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

JENLIH JOHN HSIEH, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

(*February 27, 2003*)

I. INTRODUCTION

On January 27, 2003, PMC-Sierra, Inc.(Respondent) filed a Motion for Summary Decision, supported by four affidavits and other documentation, including partial transcripts of six depositions and a table of undisputed material facts. Respondent contends there are no genuine issues of material fact. Jenlih John Hsieh (Complainant) submitted a Response to the Motion for Summary Decision (Complainant's Response) on February 10, 2003. Complainant's Response is supported by Complainant's affidavit, partial transcripts of seven depositions, and other documentation. Complainant contends that he has produced sufficient evidence to demonstrate a prima facie case of citizenship status discrimination in violation of 8 U.S.C. section 1324b, and to establish that Respondent's legitimate nondiscriminatory reason for terminating Complainant was pretext for discrimination. However, Complainant was late submitting a response to Respondent's Motion for Summary Decision and filed a Motion to Request an Extension of Time on February 6, 2003. Also on February 10, 2003, Complainant filed Objections and Motion to Strike Respondent's Evidence Submitted in Support of Respondent's Motion for Summary Decision (Complainant's Motion to Strike).

This Order makes the following rulings:

1. The Complainant's Motion to Request an Extension of Time to File Response to Respondent's Motion for Summary Decision is granted.

2. I am not ruling on Complainant's Motion to Strike Respondent's Evidence at this time.

3. The Respondent's Motion for Summary Decision is denied because genuine issues of material fact remain unresolved, and thus Respondent is not entitled to Summary Decision as a matter of law.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On April 3, 2001, Complainant filed a Charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices alleging a violation of 8 U.S.C. section 1324b based on citizenship status discrimination and national origin discrimination (OSC). Charge ¶ 4. Complainant stated that he is a United States citizen. Charge ¶ 5. Complainant alleged that one half of the employees at his work site are authorized to work based on an H1 visa, eighty-five percent of the employees at his work site are of Indian nationality, and that, during a company-wide RIF, no H1 employee was terminated, and Complainant was the only employee at his work site terminated. Charge ¶ 9.

In a letter to Complainant dated August 14, 2001, OSC informed him that their investigatory 120-day period had expired, OSC was still investigating Complainant's allegations, and Complainant may file a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complaint attachment.

On October 23, 2001, Complainant filed a Complaint with OCAHO alleging that Respondent had violated 8 U.S.C. section 1324b by engaging in national origin discrimination, citizenship status discrimination, and retaliation. Complaint, Part II ¶ 2, Part III ¶ 1. Complainant alleged that he was terminated because Respondent saved jobs for H1B employees, and he was replaced by an H1B employee. Id. at Part II ¶ 7. Referring to his retaliation claim, Complainant alleged that after he filed his Charge with OSC, Respondent sent a letter to the Equal Employment Opportunity Commission (EEOC) stating that his "job performance review was not acceptable." Id. at Part III ¶ 3. Complainant stated that he never received a job performance review while working for Respondent. Id.

Respondent filed an Answer on December 5, 2001, in which it denied the allegations that Complainant was fired due to national origin discrimination or citizenship status discrimination in violation of 8 U.S.C. section 1324b. Answer at 2. Respondent denied engaging in retaliation, but admitted sending a letter to the EEOC reporting that Complainant's performance was unacceptable. Id. at 3. Respondent contended that the statements in the letter were true. Id. Respondent also asserted the affirmative defenses of good cause, legitimate action, and possessing legitimate nondiscriminatory reasons for Complainant's termination. Id. at 3-4.

On December 6, 2001, I issued the First Prehearing Order (FPO) with a Procedural Order attached, which stated, among other things, that an extension of time to file with the Court shall be submitted prior to the due date and faxes that exceed twenty-five pages may not be sent to the Court without my advance approval. FPO, Dec. 6, 2001, at 2, Procedural Order at 2-3.

On October 16, 2002, in response to a motion by Respondent to dismiss the Complaint, I dismissed Complainant's national origin discrimination claim. Order Partially Granting Respondent's Motion to Dismiss, Oct. 16, 2002. Because Respondent employs more than fifteen employees, and thus Complainant's claim of national origin discrimination would be covered by 42 U.S.C. §2000e-2, this Court does not have jurisdiction over Complainant's national origin discrimination claim pursuant to 8 U.S.C. section 1324b(a)(2)(B). Id. at 4-5.

On December 24, 2002, I issued an Order Setting Revised Procedural Schedule which ordered the parties to file dispositive motions by January 27, 2003, and the Joint Proposed Final Prehearing Order (JPFPO) by February 24, 2003. Order Setting Revised Procedural Schedule, Dec. 24, 2002.

On January 7, 2003, the Court received a Notice of Unavailability of Counsel from Respondent. The Notice informed the Court that from February 10 through February 28, 2003, Marina Tsatalis, lead counsel for Respondent, "will be unavailable for any purpose whatsoever, including, but not limited to, receiving notices of any kind, responding to ex parte applications on motions, appearing in court or attending depositions. Wilson, Sonsini, Goodrich & Rosati will receive facsimile transmissions, but they will not be reviewed or acted upon during this period." Notice of Unavailability, Jan. 7, 2003.

