UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

ROBERT Y. CHU, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 94B00036
FUJITSU NETWORK TRANSMISSION SYSTEM, INC., Respondent.	)	

FINAL DECISION AND ORDER
(June 30, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Jean Kalil, Esq.
for Complainant
Laurie Jones, Esq.
for Respondent

I. *Procedural History*

Robert Y. Chu (Chu or Complainant) filed a charge dated July 31, 1993, alleging that Fujitsu Network Transmission System, Inc. (Fujitsu or Respondent) discriminated against him based on national origin and citizenship status, practices prohibited by section 102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b. Chu filed his charge in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

In describing the alleged unfair employment practice, Chu, a United States citizen of Chinese descent, stated:

> I was informed by Fujitsu . . . on February 5, 1993 that I was terminated by the company because work/assignments were under performance [sic]. Prior to the termination my job assignments were assigned by the management to the NON-CITIZENSHIP colleagues without notice and reason. The management team and the decision maker(s) are different from my National Origin.

By a determination letter dated December 30, 1993, OSC informed Chu that it elected not to file a complaint on his behalf before an

administrative law judge (ALJ) because "there is insufficient evidence of reasonable cause to believe the charging party was discriminated against. . . ." OSC advised Chu of his right to file his own complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO).

On March 7, 1994, Chu filed the Complaint at issue in which he reasserted his national origin and citizenship status discrimination allegations. In addition, Chu alleged that he was retaliated against in violation of § 1324b after filing a complaint with Fujitsu's Department of Human Resources.

On April 7, 1994, Respondent timely filed an Answer which denies that it discriminated and/or retaliated against Chu. As affirmative defenses, Respondent stated that (1) "all actions taken by Respondent regarding Complainant's employment were taken for legitimate, nondiscriminatory reasons" and (2) "the allegations contained in Complainant's Complaint are without merit, brought in bad faith for purposes of harassment, and are not well-grounded in fact or law."

On July 27, 1994, Respondent filed a Motion to Dismiss the Complaint in which Fujitsu argued that Chu's allegation based on national origin discrimination should be dismissed for lack of jurisdiction. Under IRCA, Complainants may only allege national origin discrimination against employers who employ fewer than 15 individuals; complaints against employers with 15 or more employees must be filed under Title VII of the Civil Rights Act of 1964, jurisdiction for which lies with the Equal Employment Opportunity Commission. See 8 U.S.C. § 1324b(a)(2)(B). Accordingly, on August 23, 1994, I issued an Order granting Respondent's Motion to Dismiss Complainant's national origin claim. Chu v. Fujitsu Network Transmission System Inc., 4 OCAHO 678 (1994) (Order).

On October 3, 1994, Respondent filed a Motion for Summary Decision arguing that (1) there is no evidence that Fujitsu discriminated against Chu on the basis of his citizenship status, and (2) Chu cannot establish a prima facie case of retaliation. Complainant filed an Opposition to the Motion on November 21, 1994. By Order dated November 28, 1994, I directed the parties to file responses to specific inquiries in order to assist in resolving the Summary Decision Motion. On December 16, 1994, Respondent filed its Reply to Complainant's Opposition to Respondent's Motion for Summary Decision.

During the fifth telephonic prehearing conference on December 21, 1994, I stated that on the basis of the pleadings I was unable at that

time to conclude that there was no genuine issue as to any material fact such as to entitle Respondent to summary judgment.

On January 17, 1995, Jean M. Kalil, Esq. filed a notice of appearance for Complainant who had until then represented himself in this case.

On January 25-26, 1995, an adversarial evidentiary hearing was held in San Francisco, California. Each party filed a post-hearing brief; Respondent's Brief (Resp. Br.) was filed on May 5, 1995 and Complainant's Brief (Cplt. Br.) on May 8, 1995.

II. *Factual Summary*

Complainant, of Chinese ethnicity who was not an American citizen at the time of hire by Fujitsu in 1987, was employed as a Senior Member of its Technical Staff I. His tasks included developing and modifying software and computer programs.

During the period from 1987 until 1989, while under the supervision of George Chen, Chu's job title changed to Software Engineer III with little change in duties. In 1989, Yasufumi Toyoshima (Toyoshima) became director of Systems Research and Planning for Fujitsu and as such indirectly supervised Chu. David Chen became Chu's supervisor in 1990, the year Chu became a United States citizen.[1] Chu was again transferred, this time to another, albeit similar, position in the Testing or Quality Assurance division.

