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

August 8, 2002

KENNETH WADE PARKER, JR., Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 01B00055
WILD GOOSE STORAGE, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (2000) (INA), in which Kenneth Wade Parker, Jr. (Parker) is the complainant, and Wild Goose Storage, Inc. (Wild Goose) is the respondent. Parker filed a complaint in which he alleged that Wild Goose fired him from his job as a gas storage operator because of his United States citizenship status. Wild Goose filed an answer which denied the material allegations of the complaint and contended that Parker was fired for legitimate nondiscriminatory reasons. The case was initially assigned to administrative law judge Marvin H. Morse (ret.), and was reassigned to me upon his retirement. Presently pending is the motion of Wild Goose for summary decision which is ready for decision. A hearing previously scheduled for July 9, 2002, was rescheduled until October 30, 2002, in order to permit consideration of this motion. In view of the disposition of the motion, the hearing will be canceled.

II. BACKGROUND INFORMATION

Wild Goose Storage, Inc., a subsidiary of Alberta Energy Company Ltd. (AEC), is a natural gas utility company engaged in the business of storing and delivering natural gas. It began its commercial operations in or near Gridley, California, in April of 1999 under the supervision of Wayne Mardian, the Operations Manager for the facility. Mardian's duties included responsibility for the day-to-day management of the facility as well as the recruitment, hiring, management, retention, evaluation,

discipline and promotion of nonmanagement employees, including, in consultation with others, the recommendation for termination of such employees. He hired four nonmanagement employees in 1999: Stan Lacey and Kenneth Parker were hired as gas storage operators, Pat Baynard was hired as a mechanic and Blair Hanel was hired as an instrumentation/controls technician. Parker, Lacey and Baynard are citizens of the United States, while Hanel and Mardian are citizens of Canada.

Parker started working for Wild Goose on June 2, 1999. He was discharged ten months later on April 13, 2000, based on Mardian's recommendation. Parker had previously been issued a warning letter on January 20, 2000, and a last chance agreement letter on February 8, 2000.

III. STANDARDS APPLICABLE TO THE MOTION

The familiar burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

A prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *See, e.g., Jones v. Los Angeles Cmty. Coll. Dist.*, 702 F.2d 203, 205 (9th Cir. 1983). Alternatively, in a case alleging disparate treatment the discharged employee may establish the fourth prong by a showing that others similarly situated but outside the plaintiff's protected group were treated more favorably. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002). For purposes of a prima facie case, the burden in the Ninth Circuit of showing that another person is similarly situated to the plaintiff is not onerous. *Id.* (degree of proof for prima facie case "does not even need to rise to the level of a preponderance of the evidence" (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)).

Once the employer sets forth and supports a facially valid reason for the employment decision, any presumption created by the prima facie case drops out of the picture. *Wallis*, 26 F.3d at 889. The burden then reverts to the employee to prove that the employer's stated reasons are pretextual. The complainant's evidence must be "*both specific* and *substantial*" to overcome an employer's legitimate reasons. *Aragon v. Republic Silver State Disposal, Inc.*, __F.3d__, 2002 WL 1578826, at *3 (9th Cir. July 18, 2002) (citing cases) (emphasis in the original). To prevent summary judgment, there must be sufficient evidence of pretext to permit a rational fact finder to find that the employer's explanation is

pretextual. *Wallis*, 26 F.3d at 890.

Rules applicable to OCAHO proceedings[1] provide that summary decision on all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision. 28 C.F.R. § 68.38(c). Only facts that might affect the outcome of the proceedings are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).[2] Doubts are resolved in favor of the party opposing summary decision. *Id.*

The party seeking a summary disposition bears the initial burden of demonstrating an absence of a material factual issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, when the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1077, 5 (2001). OCAHO case law is in accord that a failure of proof on any element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000), *petition for review denied*, No. 00-2052, 2001 WL 114717 (7th Cir. Feb. 9, 2001), *cert. denied*, 122 S.Ct. 89 (2001), *reh'g denied*, 122 S.Ct. 1130 (2002).