On January 14, 2003, Respondent filed a Motion to Modify Order Setting Revised Procedural Schedule. Respondent requested that any oral argument on dispositive motions be scheduled after March 10, 2003, and that the JPFPO be due after the oral argument on dispositive motions. The Motion states that Ms. Tsatalis' unavailability was due to her marriage and honeymoon. Motion to Modify Order Setting Revised Procedural Schedule at 1-2.

On January 27, 2003, Respondent filed a Motion for Summary Decision. The motion was supported by a Statement of Undisputed Material Facts, the Declaration of Jennifer K. Mathe and accompanying exhibits, the Declaration of Tom Mauro, the Declaration of Christopher E. Smith, and the Declaration of Teri McNaughton. Respondent argues that Complainant has not demonstrated a prima facie case of citizenship status discrimination, Respondent has established a legitimate nondiscriminatory reason for terminating Complainant, and Complainant has not shown that the articulated legitimate nondiscriminatory reason for his termination was pretext for discrimination. Respondent's Motion for Summary Decision at 8-17.

On January 28, 2003, I issued an Order Ruling on Respondent's Motion to Modify Order Setting Revised Procedural Schedule. I vacated the date of February 24, 2003, for the filing of the JPFPO because a Motion for Summary Decision had been filed. Order Ruling on Respondent's Motion to Modify Order Setting Revised Procedural Schedule, Jan. 28, 2003, at 4. The Order clearly stated that "this case will not go into hibernation on February 10, only to emerge when Ms. Tsatalis returns." Id. I reiterated that all procedural deadlines must be met, especially due to the fact that there are two other attorneys for Respondent who have filed appearances and have been actively involved in the case. Id.

On February 6, 2003, the day Complainant's Response to the Motion for Summary Decision was due to be filed, Complainant filed a Motion to Request Extension of Time to File Response to Respondent's Motion for Summary Decision with attached Declaration of Phillip J. Griego. In his motion, Complainant contends that, pursuant to 28 C.F.R. section 68.1, the Federal Rules of Civil Procedure (FRCP) can be used as a guideline in this proceeding and FRCP 6 provides that a court may enlarge the time period for filing if application is made either before or after the time required upon a showing of excusable neglect. Complainant's Motion to Request Extension at 1-2. The Declaration of Phillip J. Griego explains that he was going to fax the Response to toll the filing deadline, but was unaware of the Court's twenty-five page limit for faxes. Mr. Griego was then going to overnight the Response to the Court, but was unaware of the time deadline of 6:15 p.m. for overnight mail to the East coast. Griego Declaration at 2, ¶ 4. Complainant requested leave of Court to send the Response to the Motion for Summary Decision by overnight mail on Friday, February 7, 2003; thus it would be filed with the Court on Monday, February 10, 2003. Id. at 3.

Respondent filed an Opposition to Complainant's Motion to Request Extension of Time on February 7, 2003. Respondent argues that FRCP 6 requires a party to request an extension before the expiration of the prescribed time period or upon a showing of excusable neglect. Opposition to Complainant's Motion to Request Extension at 2. Respondent does not believe that Complainant has shown excusable neglect, especially because Complainant has asked for extensions before in both this proceeding and a federal court proceeding. Id. Additionally, Respondent contended that it would be prejudiced by Complainant's late filing because Respondent's lead counsel will be leaving the country and will not have a chance to review the opposition until her return in March. Id. at 3.

The Court received Complainant's Response to Respondent's Motion for Summary Decision on February 10, 2003. Complainant contends that it has produced sufficient evidence to demonstrate a prima facie case of citizenship status discrimination in violation of 8 U.S.C. § 1324b, and to establish that Respondent's legitimate nondiscriminatory reason for terminating Complainant was pretext for discrimination. Complainant's Response at 4-14.

Also on February 10, 2003, Complainant filed Objections and Motion to Strike Respondent's Evidence Submitted in Support of Respondent's Motion for Summary Decision (Complainant's Motion to Strike). In this motion, Complainant moved to strike evidence "purportedly supporting" six material facts stated by Respondent and other evidence not referenced in Respondent's material facts. The Court never received an opposition from Respondent to Complainant's Motion to Strike.

On February 11, 2003, I issued an Order Requiring Parties to File Stipulations of Fact, because Respondent provided a Statement of Undisputed Material Facts with its Motion for Summary Decision and Complainant disputes the majority of these facts. Order Requiring Parties to File Stipulations of Fact, Feb. 11, 2003, at 1. As stated in the Order, the Joint Statement of Undisputed Facts (Joint Statement) was due February 25, 2003, and no extension would be granted. Id.

On February 12, 2003, Respondent filed a Motion to Schedule a Conference Call with Judge Barton on or Before February 13, 2003, to discuss an extension to the due date for the Joint Statement. Respondent requested a ruling on the Motion the day it was filed. Motion to Schedule Conference Call at 3.

On February 13, 2003, I issued an Order Denying Respondent's Request for Prehearing Conference. I reiterated that no extension would be granted for filing of the Joint Statement, and that two weeks would be ample time to meet with opposing counsel and file the Joint Statement with the Court. Order Denying Respondent's Request for Prehearing Conference, Feb. 13, 2003, at 3.