In 1991, Chris Chen (Chen) became Chu's immediate supervisor. Chen remained Chu's supervisor until Chu was terminated in February 1993. According to Respondent, Chu's termination was the result of a history of poor performance coupled with his increasing aggressiveness towards co-workers and his lack of cooperation with his superiors. Chu maintains that he was terminated because, unlike his supervisors and co-workers at Fujitsu, he became a United States citizen. In addition to the discrimination which culminated in his termination, Chu alleges that he was fired in retaliation for stating his intent to file a discrimination complaint with a government agency.

III. *Discussion*

A. Citizenship Status Discrimination

[1] Chu became a U.S. citizen on January 13, 1990. Tr. at 36.

In order to prove discrimination on the basis of citizenship status, Chu has the initial burden of proof. United States v. Mesa Airlines, 1 OCAHO 74, 500 (1989).[2] To meet this burden in a case involving employment termination, a Complainant must show, by a preponderance of the evidence, that

> [1] he is a member of a class entitled to the protection of . . . [IRCA], [2] that he was discharged without valid cause, and [3] that the employer continued to solicit application for the vacant position.

Nguyen v. ADT Engineering, Inc., 3 OCAHO 489 at 11 (1993) (citing Shah v. General Electric Co., 816 F.2d 264, 268 (6th Cir. 1987)); Brownlee v. Chrysler Motors Corp., No. 89-CV-72108-DT (E.D. Mich. 1991) (quoting Potter v. Goodwill Industries, 518 F.2d 864, 865 (6th Cir. 1975)). Once the complainant makes a prima facie showing of the above-listed elements, the burden then shifts to the employer "'to articulate some legitimate, nondiscriminatory reason for the employee's . . . [termination].'" Mesa Airlines, 1 OCAHO 74, 500 (citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)). If the employer is successful, the burden shifts a third and final time to the Complainant who must show that the employer's reasons for termination are a "pretext or gloss designed to conceal an underlying discriminatory motivation." Mesa Airlines at 500.

Notwithstanding the shifts in burdens of production, the ultimate burden of persuasion always remains with the complainant to prove that there was discriminatory intent. In other words, once the employer produces evidence "'which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus,'" the complainant bears the final burden of proving that "'the proffered reason was not the true reason for the employment decision [and] that she [or he] has been the victim of intentional discrimination.'" Dhuria v. Trustees of the University of D.C., 827 F. Supp. 818, 826 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

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[2] Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

As Chu carries the initial burden in this case, it is instructive first to analyze the elements he must prove in order to prevail on a citizenship status discrimination complaint.

1. Complainant is a Member of a Class Entitled to Protection?

As both parties agree that Chu is a United States citizen, he has met the first prong of the test to prove discrimination: he is a member of a class entitled to protection under IRCA. See 8 U.S.C. § 1324b(a)(3)(A).

2. Discharged without a Valid Cause?

Complainant argues that he was discharged without a valid cause because his "job performance was satisfactory . . .[,] [h]e was never evaluated at "Unacceptable," the lowest category on all but one of his performance reviews . . . [,] [and] [i]t was not usual practice for Respondent to terminate employees who are rated at "Needs Improvement on their performance reviews." Cplt. Br. at 16.

Respondent counters that "Chu was given verbal and written warnings on numerous occasions throughout the five years of his employment to improve his performance prior to Chu's termination." Resp. Br. at 15. Furthermore, Respondent argues that "[t]hese warnings were given to Chu by Chinese, Japanese and United States citizens" without discriminatory intent. Id.

Both parties discussed Chu's performance evaluations at length during the hearing and in written briefs. It is undisputed that Chu received neither the highest evaluations nor the lowest at any given time. However, based on his performance over a period of five years with evaluations given by several different supervisors, I cannot find that Chu exhibited such an exemplary work performance that Respondent lacked a valid reason for his termination.

When Chu became an employee in February, 1988, Fujitsu rated its employees using the following performance levels ranging from best to worst, respectively: exceptional; commendable; fully effective; developmental; needs improvement; and unacceptable. Complainant argues that, in his evaluation dated February 1988, although Chu was rated "needs improvement" in eight out of 16 total categories, yielding an overall rating of "needs improvement," he was given higher ratings in some categories and he was never given a performance rating of "unacceptable." Cplt. Br. at 2.

