d 553, 579 (5th Cir. 2019) (interior quotation marks and alterations omitted). Whether QSC shared Mr. Nguyen's concerns about public health and safety, it cannot credibly deny that his actions fall within the permissive bounds of 21 U.S.C. § 342(a)(4). Under the circumstances, the federal government shares Mr. Nguyen's concerns, and it does not matter — for purposes of 21 U.S.C. § 399d(a)(1)-(4) and § 342(a)(4) — whether QSC shares them.

II. THE REQUESTED INFORMATION IS RELEVANT TO MR. NGUYEN'S WHISTLEBLOWER CLAIM

With the foregoing background on the public health and safety issues associated with both the INA and the FFDCA, the information that Mr. Nguyen seeks to compel QSC to provide is clearly relevant and discoverable.

QSC's invocation of an allegedly lawful bases for terminating Mr. Nguyen is no defense to discovery. Mixed-motive terminations can be actionable, *see generally* 3 UNJUST DISMISSAL § 11.03 (2019), and QSC's shifting rationales suggest that all its rationales are merely pretextual: "Pretext may be shown by any evidence which demonstrates the employer's proffered reason is false." *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 412 n.11 (5th Cir. 2007). Moreover, "an employer's inconsistent explanations for its employment decisions at different times permits [an inference] that the employer's proffered reasons are pretextual." *Id.* (citing *Gee v.*

Principi, 289 F.3d 342, 347-48 (5th Cir. 2002)). Thus, the shifting rationales here warrant this Court's allowing discovery into QSC's true motive.

In any event, QSC's rationale — assuming it had stated only one — is only QSC's side of the story. A plaintiff is entitled to discovery to establish *the plaintiff's side* of the story:

> In short, [the plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for [an impermissible motive for the employer's] decision.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973). This Court need not adopt the *McDonnell Douglas* burden-shifting rationale for Title VII employment cases to acknowledge the scope of evidence that *McDonnell Douglas* deemed relevant to the plaintiff's claims. *See Brady v. Fort Bend Cty.*, 145 F.3d 691, 711-12 (5th Cir. 1998) (declining to extend *McDonnell Douglas* burden-shifting to First Amendment cases); *but see* Richard E. Condit, *Providing Environmental Whistleblowers with Twenty-First Century Protections*, 2 AM. U. LABOR & EMP. L.F. 31, 54 & n.116 (2012) (including FSMA among the modern whistleblower protection provisions that adopt burden-shifting if the employee "establishes that whistleblowing was a 'contributing factor' in the adverse action"). With or without burden shifting, the discovery that Mr. Nguyen seeks remains *relevant*.

Finally, the test for relevance in discovery is not whether the evidence in question would be an exhibit to a motion for summary judgment in its own right but whether the evidence might lead to relevant and otherwise admissible evidence: "Information within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1). There are numerous ways in which the immigration information that Mr. Nguyen seeks could lead to relevant evidence about the risks and *possible* risks to food safety posed by QSC's hiring practices. For example, that information might lead to evidence that aliens employed by defendant come from a

part of the world where communicable diseases that can contaminate food are more common than in the United States. In that case, both the origin of these aliens and their immigration status would be relevant because illegal aliens, unlike legal aliens, are not medically screened upon entry.

CONCLUSION

This Court should grant Mr. Nguyen's discovery motion.

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Respectfully submitted,

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