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Fence builder hired entrants, made millions

Feds sought prison time, but judge approved home-confinement deal

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SAN DIEGO — That the government wanted to put Mel Kay behind a prison fence is an irony, though one that neither he nor his accusers would find amusing.

Kay builds fences. His was the largest fence-building company in Southern California; he rode the nation's housing boom to \$150 million in annual sales. His fences are just about everywhere — at gated subdivisions, on military bases, at prisons.

He even built fences at two immigration jails, a Border Patrol station and the U.S.-Mexico border.

Which is the second irony, because he admits now that many of his company's fences were built by illegal immigrants. Federal authorities knew it, and they went after him tenaciously, determined to send him to prison as an example to other employers who hire undocumented workers.

They had plenty of evidence. Prosecutors determined that about a third of his 750 workers were illegal immigrants. They told Kay's lawyers of videotaped interviews with about a dozen employees who had been caught in raids at Golden State Fence Co. in 1999 or 2004 — exposed as illegal immigrants — and then were rehired by the company, regardless.

Kay thought he was toast.

But this lean, sun-beaten 65-year-old had two things going for him: He was tough, and he was tender.

Kay's rise and fall

The story of Kay's rise and fall — based on court documents, government records and interviews with his employees and associates, federal investigators and Kay himself — begins in the Los Angeles suburb of Glendale, where he was born the fourth of 11 children.

His father, who moved to California from Oklahoma during the Depression, had a gambling problem and died at 47 from a heart attack. His mother, the daughter of Italian immigrants, never drove a car or wrote a check.

The Kays moved up and down California, farming almonds, tomatoes and other crops. Mel began picking fruit when he was 7 and attended more than 20 schools before dropping out when he was 16 to work at a lumberyard; he recalls how his bosses would stiff him on payday.

Kay and a friend borrowed \$8,000 to start a fence and garage-door business in 1968. In 1977, he moved to Coeur D'Alene, Idaho, to open a sawmill. It failed.

Kay returned to California to start Golden State Fence in 1984 with five employees and was on a roll by the early 1990s. Almost from the start, he relied on illegal immigrants.

Nearly all of his workers took advantage of the 1986 amnesty, but he soon struggled to fill jobs. He shunned applicants who came in off the street, instead relying on Mexican employees to recruit relatives and friends.

"They were more trustworthy and more apt to stay long-term," Kay told The Associated Press at his office in

Riverside.

Kay admits depending on illegal workers as the housing market grew in the 1990s and exploded in the first half of this decade.

Installing fences is punishing labor, especially in Southern California's desert heat and rocky soil. Kay requires job applicants to raise 60 pounds over their heads and move wheelbarrows of dirt. About 75 percent of his workers are Hispanic.

But Kay compensated his employees well. New hires start at \$35,000 a year and jump to about \$60,000 after three years. Full-time workers get health and life insurance, sick leave and at least two weeks' vacation.

The business prospered. An array of small companies bought fences from Kay's factory.

In letters to the judge in Kay's case, they lauded the variety of Golden State's designs and materials, and its track record on big projects. Golden State worked on several military bases and, in 1997, on a mile-long stretch of the U.S.-Mexico border in San Diego.

Hiring offense became felony

Joe Flores was Mel Kay's nemesis.

The El Paso native and son of Mexican immigrants began policing federal immigration laws in 1987 after 10 years as a Texas state trooper. A year earlier, the government made it a crime to hire an illegal immigrant; the offense became a felony in 1996.

Now, at age 53, he is a group supervisor for U.S. Immigration and Customs Enforcement. From his office on the second floor of downtown San Diego's federal building, he directed the raid on Golden State Fence.

Flores strongly believes that American jobs should go to citizens and legal residents. He is skeptical of Kay's claims that Golden State couldn't find enough of them to dig ditches for \$60,000 a year, with benefits.

The government's enthusiasm for punishing employers waned after Flores' first few years on the job, and by the mid-1990s, his focus turned to illegal immigrants who got into gangs and violent crime.

The Bush administration has renewed enforcement at factories and offices but has scored few legal victories. There are many reasons: about 7 million illegal immigrants are part of America's work force, making a crackdown on more than a handful impossible for prosecutors with limited resources; employers easily shield themselves by saying they didn't know illegal workers had phony documents; prosecutors refuse cases because it's extremely difficult to prove businesses are complicit.

Golden State Fence was different.

Investigators stumbled on the company when they were auditing military contractors in a nationwide post-Sept. 11 crackdown and determined that 48 of 182 workers at Golden State's Oceanside branch were illegal. In the pre-dawn hours of Sept. 21, 2004, agents arrested 12 as they left home.

As they pored over files, investigators discovered a government audit in 1999 that found 15 employees were illegal immigrants, including three they had just arrested. They needed to find them and have them admit they were rehired with the company's knowledge. It's a crime only if 10 workers are knowingly hired.

Investigators picked up two outside their homes. They staked out a warehouse across the street from the Oceanside branch and videotaped workers as they came and went for a week, resulting in six arrests.

There would be other evidence against Kay — 368 workers had Social Security numbers that did not match their names — but rehiring workers flagged in the audits would be the crux of the government's case.

Kay said he ignored the warnings not to rehire the men: "They had been working for me a long time."

Agents stormed offices

Shortly after Kay arrived at work at 5 a.m. on Nov. 30, 2005, federal agents stormed his 14-acre headquarters in an industrial part of Riverside, 60 miles east of Los Angeles. In 14 hours, they filled a 16-foot

truck with boxes of documents and computer hard drives.

Simultaneously, a helicopter with a loudspeaker circled over nearly 200 agents who raided the largest of Kay's 10 branches, in Oceanside, north of San Diego. In all, agents arrested 17 employees at their homes or as they came to load their trucks at 6 a.m.

Finally, Kay recognized he had a very serious problem. But it was too late.

He signed up for a voluntary federal program to electronically verify a job applicant's immigration status, which the White House wanted to make mandatory under a proposed immigration overhaul that failed last year. Only 37,000 of an estimated 7.5 million eligible employers have enrolled.

Kay's new, high-profile immigration attorney insisted he stop relying on employee referrals to fill jobs. The company put help-wanted ads in newspapers and on its fleet of 225 trucks. It sought workers at job fairs, halfway houses, probation departments, unemployment offices and community colleges.

Kay offered to plead guilty to a felony and pay a fine, but Carol Lam, then the top federal prosecutor in San Diego, took a hard line. Lam was one of eight U.S. attorneys who were fired last year by the Bush administration after criticism that she was lax on immigration.

Kay said Lam wanted him to serve 18 months in prison. Prosecutors were ready to file criminal charges against 10 to 12 managers.

The government relented, agreeing to recommend six months' prison time and charge only Kay and Michael McLaughlin, manager of the Oceanside branch. McLaughlin, 43, dropped out of high school to work at Kay's Idaho sawmill, followed his boss to California, and married his eldest daughter.

Kay's wife and five children were split about whether to accept the offer, but Kay slowly reconciled himself to jail time.

Kay and his son-in-law pleaded guilty to knowingly hiring at least 10 illegal immigrants over a 12-month period.

Confined to homes 6 months

When Kay arrived at his sentencing in March, U.S. District Judge Barry Ted Moskowitz said his initial instinct was to send him to prison. Moskowitz joined the federal bench in 1986, the year that President Ronald Reagan gave amnesty to 2.7 million illegal immigrants and promised to crack down on employers who broke the law.

The crackdown never came, and the judge felt it was long overdue. Neither the judge nor the young prosecutor could name even a single U.S. employer who went to jail for hiring illegal immigrants, even though the practice is widespread.

Moskowitz knew Kay's prison term could set a national precedent to determine how much time other employers would spend behind bars.

But Moskowitz noted Kay's strong work ethic and support from employees who overflowed the courtroom into the hallway. The judge said he couldn't ignore that Kay and McLaughlin treated employees like family. After a federal raid forced them to fire about 200 illegal immigrants, they paid each two weeks' severance, though they were not legally obligated.

"Are these the poster children for being the first ones to get jail time?" Moskowitz asked. "I think the answer is no."

Kay and McLaughlin were confined to their homes for six months with permission to leave only to go to the office. Golden State and the two executives forfeited \$5 million in a deal with prosecutors.

Still, the government didn't get the six months' prison time that it wanted. Flores struggled to hide his disappointment. "Jail time would have really sent a strong message," he said.

Kay, whose electronic monitor was removed from his ankle in September, doubts that the government can mount an effective crackdown on employers.

"On a smaller scale, there are thousands of companies like me in Southern California," he said. "Just go down, take out a company and bust them. They won't do it. They don't have the manpower."

Kay has postponed retirement for three years, when he finishes probation, and is trying to repair a business that was stricken by bad publicity.

Golden State, now renamed Fenceworks Inc., has seen sales slow severely amid the housing slump, and its payroll has shrunk to 450.

Kay, a longtime Republican, hopes the government overhauls laws soon to permit some illegal immigrants to stay in the United States. If not, he said, he may struggle to fill jobs when the housing market rebounds.

Meanwhile, Kay is relying more on government work. One contract he bid on, but did not get: a seven-mile extension of the U.S.-Mexico border fence in California.

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