On February 25, 2003, Complainant and Respondent submitted the Joint Statement of Undisputed Material Facts, which listed only twenty-two undisputed material facts.

III. STANDARDS GOVERNING MOTIONS FOR SUMMARY DECISION

The OCAHO rules of practice (OCAHO rules) permit me to "enter a summary decision for either party 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 a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (2002). OCAHO rule 68.38(c) is similar to FRCP 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, FRCP 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO Rules.

See United States v. Aid Maint. Co., Inc., 6 OCAHO 810, 813 (1996), 1996 WL 735954, at *3; United States v. Tri Component Prod. Corp., 5 OCAHO 765, 767 (1995), 1995 WL 813122, at *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the case are deemed "material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, an issue of material fact must be "genuine." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, disputed facts that are not material do not preclude granting summary judgment. There are no genuine issues of fact for trial when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. at 587. In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id.

The party requesting summary decision bears the initial burden of asserting the absence of genuine issues of material fact by "identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting in part FRCP 56(c)). After the moving party has met its initial burden, the nonmoving party must then come forward with "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587.

Because this case arises under the jurisdiction of the United States Ninth Circuit Court of Appeals (Ninth Circuit), the case law of that Circuit is authoritative in this case. In the Ninth Circuit, "a plaintiff in an employment discrimination case need produce very little evidence in order to overcome an employer's motion for summary judgment." Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000). A low evidentiary burden is placed on the plaintiff because factual inquires should most appropriately be conducted by the fact finder on the basis of a full record. Id.

IV. COMPLAINANT'S MOTION TO REQUEST AN EXTENSION OF TIME TO FILE RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY DECISION

Respondent filed its Motion for Summary Decision on January 27, 2003. Pursuant to 28 C.F.R. section 68.38, Complainant had ten days to respond to the motion. Complainant's response was due on February 6, 2003.

On February 6, 2003, Complainant requested an extension of time to file the response to Respondent's Motion for Summary Decision. Complainant stated that he would mail the response by overnight mail on February 7, 2003, and it would arrive on Monday, February 10, 2003. Respondent objected to this motion on the grounds that Respondent has not shown excusable neglect as is required under the FRCP, and that Respondent will be prejudiced because its lead counsel will not be able to receive and review Complainant's opposition until her return in March. Complainant's response was filed on Monday, February 10, 2003.

Complainant contends that his response was untimely because he was unaware that faxes of more than twenty-five pages require my advanced approval. Complainant was notified of this rule in the FPO and the attached Procedural Order. FPO, Procedural Order at 2. Also in the FPO, I stated that extensions shall be requested before the deadline. FPO at 2, Procedural Order at 2-3.

Absent leave of court, a party does not have a right to file a reply to a response to a motion.. 28 C.F.R. § 68.11(b) (2002). Moreover, .no oral argument on a motion is permitted unless the Judge otherwise directs. 28 C.F.R. § 68.11(c) (2002). In this instance, Respondent did not even file a motion requesting leave to file a reply to Complainant's opposition and did not request oral argument on the motion for summary decision. Therefore, it is difficult to see how lead counsel's inability to receive and review Complainant's opposition before she left would be prejudicial to Respondent.

Complainant's Motion to Request an Extension of Time to File a Response to Respondent's Motion for Summary Decision is granted because he requested the extension before his response was untimely, the extension was merely two business days, Respondent has not shown any prejudice from this slight delay, and fairness dictates that a complainant alleging employment discrimination be heard on the merits in a motion for summary decision.

V. COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S EVIDENCE

As part of Complainant's Response, he filed objections and a Motion to Strike certain parts of Respondent's evidence submitted in support of Respondent's Motion for Summary Decision. The motion was filed on February 7, 2003, by overnight delivery. Therefore, pursuant to the OCAHO rules of practice, Respondent's response to the Motion to Strike had to be filed within ten days, or in this case by February 18, 2003 (because February 17, 2003, was a federal holiday, the response was due the next day). Because the federal government in the Washington D.C. area, including federal courts, were officially closed on February 18, 2003, due to a major snowstorm, the response would be timely if filed by February 19, 2003. However, to date, the Court has not received any response from Respondent.

Although the Motion to Strike is unopposed, I am not granting the Motion at this time. The Motion seeks to exclude certain exhibits and certain deposition testimony. As a basis for the Motion to Strike, Complainant cites various provisions of the Federal Rules of Evidence (FRE). The FRE provide that those rules govern proceedings in the courts of the United States and pending before the United States bankruptcy judges and Unites States magistrate judges. The FRE do not automatically apply to cases before federal agencies governed by the Administrative Procedure Act (APA), 5 U.S.C. § 556 et. seq. The APA provides, in pertinent part, that in hearings governed by the APA, any oral or documentary evidence may be received, but irrelevant, immaterial, or unduly repetitious evidence may be excluded. 5 U.S.C. § 556(d) (2002).