OCAHO rules also provide that evidence to support or resist a summary decision must be presented through means designed to ensure its reliability. Affidavits must set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557 and should show affirmatively that the affiant is competent to testify as to the matters stated therein. 28 C.F.R. § 68.38(b). Thus to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the claim. *Cf. Celotex*, 477 U.S. at 321-23.

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[1] 28 C.F.R. Pt. 68 (2001).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is omitted from the citation.

IV. CONTENTIONS OF THE PARTIES

Wild Goose's motion contends that Parker is unable to meet the fourth[3] element of a *McDonnell Douglas* prima facie case for two reasons, the first being that after his termination he was not replaced by a nonmember of his protected class; indeed, he was not replaced at all for seventeen months and when he was, it was by another United States citizen. Wild Goose contends further that Parker can't show that any other employee not in Parker's protected class was treated differently. Wild Goose says that in any event its evidence shows that Parker was discharged for legitimate nondiscriminatory reasons including many instances of consistently poor job performance and violations of company policy. Finally, Wild Goose contends that because Wayne Mardian is the person who hired Parker less than a year before discharging him it is entitled to a strong inference that discrimination was not the reason for Parker's termination. The Ninth Circuit, in which this case arises, has expressly held that where the same actor both hires and fires the plaintiff within a short period of time, a strong inference arises that there was no discriminatory motive. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996); *accord Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1286 (9th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001). OCAHO jurisprudence has not taken a position with respect to the same actor inference.[4]

Parker contended in response to the motion that he established a prima facie case by showing that Blair Hanel, a Canadian, violated the company vehicle policy in exactly the same way he did, but was not issued a warning letter for doing so. He also took issue with Mardian's assessment of his performance, which he described as "excellent." He characterized Wild Goose's alleged nondiscriminatory reasons as "misleading, exaggerated, taken out of context, and/or outright false," and contended that Wild Goose's reasons for firing him are a pretext for discrimination based on his United States citizenship. Mardian's real reason for firing him, according to Parker, was to protect his own job by eliminating Parker as a possible rival in the future for the position of Operations Manager.

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[3] Wild Goose's answer also denied that Parker was qualified for his job, but it conceded that for purposes of the prima facie case the burden in this Circuit to show qualification is minimal. *Cf. Aragon*, __ F.3d __, 2002 WL 1578826, at *3-4. The Circuits are divided with respect to this question. *Cf., e.g., Lim v. Trs. of Indiana Univ.*, _ F.3d _, 2002 WL 1586703 at *5 (7th Cir. July 19, 2002) (no prima facie case if plaintiff not meeting employer's expectations); *Salvadori v. Franklin School Dist.*, 293 F.3d 989, 996-97 (7th Cir. 2002) (same where plaintiff cannot show she was performing well at the time of her termination, notwithstanding earlier adequate performance).

[4] The circuits are divided on the question. See generally Anna Laurie Bryant and Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 Utah L. Rev. 255 (1999), for analysis of the arguments for and against its use and a scorecard showing the line-up of the circuits.

V. EVIDENCE CONSIDERED

For the purpose of ruling on the instant motion, I have considered the pleadings and all other materials of record as well as the materials tendered by the parties in support and opposition. The motion was accompanied by the declarations of Wayne Mardian and Richard N. Hill, together with various exhibits appended thereto. Among the exhibits to the Mardian declaration are A) the resume of Kenneth W. Parker; B) a 7-page narrative captioned "Performance Documentation"; C) an Employee Acknowledgment signed by Parker for receipt of the Wild Goose Employee Handbook together with a page containing a section captioned "Company Vehicles"; D) a letter to Parker from Wayne Mardian dated January 20, 2000, ("the warning letter"); E) a letter to Parker from Wayne Mardian dated February 8, 2000, ("the 'last chance' letter"); F) a letter to Parker from C. Dean Cockshutt dated April 13, 2000, ("the termination letter"); and G) Wild Goose's newspaper advertisement for a Gas Storage Operator and an Instrumentation Technician. Exhibit H, attached to the Declaration of Richard N. Hill, consists of excerpts from Parker's deposition taken September 21, 2001, and April 19, 2002.

