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

February 4, 2003

DOLORES GARCIA CONTRERAS, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00008
CASCADE FRUIT COMPANY, Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b, in which Dolores Garcia Contreras (Contreras) is the complainant and Cascade Fruit Company (Cascade or the company) is the respondent. Contreras filed a complaint alleging that she was fired from her job as a seasonal fruit sorter at Cascade because of her national origin and citizenship status, and that the company refused to accept valid documents she presented to show that she could work in the United States. Cascade filed an answer in which it denied Contreras' material allegations and said that she was fired because the company found out that she had presented a falsified work authorization document to get the job in the first place.

Discovery was undertaken, after which the parties submitted a list of stipulated facts[1] together with five exhibits. Cascade filed a Motion for Summary Decision with affidavits, and Contreras filed a Cross Motion in Support of Partial Summary Decision with exhibits. Each party responded to the other's filing and both motions thus are ripe for adjudication.

II. EVIDENCE CONSIDERED

Accompanying the parties' Stipulated Facts were five exhibits: 1) an I-9 Form dated May 20, 1996; 2) a resident alien card bearing the number A 90 634 967; 3) Articles V, VI and XVIII of a Labor Agreement between Cascade and Teamsters Local 670; 4) a passport page bearing a temporary residence stamp and the number A 75 880 306; and 5) Articles V, VI, XIII and XIV, and Schedule A of a Labor Agreement between Oregon Cherry Growers, Inc. and Teamsters Local 670.

Additional materials considered include the pleadings, the affidavits of Susan Kment and Delia Magana accompanying Cascade's Motion for Summary Decision, and five exhibits accompanying Contreras' Cross Motion for Partial Summary Decision. Because these latter exhibits were also numbered 1-5, I have identified them as CX 1-5 in order to distinguish them from Exhibits 1-5 accompanying the Stipulated Facts. Contreras' exhibits accordingly include CX1) portions of the depositions of Aracely Romero and Randy Scruggs; CX2) an Arbitrator's Decision dated September 20, 1993 and captioned In Re Albertson's and United Food and Commercial Workers Local 324; CX3) a Memorandum and Order dated May 23, 1996, in the case of The Great Atlantic and Pacific Tea Company v. Local Union No. 338; CX4) an Arbitrator's Opinion and Award dated October 25, 2000, in a case between the Office & Distribution Employees' Union Local 99, UNITE, and Donna Karan; and CX5) an Arbitrator's Award and Opinion dated April 4, 2002, in a case between AmeriPride Linen and Apparel Services and Local 66L, Union of Needletrades, Industrial and Textile Employees (UNITE), AFL-CIO, FMCS Case No. 021120-01435-3.

III. THE STIPULATIONS

The following facts have been stipulated for purposes of the pending motions:

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[1] The facts stipulated to in paragraph 28 are subject to a confidentiality provision which the parties had previously agreed upon. I have reviewed that paragraph and conclude that the names of eight employees identified as having been subjected to disciplinary proceedings for the same or similar offenses as the complainant are not essential for making the necessary comparison of their conduct to hers. Accordingly, I have amended paragraph 28 to identify those individuals as Employee 1, Employee 2, etc. rather than by their actual names.

1. Complainant Dolores Garcia Contreras (?Complainant") is a citizen of Mexico. She became a U.S. permanent resident on September 26, 2000.

2. Respondent Cascade Fruit Company (the ?Company") operates a cherry processing plant in The Dalles, Oregon.

3. The Company is a wholly-owned subsidiary of Oregon Cherry Growers, Inc. (?OCG"), a food-processing cooperative of cherry farmers. OCG and the Company operate plants in The Dalles that are 2.3 miles from each other. The Company and OCG share the following management personnel at their plants: Randy Scruggs, head of personnel; Sue Kment, personnel supervisor; Steve O'Harra, director of human resources; Lori Waters, quality assurance manager; Pete Varberg, plant manager; Linda Erickson, office manager; and Aracely Romero, assistant personnel supervisor. Both companies share the same chief executive officer and vice president. OCG processes only fruit grown by members of the cooperative, and the Company receives and processes fruit that is grown outside the cooperative. The personnel manuals for OCG and the Company are currently the same and are in English and Spanish.

4. Unionized hourly employees at the Company's facility and at OCG are represented by Teamsters Local no. 670 (the ?Union").

5. A copy of Articles V (Seniority), VI (Wages and Wage Practices), and XVIII (Adjustment of Grievances) of the collective bargaining agreement in effect between the Union and the Company at the time of Complainant's discharge (CFC Labor Agreement) is attached as Exhibit 3. A copy of Articles V (Seniority), VI (Wages - Wage Practices), XIII (Adjustment of Grievances), and XIV (Conformance with Federal and State Law), and Schedule A of the collective bargaining agreement in effect between OCG and Teamsters Local 670 at the time that OCG hired Complainant (?OCG Labor Agreement") is enclosed as Exhibit 5.

6. No one who was discharged from the Company was ever rehired at the Company or OCG with any seniority.

7. Complainant was employed seasonally by Stadelman Fruit Co. as a sorter beginning in September 1987. In June 1990, the Company purchased Stadelman Fruit Co., and Complainant was hired as a seasonal employee of the Company.

8. Complainant signed an I-9 form dated May 11, 1994, in which she represented that she was an alien authorized to work until May 24, 1996. A copy of that I-9 form is attached as Exhibit 1. (This fact is deemed admitted by Complainant only for purposes of this proceeding.)

9. On or about May 11, 1994, Complainant produced an employment authorization card, no. A 090 634 967, with an expiration date of May 24, 1996. (The preceding sentence is deemed admitted by Complainant only for purposes of this proceeding.) The Company accepted that card and certified the I-9 form based on it. Exhibit 1.

10. On May 20, 1996, Complainant presented to the Company what appeared to be a resident alien card no. A 90 634 967, which had an expiration date of December 10, 2002. (The preceding sentence is deemed admitted by Complainant only for purposes of this proceeding.) The Company accepted that card and recertified Complainant's I-9 form on the basis of that card. Exhibit 1.