The OCAHO rules of practice are in accord. While the OCAHO rules of practice state that the FRE are "a general guide to all proceedings held pursuant to these rules," they also state that all relevant, material, and reliable evidence is admissible. 28 C.F.R. § 68.40(b) (2002). Such evidence may be excluded if the probative value is outweighed by unfair prejudice or confusion of the issues, or by consideration of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence. Id. It is proper for a party to cite the FRE as persuasive authority, and evidence that would be admissible under the FRE clearly will be accepted in an OCAHO case. However, the converse is not necessarily true; i.e. evidence will not necessarily be excluded in an OCAHO proceeding simply because it does not meet the standards established by the FRE.

Many of Complainant's objections are founded on the hearsay provisions in FRE 802-804. Complainant's Motion to Strike ¶¶ 4, 7-8, 10-11, 13, 16-22, 24. Hearsay evidence is not necessarily excluded in an OCAHO proceeding, even if the proponent cannot show that the proffered evidence would come within one of the hearsay exceptions covered by FRE 803 and 804. Thus, *reliable, relevant* hearsay evidence may be admitted. Martin Flores v. Logan Foods Co., 6 OCAHO 545, 551 (1996), 1996 WL 525690 (OCAHO) ("hearsay evidence is admissible if facts exist which assure the underlying reliability and probative value of the evidence"), Lardy v. United Airlines, Inc., 3 OCAHO 583, 574-75 (1992), 1992 WL 535604 (OCAHO), United States v. O'Brien, 1 OCAHO 1144,1145 (1990), 190 WL 512216 (OCAHO).

I would observe that even under these rather liberal evidentiary standards, some of the Complainant's objections seem well-founded. For example, Complainant objects to and moves to strike paragraph six of Christopher Smith's declaration where Smith states that he considers Mr. Singh's work performance to be excellent. Complainant also objects to paragraph eight of Mr. Smith's declaration, which states that Smith has not received any complaints about Mr. Singh's performance and considers Mr. Singh's performance to be far superior to Complainant's performance. Complainant contends that the issue is Respondent's state of mind when it displaced Complainant in favor of a non-U.S. citizen, and Mr. Singh's performance after the displacement is irrelevant. Complainant's Motion to Strike ¶ 15, 23.

I agree that, to the extent that Mr. Smith is basing his conclusion on work performed by Mr. Singh since March 2001, this would seem to have no relevance to the issues in the present lawsuit. See Wong v. Regents of Univ. of Cal., 192 F.3d 807, 819 (9th Cir. 1999).

As discussed in this Order, infra Part VI, even considering the evidence presented by Respondent that is the subject of the Motion to Strike, Respondent's Motion for Summary Decision must be denied. Because the Motion for Summary Decision is being denied, I do not need to rule on the various objections raised by the Motion to Strike. If, at a later time, Respondent offers these exhibits in evidence, I will then rule on Complainant's objections.

VI. RESPONDENT'S MOTION FOR SUMMARY DECISION

Because Respondent moved for summary decision, it has the burden of establishing that there is no genuine issue as to any material fact and is entitled to summary decision as a matter of law. 28 C.F.R. § 68.38(c) (2002). Complainant alleges that Respondent engaged in citizenship status discrimination and retaliation in violation of 8 U.S.C. section 1324b. Complaint, Part II ¶¶ 2, 7, Part III ¶¶ 1, 3.

A. Factual Findings

The facts recited below are based either on the Joint Statement, the Complaint, Complainant's affidavit, deposition testimony attached to Complainant's Response, or documentary evidence attached to Complainant's Response. The statements contained below should not be considered as dispositive facts that have been proven for the purpose of the final decision in this case but rather that, in adjudicating a motion for summary decision, I must view all facts and reasonable inferences in favor of Complainant, pursuant to the law cited above.

Viewing all facts and drawing all inferences in favor of Complainant, for the purpose of adjudicating the present motion, I conclude that the relevant facts are as follows:

1. Complainant is a citizen of the United States. Complaint at 2.

2. Complainant has a Bachelor's degree in economics, a Masters degree in computer science, and over twelve years of experience in UNIX Systems administration. Declaration of Jenlih John Hsieh Opposing Respondent's Motion for Summary Decision (Hsieh Declaration) ¶ 3.

3. Upon hire, Respondent promised Complainant a salary of $100,000 per year and stock options to vest over a four year period of time. Id. at ¶ 2.

4. The recruiter who placed Complainant with Respondent, Jeff Gon, described Complainant as a "superstar based on his resume." Gon Deposition, CX-F-3.

5. Respondent's contract with the recruiting company that placed Complainant contained an escape clause which allowed a refund of $25,000, if Complainant's employment was terminated for any reason within ninety days of the placement. Bashteen Deposition, CX-C-29-30, Gon Deposition, CX-F-5-6, 9-10.

6. Complainant worked as a UNIX System Administrator in the Computer Services division of Respondent's Santa Clara/Milpitas facility. Joint Statement ¶ 2, 10, Hsieh Declaration ¶ 4,[1] Smith Deposition, CX B-11, 15, 36, 44-45. The parties use the Santa Clara/Milpitas facilities of Respondent interchangeably. It is unclear whether the facilities are the same or separate, but for purposes of this motion, it makes no difference.