Parker's evidence consisted of Exhibits A) a Vehicle Report for Ken Parker dated August 1999; B) Wild Goose's answers to Parker's Interrogatories nos. 16 and 17; C) 3 e-mail messages, the first dated February 24, 2000, at 5:04 p.m. from Dean Cockshutt to "wmaraec" (evidently Wayne Mardian) and Ron Sitter, the second dated February 25, 2000, at 6:45 a.m. from Ron Sitter to Dean Cockshutt and Wayne Mardian, and the third dated February 25, 2000, at 8:04 a.m. from Mardian to Ron Sitter; D) a partially completed unsigned Performance Appraisal form for Ken Parker dated December, 1999; E) an e-mail from Wayne Mardian to Ron Sitter dated January 17, 2000, at 2:07 p.m., with handwritten annotation; and, F) portions of Performance Development worksheets for three individuals.

VI. DISCUSSION

The salient question for purposes of this motion is whether Parker has tendered sufficient evidence to avoid a summary decision. I note at the outset that Parker's materials do not satisfy the evidentiary standards set out in 28 C.F.R. § 68.38(b). In addition to exhibits A-F, he tendered a 17-page narrative addressing Wild Goose's contentions. This narrative is unsworn, and combines facts with allegations, suppositions, and conclusions. As to many of the assertions, there is no foundation for finding that Parker had any personal knowledge as to the matters addressed and they do not set forth such facts as would be admissible in evidence. The attached exhibits are not authenticated. Strictly speaking, these materials should be disregarded because the only evidence properly considered is that which would be admissible at a hearing and neither 28 C.F.R. § 68.38(b) nor the corresponding federal rule, Fed. R. Civ. P. 56(e), authorizes a qualitative double standard for treating the papers of the moving and nonmoving party differently. I have nevertheless considered these materials in light of Parker's pro se status and have also assumed the authenticity of the exhibits, which has not been challenged. A more

lenient standard is often applied in practice to the materials of the party opposing summary disposition notwithstanding the strictures of the rules. *See, e.g., Lew v Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985).

Parker asserts that his Exhibits A and B demonstrate that Blair Hanel was more favorably treated than he was because Hanel violated the vehicle policy in precisely the same manner Parker did but was not given a warning letter. The vehicle policy is set out as page 2 of Wild Goose's Exhibit C. It provides that although company vehicles could be stored at an employee's residence, they were to be used only for company business. On an employee's day off the vehicles had to remain locked up at the employee's residence. Unless the employee was on call, the vehicle could be used only for travel to or from work. If the employee was on call, the vehicle could be used for personal errands within the employee's residential area, but not outside that area without approval.

The Mardian declaration states that on December 21, 1999, his day off, Parker drove a company car to and from Yuba City, a forty mile trip, to shop at Wal-mart and while there he had the oil changed. Mardian said he learned of this violation in January 2000, by finding Parker's company credit card receipt while reviewing his monthly employee expense reports. Mardian said there was no reason for Parker to go all the way to Yuba City when the oil could have been changed in Gridley, close to Parker's residence and to the company facility. This was the reason for the warning letter (Wild Goose's Exh. D) issued to Parker on January 20, 2000.

In response Parker initially seems to suggest that he didn't violate the policy at all because vehicle maintenance was the driver's responsibility and oil changes could be done at any reputable service center. The vehicle policy (Wild Goose's Exh. C, p. 2) so provides. While Parker did not deny that he failed to keep the vehicle locked up at his residence, he said he was never told he had to get the oil changed while on shift and the manual doesn't say that either. As to why he drove 40 miles to get the oil changed, he explained that he went to the Wal-mart in Yuba City because otherwise he would have had to waste his time simply waiting for the oil to be changed in Gridley since there are no quick lube service centers there. Yuba City was the most convenient place for him because his daughters could finish their Christmas shopping there while waiting for the oil to be changed. He also points to the fact that he was not reprimanded for using the company credit card because the oil change was clearly company related business. Parker contends that his own vehicle report for August 1999 (Parker's Exh. A) shows that Blair Hanel had gotten an oil change in the same truck at a different Wal-mart on his day off, and that Wild Goose's interrogatory answers (Parker's Exh. B) confirm that no other employee was disciplined for obtaining oil changes for company vehicles while off duty.[5]

