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

CASSANDRA MONTY, Complainant, v. USA2GO QUICK STORES, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2021B00036

Appearances: Cassandra Monty, pro se Complainant
Jenna H. Sheena, Esq. and Tad T. Roumayah, Esq., for Respondent
Sam Shirazi, Esq., for the United States[1]

ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION

I. INTRODUCTION

This action arises under the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. On June 2, 2021, Complainant, Cassandra Monty, filed a complaint alleging that Respondent, USA2GO Quick Stores, violated § 1324b. Presently before the Court is Respondent's Motion for Summary Decision. The Court finds that Respondent has established that there is no genuine issue of material fact as to Complainant's discrimination and unfair documentary practices claims, and Respondent's motion for summary decision is therefore granted as to these claims. Respondent's motion is denied as to Complainant's retaliation claim.

II. PROCEDURAL HISTORY

On June 2, 2021, Complainant filed a complaint alleging variously that her former employer discriminated against her based on national origin and citizenship status, engaged in unfair documentary practices, and retaliated against her when it either failed to hire her or fired

[1] Attorney Shirazi, a Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, filed a Notice of Appearance in this matter on behalf of the United States pursuant to 28 U.S.C. § 517 and 28 C.F.R. § 68.33(f) on June 2, 2022.

her after she informed them that she had called the Immigrant and Employee Rights Section (IER) hotline. *See generally* Compl. Following service of the Notice of Case Assignment (NOCA) and an extension of time to answer, Respondent filed its answer to the complaint on September 7, 2021.

Respondent filed its Motion for Summary Decision on May 5, 2022. Respondent moved for summary decision as to Complainant's discrimination and retaliation claims, but did not address the unfair documentary practices claim. *See generally* Mot. Summ. Dec. Complainant did not submit an opposition to Respondent's Motion.

On June 2, 2022, the Immigrant and Employee Rights Section (IER) filed a Notice of Filing of Statement of Interest or, in the Alternative, Motion for Leave to File pursuant to 28 U.S.C. § 517, attaching a Statement of Interest of the United States.

On June 21, 2022, Respondent filed Respondent's Request for Expedited Review of its Motion for Summary Decision, noting that it had conferred with Complainant, who did not oppose the filing. Respondent also noted that, pursuant to the Court's Updated Scheduling Order from Feb. 18, 2022, Complainant's response was due by June 6, 2022, but to date, she had not filed a response to Respondent's Motion for Summary Decision.

On July 15, 2022, the Court issued a stay of proceedings pending adjudication of Respondent's Motion for Summary Decision. Monty v. USA2GO Quick Stores, 16 OCAHO no. 1443 (2022).[2]

On June 26, 2022, Complainant filed a "Final Prehearing Statement."

On November 14, 2022, the Court issued a Supplemental Briefing Order, directing Respondent to file a supplemental brief addressing whether Complainant's allegations could be liberally construed to raise a claim for unfair documentary practices pursuant to 8 U.S.C. § 1324b(a)(6), and if so, whether Respondent is entitled to summary decision on such a claim. Monty v. USA2GO Quick Stores, 16 OCAHO no. 1443a (2022). The Court provided an opportunity for Complainant to respond by December 12, 2022, id. at 2.

[2] Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, 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 accordingly omitted from the citation. Published decisions may be accessed through the Westlaw database "FIM OCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice's website: https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

Respondent filed a Supplemental Brief on November 28, 2022; Complainant did not file a response.

On June 28, 2023, Attorney Tad T. Roumayah filed a Notice of Appearance on behalf of Respondent.[3]

III. STAY OF PROCEEDINGS

On July 15, 2022, the Court issued an Order Issuing Stay of Proceedings. Previously, this Court has issued stays of proceedings of cases arising under 8 U.S.C. § 1324b due to an "unresolved question as to the Court's ability to issue a final order with regard to §1324b cases that address non-administrative questions" following the Supreme Court's ruling in United States v. Arthrex, Inc., 594 U.S. 1 (2021) (holding that unreviewable authority by an Administrative Patent Judge is incompatible with that Judge's status as an inferior officer). *See* A.S. v. Amazon Web Servs. Inc., 14 OCAHO no. 1381h, 2 n.4 (CAHO order 2021). However, on October 12, 2023, the Department of Justice issued an interim final rule providing that cases arising under 8 U.S.C. § 1324b are subject to administrative review by the Attorney General, resolving the concerns raised in Arthrex, Inc. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68). As a result of this change to the regulation, this Court may make a final case disposition in this matter. Accordingly, the stay is lifted.

IV. STATUS OF RECENT SUBMISSIONS

A. Supplemental Briefing Regarding Document Abuse Claim

In its Supplemental Briefing Order, the Court noted that the Complaint raises varying allegations regarding unfair documentary practices. *See* Monty, 16 OCAHO no. 1443a, at 1 (noting that Complainant answered "Yes" to whether she was "asked for more or different documents than required," but "No" to whether Respondent "reject[ed] or refuse[d] to accept the documents [she] presented" or "ask[ed her] for more or different documents than required"). In its Supplemental Brief, Respondent does not dispute that the Complaint can be read to raise a claim for unfair documentary practices under 8 U.S.C. § 1324b(a)(6), but argues that Complainant cannot demonstrate a genuine issue of material fact that would support a claim of document abuse, and asks that the claim be dismissed. *See generally* R's Supp. Br. Complainant did not file a Supplemental Brief.

[3] Attorney Roumayah has been added to the appearances in this case, as well as to the e-filing list.

Given that Respondent has not disputed that the Complaint may be read to raise a claim for unfair documentary practices, and cognizant that the Court must construe the pleadings of pro se litigants such as Complainant liberally, *see* Zu v. Avalan Valley Rehab. Ctr., 14 OCAHO no. 1376, 9 (2020), the Court will construe the complaint to raise such a claim. The Court will consider Respondent's motion for summary decision on this claim, raised in its Supplemental Brief, *infra* Section VII, Subsection C.