11. A photocopy of the card referred to in paragraph 10 is attached as Exhibit 2. The card referred to in paragraphs 10 and 11 is not genuine and was not issued by the Immigration and Naturalization Service.

12. On or about December 15, 2000, Complainant brought a passport with a temporary permanent residence stamp and a resident alien card, number 075 880 306, to Delia Magana, an employee in the Company's personnel office. A copy of the identification page of the passport and temporary permanent resident stamp is attached as Exhibit 4. Ms. Magana noted that the resident alien card number A075 880 306 differed from the resident alien card number A90 634 967, a copy of which was in the Company's files (Exhibit 2).

13. When the Company's personnel manager, Randy Scruggs, returned from vacation in early January 2001, he was informed by Ms. Romero and Ms. Magana of the situation with Complainant's work authorization documents. He learned from Ms. Magana that she had inspected the documents offered by Complainant, noted that they had different A numbers, and concluded that there were problems with them. Ms. Magana therefore refused to sign the certification part of a new I-9 form for Complainant.

14. Mr. Scruggs then telephoned the INS Portland District Office and was told with regard to file number A90 634 967, that the application had been denied and an alien registration card had never been issued for Complainant with an expiration date of December 10, 2002. INS told Mr. Scruggs that A number 075 880 306 was valid and that Complainant was authorized to work at that time.

15. Mr. Scruggs then made the decision to discharge Complainant for dishonesty and falsification of Company records. This decision was based on his conclusion that Complainant had submitted false work authorization documents.

16. Complainant's work performance at the Company was considered good.

17. The Union did not file a grievance over Complainant's discharge. The Union has not grieved the Company's termination of any other employee for dishonesty or falsification, whether or not the employee was authorized to work at the time of discharge.

18. As of December 8, 2000, the last day Complainant worked at the Company before a seasonal plant closure, she ranked 32 on the relevant seniority list and was paid at a contract rate of $9.29 per hour.

19. After Complainant learned in January 2001 that she had been discharged from the Company, she immediately applied for work at OCG. OCG hired Complainant as a sorter effective January 22, 2001. She began with no seniority at OCG and was paid according to the contract pay scale for new workers. Complainant is currently on the OCG seniority list.

20. Complainant completed section 1 of her I-9 form for OCG on January 22, 2001, and presented a passport with a temporary permanent residence stamp it [sic]. This documentation was accepted by OCG, which certified her I-9 form on January 22, 2001.

21. On February 14, 2001, Complainant presented permanent resident alien card no. A 075 880 306, expiration date January 30, 2011, and OCG recertified her I-9 on the basis of that document.

22. The Company was shut down for about two months in December 2000 and January 2001. At the time that Complainant applied to OCG, the Company was not hiring sorters.

23. Since her discharge, Complainant has not applied for employment with the Company. If she applied at the Company, she could be rehired there based on her past work performance, but she would be paid according to the contract wage scale for new workers and would not have seniority for the first 30 days.

24. The Company and OCG have separate labor contracts with the Union and separate seniority lists. The Union representative, Tony Gordiano, is the same for the Company and OCG. An employee cannot transfer seniority from the Company to OCG and vice versa.

25. The Company has discharged other employees for falsification of documents. In some cases, these documents have been items like a medical slip or time card. In other cases, employees were discharged when the Company learned that they had presented false work authorization documents or social security cards. As far as Company employees recall, other than one Samoan man, Company employees who have been discharged for dishonesty or falsification related to the submission of invalid work authorization documents have been people of Hispanic origin.

26. If an employee who is discharged for dishonesty or falsification reapplies for employment, the Company makes a case-by-case determination whether to rehire that person, depending on whether his/her previous work performance was satisfactory. Employees who are discharged and rehired are paid at the contract rate for beginning workers and have no seniority for the first 30 days. As far as Company employees recall, Company employees who were discharged for dishonesty or falsification in connection with work authorization documents are subject to rehire if (a) they reapply for employment, (b) the Company is hiring for positions for which they are qualified, (c) they have current, valid work authorization, and (d) their former work performance was satisfactory. Newly hired employees in bargaining unit positions are paid at the labor contract's rate for new hires and are subject to contract's terms concerning seniority.

27. SUBJECT TO PROTECTIVE ORDER. An OCG employee named [Employee 1], who is Hispanic, was terminated for falsification when she brought in a new work authorization document that did not match her previous one. She had worked for OCG for about five years. She subsequently applied for employment again with OCG and was rehired. She did not have seniority and was at the beginning of the wage scale when she was rehired.

At least two employees who were discharged for falsification were not rehired because their work performance was not up to par. These employees were [Employee 2], who falsified time cards, and [Employee 3], who falsified medical notes.

[Employee 4] who is Hispanic, was terminated for falsification related to work authorization documents. She had little or no seniority when she was discharged. She applied and was rehired at the contract starting pay level.

[Employee 5]'s name (Hispanic) came up on a Social Security no match letter. When told to contract [sic] Social Security about it, she admitted to OCG that the social security number, name, and other identification she had used to apply for employment were false. [Employee 5] was discharged for falsification. She reapplied and was rehired the same week as a new employee. [Employee 5] said that she was legally authorized to work at the time she was discharged. Upon rehire, [Employee 5] submitted new work authorization documents, and OCG accepted them.

[Employee 6] (Hispanic) brought in a new resident alien card with different A number when her old resident alien card expired. She told the Company she had been reinstated through her husband and that she had lied on her first work certification. [Employee 6], who was on the seniority list at the time, was discharged. She reapplied and was rehired, beginning as a new hire.

[Employee 7] (Hispanic) was discharged when OCG learned that she was not work authorized. She could not bring in good documents and was never rehired.