It is not at all clear, however, even assuming its authenticity, that the vehicle report shows what Parker

[5] Parker's response asserts, however, that Stan Lacey was reprimanded for not having his vehicle sufficiently full of gas while on duty in case he had to drive out to the well site and back.

claims it does. It is Parker's own vehicle report, but he contends that the vehicle was being used by Hanel on the day in question. At least two, if not three, different unidentified handwritings appear on it on different lines. An entry on the line for August 12 shows what appears to be the purchase of 16.0 liters of gas and contains the notation "Blair." An entry on the line for August 15, in a different handwriting, shows the notations "Wall Mart" (sic) and "oil change," but does not show a name.

Notwithstanding the problems with the exhibit, Wild Goose offered a legitimate nondiscriminatory reason why it didn't discipline Hanel: the Mardian declaration says that he first learned of the contention that Hanel violated the vehicle policy during the course of Parker's deposition (Wild Goose's Exh. H, taken September 21, 2001, and April 19, 2002), and that to Mardian's knowledge Hanel never had his vehicle serviced on an off day outside of Gridley or his area of residence. Mardian stated that his subsequent review of credit card receipts submitted by Hanel did not reflect any receipts showing such vehicle service.

Even assuming for purposes of this motion that Hanel got an oil change at a Wal-mart, as Parker contends, there is no indication on the vehicle report that this was Hanel's day off or where that particular Wal-mart was. Parker asserted that the Wal-mart was in Chico, but offered no evidence to show that, or to show what the distance was between Hanel's residence and/or the company facility and the Wal-mart in Chico. There is no evidence showing whether Hanel was on call or whether Chico was within or outside of his residential area.[6] Neither is there any evidence that Wild Goose knew about the alleged violation.

Parker questions Mardian's explanation and contends that Mardian must have known about Hanel's violation because he reviewed the vehicle reports, but even if Mardian did review them, the report in question would not provide notice that it was Hanel's day off or where the particular Wal-mart was. Parker acknowledged in his deposition (Exh. H, pp. 139-140) that his own review of Hanel's credit card receipts did not support his allegation. There is no evidence as to how Parker would have personal knowledge as to who reviews the vehicle reports or at what intervals. Thus it cannot be concluded on the basis of this record that Mardian had actual knowledge of any other similar violation of the policy in January 2000 at the time Parker's warning letter was issued. Assuming again, however, for purposes of this motion, that Parker were able to shown a prima facie case as to the issuance of the warning letter, he did not produce significant probative evidence as to the pretextual nature of Mardian's explanation. More importantly he produced no evidence which would support a prima facie case as to his termination; he has not contended that any other employee had comparable performance issues.

Parker did not suggest that his termination occurred because he violated the vehicle policy, and Wild

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[6] In an unsworn 9-page statement attached to his complaint, Parker alleges that both Mardian and Hanel bought houses in Chico, but there is no probative evidence on the point.

Goose's proffered reasons included performance issues as well as policy violations. Parker has the burden of establishing a factual issue as to the pretextual nature of each of the reasons given for terminating him. *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993). The performance issues were detailed in the last chance letter issued on February 8, 2000, (Wild Goose's Exh. E), which is specifically addressed to work effectiveness and overall performance. It set out a summary of Mardian's observations of Parker's performance deficiencies, stated the expectations for improvement in the ensuing three months, and added the caution that "[s]hould your behavior show no significant improvement . . . you may be terminated at any time during this three month period." Mardian's declaration said that the same problems persisted in the two months following the last chance agreement and that Parker's performance did not improve. He said he had formally counseled Parker in July 1999, January 2000, and February 2000, and provided informal feedback on other occasions.

Exhibits attached to Mardian's declaration include a log captioned "Performance Documentation" (Exh. B), which he said he maintained in the course of his job. The log describes a series of specific performance-related incidents Mardian says showed how Parker repeatedly failed to meet the company's expectation for his position. Mardian said he had initially hired Parker because on the basis of his resume and a personal interview he concluded that Parker was ideal for the job, but that performance problems became evident shortly after Parker started work. He said the first incident occurred in June 1999 and involved a problem with a failure to identify and fix a tripping electrical breaker. There were other incidents which involved Parker's calling Mardian at home at 3:30 a.m. to report the loss of auxiliary water and his elimination of a safety shutdown by installing a pipe plug on a compressor. Still other incidents involved failure to fix a fluid leak from a water tank, failure to adjust a dehydration flame, unnecessary overtime, Parker's entering the wrong code and triggering the silent alarm, and other performance issues. The declaration reports that at least one employee said he didn't want to work with Parker because of safety concerns. Mardian said he sent a summary of his criticisms of Parker's performance to Ron Sitter, Manager of Human Resources, and issued the last chance letter.

Wild Goose also alleges that Parker violated the vehicle policy a second time when he allegedly took a company car home on April 5, 2000, the night before another vacation day, then used it the next day to drive to the Gridley facility to pick up his paycheck. Parker's Exhibit E reflects that after the first violation, Mardian decided that "From here on in Mr. Parker will be leaving his vehicle at work when he goes on days off, he'll either be given a ride home by an employee or if we are wrapped up doing other things he can call his wife for a ride home." His log for the 5th reflects that Parker knew his vehicle was off limits to him on vacation days and he took it home anyway. Parker did not deny that he took the car home and drove it back the next day, but said the purpose was to return the vehicle to the plant between shifts in order to comply with the unusually harsh treatment he was receiving concerning vehicle use. Parker said he believes that this incident had nothing to do with his termination and that his Exhibit C, the e-mails between Mardian and others, shows that the decision to terminate him had already been made by February 25. Wild Goose's Answer to Parker's Interrogatory no. 19 said Mardian recommended to Sitter about March 30, 2000, that Parker be terminated and this was

subsequently approved by Sitter, Dean Cockshutt, Vice President of Engineering and Operations and by Rick Daniel, President. The record does not reflect the dates these approvals were given. Parker's Exhibit C, the exchange of e-mails, reflects that Mardian, Sitter and Cockshutt agreed Parker should be given a period of 6-8 weeks after the February 8, 2000, letter to give him a chance. It is undisputed that Mardian told Parker on the afternoon of April 13, 2000, that his employment was terminated as of that day.

Parker challenged the credibility of Mardian's declaration and claimed that there are issues of fact with respect to each of the performance problems described. While he did not deny the occurrence of any of the specific events, he took a different view with respect to their significance and whether Mardian's expectations were appropriate. His narrative also set forth his views with respect to each of the incidents described in the declaration and in the last chance letter (Wild Goose's Exh. E). His deposition testimony (Wild Goose's Exh. H) also explained his view of what happened and why he handled each of the incidents the way he did. In Parker's view, for example, his triggering the silent alarm caused no harm to the company and was simply a human error. With respect to some of the incidents he suggested that Mardian's expectations that he be able to troubleshoot the problems were unrealistic because he, Parker, was not an electrician or a mechanic and should not be expected to do tasks related to those occupations. He characterized the incidents with the dehydration flame and pump as "overblown," and attributed his coworker's safety concerns to that employee's lack of experience in gas storage facilities.