B. Notice of Filing of Statement of Interest

On June 2, 2022, the Immigrant and Employee Rights Section (IER) filed a Notice of Filing of Statement of Interest or, in the Alternative, Motion for Leave to File pursuant to 28 U.S.C. § 517, attaching a Statement of Interest of the United States. IER argues that 1) IER is authorized to make such a filing under 28 U.S.C. § 517, which "permits the Attorney General to send any officer of the Department of Justice 'to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States,'" or, 2) in the alternative, that the Court should accept its Statement of Interest as an amicus curiae brief pursuant to 28 C.F.R. § 68.17.[4] IER chose not to intervene under 28 C.F.R. § 68.15, which provides that "[t]he Special Counsel, or any other interested person or private organization . . . may petition to intervene as a party in unfair immigration-related employment cases." The Court finds that that the document "attend[s] to [the] interest of the United States," pursuant to Section 517, and accepts the submission.

V. FACTS NOT IN DISPUTE[5]

Complainant began working for Plymouth Super Center (Super Center) on September 23, 2020. Complainant's Deposition Transcript Pages (C's Depo.) 22.[6] The Super Center included a car wash attached to the building and a Valvoline Oil Shop and Brilliant Auto Detail outside. Id. Complainant worked as a cashier. Id. She made $11.50 an hour. Id. at 22–23. She found the position on Indeed.com by indicating she was "interested," after which the Super Center called her; she filled out a physical application on September 22, 2020. Id. at 23. When she was hired, she filled out new hire paperwork, including a Form I-9. Id.

The Super Center was previously owned by a man named Drew. Id. Around December 13, 2020 Drew told Complainant and a few others that USA2GO was going to buy the Super Center. Id. at 25. He said that Kevin (last name unknown) would be coming to purchase the store around that time, and that he wanted all documents signed by Christmas. Id.

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[4] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

[5] Pursuant to OCAHO precedent, Rule 56, Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and its' progeny, the Court construes the facts in the light most favorable to the non-moving party and crafts findings of facts in a manner that reflects these presumptions. Fed. R. Civ. P. 56; United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp., 477 U.S. at 323).

[6] The Court will reference Complainant's Deposition Transcript Pages using the page number on the right-hand corner of each page, rather than the page number within the filing, for ease of reference.

Drew told Complainant that if she filled out the application packet she would keep her job. Id. at 26. On December 21, 2020 another person brought a pile of employee packets to the store counter. Id. at 26–27. Complainant took one and started filling it out, intending to complete it and to work for USA2GO. Id. at 27. However, when she got to the Form I-9 section of the packet, on page 13, she looked in the upper right-hand corner and saw that the Form I-9 was expired. *See* id. at 27–28. She was standing around with other employees talking and filling out their applications, and she asked someone to hand her a black Sharpie, and blacked out all of the information from the cover until the Form I-9 that she had already filled out. Id. at 28.

Complainant told Drew about the expired Form I-9 but he disregarded it, saying that it was "not [his] business, not [his] problem," and that Complainant should take it up with the new company. Id. Complainant also brought the expired forms to the attention of her supervisor and Office Manager, Crystal Underwood, who previously said that she would be maintaining her position with the new company. Id.; Disciplinary Report 1. Underwood told Complainant to "just fill it out." C's Depo. 28.

Around December 21 or 23, Complainant remarked to another coworker that the name "USA2GO" sounded like a "conspiracy theory." Id. at 67. Complainant felt that the name "sounded funny" and "funky" and "like there was a conspiracy." Id. By "conspiracy theory," she meant "[t]hat there was ideology behind something that I wasn't aware of" and that "[t]here was more to the sale and things just happening so fast as they were that [she] couldn't understand, or that was explained or relayed," and it was "very fast and hurtful." Id.

Still troubled by the expired Form I-9, Complainant conducted an internet search on what a Form I-9 is. Id. at 28. One of the search results was the Department of Justice's IER page and their anonymous hotline. Id.

On the morning of December 23, 2020, the date of the store sale, she called the IER hotline and explained that she was "filling out an application to maintain [her] position at a company . . . that was just purchased by another company," and her concerns about the expired I-9 form. Id. at 28, 33. She spoke with an IER representative, Sarah Digert, who told her that "the expired I-9 form would raise flags with the Department of Justice," and advised Complainant to bring it to the attention of her managers or the new owners. Id. at 33, 54.

Complainant then contacted Vicki Dellanger, the new owner's controller, and Bob (last name unknown), whose business cards had been included in the application packet. Id. at 34. Bob told Complainant "we'll take care of it." Id. at 36. Complainant thought that an updated Form I-9 was going to be exchanged for the expired one. Id.

That day, Complainant was standing around with employees Crystal Underwood, Jenna Holden, and Chris Holden. Id. at 53–54. There was a blank packet sitting on the counter, which Complainant picked up. Id. at 54. She brought the expired I-9 to the attention of the other

employees, saying that she "had spoken with [IER] and was told that filling out the expired document would raise red flags," and that "filling out an expired Department of Homeland Security document is illegal." Id. These other employees "didn't think it was an issue at all" and "didn't understand [her] concern." Id.

Another employee named Ed Schmeeter had previously told Complainant that the Holdens were adopted from Guatemala. Id. at 56. Although Complainant had never previously spoken about the Holdens' national origin, Complainant remarked that the Form I-9 "verifies anybody to work in the United States, whether they're national origin, whether they're immigrant," and that the Form I-9 would affect the Holdens "with them having been adopted." Id. at 54–56; *see also* C's Resp. to Interrogatories 2. In her deposition, Complainant testified that she "wasn't trying to be offensive in any way whatsoever"; she had a friend whose stepdad was deported after high school, and she "didn't want to see somebody else you [sic] through [that]" or for the Form I-9 "to affect somebody's citizenship status." C's Depo. 58–59.

Jenna and Chris became upset. Id. at 61. Jenna said that they were not adopted from Guatemala. Complainant responded "oh, okay" and the conversation ended. Id.