7. Complainant's supervisor was Christopher Smith. Hsieh Declaration ¶ 5.

8. Complainant never received verbal or written notice of poor job performance, and no one at Respondent expressed to him any dissatisfaction with his work. Id. at ¶ 6.

9. If an employee is not meeting performance expectations, Respondent's company policy is to give the employee verbal or written warnings and allow the employee time to improve performance. Smith Deposition, CX-B-4.

10. Five employees of Respondent had knowledge that Complainant was a United States citizen: Raghunath Iyer, Paula Stevens, Ashgar Bashteen, Mayur Patel, and Christopher Smith. Hsieh Declaration ¶ 5.

11. On September 29, 2000, SwitchOn, Inc., was acquired by Respondent. Joint Statement ¶ 9, Respondent's Letter to EEOC, CX-I-2.

12. On or about January 16, 2001, the Immigration and Naturalization Service (INS) approved Ravinder Singh's petition for an H1B work visa. Joint Statement ¶ 11.

---

[1] The Declaration of Jenlih John Hsieh has two paragraphs labeled "4." The second paragraph will be referred to as "5" and every paragraph thereafter will be renumbered (e.g. ¶ 6 will be referred to as ¶ 7 to reflect how the numbering should have been done).

13. Greg Stazyk, the head of Respondent's Computer Services division, informed Christopher Smith, the leader of the Computer Services division, on or about March 5, 2001, that he needed to layoff one person from Computer Services. Smith Deposition, CX-B-29-30.

14. On March 5, 2001, Christopher Smith wrote an e-mail to Paula Stevens, a human resource official, describing an urgent need to get a UNIX Administrator to the United States. This e-mail was going to be used to support Mr. Singh's petition for an H1B visa. Smith Deposition, CX-B-33-36, 54-56.

15. On March 18, 2001, Respondent's business executives decided that a Company-wide layoff would be implemented, effective March 26, 2001. Smith Deposition, CX-B-48.

16. On March 22, 2001, Respondent offered Mr. Singh a position in the Santa Clara/Milpitas facility with a yearly salary of $70,000. Singh Deposition, CX-D-3 4, 14, Smith Deposition, CX-B-45 .

17. Complainant was terminated by Respondent on March 26, 2001. Joint Statement ¶ 14, Complaint Part II ¶ 3, Answer at 2.

18. Complainant would not have been terminated on March 26, 2001, but for Respondent's reduction in force (RIF). Smith Deposition, CX-B-8.

19. Complainant's layoff notice conveyed that he was terminated because of business needs and his termination was unrelated to any dissatisfaction with his work. Joint Statement ¶ 18, Hsieh Declaration ¶ 8.

20. Respondent's human resource official, Paula Stevens, wrote Complainant an e-mail expressing that his termination was a business decision based on a number of factors and not how the company felt about Complainant or his contributions to the company. Joint Statement ¶ 18, Hsieh Declaration ¶ 8.

21. Mr. Singh is an H1B visa holder from India. Joint Statement ¶ 3, 11, Smith Deposition, CX-B-45, Singh Deposition, CX-D-4-5, Respondent's Response to Complainant's First Set of Request for Admissions, CX-H-3.

22. Mr. Singh has a bachelor's degree in computer science and two to three years working with UNIX Systems. Smith Deposition, CX-B-25-26.

23. Mr. Singh works as a UNIX Systems Administrator in the Computer Services division of Respondent's Santa Clara/Milpitas facility. Smith Deposition, CX-B-11, 15, 44, 53.

24. Mr. Singh began work with Respondent at the beginning of April 2001. Smith Deposition, CX-B-44.

25. Mr. Singh's supervisor is Christopher Smith. Singh Deposition, CX-D-7.

26. Mr. Singh assumed about eighty to eighty-five percent of Complainant's responsibility when he left. Smith Deposition, CX-B-16-21. The other fifteen to twenty percent of Complainant's job was delegated to other employees in the Computer Services Division. Id.

B. Legal Conclusions

1. Citizenship Status Discrimination

An employer may not terminate a "protected individual" because of the individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B) (2002). In employment discrimination cases, the complainant must establish a prima facie case of discrimination; then the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and, if the respondent does so, the complainant must show by a preponderance of the evidence that the respondent's reason is untrue and the respondent intentionally discriminated against the complainant. See Bendig v. Conoco, Inc., 9 OCAHO (ref. no. 1077), 5-6 (2001), 2001 WL 1754725 (OCAHO), Wisniewski v. Douglas County Sch. Dist., 1 OCAHO 153, 156-57 (1988), see generally Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142-43 (2000).

a. Prima Facie Case

Traditionally, a complainant establishes a prima facie case of citizenship discrimination by alleging and demonstrating that: (1) he belongs to a class protected by 8 U.S.C. section 1324b, (2) he suffered an adverse employment action, and (3) there was disparate treatment from which the Court may infer a causal relationship between his protected status and the adverse employment action, See generally Lee v. Airtouch Communications, 6 OCAHO 891, 902 (1996), 1996 WL 780148 (OCAHO), Wisniewski 1 OCAHO at 157 (1988), citing generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

However, the Ninth Circuit has developed a variation of the traditional prima facie case when a plaintiff alleges that a RIF has been carried out in a discriminatory manner. To establish a prima facie case of employment discrimination in this situation, a plaintiff must show that: (1) he belongs to a protected class; (2) he was terminated from a job for which he was qualified; and (3) others not in his protected class were treated more favorably. Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993), cited in Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000) (ADEA RIF case). Establishing a prima facie case on summary decision requires a minimal degree of proof that does not even rise to the level of preponderance of the evidence. Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000).