A plaintiff's subjective evaluation of his own performance, however, does not suffice to create a factual issue. *Cf. Quaker Oats*, 232 F.3d at 1286. An employer has broad discretion in defining the expectations for employees' performance. *Yefremov v. NYC Dep't. of Transp.*, 3 OCAHO no. 562, 1559, 1584 (1993). Thus a difference of opinion between an employer and employee with respect to expectations or to the quality of the employee's job performance is not, in itself, sufficient to create a genuine issue of material fact. It is not my task, either for purposes of this motion or at a hearing, to reconcile the conflicting characterizations of these incidents and determine whose view of each incident is "objectively" more fair or accurate. Instead, my task is to assess whether Parker provided any evidence which would permit a reasonable fact finder to believe that the reasons Mardian gave for firing him are false or that the true reason was discrimination on the basis of Parker's United States citizenship status.

It is Parker's contention that neither Wild Goose's Exhibit B, the Performance Documentation, nor his own Exhibit D, his uncompleted Performance Appraisal dated December 1999, was actually generated until January 2000, after Mardian first became aware of Parker's interest in becoming an operations manager. Parker stated in a preface to his Preliminary Witness and Exhibit List that he believed Mardian's harsh evaluation of his performance was "a pretext he used to underhandedly protect his position as manager," and that Parker's United States citizenship "was likely perceived by Mr. Mardian as a threat." As evidence to support that theory, Parker pointed to his Exhibit F, Performance Development Work Sheets for himself and two other employees. In response to the question, "What

are your career goals/aspirations?" Parker was the only one of the three who responded to the question by saying "To prepare myself for possible role as an operations superviser (sic)."[7] Parker contends that once Mardian became aware of this interest he perceived Parker as a threat to his own job. He testified in his deposition (Wild Goose's Exh. H, p. 40) that:

> Mr. Mardian, if he intends to remain here indefinitely and he is working here on a Visa that is employment based, he will have to go through a process of changing that status and to do that, to get a permanent work Visa, the company will have to petition the federal government for that, for him, and one of the qualifications is that there be no U.S. workers capable or qualified even minimally to do the work for which he is trying to get a permanent Visa to remain in the U.S.

Parker explains the fact that his other United States citizen coworkers, Stan Lacey and Pat Baynard, were not only not fired but received bonuses and stock options, by saying their treatment is irrelevant because these employees did not have his experience, did not aspire to Mardian's job, and were not seen by Mardian as a threat. Parker explained the basis for his theory in the preface to his Preliminary Witness and Exhibit List: "This is a reasonable argument when viewed in the light of U.S. immigration policies and the highly questionable legality of Wayne Mardian's current immigration status."[8] The record discloses, however, no evidence of any irregularity in Mardian's immigration status, and Parker's theory that Mardian was seeking to protect his own job appears speculative and far-fetched, inasmuch as Mardian's job was not vacant and Parker was never a candidate for it. Hearings are not required because of suspicions not anchored by a showing of concrete and specific facts.

In order to create a triable issue at the pretext stage, there must be "substantial" evidence of pretext. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221-22 (9th Cir. 1998). The question here is not whether Mardian's expectations and his assessment of Parker's performance are fair or even objectively "correct." *Villiarimo*, 281 F.3d at 1063. It is whether there is any factual basis in the record from which a rational trier of fact could conclude that Mardian didn't really believe those reasons and used them as a cover up for citizenship status discrimination. The record is devoid of evidence showing any indicia of discrimination or any nexus between Parker's United States citizenship

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[7] Again, the evidentiary quality of the documents is marginal. The pages which purport to pertain to Ken Parker are undated and bear the handwritten page numbers 2 and 5. Those purporting to pertain to Blair Hanel are undated and bear the handwritten page numbers 2 and 6. Those purporting to pertain to Pat Baynard are dated December 4, 1999, and bear the handwritten page numbers 9, 16 and 19, but pages 16 and 19 show different answers to identical questions.

[8] Mardian holds an L-1A visa which expires on December 16, 2002. He intends to apply for its renewal. (Respondent's Supplemental Answers to Complainant's Interrogatories, no. 1). An intracompany transferee is generally permitted to remain in the United States for up to 7 years. 8 U.S.C. § 1184(c)(2)(D)(i) (2000).

and his termination.

Where a party fails to set forth specific facts or identify with reasonable particularity the evidence precluding summary decision, the motion must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation.