Shortly thereafter, Underwood issued Complainant an Employee Disciplinary Report (Report) due to the incident with the Holdens. Id. at 51, 61. Underwood wrote that the incident occurred on December 23, 2020 between 5:00 and 5:20pm. Report 1. Under "Nature of incident," Underwood checked the boxes for "Improper conduct" and "[v]iolation of company rules of conduct." Id. She wrote: "[Complainant] said very offensive and hurtful statements regarding other employees' race, making employees feel very uncomfortable." Id. (cleaned up). Underwood identified Jena and Chris Holden as witnesses. Id. Under "additional remarks," Underwood wrote: "I Crystal U. have talk [sic] to [Complainant] several times about her attitude when dealing with employers & customers." Id. Complainant testified at her deposition that she had two complaints from customers prior to this write-up, but this was the first time she had been spoken to about treating other employees with respect. C's Depo. 64.

After receiving this Report, Complainant offered to resign, but Underwood told her that she "didn't need to quit," and to go back to her shift. Id. at 63. Complainant went back to Chris and Jenna and "verbally apologized to them multiple times," apologized "for it coming up as a hurtful statement," and continued her shift. Id. According to Complainant, the Holdens accepted her apology. Id. at 64.

Complainant states in her IER charge that she was told that her employment packet was due on December 30, 2020 in order to keep her position. Compl. 14. On December 31, 2020, she received a text message from Underwood asking Complainant to call. Id. Complainant called Underwood immediately; Underwood told her that "[a]t this time, we are going to go a different route" and that she would "reach out to Vicki about getting [her] next paycheck early so [she didn't] have to wait," but that Complainant was "no longer employed with us." Id.

Underwood told Complainant that she did not need to return her uniform, because the company had new ownership, and thanked her for "all of [her] hard work." Id. Complainant's last shift was December 29, 2020, and she had not turned in the application yet due to a "lack in update" as to the paperwork. Id.

Complainant states that no one at USA2GO made any discriminatory remarks to her about her national origin and that Underwood did not tell her that she was fired because of her national origin. C's Depo. 79–80.

VI. LEGAL STANDARDS

A. Motion for Summary Decision

OCAHO's Rules of Practice and Procedure provides that the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . 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). Since this rule is analogous to the Federal Rule of Civil Procedure 56(c), OCAHO looks to federal case law interpreting Rule 56(c) for guidance in determining whether summary decision is appropriate. *See* Martinez v. Superior Linen, 10 OCAHO no. 1180, 5 (2013); *see also* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation."). Federal cases decided under the jurisdiction of the Court of Appeals for the Sixth Circuit are particularly persuasive in this matter because the events in this case occurred in Michigan, which is in the geographical scope of the Sixth Circuit. *See* 28 C.F.R. § 68.57.

"An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

"[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" United States v. 3679 Com. Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). In the absence of any proof, the Court will not assume that the non-moving party could or would prove the necessary facts. Crespo v. Famsa,

Inc., 13 OCAHO no. 1337, 3 (2019). However, "[e]ven where a party 'offer[s] no timely response to [a] [ ] motion for summary judgment, the District Court [may] not use that as a reason for granting summary judgment without first examining all the materials properly before it under Rule 56(c)." F.T.C. v. E.M.A. Nationwide, Inc., 767 F.3d 611, 630 (6th Cir. 2014) (quoting Smith v. Hudson, 600 F.2d 60, 65 (6th Cir. 1979)). "This is so because '[a] party is never required to respond to a motion for summary judgment in order to prevail since the burden of establishing the nonexistence of a material factual dispute always rests with the movant.'" Id. (citing Smith, 600 F.2d at 64). "Therefore, even where a motion for summary judgment is unopposed, a [ ] court must review carefully the portions of the record submitted by the moving party to determine whether a genuine dispute of material fact exists." Id. "However, '[n]either the trial nor appellate court . . . will sua sponte comb the record from the partisan perspective of an advocate for the non-moving party." Id. (quoting Guarino v. Brookfield Twp. Trs., 980 F.2d 399, 410 (6th Cir.1992)).

While the Court views all facts and reasonable inferences in the light most favorable to the non-moving party, "those inferences may not be so tenuous as to amount to speculation." Angulo v. Securitas Sec. Servs. USA, Inc., 11 OCAHO no. 1259, 8 (2015). Furthermore, "[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." Id. at 9 (relying on Celotex Corp., 477 U.S. at 322–23).

B. Burdens of Proof

"In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." Chellouf v. Inter Am. Univ. of P.R., 12 OCAHO no. 1269, 5 (2016) (citing Cruz v. Able Serv. Contractors, Inc., 6 OCAHO no. 837, 144, 154–55 (1996)),

In order to prove a case of employment-based discrimination under § 1324b, a complainant may use direct or circumstantial evidence. United States v. Diversified Tech. & Servs. of Va., Inc., 9 OCAHO no. 1095, 13 (2003) (citing United States Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983)). Direct evidence is evidence that, on its face, establishes discriminatory intent. Id. "If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence." Id.

If a complainant relies on circumstantial evidence, OCAHO applies the familiar burden shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973), and its progeny. See Reed v. Dupont Pioneer Hi-Bred Int'l, Inc., 13 OCAHO no. 1321a, 3 (2019). First, Complainants must establish a prima facie case of discrimination; second, Respondents must articulate some legitimate, non-discriminatory reason for the challenged employment action; third, if Respondent does so, the inference of discrimination raised by the

prima facie case disappears, and Complainants must then prove by a preponderance of the evidence that Respondent's articulated reason is false and that Respondent intentionally discriminated against Complainants. Crespo, 13 OCAHO no. 1337, at 3; *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); Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

C. Discrimination

Section 1324b of Title 8 of the United States Code prohibits an employer from discriminating against a "protected individual" in hiring or by discharging that individual from employment based on their citizenship status. 8 U.S.C. § 1324b(a)(1)(B). A United States citizen is a "protected individual" under § 1324b(a)(3)(A).