(1) Complainant Belongs to a "Protected Class"

Under 8 U.S.C. section 1324b, a "protected individual" means, among other things, an individual who is a citizen of the United States. 8 U.S.C. § 1324b(a)(3)(A) (2002).

Complainant has alleged that he is a citizen of the United States. Finding of Fact (FF) ¶ 1. Respondent has not challenged or disputed that Complainant is a citizen of the United States.

Thus, Complainant has satisfied the first prong of his prima facie case, and alleged that he is a member of a protected class.

(2) Complainant Was Terminated From a Job For Which He Was Qualified

Both parties agree that Respondent terminated Complainant on March 26, 2001. FF ¶ 17.

Complainant has alleged that he was qualified for the position he held with Respondent. Complaint Part II ¶ 4. In its Answer, Respondent denied this allegation. Answer at 2. However, in Respondent's Motion for Summary Decision, Respondent does not contend that Complainant failed to demonstrate a prima facie case because Complainant was not qualified for the position. Moreover, Respondent admits that Complainant was hired to perform UNIX systems administration duties for SwitchOn. FF ¶ 6.

Complainant has produced sufficient evidence that he was qualified for the position he held with Respondent. From an examination of both his educational background, job experience, and job performance record, for purposes of this motion, Complainant has demonstrated that he was qualified to work as a UNIX Systems Administrator.

First, Complainant has a bachelor's degree in economics, a Master's degree in computer science, and over twelve years of experience working in UNIX Systems Administration. FF ¶ 2. The recruiter who placed him with Respondent, Jeffrey Gon, described Complainant as a "superstar based on his resume." FF ¶ 4.

Second, Complainant has produced sufficient evidence to demonstrate that he had a satisfactory job performance record. Complainant maintains that no one at SwitchOn, Inc., nor Respondent expressed any dissatisfaction with his job performance. FF ¶ 8. If employees are not meeting performance expectations, Respondent's company policy is to give the employees verbal or written warnings and allow the employee time to improve performance. FF ¶ 9. No written documents or records produced contemporaneously with Complainant's alleged poor performance have been produced. One e-mail was produced describing Complainant's substandard performance. Smith Deposition, CX-B-7, 42. However, this e-mail was written on April 11, 2002, after Complainant filed a Charge with OSC. Complainant's supervisor stated that he would not have terminated Complainant on March 26, 2001, but for the RIF. FF ¶ 18. When Complainant was terminated, his layoff notice stated that he was fired due solely to business needs and not because of dissatisfaction with his work. FF ¶ 19. After Complainant was terminated, Paula Stevens, an official in Respondent's human resources department, sent Complainant an e-mail stating that his termination was not based on how the company felt about Complainant or his contributions to the company. FF ¶ 20.

Additionally, Respondent had an escape clause with the recruiting company that placed Complainant with Respondent which allowed a refund of $25,000, if Complainant's employment was terminated for any reason within ninety days of the placement. FF ¶ 5. If Complainant was not qualified for the position, Respondent could have terminated Complainant and requested a refund of $25,000, from the recruiting company, but Respondent did not do so.

Based on a review of Complainant's qualifications, work experience, and job performance, for purposes of this motion, Complainant has produced sufficient evidence to show that he was qualified for the position he held with Respondent.

Complainant has met the second prong of the prima facie case by alleging that he was terminated from a job for which he was qualified and producing sufficient evidence to show the same.

(3) Others Not in Complainant's Protected Class Were Treated More Favorably

Complainant has alleged that he was discriminated against because Respondent saved jobs for H1B visa holders and he was replaced by an H1B visa holder. Complaint Part II ¶ 7. In his opposition to Respondent's Motion for Summary Decision, Complainant alleges that he was fired and replaced by Ravinder Singh, an H1B visa holder from India. Complainant's Response at 8.

H1B visa holders are not citizens of the United States, nor are they protected by 8 U.S.C. section 1324b. 8 U.S.C. § 1324b(a)(3)(A-B) (2002).

Mr. Singh is an H1B visa holder from India. FF ¶ 21. Mr. Singh is not a citizen of the United States, nor is he a protected individual under 8 U.S.C. section 1324b. 8 U.S.C. § 1324b(a)(3)(A-B) (2002). Thus, Mr. Singh is outside of Complainant's protected class.

On March 22, 2001, Respondent offered Mr. Singh a job as a UNIX Systems Administrator in the Santa Clara/Milpitas facility. FF ¶ 16. Mr. Singh began work with Respondent at the beginning of April 2001. FF ¶ 24. Mr. Singh continues to work for Respondent. FF ¶ 23.