[Employee 8] (Hispanic) brought in a new work authorization card and told OCG that she lied on her previous work authorization form. She had seniority at OCG at the time and was discharged. She reapplied as was rehired at OCG as a new hire under the collective bargaining agreement.

28. No Company employee has been disciplined but not discharged for dishonesty or falsification of Company documents.

29. The Company's seniority list dated February 11, 2000, shows that approximately half the hourly workers had Hispanic surnames.

30. The Company is not aware of having any employees who are not legally authorized to work.

31. The Company has never allowed any employee to continue working once it learned that he/she was not authorized to work.

32. When a Company employee is discharged, is laid off, or quits voluntarily, the next person on the seniority list in the same employment category moves up and has the same priority as the former employee for recall from layoff status.

33. When the Company resumed operations after Complainant's discharge, the next sorter with the same level of seniority as Complainant was called back to work.

IV. ADDITIONAL INFORMATION FROM THE EXHIBITS

Attached to the stipulations is an I-9 Form (Exhibit 1) reflecting that on May 11, 1994, Contreras attested under penalty of perjury that she was an alien authorized to work in the United States until May 24, 1996, and that she presented Cascade with an employment authorization document bearing the number A 90634967 and an expiration date of May 24, 1996. The reverification section of the form indicates that on May 20, 1996 she presented a permanent resident alien card (Exhibit 2) with the number A 90634967 and an expiration date of December 10, 2002.

The Cascade collective bargaining agreement (Exhibit 3) contains various provisions, including Article V, Section 6(a) which says that employees may be terminated only for good cause, and that grounds for immediate dismissal include, but are not limited to, insubordination, drinking or drug use on the premises, dishonesty, abuse of sick leave, intentional destruction of property, fighting, threats or intimidation, theft, or falsification of company records. Section 6(b) provides that where a complaint against an employee does not warrant discharge, a written warning notice of the complaint shall be issued to the employee.

Article V, Section 1(g) provides that seniority is forfeited under a variety of circumstances, including voluntary quit, discharge, retirement, unavailability for work after layoff, failure to call in promptly when ill (with exceptions), failure to comply with the terms of a leave of absence, and layoff exceeding 12 months. Exhibit 4 is a passport page together with a stamp dated October 18, 2000, bearing the number A75880306 indicating it was temporary evidence of lawful admission for permanent residence and was valid until October 17, 2001.

Exhibit 5, the OCG collective bargaining agreement, provides at Article V, Section 1(b) that seniority shall be established after 30 days of work in the processing season. Schedule A sets out inter alia the pay rates for new employees.

The affidavit of Susan Kment asserts that Cascade and its parent, Oregon Cherry Growers, each has more than 15 employees in each working day during 20 or more weeks of each calendar year. The affidavit of Delia Magana states that Contreras came to the personnel office in December, 2000, with a resident alien card number 90 634 967, a new work visa in her Mexican passport, and her other resident alien card.[2] Magana said the 90 634 967 card did not have a scanned picture, and the print and lamination did not look valid, so she copied all the documents to show to her supervisor and the personnel manager.

CX1 contains deposition testimony by Aracely Romero, assistant personnel supervisor, and Randy Scruggs, the head of personnel. Romero said that no one submitting false documents received a lesser penalty than termination. Romero also testified about another employee, evidently not included in Stipulation 28, who was in jail and kept lying about her reasons for requesting time off. Romero said that Employee 3, who falsified a doctor's note, didn't apply for rehire but wouldn't have been rehired if he had applied. He indicated that it was up to Randy Scruggs to decide who could be rehired. Scruggs said Contreras was a good worker, but Employees 2 and 3 were not rehired because their work standards were not up to par.

V. STANDARDS APPLICABLE TO THE MOTIONS

A. Standards for Summary Decision

[2] Contreras denies presenting her old card in 2000, but did not file an affidavit to that effect.

OCAHO rules[3] 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 a 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).

B. Relative Burdens of Production and Proof

The party seeking a summary disposition bears the initial burden of demonstrating the 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).[4] 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,* 534 U.S. 836 (2001) (*Hammoudah II*). Because the inquiry necessarily implicates the standard of proof that would apply at a hearing or trial, the evidence on summary judgment must be viewed "through the prism of the substantive evidentiary burden" in the particular case. *Anderson*, 477 U.S. at 254.

The nondiscrimination provision in § 1324b was modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (2001). *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990). Unlike Title VII, however, § 1324b(a)(1) is addressed only to cases brought under the disparate treatment theory, not to disparate impact cases. *Wije v. Barton Springs*, 5 OCAHO no. 785, 499, 520 (1995). Accordingly a complainant in a § 1324b(a)(1) case must bring sufficient evidence to show that the discrimination alleged was knowing and intentional. *Yefremov v.*

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[3] 28 C.F.R. Part 68 (2001)

[4] 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.

NYC Dep't of Transp., 3 OCAHO no. 562, 1556, 1579-80 (1993), *United States v. General Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1163 (1993). While OCAHO jurisprudence looks to Title VII cases for guidance, only disparate treatment cases can be viewed as persuasive.

As in any civil action, a plaintiff may prove an employment discrimination case by direct or circumstantial evidence. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Direct evidence is evidence which proves the fact at issue without the aid of any inference or presumption. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662-63 (9th Cir. 2002) (citing cases and examples). To satisfy this standard the evidence must on its face demonstrate the discriminatory intent. *Id.* An admission by the employer may satisfy this standard as well. *United States v. San Diego Semiconductors, Inc.*, 2 OCAHO no. 314, 104, 119 (1991) (employer admitted considering complainant's citizenship status). If the evidence is ambiguous, or susceptible to varying interpretations, it cannot be treated as direct evidence. *Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO no. 550, 1454, 1470-74 (1993). When plaintiffs are able to present sufficiently direct evidence of discrimination, they may qualify for a more advantageous standard of proof which requires the defendant to show that the same decision would have been made even in the absence of discrimination, *United States v. Mesa Airlines*, 1 OCAHO no. 74, 462, 499-504 (1989), *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or to establish some other affirmative defense. *Tovar v. United States Postal Service*, 1 OCAHO no. 269, 1720, 1726-29 (1990).