To make a prima facie case of discriminatory discharge, the Complainant must show that he was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) replaced by a person outside the protected class or treated differently than similarly situated nonminority employees." Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 303 (6th Cir. 2016) (citing Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992)). The burden then shifts to the Respondent to articulate a "legitimate, nondiscriminatory reason" for Complainant's termination. Id. (citing McDonnell Douglas Corp., 411 U.S. at 802). Assuming Respondent does so, Complainant "can still survive the company's motion for summary judgment if he can 'identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination.'" Id. (quoting Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 812 (6th Cir. 2011)).

D. Unfair Documentary Practices

To establish an unfair documentary practice (document abuse) claim under 8 U.S.C. § 1324b(a)(6), the Complainant must set forth two elements: an act and an intent. United States v. Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, 25 (2017) (citing Johnson v. Progressive Roofing, 12 OCAHO no. 1295, 5 (2017)). The act is a request by the employer for the person to produce documents to satisfy an employer's obligations under IRCA, or a refusal to accept valid documents related to employment eligibility verification procedures. *See* Jarvis v. AK Steel, 7 OCAHO no. 930, 111, 117 (1997); Costigan v. NYNEX, 6 OCAHO no. 918, 1151, 1161 (1997). "While [8 U.S.C. § 1324b(a)(6)] does not explicitly define 'intent,' it conditions liability for document abuse upon proof of the employer's 'purpose or . . . intent of discriminating against an individual in violation of [8 U.S.C. § 1324b(a)(1)].'" Ondina-Mendez v. Sugar Creek Packing Co., 9 OCAHO no. 1085, 16 (2002) (citation omitted); *see* Mbitaze v. City of Greenbelt, 13 OCAHO no. 1345a, 11 (2020) (emphasizing that the requisite intent is "to act differently based on a protected characteristic").

E. Retaliation

Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section."

A prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual's protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action. Chellouf, 12 OCAHO no. 1269, at 5–6 (citing Breda v. Kindred Braintree Hosp., LLC, 10 OCAHO no. 1202, 8 (2013)).

VII. ANALYSIS

A. Discrimination: National Origin

Respondent argues that this Court must dismiss Complainant's national origin discrimination claim because this Court lacks subject matter jurisdiction as Respondent has more than 15 employees. Mot. Summ. Dec. 8–9.

The Court construes Complainant's motion as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *See* Ugochi v. N.D. Dep't of Human Servs., 12 OCAHO no. 1304, 4 (2017) (quoting 28 C.F.R. § 68.1) ("The OCAHO Rules of Practice and Procedure do not contain a specific provision regarding dismissal of actions for lack of subject-matter jurisdiction but the Federal Rules of Civil Procedure 'may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.'"); Ogle v. Church of God, 153 F. App'x 371, 374–75 (6th Cir. 2005) (reviewing district court's consideration of a converted motion for summary judgment for lack of subject matter jurisdiction as a motion to dismiss pursuant to Rule 12(b)(1) (citing Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) (noting that a Rule 12(b)(1) motion is the proper vehicle for considering whether subject matter jurisdiction exists in a particular case))).

Complainant has the burden to establish subject matter jurisdiction over her claims. *See* Zajradhara v. Aljeric Gen. Servs., 16 OCAHO no. 1432c, 6–7 (2023) (citing Jayaben Patel v. USCIS Boston, 14 OCAHO no. 1353, 4 (2020) ("Complainant must establish that OCAHO has subject matter jurisdiction over her discrimination and retaliation claims."), and then citing Wilson v. Harrisburg Sch. Dist., 6 OCAHO no. 919, 1167, 1172 (1997) ("The party asserting subject matter jurisdiction bears the burden of proving it.")).

In the case of discrimination based upon national origin, § 1324b does not apply to employers who employ more than 15 persons. 8 U.S.C. § 1324b(a)(2)(B); *see* Hayden v. N.Y. Police Dep't., 13 OCAHO no. 1313, 4 (2018). "OCAHO may only hear national origin discrimination claims brought under § 1324b(a)(1) when the employer employs 'between four and fourteen employees.'" Hayden, 13 OCAHO no. 1313, at 4 (quoting Ondina-Mendez v. Sugar Creek Packing Co., 9 OCAHO no. 1085, 13 (2002)).

In the Complaint, Complainant answered the question "How many employees does the Business/Employer have?" by checking the box for "15 or more employees." Compl. 6. Complainant has not provided any additional evidence or argument to the Court regarding Respondent's number of employees.

Accordingly, Court finds that Complainant has not met her burden to establish subject matter jurisdiction concerning her national origin discrimination claim. The appropriate result for a jurisdictionally deficient allegation is dismissal of the claim. *See* Zajradhara v. Misamis Constr. (Saipan) Ltd., 15 OCAHO no. 1396b, 3 (2022) (citing Boyd v. Sherling, 6 OCAHO no. 916, 1113, 1120 (1997)). Accordingly, Respondent's motion to dismiss Complainant's national origin discrimination claim is granted, and the claim is DISMISSED.

B. Discrimination: Citizenship Status

Respondent next moves for summary decision as to Complainant's citizenship status discrimination claim, asserting that Complainant "cannot make a prima facie showing of discrimination." Mot. Summ. Dec. 9–10. Respondent asserts that Complainant cannot show that she was qualified for her position or that she was treated differently than similarly situated individuals who were not United States citizens. Id.

As a threshold matter, as Respondent notes, the allegations in the Complaint and the evidence in the record is unclear as to whether Respondent terminated Complainant or whether USA2GO failed to hire her following its purchase of the Super Center. *See* Compl. 6–8 (alleging that Respondent refused to hire her, but also that she was fired on December 31, 2020); Mot. Summ. Dec. 4 n.1. Supporting the notion that this is a failure to hire claim, Complainant was told to fill out an application packet, C's Depo. 26, which contained a Form I-9—a form that an employee is required to sign no later than the date of hire. She did not complete the packet in its entirety by the deadline. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B) (2020). Supporting the notion that this is a termination claim, the record indicates that Complainant worked for Respondent after the sale occurred—the sale happened on December 23, 2020 and Complainant's last shift was on December 29, 2020. Complainant's conversation with Underwood in which Underwood advised that she was being separated from Respondent occurred on December 31, 2023. Compl. 14. Moreover, Complainant refers to being "fired" and "let go" by Underwood in her deposition. C's Depo. 79–80.