Thus, four days after Mr. Singh was offered a job with Respondent, Complainant was terminated, and Mr. Singh still works for Respondent. Mr. Singh, who is outside of Complainant's protected class, was treated more favorably by Respondent. Complainant has demonstrated the third prong of his prima facie case.

Respondent argues that Complainant has not established a prima facie case because he has failed to show that Complainant and Mr. Singh were similarly situated. Respondent's Motion for Summary Decision at 10-12. Under Ninth Circuit law governing employment discrimination cases involving RIFs, Complainant does not have to allege and produce evidence that he and others outside his protected class were "similarly situated" to demonstrate a prima facie case. In Washington v. Garrett, the case in which the Ninth Circuit adopted the altered prima facie case for RIFs, the court compared the plaintiff to all others in the Office of Public Affairs of the Navy, including, but not limited to, the person who took over her position. 10 F.3d 1421, 1434 (1993).

Respondent relies heavily on Bendig v. Conoco, Inc., 9 OCAHO 1077 (2002), and Parker v. Wild Goose Storage, Inc., 9 OCAHO 1081 (2002), to support its argument that Complainant and Mr. Singh were not similarly situated. For this proposition, Bendig is not applicable for two reasons. First, Bendig was decided under Fifth Circuit law, which differs from the law governing the Ninth Circuit. Id. at 6. Second, the complainants in Bendig were terminated as part of a RIF, but they were not replaced at all, much less by an individual outside of the complainant's protected group. Id. at 7. In Bendig, the court was comparing complainants to current employees to determine whether those terminated were similarly situated to those who were not terminated. The court was not comparing the complainants, who were terminated due to a RIF, to individuals who were hired about the same time that complainants were terminated.

Likewise, Parker does not support the proposition that Complainant and Mr. Singh were not similarly situated. First, Parker did not involve a RIF. Second, the complainant in Parker was replaced seventeen months later with another American citizen. 9 OCAHO at 1081. Third, the Respondent in Parker provided contemporaneous documentation of the complainant's performance problems. Id. at 5. The instant case involves a RIF, Complainant's alleged instantaneous replacement with an employee outside of his protected class, and no contemporaneous documentation of Complainant's alleged performance problems.

Moreover, for purposes of this motion, Complainant has produced sufficient evidence to show that he and Mr. Singh were similarly situated. Complainant worked as a UNIX Systems Administrator in the Computer Services division of Respondent's Santa Clara/Milpitas facility. FF ¶ 6. Mr. Singh works as a UNIX Systems Administrator in the Computer Services division of Respondent's Santa Clara/Milpitas facility. FF ¶ 23. Mr. Singh took over eighty to eighty-five percent of Complainant's responsibility when he left. FF ¶ 26. The other fifteen to twenty percent of Complainant's job was delegated to others in the group. Id. Complainant's supervisor was Christopher Smith, and Mr. Singh's supervisor is Christopher Smith. FF ¶¶ 7, 25.

Thus, Complainant has produced sufficient evidence to show that Respondent treated Mr. Singh, an individual outside Complainant's protected class, more favorably than Complainant by terminating Complainant, and hiring and retaining Mr. Singh. Complainant has met the third prong of his prima facie case for citizenship status discrimination.

Complainant has demonstrated a prima facie case of citizenship status discrimination by producing sufficient evidence to show that he is a member of a protected class, he was terminated from a job for which he was qualified, and others outside his protected class were treated more favorably.

b. Legitimate Nondiscriminatory Reason

Because Complainant has demonstrated a prima facie case of citizenship discrimination, the burden of production shifts to Respondent to produce a legitimate nondiscriminatory reason for Complainant's discharge. Wisniewski 1 OCAHO at 153, 156-157, Reeves, 530 U.S. at 142-43.

For purposes of this motion, Respondent has demonstrated that it had a legitimate nondiscriminatory reason for terminating Complainant. Respondent asserts that Complainant was terminated due to a company-wide RIF based on Respondent's "deteriorating financial situation." Respondent's Motion for Summary Decision at 12. A RIF is a legitimate nondiscriminatory reason for terminating an employee. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir. 2000).

Complainant does not argue in his Response that Respondent has not established a legitimate nondiscriminatory reason, or that a RIF is not a legitimate nondiscriminatory reason for termination.

For purposes of this motion, Respondent has met its burden of production by asserting that Complainant was terminated due to a company-wide RIF.

c. Pretext

Because Respondent has met its burden of production and asserted a legitimate nondiscriminatory reason for Complainant's termination, a presumption of discrimination drops away. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 917 (9th Cir. 1996). The burden of production is now shifted to Complainant to show that Respondent's proffered reason for the discharge is pretext for discrimination. Id. at 918. To satisfy that burden of production on a motion for summary decision, Complainant must produce enough evidence to allow a reasonable fact finder to conclude either: Respondent's articulated reason for Complainant's discharge was false or unworthy of credence because it is internally inconsistent or otherwise not believable, or that unlawful discrimination more likely motivated Respondent. Id., Chuang, 225 F.3d at 1127.