VII. SUMMARY

Quite apart from any formal deficiency in Parker's opposition papers, the record as a whole simply fails to provide any basis to deny the instant motion. Because the record could not lead a rational trier of fact to find for the nonmoving party, summary decision is the appropriate result. *United States v. IBP, Inc.*, 8 OCAHO no. 1021, 295, 303 (1999).

VIII. FINDINGS AND CONCLUSIONS

I have considered the pleadings, testimony, documentary evidence, memoranda, briefs and arguments submitted by the parties. All motions and requests not previously disposed of are denied. The hearing previously scheduled to take place on October 30, 2002, is canceled. Accordingly, and in addition to findings and conclusions already stated, I find and conclude that:

Findings

1. Wild Goose Storage, Inc. is a natural gas utility located in Gridley, California.

2. Wild Goose Storage, Inc. is a subsidiary of Alberta Energy Company Ltd. (AEC).

3. Wild Goose Storage, Inc. started construction in Gridley in April 1998 and began its commercial operations there in the business of storing and delivering natural gas in April 1999.

4. Wild Goose Storage, Inc. employed more than three employees at all times relevant to the events complained of in this proceeding.

5. Wayne Mardian, a Canadian citizen, was at all times relevant to this action the Operations Manager of Wild Goose or the Operations Manager of U.S. Gas Storage.

6. Mardian was at all relevant times responsible for the day-to-day operations of Wild Goose, including the recruitment, hiring, management, retention and promotion of nonmanagement employees,

and, in consultation with other managers, the recommendation for termination of such employees.

7. Ron Sitter was at all times relevant to this matter Wild Goose's Manager of Human Resources.

8. Four nonmanagement employees were hired by Wayne Mardian in 1999 for the Gridley facility: Stan Lacey and Kenneth Parker were gas storage operators, Pat Baynard was a mechanic and Blair Hanel was an instrumentation/controls technician.

9. Stan Lacey and Pat Baynard are and were at all relevant times citizens of the United States.

10. Kenneth W. Parker is and has been at all times relevant to this proceeding a citizen of the United States.

11. Parker was hired by Wayne Mardian and started work for Wild Goose on June 2, 1999, as a gas storage operator.

12. Blair Hanel, a Canadian citizen, began work at Wild Goose Storage, Inc. in Gridley, California as an Instrumentation Technician on August 8, 1999.

13. On January 20, 2000, a warning letter was issued to Parker alleging a violation of the company's vehicle policy.

14. On February 8, 2000, a last chance letter was issued to Parker alleging performance deficiencies.

15. Parker was discharged from his employment on April 13, 2000, at the recommendation of Wayne Mardian with the concurrence of Ron Sitter.

16. Parker's United States citizenship was not a factor in Mardian's decision to recommend his termination.

17. No evidence was presented from which it could reasonably be inferred that Parker's United States citizenship was the reason his employment was terminated.

18. There is no factual basis in the record from which a reasonable fact finder could conclude that the reasons given for Parker's termination are unworthy of credence or are a pretext for prohibited discrimination.

Conclusions

1. Wild Goose Storage, Inc. is a person or entity within the meaning of 8 U.S.C. § 1324b(a)(1).

2. Kenneth Parker is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

3. Parker is authorized by 8 U.S.C. § 1324b(d)(2) to be the complainant in this proceeding.

4. All conditions precedent to the commencement of this action have been satisfied.

5. Wild Goose made a motion for summary decision which was supported as required by 28 C.F.R. § 68.38(a) and (b).

6. Parker failed to set forth specific facts showing that there is a genuine issue of material fact remaining for a hearing as provided in 28 C.F.R. § 68.38(b).

7. There are no genuine issues of material fact and Wild Goose is entitled to a summary decision pursuant to 28 C.F.R. § 68.38(c).

To the extent any statement of material fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of material fact, the same is so denominated as if set forth herein as such.

ORDER

For the reasons more fully set forth herein, the complaint should be, and it hereby is, dismissed.

SO ORDERED.

Dated and entered this 8th day of August, 2002.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C.

§ 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.