As the Court is obliged to construe the facts in the light most favorable to Complainant as the non-moving party, the Court will analyze whether Complainant has made a prima facie case as either a termination or a non-selection.

First, the Court notes that as a U.S. Citizen, Complainant is within the scope of the statute, meeting the first element of the prima facie case. *See* 8 U.S.C. § 1324b(a)(3)(A).

Addressing the second element of the prima facie case, the adverse employment action, neither party disputes for the purpose of the motion that Complainant was either not hired or terminated. Either action would obviously meet this element of the case. *See* 8 U.S.C. § 1324b(a)(1) (providing that it is an unfair immigration-related employment practice to discriminate in "hiring" or "discharging").

Concerning the third element, Complainant must offer evidence which demonstrates that she is otherwise qualified for the position she held (in the case of a termination) or sought to hold (in the case of a non-selection). Complainant presents her several years of working at the Super Center, and her understanding, conveyed from Respondent's management, that all prior employees of the business would be retained or rehired once the transfer of ownership occurred.

Respondent has argued that Complainant's behavior at the Super Center was below the standard sufficient to establish this element of the prima face case. It cites Respondent's violations of the prior company's rules of conduct, and her documented challenges with customer interactions. As noted previously, Complainant offered no written opposition to the motion.

To establish that they are qualified for their position, "a plaintiff must show that h[is] performance met h[is] employer's legitimate expectations at the time of h[is] discharge." Vincent v. Brewer Co., 514 F.3d 489, 495 (6th Cir. 2007) (citing McClain v. Nw. Cmty. Corr. Ctr. Judicial Corr. Bd., 440 F.3d 320, 334 (6th Cir. 2006)). Prior to her termination, it is undisputed that Complainant received an Employee Disciplinary Report indicating a violation of the company rules of conduct, and that she had been counselled concerning her interactions with customers in the past. There is no further information in the record regarding USA2GO's job requirements or expectations for Complainant, nor was a reason given for Complainant's discharge or non-selection. Compl. 14.

The difficulty with accepting Respondent's argument, at the summary decision stage, is that it offers no evidence of a minimum standard of conduct for the position against which to compare Complainant. Respondent offers no evidence, in the case of a non-selection, that its minimum qualification was no more than one documented performance infraction in an applicant's prior employment. It similarly offers no evidence, in the case of a termination, that Respondent's minimum standard of conduct was a maximum of one prior infraction. It also offers no evidence that it honors the infractions which occurred under the company's prior ownership. In short, there is a material question of fact concerning this element of the prima facie case.

Addressing the fourth and final element, the causal nexus between the adverse employment action and the protected basis, there is no evidence in the record which might meet this element. Complainant testifies that no one at Respondent spoke about her citizenship status, or citizenship in general, in the context of her non-selection or termination. Complainant offers no evidence concerning whether the vacancy was filled by a person of a different citizenship status, or whether Respondent retained the employment of non-citizens instead of her. There are no other allegations or evidence suggesting that Complainant was treated differently than a similarly situated non-U.S. citizen employee, nor any evidence suggesting that Respondent's

decision to fire Complainant was motivated by discriminatory animus based on her citizenship status.

Moreover, there is no evidence that Respondent's initial demand that Complainant complete an application packet with an expired Form I-9 was motivated by discriminatory intent based on either Complainant's citizenship or national origin. Complainant offers no evidence that she was treated differently than her co-workers; rather, the evidence in the record is that Respondent placed a stack of application packets on the counter and each employee was directed to take one and fill them out to retain their position. C's Depo. 26–27. This appears to have been Respondent's general practice, and not discriminatorily applied to Complainant.

Accordingly, the Court finds that Complainant has failed to establish a prima facie case of citizenship status discrimination. Respondent's motion for summary decision is granted as to Complainant's citizenship discrimination claim, and this claim is DISMISSED.

C. Unfair Documentary Practices

1. Analysis

While Complainant's position on this matter is not entirely clear, the Court presumes that Complainant's unfair documentary practices claim rests on the demand that she complete an expired Form I-9.

However, this claim is not cognizable as an allegation of unfair documentary practices. An unfair documentary practices claim occurs when an employer demands more or different documents than those required by IRCA. OCAHO case law makes clear that the "documents" referred to in the statute are those used to verify the identity and work-authorization of a prospective employee, such as ID cards, birth certificates, etc., not the Form I-9 itself. *See* Mar-Jac Poultry, Inc., 12 OCAHO no. 1298, at 25 ("Document abuse is prohibited if made 'in connection with the employment verification process required by 8 U.S.C. § 1324a(b),' meaning 'for the purpose of verifying the identity and work eligibility of the individual . . . '"). There is no evidence in the record that Respondent required more or different identification or work authorization documents than required to satisfy the List A and/or B and C options provided on the Form I-9, nor that Respondent rejected any of Complainant's work authorization or identification documents. Similarly, Complainant makes no argument that the documents identified in Lists A, B, or C of the expired Form I-9 were any different than the current Form I-9, or that (even if they were) an unfair documentary practices claim would be properly before this Court.

The Court therefore finds that Complainant has failed to establish a prima facie case of document abuse. Respondent's motion for summary decision as to Complainant's document abuse claim is granted, and the claim is DISMISSED.

D. Retaliation

To briefly recap the allegations of retaliation, after noticing that the Form I-9 was expired, Complainant alerted her colleagues and Supervisor Crystal Underwood. Later, she called the IER hotline to inquire about whether she should complete the form. She then contacted Respondent's higher management, alerting them to the form and asking them to resolve the matter. A few days later, her employment was either discontinued or she was not hired.

Respondent argues, in support of its motion for summary decision, that Complainant has not shown that she engaged in protected activity. Respondent argues that Complainant has not alleged facts showing that Respondent's alleged act of retaliation was "in response to her asserting her legal rights of unfair immigration-related employment practices," as Complainant only advised that she had called the Department of Justice's hotline, not that she "intended to file a charge, complaint, testify, assist, or participate in an investigation or proceeding under § 1324b." Mot. Summ. Dec. 10.

Moreover, Respondent argues that even if Complainant can establish a prima facie case for any of her claims, she cannot show that Respondent's reason for discharging her was pretextual. Id. at 10—11. Respondent argues that Complainant cannot establish that its reason for the discharge has no basis in fact given Complainant's write up. It also argues that Complainant cannot demonstrate that her prior conduct did not motivate Respondent's decision to separate her employment. Id. at 11. Respondent also argues that Complainant cannot point to any of its other employees who engaged in the same or similar conduct who were not discharged. Id. Respondent further notes that Complainant was an at-will employee. Id.

1. IER's Position

In its Statement of Interest, IER argues that contrary to Respondent's argument, protected activity under 8 U.S.C. § 1324b(a)(5) includes contacting IER's hotline. Statement of Interest 2, 5–8. IER argues that §1324b(a)(5) not only prohibits a person or entity from retaliating against an individual because the individual intends to file or has filed a charge or complaint, but also against "any individual for the purpose of interfering with any right or privilege secured under this section." Id. at 4. IER argues that §1324b(l) requires IER to "conduct a campaign to disseminate information respecting the rights and remedies prescribed under [§ 1324b]" with a specific mandate to "increase[] the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies under [§1324b]." Id. at 5–7. IER argues that it uses a variety of methods to comply with this mandate, including its hotline. Id. at 12. Therefore, IER argues that "IER's statutory right to educate the public about §1324b is a right 'secured under this section' for purposes of § 1324b(a)(5)[, a]nd preventing the public from accessing IER's hotline . . . would interfere with, if not undermine, IER's right to

disseminate such information." Id. at 6. IER argues that OCAHO case law supports the conclusion that dissemination of information under 8 U.S.C. § 1324b(1) is protected activity because it comprises a right or privilege secured under the statute. Id. at 7–8 & n.4 (citing, inter alia, Cruz v. Able Service Contractors, Inc., 6 OCAHO no. 837, 147 (1996); Rainwater v. Doctor's Hospice of Ga., Inc., 12 OCAHO no. 1300, 22 (2017)).

2. Prima Facie Case

Here, Respondent does not contest that Complainant informed Respondent that she had contacted the IER hotline, nor that her firing constituted an adverse employment action. *See* Mot. Summ. Dec. The remaining questions are: 1) whether Complainant engaged in any protected activity, 2) and whether Complainant has established a causal connection between the protected activity and her discharge.

a. Protected Activity (Opposition)

In order to qualify as protected conduct in this forum, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *See, e.g.*, Harris v. Haw. Gov't Emps. Ass'n, 7 OCAHO no. 937, 291, 295 (1997); Yohan v. Cent. State Hosp., 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO jurisdiction over threats to report employer to "EEOC, the Immigration Department [sic], the American Counsel General, the ALCU [sic], the NAACP, Georgia Legal Services," or agencies other than IER or OCAHO); De Araujo v. Joan Smith Enter., 10 OCAHO no. 1187 (2013).

Complainant's conduct suggests she has engaged in opposition to what she believed to be an unlawful employment practice under IRCA. Viewing the facts in the light most favorable to Complainant, she suspected that the Respondent's requirement that she and her co-workers complete an expired Form I-9 was violative of an immigration and employment related statute or regulation. She warned her colleagues against doing so, in the presence of her immediate supervisor, believing that they might be arrested and deported. She later contacted IER to investigate her belief that she was being asked to perform an illegal task. Upon speaking with IER, she again protested the requirement that she complete the expired form with Respondent's senior management.

OCAHO jurisprudence has long understood § 1324b retaliation to include opposing unlawful practices, and it has applied the caselaw concerning the "oppositional" retaliation provisions of Title VII of the Civil Rights Act of 1964 to the IRCA. *See, e.g.*, Diarrassouba v. Medallion Fin. Corp., 9 OCAHO 1076, 7–8 (2001). Moreover, the Court notes that the statute's prohibition on "interference" with any "right or privilege secured by [8 U.S.C. § 1324b]," necessarily encompasses opposing a practice made unlawful by § 1324b.[7] Analogizing to Title

[7] In interpreting the "interference" component of similar anti-retaliation employment statutes, the courts often take an expansive view of its meaning to generally include activities which "tend to chill" an employee's exercise of their rights, or any action which takes into account the employee's exercise of their protected rights in making an adverse employment action. *See, e.g.*, Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123-24 (9th Cir. 2001) (interpreting 29 U.S.C. § 2615(a)'s interference provision, stating "[a]s a general matter, then, the established understanding at the time that the [Family and Medical Leave Act] was enacted was that employer actions that deter employee participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights. Under the FMLA, as under the [National Labor Relations Act], attaching negative consequences to the exercise of protected rights surely 'tends to chill' an employee's willingness to exercise those rights."); Dyer v. Ventra Sandusky, LLC, 934 F.3d 472, 476 (6th Cir. 2019) (approvingly citing Bachelder's interpretation of the anti-interference provisions of the FMLA); NLRB v. Inter-Disciplinary Advantage, Inc., 312 F. App'x 737, 744-45 (6th Cir. 2008) (addressing 29 U.S.C. § 158, the anti-interference provisions of the NLRA, the court notes "the Board reasonably concluded that [the challenged employee policy] would reasonably *tend to chill* employees in the exercise of their Section 7 rights.") (emphasis added); Fogelman v. Mercy Hosp., Inc., 284 F.3d 561, 570 (3d Cir. 2002) (addressing 42 U.S.C. § 12203(b), the anti-interference provision of the Americans with Disabilities Act, the court states "we have noted that the scope of this second anti-retaliation provision of the ADA 'arguably sweeps more broadly' than the first.").