In an evaluation six months later (June, 1988), Chu was again given a rating of "needs improvement" in eight out of 16 categories. In all

other categories, as well as overall, Chu was rated "developmental." Fujitsu defines "developmental" as that of an "[e]mployee [who] is new to the position and requires additional development and experience in the job to perform at a fully effective level." Cplt. Exh. L at 1. Complainant states that he had "new assignments and the title of his position had changed." Cplt. Br. at 2. This does not explain, however, why Chu received low ratings in areas which would not be affected by having changed positions. For instance, he was rated as "needs improvement" in the categories of leadership (i.e., "inspires enthusiasm and confidence by effectively motivating and directing others towards a given objective") and delegation (i.e., "delegates work and authority to subordinates and staff personnel"). Cplt. Exh. L at 3.

In June 1989, Chu was again rated "developmental" overall. Although he was rated "fully effective" in the two categories of "planning and organization" and "communication," he was rated "needs improvement" in the "initiative" category. Cplt. Exh. N at 3-4.

Chu's performance evaluations in May, 1990 and June, 1991 showed much improvement. He was rated "fully effective" overall on both reports. Nevertheless, Chu was rated "needs improvement" in several of the categories, including "initiative" on both evaluations. Cplt. Exhs. O and P at 2 respectively.

During June 1991, Chu was given his first evaluation by Chris Chen. Chu alleges that it is at this time that because he became a United States citizen, his supervisors, in particular Chen, began to discriminate against him in order to hire a non-citizen replacement. Chen, himself a U.S. citizen, gave Chu an overall rating of "fully effective" but found he needed improvement in "planning & organizing," "productivity," "quality of work," "initiative" and "communication."

At this point in time, Fujitsu revised its evaluation forms, reducing from six to three the number of levels at which an employee could be rated. An employee could subsequently only be rated as exceptional, fully effective or needs improvement. In addition, the number of categories to be rated was reduced from 16 to twelve. See Cplt. Exh. Q.

In June 1992, although Chen rated Chu "fully effective" in four categories, Chu was categorized as needing improvement in eight of the twelve categories. Id. Complainant felt his supervisor was discriminating against him; in the employee comments section, he wrote:

> Basically, I am not totally agree this performance view. The reason of my disagreement is because the misunderstanding of my personality, experience and propensity. The best way to avoid the misunderstanding is to improve the communication each other that will solve most ambiguous judgement.

Id. at 4.

It is obvious that Chu was not the only one to feel that there was a lack of communication and a poor working relationship between him and his superiors. Chen testified that he discussed his concerns about Chu with Toyoshima, Chen's supervisor. These concerns included "poor communication, poor testing skills, Chu not following Chen's directions and Chu reading magazines and newspapers in his cubicle on company time." Resp. Br. at 6. See also Tr. at 271-2, 274-5, 296-301, 383-5. Chen testified that Toyoshima also saw Chu reading the dictionary, magazines and newspapers at his desk while he should have been working and that Toyoshima was upset about Chu's behavior. Tr. at 383-4. Both supervisors testified that they witnessed Chu yelling at other employees. Tr. at 373-5, 390-1, 459. Linda Pond, the Human Resources Manager, whom Chu contacted regarding his problems with Chen, testified to Chu's "abusive" behavior which allegedly included him cursing at her on the telephone, ultimately forcing her to terminate the conversation. Resp. Br. at 12; Tr. at 518-23. Although Complainant rejects any characterization that he was discourteous to Pond and denies he used vulgar language, he admits to calling her back "as a courtesy" to apologize for his conduct on the telephone. Tr. at 91, 228-9.

As well summarized by Respondent on brief, the problems between Chu and Fujitsu managers escalated:

> On April 2, 1992, Chu was given a memo from Chen requesting that Chu complete personnel action notices for absences from work because of illness or doctor appointments. R. Ex. 65; Tr. Vol. 1, pp. 169-170. This request was pursuant to company policy and was a requirement of all Fujitsu employees. R. Ex. 65; Tr. Vol. 2, pp. 173-174. In response to this memo, Chu made copies of it and posted the memo in public areas around the Fujitsu office. Id. at pp. 170-172.
>
> On April 6, 1992, Toyoshima sent a memo to Chu counseling Chu that the posting of the April 2, 1992 memo in areas where other employees, customers and Toyoshima could see it was insubordinate behavior and Chu was not to take such actions again. R. Ex. 65; Tr. Vol. 2, pp. 457-458.

Resp. Br. at 7.

Complainant testified that the reason that he posted the notice was because he felt that it was discriminatory for him to get such a memo from Chen. Although he acknowledged that all employees must obtain

permission for absence from work and that the information in the memo was correct, he stated "[i]t's my intention to let other people know I was mistreated." Tr. at 172-3.

In June 1992, Chen presented Chu with a Performance Improvement Plan setting forth "the areas where improvement was needed, the aid Chen would give Chu in order to reach that improvement level and a list of how Chu's progress would be evaluated." Resp. Br. at 8. The Plan identified the following areas which required improvement: job knowledge & skill, planning & organizing, productivity, quality of work, initiative, communication and cooperation & teamwork. Resp. Exh. 55. The Plan informed Chu that "failure to meet these objectives during this period will result in further corrective action." Id. Chu testified that at this point, he knew his job was in jeopardy and that he was, in effect, on probation. Tr. at 189.

The Plan required Chu to complete weekly work reports. Although all employees were required to fill out weekly status reports, Chu's weekly work plans were to be more detailed and, unlike other employees' reports, were to be discussed with Chen each week. Tr. at 193-198. Chen also assigned Chu a student helper for a short period of time to help him with completion of projects. Tr. at 198. Immediately prior to Chu's termination, Chen assigned the same jobs to both Chu and another worker because, as Chen testified, Chu was too slow at completion. Tr. at 391.

Chen was satisfied with the work Chu was doing at this point as he gave him a rating of "fully effective" on his next evaluation, stating that Chu "is expected to maintain this type of productivity in his future projects. . . ." Tr. at 199-201; Resp. Ex. 7. The evaluation, however, continued to record concerns such as lack of initiative and low attention span which Chen said Chu needed to improve. Tr. 201-202; Resp. Ex. 7.

Chu's performance again declined in December 1992. Chu acknowledged Chen's renewed request to submit detailed weekly work plans. Resp. Exh. 34 at 1. During this time-frame, Chu received a written warning from Toyoshima, directing him not to use xerox machines to copy personal documents. Resp. Exh. 64. Chen considered such a memo to be fairly serious as it was Chu's second warning from Toyoshima. Tr. 382-385.

Chu turned in weekly status reports which Chen rejected as insufficient compliance with the demand for weekly work plans in the nature of performance improvement plans. Resp. Exh. 34 at 3. Chen

issued a January 11, 1993 memorandum to Chu, directing submission of such weekly plans, stating inter alia that "I want to see the first weekly work plan on Wednesday, January 13, 1993, p.m." Id. At hearing, Chu introduced a report for the period January 11-January 15, 1993. Cplt. Exh. BB. Chen testified, however, consistent with handwritten notations on the printed version in evidence, that he had never received it from Chu but only found it in the computer after Chu's discharge. Tr. at 303 & 391. The deadline for Chu's work plan having passed, Chen concluded that Chu failed to comply. Tr. at 390-1.

Upon Toyoshima's recommendation, and after reviewing Chu's file, Pond and Ken McGill (McGill), Senior Manager of Fujitsu's Human Resources Department, decided to terminate Chu. Tr. at 575; Resp. Exh. 50. Their explanation for his termination was poor conduct and performance. Tr. at 105, 587-88. The decision was approved by Joe Snayd, Vice President of Human Resources. Tr. at 560-561.

In contrast, Chu argues that his termination is the result of discrimination because of his citizenship status. Complainant ignores the fact, however, that those responsible for reviewing the termination, including Pond and McGill, are U.S. citizens and that, according to Fujitsu policy, no termination decision is made without their agreement. Tr. at 561. In addition, although Toyoshima is not a U.S. citizen, Chen, the primary source of Chu's citizenship discrimination according to Complainant, became a citizen in December 1990, only one year prior to the time he began to supervise Chu, and well before the evaluations which culminated in Chu's discharge. Tr. at 395-6.