However, because "direct evidence of discriminatory intent exists mostly in plaintiffs' dreams," *Hammoudah II*, 8 OCAHO no. 1050 at 771, quoting *Santos v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 641 F. Supp. 353, 358 (N.D. Ill. 1986), the customary mode of proof of discrimination is by circumstantial evidence. The familiar burden shifting analysis in a circumstantial case is that initially established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently elaborated by 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).

What this means in the summary decision context is that a complainant in a case based on circumstantial evidence must establish a genuine issue of material fact as to whether the employer's proffered reason is false and whether the protected characteristic was the real reason for the decision.

The complainant in such a case therefore will not ordinarily survive a respondent's motion for summary decision simply by showing that the employment decision was harsh or severe; the question is whether the employer discriminated against the employee, not whether the employer made the most generous decision possible. *Cf. Anderson v. Newark Pub. Sch.*, 8 OCAHO no. 1024, 361, 364 (1999). The complainant's evidence must be "both *specific and substantial*" to overcome an employer's legitimate reasons. *Aragon*, 292 F.3d at 659 (citing cases) (emphasis in the original). In contrast, where a plaintiff offers direct evidence of discriminatory motive, the amount of proof needed to move past summary decision is "very little." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998).

A prima facie discharge case under the traditional formulation ordinarily 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., Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996), *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 similarly situated persons outside the plaintiff's protected group were treated more favorably. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002); *Nidds*, 113 F.3d at 917. 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.* A prima facie case is also made by showing a causal connection between the adverse employment action and the protected characteristic. *Snead v. Metropolitan Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001).

VI. CASCADE'S MOTION FOR SUMMARY DECISION

Cascade urges first that the claims of national origin discrimination must be dismissed for lack of jurisdiction. It says further that employees who present false documents but subsequently obtain legal documents are not thereby insulated from the consequences of their prior acts. It says the evidence shows Contreras was not discharged based on her citizenship status but based on the fact that she had initially presented a falsified alien registration card to secure her employment, and case law says an employer may lawfully discharge an employee for submitting false work authorization documents, citing *Aguirre v. KDI Am. Prods., Inc.*, 6 OCAHO no. 882, 632, 637-38, 651 (1996) and *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). The company says there is no evidence that it refused to accept Contreras' new and valid documents because Contreras never reapplied to Cascade after she was fired and because OCG hired her and accepted her new documents.

It says that there was no discrimination involved in OCG's hiring Contreras without any seniority[5] because the collective bargaining agreement is uniformly applied and there is no evidence that any similarly situated person was ever treated more favorably. Finally, Cascade says that § 1324b does not displace existing labor contracts.

Contreras' response to Cascade's motion foregoes further argument with respect to the claims of national origin discrimination. She alleges that application of the collective bargaining agreement establishes a pattern and practice of discharging workers because of their citizenship status, but denies having made any allegation that Cascade refused to accept her new valid documents. She says that discharging employees, then rehiring them at beginner pay rates without any seniority results in disparate treatment of Hispanic employees and that an employee's presentation of valid work documents should be protected, citing *Mata v. Bear Creek Prod. Co.*, 1 OCAHO no. 220, 1481, 1481-82 (1990); *erratum issued*, 1 OCAHO no. 241, 1563, 1564 (1990); and *LULAC v. Pasadena Indep. Sch. Dist.*, 662 F. Supp. 443, 444 (S.D. Tex. 1987). Contreras contends further that Cascade's "reliance on the dishonesty and falsification policy to terminate employees based on their citizenship is merely a pretext for an underlying discriminatory motive," and that the policy is not uniformly applied. She argues that Cascade could have imposed lesser sanctions, and that public policy favors giving employees the opportunity to update their documents without fear of discharge.

VII. CONTRERAS' MOTION FOR PARTIAL SUMMARY DECISION

Contreras' motion seeks summary decision on the issue of liability only. She contends that Cascade does not apply its dishonesty and falsification policy equally, and that the collective bargaining agreement permits the lesser penalty of a warning or suspension for violations such as hers. She says that Cascade's policy creates an arbitrary and self-serving distinction between different types of dishonesty or falsification because the only employees who are actually rehired after such a discharge are those who presented false work authorization documents. Employees who falsified medical slips or time cards were given no further opportunity for employment.

Contreras also contends that the company's practice of discharging employees for dishonesty or falsification due to the previous submission of invalid work authorization documents "amounts to" citizenship discrimination because, except for one Samoan, the only people discharged for submission of invalid work authorizations were Hispanic, as is half of Cascade's workforce. She concludes that the policy as applied had a disparate effect on Hispanics. She says the fact that she was immediately rehired by OCG demonstrates that the presentation of false documents was not really regarded as a

[5] No charge was filed against OCG, and it was not named in the complaint. Cascade is thus the only respondent in this case.

serious offense and was simply a device used to reduce her rate of pay. Contreras contends that she was discharged "for her previous lack of citizenship status" and that "but for" her previous citizenship status she would be receiving higher wages. Contreras says that there is direct evidence showing the application of Cascade's policy to be discriminatory on its face, and accordingly *McDonnell Douglas* does not apply to her case. She suggests that the "mixed-motive" test of *Price Waterhouse* is applicable instead. Nevertheless, Contreras contends that she also satisfies the requirement of a prima facie case under the *McDonnell Douglas* standard and that Cascade's policy is a pretext to conceal the underlying discriminatory motivation.

Contreras cites *LULAC* for the proposition that Congress intended workers who obtain legitimate documents to be able to present those documents to their employers without fear of retaliation. 662 F. Supp. at 444-45. She cites *Mata* as authority that OCAHO has recognized similar facts as constituting citizenship status discrimination, and cites various arbitration cases (CX2-CX5) to support the view that public policy favors the legitimation of employees. Finally, Contreras says that Cascade's policy results in disparate treatment of employees of Mexican national origin, and that its practice of discharging employees pursuant to the policy constitutes discrimination based on national origin and citizenship status. She asks that the policy be held unenforceable. In response, Cascade points out that Contreras' complaint does not allege a pattern and practice claim,[6] so Contreras' own individual claim is the only issue, notwithstanding her assertions as to Hispanics generally. It says further that it is entitled to summary decision because this forum has no jurisdiction over her claim of national origin discrimination, her allegations of discriminatory terms and conditions of employment, or any assertions predicated on a theory of disparate impact.

As to her individual claim of citizenship status discrimination, Cascade suggests that no prima facie case is shown because there is no evidence whatever that it ever treated any employee more favorably than Contreras or imposed a lesser penalty than discharge for any employee's violation of the dishonesty or falsification policy. Cascade argues further that using a falsified alien registration card is a civil violation under 8 U.S.C. § 1324c(a)(2) as well as a criminal offense under 18 U.S.C. § 1546(b), and that § 1324b does not insulate an employee from the consequences of her prior unlawful conduct, citing *Aguirre* and *Hoffman*.

VIII. DISCUSSION AND ANALYSIS

The record reflects that Contreras filed a timely charge with the Office of Special Counsel for

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[6] According to the record her OSC charge did not include pattern and practice allegations either.

Immigration-Related Unfair Employment Practices (OSC) and was issued a letter authorizing her to file her complaint. She did so in a timely manner. Because Contreras is the party bearing the burden of proof in this action, her cross motion will be considered first. In considering her motion, all facts will be viewed in the light most favorable to Cascade as the nonmoving party, and all reasonable inferences therefrom will be drawn in its favor. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

A. Whether Contreras is Entitled to Partial Summary Decision

1. Claims of National Origin Discrimination

As an initial matter, I note that Contreras implicitly conceded in response to Cascade's motion that this is the wrong forum for her allegations of national origin discrimination. She acknowledged this by stating that she would not press further with respect to those claims. Because 8 U.S.C. § 1324b(a)(2)(B) excludes complaints of discrimination based on national origin against employers whose acts are covered under Title VII, and the affidavit of Susan Kment establishes that Cascade is such an employer, the national origin allegations may not be entertained in this forum. Cases are legion for the proposition that once it is shown that the employer is covered by Title VII, allegations of national origin discrimination must be dismissed. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1015, 254, 256-59 (1998) (*Hammoudah I*). Attached to Contreras' OSC charge, moreover, is a statement indicating that in May of 2001 she filed a charge with the Seattle District Office of the EEOC based on the same facts. The so-called "no overlap" provision, 8 U.S.C. § 1324b(b)(2), prohibits both agencies from acting on the same allegations of national origin discrimination. EEOC is the appropriate forum for Contreras' allegations of national origin discrimination.

2. Claims of Document Abuse

Contreras appears as well to have conceded the issue of document abuse. This issue is not raised in her motion or argued in her memorandum, and her response to Cascade's motion denied that she had even made any such allegations. She stipulated that she never reapplied to Cascade (Stipulation 24). Allegations of document abuse nevertheless appear on page 7 of Contreras' complaint, where she says that Cascade rejected her "valid work authorization, lawful permanent resident card and social security number." No issue having been presented with respect to this pleading paragraph, I conclude that Contreras has abandoned it. Accordingly citizenship status discrimination is the only basis on which Contreras' motion will be considered.

3. Claims of Citizenship Status Discrimination

The stipulations show that Contreras is and has been since September 26, 2000, a protected individual within the meaning of § 1324b(a)(3)(B), that she was a good employee and therefore was qualified for her job as a seasonal fruit sorter, and that she suffered an adverse employment action when Cascade fired her. The parties are in dispute as to whether she has made a prima facie case and what more she would need to show in order to do so.

Contreras contends that because there is direct evidence of discrimination the burden-shifting scheme of *McDonnell Douglas* does not apply, citing *San Diego Semiconductors*, 2 OCAHO at 111. To constitute direct evidence, however, there must ordinarily be either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered. *Kamal-Griffin*, 3 OCAHO at 1470-71. Unlike Cascade, the company in *San Diego Semiconductors* admitted explicitly that it considered the complainant's Iranian citizenship and that it played a role in his termination because it precluded him from working on certain Air Force contracts. 2 OCAHO at 118-19. As explained in *Godwin,* 150 F.3d at 1221, direct evidence proves the fact in issue without the benefit of any inference or presumption, citing *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991) (employer's belief that female candidates get "nervous" and are "easily upset"); *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1149 (9th Cir. 1997) (employer referred to employee as a "dumb Mexican"); and *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1991) (reference to plaintiff as an "old warhorse" and her students as "little old ladies"). *Cf. Chuang v. University of Cal. Davis,* 225 F.3d 1115, 1121 (9th Cir. 2000) (comment by member of Executive Committee that "two Chinks" in the pharmacology department were "more than enough" and Department Chairman's statement to plaintiffs that they should "pray to [their] Buddha for help"). Contreras has presented no such evidence and I find nothing on the face of the Cascade collective bargaining agreement which demonstrates a facially discriminatory policy.[7]

Contreras' contention that "[t]here is direct evidence showing the application of Cascade's policy to be discriminatory on its face" conflates two different standards. A policy might be discriminatory on its face, in which case the policy would constitute direct evidence, *e.g., United States v. Southwest Marine Corp.*, 3 OCAHO no. 429, 336, 351 (1989) ("[N]o noncitizen employee will be allowed to

[7] While a divided Ninth Circuit recently held that direct evidence is no longer required in a "mixed motive" discrimination case, *Costa v. Desert Palace Inc.*, 299 F.3d 838 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3339 (January 10, 2003), the holding is of no help to Contreras because the rationale in *Costa* is premised upon the legislative history of the 1991 amendments to Title VII, which the court said "evinces a clear intent to overrule *Price Waterhouse*." 299 F.3d at 850. There has been no corresponding amendment to § 1324b.

work aboard naval vessels."). A policy might, on the other hand, be fair on its face but in practice fall more harshly on one group than another. *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002); *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1423 (9th Cir. 1990). The latter formulation exemplifies the classic disparate impact scenario in which intent to discriminate is irrelevant because the focus is on the consequences of the practice in issue, not the intent. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Disparate impact may be wholly unintentional; it results from the use of a facially neutral practice which falls more harshly on a protected group and cannot be justified by business necessity. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). The theory is not cognizable in OCAHO jurisprudence. *Hammoudah II*, 8 OCAHO no. 1050 at 765, citing *Mesa Airlines*, 1 OCAHO at 467. Contreras must accordingly prove her case in conformity with the disparate treatment model, which requires a showing of intentional discrimination.

It is not clear that Contreras can make a showing of disparate treatment in the face of the facts to which she stipulated: that no employee who violated the dishonesty and falsification policy ever received lesser discipline than discharge (Stipulation 29), and that no discharged employee was ever rehired with seniority (Stipulation 6). Employees 1, 6, and 8 each had varying amounts of seniority when discharged; all were rehired as new employees (Stipulation 28). Each of those individuals was work authorized at the time of discharge (Id.). They were similarly situated to Contreras and were treated precisely the same way. There is thus no evidence that a similarly situated nonmember of her protected group was treated more favorably than she was, as in *Villiarmo*. Neither is there evidence that Contreras was replaced by someone outside her protected class as in *Nidds*. Contreras says that she meets the standard in *Ortega v. Vermont Bread*, 3 OCAHO no. 475, 786, 793-94 (1992) because when Cascade resumed operation after the layoff, the next sorter after her on the seniority list was called back to work. There is, however, no indication whether that person was or was not a member of Contreras' protected group. Contreras contends as well that she meets the fourth element of a prima facie case under *Bethishou v. Ohmite Mfg. Co.*, 1 OCAHO no. 77, 534, 538-39 (1989), and *San Diego Semiconductors* by showing disparate treatment from which a causal connection may be inferred between her protected status and her discharge. She points to the facts in Stipulation 28 and contends that disparate treatment is shown because there are two classes of discharged employees, one group of which was considered eligible for rehire and one group which was not. Contreras contends that Cascade made a distinction between two types of dishonesty or falsification, and that the distinction resulted in disparate treatment of terminated employees. But that same stipulation (28), in which she joined, says that the reason Employees 2 and 3 were not rehired was because their work performance was not up to par, not because of their "type" of dishonesty or their unspecified citizenship status. She also agreed in Stipulation 24 that the reason she was eligible for rehire was because of her good past work performance, not because of her "type" of dishonesty. She agreed as well to Stipulation 27, which says,

> If an employee who is discharged for dishonesty or falsification reapplies for employment, the Company makes a case-by-case determination whether to rehire that person, depending on whether his/her previous work performance was satisfactory.

Contreras seems to be trying to contradict the stipulations by contending that the company based its decisions about whether to rehire discharged employees on something other than their work performance, and that therefore she has demonstrated "an arbitrary and self-serving distinction" between two types of discharge. But she is bound by the stipulations she agreed to. There is nothing inherently suspicious about an employer's classifying employees on the basis of their work performance. Neither can I find that Contreras has established a nexus between her citizenship status and her discharge by a showing that she was more favorably treated than two discharged employees of undetermined citizenship status.[8] The statute prohibits an employer from making distinctions between employees based on their citizenship or national origin. Nowhere does it say that an employer is precluded from making performance-based distinctions between employees, or for that matter, even "arbitrary and self-serving" distinctions, provided those distinctions are not made on a prohibited basis.

Contreras also contends that there is a causal connection between her citizenship status and her discharge because Cascade's practice "amounts to" citizenship discrimination. This is a conclusion, not a fact. It appears to rest on an unarticulated assumption that there is a correlation between the presentation of a falsified document for purposes of completing the I-9 employment eligibility verification process and the citizenship status of the person presenting the false document. The correlation is not self-evident, and the steps in reaching the conclusion are not spelled out. Evidently the intermediate assumptions are 1) that unauthorized workers are more likely than authorized workers to present false documents, and 2) that unauthorized workers are more likely to be noncitizens of the United States than are authorized workers, and, therefore, presentation of a false document can be treated as some kind of proxy for the lack of United States citizenship status.

The clearer correlation, however, would be that presentation of a false document correlates with lack of employment eligibility, not with any particular citizenship status as such. Contreras says that "[i]n reality, the only reason that [she] was discharged was for her previous lack of citizenship status" and "but for her previous citizenship status" she would still be employed at her old rate of seniority and pay. But her "previous" Mexican citizenship status, or her "previous" lack of United States citizenship is

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[8] Of the two employees not considered eligible for rehire, Employee 3 has a Spanish surname and Employee 2 does not. The record does not disclose the citizenship status of either. Romero said Employee 3 did not apply for rehire. (CX1 p.4). The record is silent as to whether Employee 2 ever reapplied.

unchanged today from what it has been all along (Stipulation 1). What is different is not Contreras' citizenship status or lack of it, but her employment eligibility status: she was previously an undocumented alien not authorized for employment, and now she is a lawful permanent resident authorized to be employed. This is the only change from her "previous" status. Citizenship status and employment eligibility are two distinct characteristics; they are not interchangeable, as Contreras appears to suggest. While an employer is prohibited from considering the former in making employment decisions, it is required by law to consider the latter. Contreras was fired for lying about her employment eligibility, not for her Mexican citizenship or her lack of United States citizenship.

Even assuming for purposes of this motion that Contreras were able to show a correlation between presentation of false documents and citizenship status, this does not mean that in performing a legal analysis the proxy characteristic can simply be substituted for the statutorily protected characteristic; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608-09 (1993), tells us precisely the contrary. *Hazen Paper* held that prohibited disparate treatment must be based on the actual protected characteristic, not on some other analytically distinct factor, even though the other factor may be empirically correlated with the protected characteristic. Thus in *Hazen Paper* the court said that, notwithstanding an empirical correlation between a person's age and such arguably related characteristics as seniority and pension status, the ADEA did not prohibit employment decisions based on those latter characteristics, but only decisions based on the protected characteristic itself. The plaintiff in *Hazen Paper* would thus have had to show that age, and not just seniority or pension eligibility, was the actual reason for the decision. 507 U.S. at 611.

Similarly here, notwithstanding the fact that there may be some theoretical correlation between Contreras' lack of United States citizenship status and her presentation of a falsified document (although many noncitizens present valid documents, and anyone, including a United States citizen, is capable of presenting falsified documents), such a correlation cannot substitute for a showing that citizenship status itself was actually a factor which influenced the decision. When a decision is motivated by factors other than the statutorily protected characteristic, even if the motivating factor is correlated with the protected characteristic, the decision does not violate the statute. *Id.* Contreras' conclusion that her termination was "based on" her citizenship status is thus not supported by the evidence. The phrase "because of" or "based on," as applied to a protected characteristic, ordinarily requires that the employee is obligated to prove not only that an adverse employment decision occurred, but also that the cause of that decision can be specifically traced to the protected characteristic itself, not to some other characteristic standing in as a proxy for the protected characteristic. That is, the adverse decision must be shown to actually have been made by reason of, or on account of, the protected characteristic itself. A complainant's bald conclusion that the protected characteristic was the reason for the decision cannot serve to make it so; there must be some factual basis upon which a rational fact-finder could infer the causal connection, and that factual basis has not been shown here.

Nevertheless, because the burden of establishing a prima facie case in the Ninth Circuit is so minimal (degree of proof for prima facie case "does not even need to rise to the level of a preponderance of the evidence"), *Villiarimo*, 281 F.3d at 1062, quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994), I will assume for the purposes of considering her motion that Contreras has shown a prima facie case. Cascade proffered a legitimate nondiscriminatory reason for its actions based on the collective bargaining agreement, so the burden thus reverted to Contreras to demonstrate a factual issue as to legitimacy of Cascade's explanation of her termination, *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993). She therefore must present sufficient evidence of pretext to permit a rational fact finder to find that Cascade's explanation is pretextual. *Wallis*, 26 F.3d at 890.

The question for purposes of this motion is thus whether Contreras has provided any evidence which would support a finding that Cascade's explanation is false, and the true reason for her discharge was discrimination based on Contreras' citizenship status or lack of it. She contends that pretext is shown by the fact that Cascade doesn't view dishonesty about employment documents as having the same significance as other forms of dishonesty because if it really thought workers were dishonest, it wouldn't hire them back at all. This theory appears to rest on a comment made by Romero, the assistant personnel supervisor, that an unauthorized employee who subsequently presents legitimate documents is turning around and being honest "after the truth is out," and gets a second chance (CX1 pp. 4-5). Romero said,

> With the other ones, they've lied as far as falsifying a doctor's note, or whatever the situation is. I know they're two different - - one has a right, and the other one - - you know, I guess it would be up to Randy Scruggs. But I would say no. We haven't hired them in the past, so, no.

Randy Scruggs, who is the head of personnel, said clearly that the critical factor as to whether an employee could be rehired was whether or not the person was a good worker (CX1 p. 9). As previously noted, Contreras stipulated that Employees 2 and 3 were not rehired because their work standards were not up to par (Stipulation 28) and that the decision whether to rehire is made on a case-by-case basis (Stipulation 27). These stipulations are corroborated by other testimony by Romero about a jailed employee who kept lying about the reasons for requesting leave to conceal the fact that she was in jail. Romero said she was an excellent employee and was told she would be eligible for rehire, but she never came back. (CX1 p. 2).

The citizenship status of that employee is unidentified. Making a distinction between good workers, who are eligible for rehire, and below-par workers, who aren't eligible for rehire, is not evidence from which an inference of pretext may reasonably be drawn.[9]

Contreras next says that in applying its policy Cascade fails to make a distinction between employees who are work-authorized at the time of discharge and those who are not, that she was eligible to work when discharged and could have just been suspended instead, and that these facts are evidence of pretext. Her initial assertion appears to be incorrect inasmuch as Cascade did distinguish between those who were work authorized at the time of discharge and those who weren't: it rehired Employees 1, 5, 6 and 8, who were so authorized, and did not rehire Employee 7, who was not.[10] It is in any event unexplained why the fact that Cascade might have had other options has any probative value on the question of pretext. Absent some explanation, I am unable to discern how her assertion that she could have just been suspended undermines the legitimacy of Cascade's reasons. The remedy Contreras is asking for does not, in any event, appear to be equal treatment but more favorable treatment than anyone else was given.

Contreras' citation to *LULAC* in this forum is misplaced. Whatever the merits of the discussion there in light of the amnesty then pending, the prediction in that case that the practice of terminating undocumented aliens for having given false social security numbers would be found to violate § 1324b, 662 F. Supp. at 448-49, must in hindsight be viewed as erroneous: first, because it is predicated on a disparate impact theory inapplicable to § 1324b proceedings, and second, because it ignores statutory language that on its face prohibits discrimination only as to "any individual (other than an unauthorized alien)" (emphasis supplied). 8 U.S.C. § 1324b(a)(1). Unauthorized aliens were not then and are not now protected individuals within the meaning of § 1324b(a)(3), and accordingly they have no protection from employment discrimination under § 1324b. Acts of discrimination which are required by federal law are, moreover, specifically exempted in § 1324b(a)(2). Undocumented workers were necessarily omitted from

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[9] Cascade's brief points out that there is another rational basis for a distinction between discharged employees: an employee who falsifies a time card or a medical record might well repeat the offense, while an employee who obtains legitimate documents is not likely again to present false ones. Cascade did not say it relied on such a distinction, and argument of counsel is not evidence for purposes of a summary judgment motion. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001), citing *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982). I therefore do not consider this as a legitimate nondiscriminatory reason for Cascade's employment decision because there is no probative evidence it was considered in making any employment decision.

[10] The record is silent as to the eligibility status of Employee 4, who was rehired.

§ 1324b(a)(3) because § 1324a requires employers to discriminate against unauthorized aliens as defined in §1324a(h)(3) by refusing to hire them for employment in the first place. While Contreras is currently a protected individual, she did not qualify for such protection when she initially presented her falsified documents to obtain employment or when she did so for reverification. Her conduct was not protected under the INA then, and I am not persuaded that it became protected retroactively simply because she subsequently obtained legitimate status.

Contreras' citation to *Mata* for the proposition that "OCAHO recognizes that termination of an employee under a dishonesty policy due to the discovery that the employee previously worked with invalid employment authorization is considered citizenship discrimination" is also misplaced: first, because a two-page order approving a settlement does not implicate any opinion on the merits, and second, because Contreras ignores more recent OCAHO authority precisely to the contrary of her position.[11] *Aguirre* held, and I agree, that an employer who discharges an employee for having presented false documents does not thereby violate § 1324b. 6 OCAHO at 660-62. The principle that discharging employees for falsifying employment information is a legitimate nondiscriminatory reason for termination was recently reaffirmed in *Simon v. Ingram Micro, Inc.*, 9 OCAHO no. 1088, 15 (2003). Contreras' suggestion that because she now has legitimate documents, her prior conduct must be overlooked is without merit, as is her suggestion that the company's willingness to rehire her is itself evidence of pretext. Cascade treats good workers more leniently than bad workers. Nothing in § 1324b prohibits this. An employer is free to elect on a case by case basis whether to consider a previously terminated employee for rehire so long as its decisions are not made on the basis of a protected characteristic.

Finally, Contreras' citation to arbitration decisions in support of public policy reasons for the outcome she seeks are addressed to the wrong forum. It is not my role to resolve labor disputes by arbitrating grievances under a labor contract. Contreras did not file a grievance and did not seek arbitration. The rules and substantive standards for adjudication in this forum are wholly different from those in arbitration proceedings.

Because Contreras failed to demonstrate that there is any genuine issue of material fact respecting the legitimacy of the reasons for her termination and has not shown a causal link between her termination and her citizenship status, her motion for summary decision must be denied.

B. Whether Cascade is Entitled to Summary Decision

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[11] With respect to the obligation of counsel to disclose contrary authority, *see United States v. Swift & Co.*, 9 OCAHO no. 1068, 15-17 (2001).

Cascade's motion correctly observes that Contreras' allegations of national origin discrimination may not be entertained in this forum and that pattern and practice allegations may not be raised for the first time in a motion for summary judgment where they were not alleged in her complaint. As previously noted, it appears that Contreras abandoned her allegations of document abuse, so the only allegation to be addressed is that of citizenship status discrimination.

For purposes of considering Cascade's motion, I must draw every reasonable inference from the undisputed facts in Contreras' favor. For the reasons previously stated, I find that, even considering the facts in the light most favorable to Contreras, there is no evidence which reasonably gives rise either to an inference of discrimination on the basis of citizenship or to an inference that Cascade's explanation is a pretext to cover up a discriminatory intent. Contreras alleges that Cascade's policy is not uniformly or equally applied, and that there were two "types" of discharge. Notwithstanding Contreras' characterization of Cascade's reasons for not rehiring Employees 2 and 3, she herself stipulated that decisions about rehire were made on the basis of prior work performance, not the "type" of discharge. Even giving her the benefit of any doubt on that point, it still appears that if there was any difference in the treatment of discharged employees, that difference was one that operated in her favor rather than otherwise: she was considered eligible for rehire, while Employees 2 and 3 were not. Contreras was treated in precisely the same manner as Employees 1, 5, 6, and 8, who were similarly situated to her. The law requires no more.

Cascade has demonstrated that there are no genuine issues of material fact and that it is a entitled to judgment as a matter of law.

IX. FINDINGS AND CONCLUSIONS

I have considered the pleadings, motions, and supporting documents filed by the parties and make the following findings of fact and conclusions of law.

A. Facts

1. Contreras filed a charge with the Office of the Special Counsel for Immigration Related Unfair Employment Practices on May 24, 2001.
2. OSC sent Contreras a letter on October 3, 2001, stating that she was authorized to file a complaint with the Office of the Chief Administrative Hearing Officer.
3. Contreras filed a complaint on December 20, 2001.
4. Since at least 1996, Cascade Fruit Company and Oregon Cherry Growers have each had more than 15 employees in each working day during 20 or more weeks of each calendar year.

5. The 34 stipulations previously entered into by the parties are here adopted by reference as if set forth herein at length.

B. Conclusions

1. Contreras is and has been since September 26, 2000, a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(B).

2. Prior to September 26, 2000, Contreras was an unauthorized alien within the meaning of 8 U.S.C. § 1324a(h)(3).
3. All conditions precedent to the institution of this action have been satisfied.
4. Cascade Fruit Company is an employer within the meaning of 42 U.S.C. § 2000e(b).
5. Cascade Fruit Company is an entity within the meaning of 8 U.S.C. § 1324b(a).
6. Cascade Fruit Company falls within the exception clause of § 1324b(a)(2)(B) with respect to allegations of national origin discrimination, and those claims must be dismissed.
7. Contreras waived any claims of document abuse pursuant to § 1324b(a)(6), and those claims must be dismissed.
8. Contreras did not carry her burden of proof with respect to her allegations of citizenship status discrimination.
9. Cascade demonstrated that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law.

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

ORDER

For the reasons stated, Cascade's motion for summary decision is granted.

SO ORDERED.

Dated and entered this 4th day of February, 2003.

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.