VII of the Civil Rights Act of 1964, examples of oppositional behavior include "complaining to anyone (management, unions, and other employees, or newspapers) about allegedly unlawful practices; [and] refusing to obey an order because the worker thinks it is unlawful under Title VII." Jackson v. Genesee Cnty. Road Comm'n, 999 F.3d 333, 344–45 (6th Cir. 2021) (citing Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 721 (6th Cir. 2008). The person making the oppositional claim need only make the claim reasonably and in good faith. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000). "A violation of Title VII's retaliation provision can be found whether or not the challenged practice was ultimately found to be unlawful." Id. at 579; *see also* Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, 428, 448–49 (1994) ("Complainant may only prevail on his retaliation claim, however, if (1) he had a reasonable, good faith belief that an IRCA violation occurred"). Applying this standard, Complainant's open opposition to filling out the expired Form I-9, while mistaken about whether it constitutes illegal conduct, nonetheless counts as protected activity.

b. Protected Activity (Interference)

The Court agrees with IER that contacting the IER hotline for information regarding one's rights under § 1324b constituted protected activity under § 1324b(5).

8 U.S.C. § 1324b(a)(5) provides in relevant part:

> It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with *any right or privilege secured under this section* or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

(emphasis added). Moreover, § 1324b(l)(1) provides in relevant part:

> [IER] shall conduct a campaign to disseminate information respecting the rights and remedies prescribed under this section and under title VII of the Civil Rights Act of 1964 [42 U.S.C. 2000e et seq.] in connection with unfair immigration-related employment practices. Such campaign shall be aimed at increasing the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies under this section and such title.

The question, therefore, is whether calling the IER hotline to inquire about one's rights under § 1324b constitutes a right or privilege under § 1324b(a)(5), due to IER's mandate to disseminate information respecting the "rights and remedies prescribed under this section" in § 1324b(l)(1). This appears to be the first time this question has been raised in an OCAHO proceeding.[8]

It is ultimately a question of statutory interpretation: what does a "right or privilege secured under this section" mean in the context of §1324b(a)(5), and does IER's mandate to "disseminate information respecting the rights and remedies prescribed under this section" create a right or privilege for individuals to contact its hotline?

"Because the issue on review is one of statutory construction, the 'starting point must be the language employed by Congress,' . . . and unless something suggests otherwise, 'affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning.'" United States v. De Jesus Corrales Hernandez, 17 OCAHO no. 1454e, (2023) (citing Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), and then citing Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481–82 (2021)). The Court must first "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," relying on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." United States ex rel. Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021), *cert*. *denied sub nom*. William Beaumont Hosp. v. United States, 142 S. Ct. 896 (2022).

As a threshold matter, the "Definitions" section found at 8 U.S.C. § 1101 does not define the terms "right" or "privilege," nor does §1324b specifically identify any of these rights or privileges. OCAHO precedent cited by IER holds that §§ 1324b(l) and 1324b(a)(5), read together, protect an individual *disseminating* information about IRCA on behalf of the former Office of Special Counsel, now IER. Cruz, 6 OCAHO no. 837, at 158. But § 1324b(l) does not expressly provide a right for individuals to *access* information disseminated by IER pursuant to its mandate. Even though § 1324b(a)(5) applies broadly to interference with *any* right or privilege under the statute, here, Complainant was not disseminating information on behalf of IER, *cf*. id., but rather, accessed this information, a circumstance the statute does not directly address.

However, the right to disseminate information is meaningless if an employee may be punished for accessing it. In the context of § 1324b, a right to access information from IER logically flows from both IER's mandate to disseminate this information as well as an individual's right to file a charge with IER. Thus, this interpretation supports the legislative

[8] Prior OCAHO cases have treated calls to the IER hotline as protected conduct implicitly, as the parties did not raise the issue. *See, e.g*., Ackermann v. Mindlance, Inc., 17 OCAHO no. 1462b, 6, 11 (2023); Rainwater, 12 OCAHO no. 1300, at 22.

intent of § 1324b to educate employees regarding their rights under the statute, as evidenced by IER's express mandate to do so. And, as noted in Cruz, federal court case law interpreting other remedial employment discrimination statutes "consistently have liberally construed remedial anti-retaliation provisions to encompass a broad range of conduct." 6 OCAHO no. 837, at 155 (collecting cases); *see also* United States v. Robison Fruit Ranch, Inc., 4 OCAHO no. 594 (1994) (noting that "Congress had intended the 1986 Immigration and Reform and Control Act to have a broad, remedial purpose" and that "Courts have firmly established a policy of liberally construing remedial statutes so as to 'suppress the evil and advance the remedy.'" (citations omitted)).

Accordingly, within the context of §1324b, the Court finds that contacting IER's hotline to inquire about one's rights under § 1324b constitutes a right or privilege under § 1324b(a)(5).

c. Causal Connection

"Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013); Chellouf, 12 OCAHO no. 1269, at 14 (following Nassar). Circumstantial evidence of the causal connection includes temporal proximity of the adverse action to the protected activity, differential treatment, and comments by an employer that intimate a retaliatory mindset. Chellouf, 12 OCAHO no. 1269, at 6 (citation omitted). Temporal proximity between an employer's knowledge and the adverse employment action may alone establish causality but "the temporal relationship must . . . be 'very close."' Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1182 (11th Cir. 2010) (quoting Thomas, 506 F.3d at 1364); Martinez v. Superior Linen, 10 OCAHO no. 1180, 7 (2013). "It is causation however, and not just temporal proximity per se, that is vital to the employee's case." Martinez, 10 OCAHO no. 1180, at 8 (citing Sodhi v. Maricopa Cnty. Special Health Care Dist., 10 OCAHO no. 1127, 8–9 (2008); Porter v. Cal. Dep't of Corrs., 419 F.3d 885, 895 (9th Cir. 2005)).

Here, Complainant called the IER hotline and informed her supervisors that she had done so on December 23, 2020. Later that day, she advised her co-workers about the expired Form I-9 and what she believed to be the consequences of filling one out. C's Depo. 36, 36, 53–56. Shortly thereafter, she was issued an Employee Disciplinary Report. Report 1. She was terminated on December 31, 2020. Compl. 14. Sixth Circuit and OCAHO case law suggest that the very close temporal proximity of 11 days between protected activity and an adverse employment action are enough to give rise to an inference of retaliation. *See* DiCarlo v. Potter, 358 F.3d 408, 421–22 (6th Cir. 2004) (finding that when termination occurred twenty-one days after EEO complaint "[i]n light of our prior precedent, the temporal proximity between the two events is significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive").

3. Non-Retaliatory Reason

Having established a prima facie case, the burden of production shifts to Respondent, who must articulate a legitimate, non-retaliatory reason for Complainant's termination or non-selection. "This is not a burden to 'persuade the court that it was actually motivated by the proffered reasons.' . . . The defendant only has to present 'clear and reasonably specific' reasons that will 'frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.'" Harris v. City of Akron, Ohio, 836 F. App'x 415, 420 (6th Cir. 2020) (citing Tex. Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 254 (1981)); *see also* Hartsel v. Keys, 87 F.3d 795, 800 (6th Cir. 1996) ("It is important to note that the defendant need not prove a nondiscriminatory reason for not promoting [the employee] but need merely articulate a valid rationale.")

Respondent asserts that Complainant was terminated or not selected "based on her discriminatory, disruptive, false, and disparaging comments about her fellow co-workers and about Respondent, together with her generally inappropriate and bad attitude towards her fellow employees and customers (which she had been counseled on repeatedly)." Mot. Summ. Dec. 6.

Complainant does not dispute that she made the adoption remark to her co-workers, that she was disciplined for it, that she had prior complaints from customers, or that she made the conspiracy theory remark. Given the low burden of production at this stage, the Court finds that Respondent has met its burden to provide a legitimate, non-retaliatory reason for its actions. *See, e.g.*, Goldblum v. Univ. of Cincinnati, 62 F.4th 244, 252 (6th Cir. 2023) ("We have previously held that an employee's insubordination and her failure to follow company policies constitute legitimate, nonretaliatory reasons to terminate employment.") (citing, inter alia, Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 260 (4th Cir. 1998) ("Congress didn't 'intend[ ] to immunize insubordinate, disruptive, or nonproductive behavior at work.'") (quotation omitted)).

4. Pretext

The burden of production now shifts to Complainant to identify evidence that suggests Respondent's proffered reasons were pretext for retaliation. "Plaintiffs typically show pretext by establishing one of three things: '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that [the proffered reasons] were insufficient to motivate the employer's action." Goldblum, 62 F.4th at 252 (citing Chen v. Dow Chem. Co., 580 F.3d 394, 400 (6th Cir. 2009)). "These are not the only ways that a plaintiff can establish pretext. Rather, these three categories are simply a 'convenient way of marshaling evidence and focusing it on the ultimate inquiry: "did the employer fire the employee for the stated reason or not?"'" Id. (citing Tingle v. Arbors at Hilliard, 692 F.3d 523, 530 (6th Cir. 2012)). "As a result, a plaintiff may also proffer some other 'cognizable explanation of how the evidence she has put forth establishes pretext.'" Id. (citing Miles v. S. Cent. Hum. Res. Agency, Inc., 946 F.3d 883, 888 (6th Cir. 2020)); *see also* Brown v. Kelsey-Hayes Co., 814 F.

App'x 72, 80 (6th Cir. 2020) ("Ultimately the plaintiff must produce 'sufficient evidence from which a jury could reasonably reject [the employer's] explanation of why it fired her.'").

As an initial matter, Complainant has not filed an opposition to Respondent's motion for summary decision. Nonetheless, the Court will review the portions of the record submitted by the moving party to determine whether a genuine dispute of material fact exists.

Here, the record raises several questions relating to both whether the proffered reasons actually motivated Respondent's decision, as well as whether the reasons were sufficient to motivate the action. First, while the disciplinary report indicates that Complainant's statements were "very offensive and hurtful" and "ma[d]e employees feel very uncomfortable," Complainant testified in her deposition that her comments were motivated by a fear that the expired Form I-9 may expose her co-workers to immigration risk, based on rumors she had heard that they were adopted from Guatemala. C's Depo. 58–59. Complainant also testified that after receiving the write-up, she went to her co-workers and apologized, and that they accepted her apology. Id. at 64. While the write-up indicates that Complainant's comment was in "[v]iolation of company rules of conduct," there is not information in the record about what company rule her comment violated. Report 1. In short, while the write-up characterizes Complainant's statement as offensive and hurtful, Complainant characterizes her statement as well-intentioned and indicates that the co-workers accepted her apology. Complainant offered to resign that day, but was told to return to complete her shift. C's Depo. 63. Moreover, while Complainant comments in the days leading up to her termination that "USA2GO" sounded like a "conspiracy theory," it is not clear from the record how—if at all—it contributed to her termination. The sole reason offered by Respondent to Complainant upon her termination was that they decided to "go a different route." Compl. 14.

In addition, Complainant was given a written reprimand on the same day that she informed her supervisor that she had called IER's hotline, and separated from Respondent within 11 days. Although "temporal proximity cannot be the sole basis for finding pretext . . . suspicious timing is a strong indicator of pretext when accompanied by some other, independent evidence." Seeger v. Cincinnati Bell Telephone Co., LLC, 681 F.3d 274, 285 (6th Cir. 2012) (quoting Bell v. Prefix, Inc., 321 F. App'x 423, 431 (6th Cir.2009)).

Ultimately, the Court finds that the evidence currently in the record raises questions of material fact as to whether the proffered reasons actually motivated Respondent's actions, or whether they were insufficient to motivate the employer's action. At this juncture, there is sufficient evidence from which a fact-finder could reasonably reject the employer's explanation of why it fired her. Accordingly, Respondent's motion for summary decision as to Complainant's retaliation claim is DENIED.

VIII. CONCLUSION

The stay of proceedings issued on July 15, 2022 is LIFTED. The Court GRANTS Respondent's motion for summary decision with regard to the discrimination and documentary practices claims; the Court DENIES the motion with regard to the retaliation claim. The Court will issue a separate revised scheduling order setting the date for the hearing in this matter.

SO ORDERED.

Dated and entered April 26, 2024.

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John A. Henderson
Administrative Law Judge