Chu argues that Chen, his immediate supervisor, preferred to employ non-U.S. citizens. According to Chu, Chen threatened to replace him with other workers, particularly Henry Ho (Ho) and Steven Yen (Yen) and that the "message" he received from Chen was that the reason was that they were not U.S. citizens. However, as Complainant himself asserts, he was not always able to understand Chen because the latter spoke in Mandarin-Chinese, a dialect which Chu asserts is replete with varying meanings dependent on a person's education and communication habits. Tr. at 119. Therefore, it is just as likely that the message Chu received that Chen prefers non-U.S. citizens is his own interpretation of Chen's use of certain Mandarin-Chinese words. That Chu's citizenship status claim lacks credibility is bolstered by Chen's U.S. citizenship. Furthermore, there is no reason to doubt Chen's testimony that Fujitsu does not prefer non-U.S. citizens over citizens. Tr. at 267. Chu's claim must be considered in context of his having obtained citizenship in January 1990, less than a year before Chen also became a U.S. citizen. Tr. at 36, 396-7. The lack of

motivation for citizenship discrimination by Chen or Fujitsu is overwhelming.

Complainant also argues that discrimination against him is evident because "Henry Ho and Steven Yen were never put on a Performance Improvement Plan while Cris Chen was manager." Cplt. Br. at 9. Complainant's argument is not persuasive in light of the fact that Yen also became a U.S. citizen after he was hired. Tr. at 261-5. In addition, the other member of Chen's work group, the librarian, Janice Ford, is a U.S. citizen. Tr. at 265. Significantly, half the employees in Chu's department at the times of his hire and termination were U.S. citizens. Tr. at 548-9. See also Resp. Exh. 53 at 1-2. Eleven of 16 employees still on board when Exhibit 53 was prepared were U.S. citizens.

By asserting a belief that Chen preferred Ho and Yen because of their supposed immigration status, Complainant does not make out a prima facie case, much less prove by an evidentiary preponderance that Chen's true reason was to remove a U.S. citizen. Considering the evidence as to Chu's work habits and problems with co-workers, supervisory and otherwise, I conclude that Chen wanted to replace Chu with someone more capable and less likely to challenge managerial oversight.

As further evidence that he was terminated because of his citizenship status, Complainant argues that Fujitsu violated its own policy on termination of employees by failing to give him written and verbal warnings prior to termination. Cplt. Br. at 4, 5 & 12. Chu asserts that at no time was he given a warning of the possibility that he would be terminated if his performance did not improve. In particular, Chu argues that he received no written warnings about anything negative relating to his job performance from August 17, 1992 to December 3, 1992, the time period after which he received an improved rating from Chen and immediately preceding his termination.

However, Fujitsu's corporate policy statements and Manager's Guide (Guide) do not require that an employee be given warning prior to termination. Rather, the Guide states that corrective action should be taken "[w]henever an employee's conduct, job performance, standards of attendance or punctuality is below the Fully Effective level. . . ." Cplt. Exh. C at 82. Corrective action "[m]ay involve one or all of the following: verbal counseling, performance improvement plan, written warning [or] termination." Id. (Emphasis added). "The first step taken depends on the type of severity of the problem and the employee's record." Id. Furthermore, while Fujitsu advocates that a first warning be verbal, its corporate policy also maintains that "[i]n extreme cases

of misconduct as determined by the corporate Vice President of Human Resources or his designate and the immediate supervisor, immediate suspension or termination may be warranted, without resorting to verbal or written warnings." Cplt. Exh. D at 5 (emphasis added). See also Cplt. Exh. F at 2; Cplt. Exh. G at 1 (Fujitsu corporate policy statement dated May 15, 1987 stating that "[t]he employment relationship may be terminated at any time by the company or the employee. This policy does not create any contract with the employee requiring that the company only terminate for cause").

Whether it was usual or otherwise to terminate an employee without prior explicit warning that his employment might be imperiled, it was not against Fujitsu policy as claimed by Complainant to terminate without such notice. Chu's claim ignores the explicit warning in the Toyoshima memorandum of December 7, 1992, addressing misuse of the copy machine, that "I will have to take other means of action if this continues in the future." Resp. Exh. 64. Additionally, Pond testified that, when an employee is required to complete a work plan, he is considered to have received a written warning. Tr. at 504. She testified that in many cases employees who fail to improve following a plan are terminated. Id. In sum, I do not find convincing Complainant's argument that, despite repeated poor evaluations as well as reprimands from both Chen and Toyoshima, Chu was fired without warning. In addition to memos and "talks" with Chen and Toyoshima, Chen testified that Toyoshima told him that the reason Chu had been transferred to so many different working groups prior to Chen becoming Chu's supervisor was because of "problems with his performance." Tr. at 405.

In addition, Complainant argues that Chu never received an evaluation "low enough" to warrant termination. Chu claims that because he never received an "unacceptable" rating, he should not have been terminated. I disagree with Complainant's logic. Cplt. Br. at 16. While Chu may not have received the lowest possible rating on an evaluation, certainly his evaluations were not exemplary. On the contrary, his evaluations were mediocre at best, and consistently so.[3]

As previously held, "[a]n employer has broad discretion in defining expectations of employees' performance. Absent an illegality, an

[3] As a result of his poor performance ratings, Chu often received less than 100% of the incentive payout for which he was eligible. For instance, he received only 85% of his incentive payout in April, 1991 and only 65% in October, 1991. This was well below par and in contrast to the norm among his fellow employees. Resp. Exhs. 22-25.

employee must acquiesce in those expectations, rather than perceive them as discriminatory." Nguyen, 3 OCAHO 489 at 12. Furthermore,

> [t]he employee doesn't get to write his own job description. An employer can set whatever performance standards he wants, provided they are not a mask for discrimination on forbidden grounds such as race or age.

Id. (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989)). See also Yefremov v. NYC Dep't of Transportation, 3 OCAHO 562 at 45 n.15 (1993) (stating that it is not the judge's role "'to second-guess an employer's business decision, but to look at evidence of discrimination'").

Complainant relies on Chen's testimony that lack of initiative, lack of communication and not submitting a work plan are all insufficient reasons to terminate an employee. Cplt. Br. at 12. However, Chen was not asked whether these considerations in the aggregate would provide adequate reasons to terminate Chu. It is beyond doubt that Chu had performance problems which escalated after Chen became his supervisor. Although Chen felt Chu was a slacker, there is no evidence that Chen discriminated against Chu. Certainly there is no implication of citizenship status discrimination. Rather, Chu's failure to improve his performance in the face of supervisory reprimands and requests, and serious conflicts with those in authority demonstrates legitimate, nondiscriminatory reasons for his discharge. I find Chu has failed to meet his burden of proving that he was not terminated for a valid reason.

3. Employer Continued to Solicit Application for the Vacant Position?

Assuming, arguendo, that Complainant satisfies his burden of proof for the second prong of a citizenship status discrimination cause of action, he failed to prove the third prong of the test. The only tangible evidence offered by Complainant in order to establish that Chu's supervisors, Chen and Toyoshima, planned to replace Chu with Chinese citizens is a memorandum to Chu dated January 11, 1993. Cplt. Br. at 17; Cplt. Exh. EE.

This is a memo Chen wrote Chu after the latter failed to turn in a weekly work plan as previously requested by Chen. Referring to Chu's failure to produce the plan, Chen wrote: "It is my understanding that our Level 24 engineers such as Henry Ho and Steven Yen, understand and know how to make a work plan which, from a management point of view, takes initiative." Chen added: "From now on, if you continue

to think that you need the same minimal initiative as the Level 22 engineers, I think you need to consider your status as to whether you should go back to "Performance Improvement."

Complainant contends he has satisfied the third prong of the test because Chen's memo "creates an inference that Henry Ho and Steven Yen were to replace Complainant." Cplt. Br. at 17. I disagree. The memo merely states that, in Chen's opinion, citing Ho and Yen as examples of others under Chen's supervision,[4] that Fujitsu employees with less training and experience than Chu, can write a weekly work plan. The fact that Ho and Yen, as of the time of hire[5] at least, were not U.S. citizens is no basis for an inference that Chen referred to or favored them for any prohibited reason. In fact, one of the two, both of whom are ethnic Chinese, obtained his U.S. citizenship after he joined Fujitsu. Tr. at 260-2. While the memo implies frustration on Chen's part as to lack of cooperation by Chu, it in no way leads to the conclusion that Chen intended to replace Chu with Ho or Yen.

Even Chu admits that the memo creates only an "inference" that Chen intended to replace Chu. Cplt. Br. at 17. Such evidence is patently insufficient to establish by a preponderance that Respondent planned to hire a non-citizen in place of Chu for the reason that he is a U.S. citizen. The memo confirms, however, that Chen felt Chu was not doing his job in a way that was profitable to Fujitsu. As previously held, "it is not the judge's role to second guess employer decisions." Nguyen, 3 OCAHO 489 at 12.

> The business of business, and the sole concern of business is profit. And the law does not judge the wisdom of a company's business decision, unless a forbidden motive is present . . . [C]ourts do not sit as a super-personnel department that re-examines [employer] decisions. [Cite omitted.] No matter how medieval an employer's practices, no matter how highhanded its decisional process, no matter how mistaken its managers . . . .

Id. (quoting Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988)). See also Douglas v. Anderson, 656 F.2d 528, 534 (9th Cir. 1981) (stating that "[t]he reason for a business decision need not meet the unqualified

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[4] Chen was in charge of supervising four employees including Chu, Ho and Yen, the two engineers, who were less senior than Chu, and Janice Ford, a software librarian. Tr. at 258.

[5] Although not a U.S. citizen at the time of hire, Yen became naturalized during his tenure at Fujitsu. Tr. at 262.

approval of the judge or jury, so long as it is not based on [a protected characteristic]").

It is absolutely clear on this record that Chu was discharged for legitimate nondiscriminatory reasons. Accordingly, I find Chu failed to prove that Fujitsu intended to replace him with non-U.S. citizens.

B. Retaliation

Upon alleging that Respondent terminated Chu in retaliation for his filing a discrimination claim under IRCA, Complainant bears the burden of proving, by a preponderance of the evidence, that he "'(1) had a reasonable, good-faith belief that an IRCA violation occurred; (2) . . . [he] intended to act on it; (3) Respondent(s) knew of Complainant's intent or act and (4) Respondent(s) lashed out in consequence of it.'" Adame v. Dunkin Donuts, 5 OCAHO 722 at 5 (1995) (stating the criteria for analysis of retaliation claims set out in Palacio v. Seaside Custom Harvesting and Zinn Packing Co., 4 OCAHO 675 at 13 (1994) (citing Zarazinski v. Anglo Fabrics Co. Inc., 4 OCAHO 661 at 17 (1994); Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991))). As in Adame, I adopt the Palacio criteria for analysis of Chu's retaliation claim.

1. Reasonable Good-Faith Belief?

Complainant testified that, on January 15, 1993, he had a telephone conversation with Pond during which he informed her that he intended to file a formal complaint with a government agency on the grounds that he was being harassed and retaliated against because of his citizenship. Tr. at 90. When questioned about her conversation with Chu, Pond did not recall Chu stating that he would file a complaint or that he was being discriminated against. However, she did discuss the Chu telephone call with two other Human Resources employees:

> Q. And who did you discuss this with?
>
> A. With Mr. Snayd and Mr. McGill.
>
> Q. And what did you discuss with Mr. Snayd?
>
> A. That I received a call and that we had had a discussion and that the situation with Mr. Chu's performance seemed to be really upsetting him and, in essence, what we talked about, the language problem, the communication problem, the request he was receiving again from Mr. Chen.

Tr. at 524.

The recollections of Chu and Pond are in sharp contrast. It is unclear whether Chu stated to Pond that he planned to file a formal discrimination complaint; there is no doubt, however, that he communicated his belief that he was being wrongly treated. Whether or not Chu articulated his claim that he was being harassed and/or discriminated against on citizenship grounds, he did raise the spectra of controversy with Chen. For purposes of analysis, considering possible communication barriers between Chu and Pond, I give Chu the benefit of the doubt that he attempted to communicate his belief that he was being treated unfairly. Accordingly, I find that Chu has satisfied the first prong of the Palacio test by communicating a belief of improper treatment.

2. Complainant's Intent to Act on Belief and

3. Did Respondent Know of Complainant's Intent to Act?

Chu's testimony that he stated his intent to Pond and Pond's testimony that he only spoke of language/communication problems and requests from Chen comprises the total evidence to support or refute Chu's assertion that before discharge he intended to file a discrimination complaint. In fact, Chu did file complaints with the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing and the Complaint at issue, after he was terminated. Cplt. Exhs. A and B. On the basis of their demeanor on the witness stand, I am unable to credit either Pond or Chu with total ability at recall. Between the two, I am inclined to conclude that Chu's communication skills are less adequate than Pond's. He appears more likely than not to assume that a matter has been effectively communicated than is actually the case. Whether or not Chu had the intent to act on his belief of discrimination at the time he spoke to Pond, prior to his discharge, I am unable to conclude that Pond and her colleagues were made aware of that intent. Chu failed to establish the second and third prongs of the Palacio test.

4. Respondent Lashed Out in Consequence?

Complainant testified at hearing that he told Pond "to give me the formal procedure for complaint regarding the harassment and retaliation. 'I want to file formally'" Tr. at 89-90. He said that Pond replied "[i]f you want to file formally, that will not be good for you." Id. at 90. He also testified that he told Pond, "I would like to file a complaint to the EEOC government agency." Id. According to her, Pond replied, "If you think you have a case, go ahead and file." Id.

Pond, however, testified that Chu never mentioned retaliation or harassment. When asked about Chu's "complaint," she testified:

> A. I don't believe he was complaining. I believe he was very agitated about the fact that he was being asked, that he was again having performance problems. That was the substance that I remember was that it had to do with the performance and the fact that Mr. Chen was, once again, going through the process with him and, as you know, had been very laborious and long in the past.
>
> There was no other issues in that, in the communication in the Chinese language which he mentioned, which I asked him to clarify for me as I recall.

Id. at 522-23.

Pond also testified to the following:

> Q. Why did you feel you had no reason to investigate anything?
>
> A. Because there was no official complaint made to me [by Chu] about anything that I could investigate. This was a performance issue. I don't investigate performance issues.

Id. at 527.

Despite Chu's assertion that he was terminated because of his intent to file a formal complaint, he has not persuaded me that his discharge was retaliatory. Having observed the witnesses and studied the exhibits, I can only conclude that there is insufficient evidence that Respondent (1) knew of his intent or, if so, (2) lashed out because of it. Chu was terminated due to a history of poor performance and lack of responsiveness to his superiors. The obsequiousness with which Chen treated Toyoshima reflects a culture alien to the traditional American workplace.[6]

It is instructive that Chen testified that his relationship with Chu became so poor that on January 18, 1993 he wrote to Toyoshima proposing his own demotion so that he would not have to supervise Chu any longer. Tr. at 404. Specifically, Chen wrote the following:

> I must take this opportunity to apologize to you for not being able to manage Robert Chu. I have tried for one year and nine months now and have failed to motivate him in his attitude toward his work and towards the company. . . .

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[6] Chen's acknowledgment of the status accorded Toyoshima is reflected in his use of the traditional Japanese term of respect, Toyoshima-san.

> A period of Performance Improvement took place from June to August of last year. Robert really did improve during a short period, however he did not maintain his improved performance or attitude.
>
> I have talked to him several times and cannot handle him anymore.
>
> The last several conversations with Robert Chu after 8/92 involved his problem in taking initiative in handling his project(s). I talked to him about the responsibilities of a Sr. Engineer, Level 26 and his attitude towards the project(s) he either showed a bad attitude or called in sick the following day (or both).
>
> * * *

Resp. Exh. 3 at 1.

It is not evident that Chen formed an intent to retaliate against Chu for intending to file a discrimination complaint. Chen did not express a desire to discharge Chu. Chen was willing to take the blame for Chu's poor performance. Chen's humility and willingness to sacrifice himself by offering to step down due to inability successfully to supervise Chu belie any participation in a pretextual discharge. I do not find it credible that Chen would have participated in such a scheme.

I conclude that employee-supervisor relationships and performance evaluations, not citizenship status or § 1324b retaliation conduct, caused Chu's discharge. I find no evidence of retaliatory intent or conduct on the part of either Chen or Fujitsu. Rather, management had every reason to discharge him.

C. Attorney's Fees

Respondent requests that I grant it attorney's fees, as authorized in favor of the prevailing party upon a finding that the "losing party's argument is without legal foundation in law and fact." 8 U.S.C. § 1324b(h). Complainant did not meet his burden of proof for either the citizenship discrimination or the retaliation allegation. The record is devoid of any semblance of citizenship status discrimination. However, in December 1994, I had refused to grant summary decision against Chu, as noted supra at 2. In that light, I cannot conclude that the Complaint so lacked factual and legal foundation at the outset so as to warrant shifting fees in favor of Respondent. Therefore, in the exercise of my discretion as explicitly authorized by § 1324b(h), I withhold fee shifting.

IV. *Ultimate Findings, Conclusions and Order*

I have considered the pleadings, testimony, evidence, briefs and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already stated, I find and conclude the following:

1. That Complainant has failed to prove by a preponderance of the evidence that Respondent discriminated against him on the basis of citizenship status or retaliation in violation of 8 U.S.C. § 1324b;

2. That Respondent has not engaged in the unfair immigration-related employment practices alleged in the Complaint;

3. The Complaint is dismissed.

Pursuant to 8 U.S.C. § 1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and shall be final unless appealed not later than 60 days in a United States court of appeals in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 30th day of June, 1995.

MARVIN H. MORSE
Administrative Law Judge