Complainant has produced enough evidence to allow a reasonable fact finder to conclude that Respondent's proffered reason for Complainant's discharge is unworthy of credence, and genuine issues of material fact still remain.

Respondent knew as early as January 16, 2001, that Mr. Singh's H1B visa had been approved and Respondent planned to "slot" him as a UNIX Systems Administrator at Milpitas/Santa Clara. FF ¶ 12, CX-J-13. Greg Stazyk, the head of Respondent's Computer Services division, informed Christopher Smith, the leader of the Computer Services division, on or about March 5, 2001, that he needed to lay off one person from Computer Services. FF ¶ 13. Christopher Smith had knowledge that Complainant was a United States citizen. FF ¶ 10. On the same day, March 5, 2001, Christopher Smith wrote an e-mail to Paula Stevens, a human resource official for Respondent. FF ¶ 14. The e-mail stated an urgent need to get a UNIX Administrator to the United States, and was going to be used to support Mr. Singh's petition for an H1B visa. Id. On March 18, 2001, Respondent stated that business executives decided that a Company-wide layoff would be implemented, effective March 26, 2001. FF ¶ 15. On March 21, 2001, Greg Stazyk sent an e-mail entitled Headcount and Expense Reduction Plan. In that e-mail, he stated, "[e]xpenses can be further decreased by 19KUSD/month by moving Ravinder Singh from Pune to San Jose to replace UNIX Contractor as outline [sic] below." CX-J-1.

Despite the dire financial position of Respondent, on March 22, 2001, Respondent offered Mr. Singh a position in the Santa Clara/Milpitas facility with the yearly salary of $70,000. FF ¶ 16. Mr. Singh had a bachelor's degree in computer science and two to three years working with UNIX Systems. FF ¶ 22.

On March 26, 2002, Respondent terminated Complainant, who had been making a yearly salary of $100,000, in addition to stock options. FF ¶¶ 3, 17. Complainant had a Master's Degree in Computer Science and over twelve years of experience in UNIX Systems administration. FF ¶ 2.

Respondent contends that Complainant was laid off based on both the RIF and performance concerns. However, Complainant's job performance remains a genuine issue of material fact. Complainant states that Respondent never gave him any written or verbal notice of poor performance before he was terminated. FF ¶ 8. Complainant's layoff notice stated that the reason for his termination was unrelated to any dissatisfaction with his work (FF ¶ 19), and a human resource official told Complainant that his layoff did not reflect how the company felt about Complainant's contributions to the company (FF ¶ 20). Yet, Complainant's leader, Christopher Smith, testified that Respondent had many performance issues with Complainant, including troubleshooting problems, misconfiguration of IP settings, and negative feedback from users in the office. Smith Deposition, Respondent's Motion for Summary Decision, Ex. C, Tr. at 79, 83, 111-12, 117-18. Christopher Smith also maintains that he met with Complainant twice in February 2001, to discuss "his performance problems." Smith Declaration ¶ 14. No evidence of contemporaneous documentation of Complainant's performance problems has been produced.

Based on the sequence of events described above, a reasonable fact finder could conclude that Respondent's proffered reason for Complainant's discharge is unworthy of credence. Respondent stated an economic need to layoff a Computer Services employee, and chose Complainant, yet at the same time, worked hard to obtain an H1B visa for Mr. Singh, another Computer Services employee. Mr. Singh assumed eighty to eighty-five percent of Complainant's job functions. Additionally, Complainant was better educated and had more experience than Mr. Singh. Complainant was paid more money than Respondent offered Mr. Singh. Respondent had knowledge that Complainant is a United States citizen and Mr. Singh is not.

Additionally, many genuine issues of material fact remain, including, but certainly not limited to, Respondent's employees actual or constructive knowledge of Complainant's citizenship, Complainant's job performance while working with Respondent, and whether Complainant was terminated pursuant to the company-wide RIF. Indeed, because the parties only could agree on twenty-two undisputed facts in their Joint Statement, this suggests that there may be many unresolved disputed facts.

Because a plaintiff in an employment discrimination action need produce very little evidence to overcome an employer's motion for summary decision, and genuine issues of material fact remain, Respondent's Motion for Summary Decision with respect to Complainant's citizenship status discrimination claim is denied.

2. Retaliation

Respondent failed to present any argument regarding Complainant's retaliation claim in its Motion for Summary Decision. Respondent has failed to show that there is no genuine issue of material fact with regard to Complainant's retaliation claim, and thus summary decision is inappropriate as to Complainant's retaliation claim. See generally Cruz v. Able Serv. Contractors, Inc., 6 OCAHO 144, 149-50 (1996), 1996 WL229220 (OCAHO) (OCAHO has jurisdiction over a retaliation claim, even in the absence of a citizenship status discrimination claim or a national origin discrimination claim).

VII. CONCLUSION

The Complainant's Motion to Request an Extension of Time to File Response to Respondent's Motion for Summary Decision is granted.

The Respondent's Motion for Summary Decision is denied because genuine issues of material fact remain unresolved, thus Respondent is not entitled to Summary Decision as a matter of law.

Because Respondent's Motion for Summary Decision is denied, I am not ruling on Complainant's Motion to Strike Respondent's Evidence at this time.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE