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

April 19, 2013

BENJAMIN BARONE, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00016
SUPERIOR WASHER AND GASKET CORP, Respondent.	)	

FINAL DECISION AND ORDER

Appearances: Benjamin Barone, Pro se
for complainant

Randi Seltzer May, Esquire,
for respondent

I. PROCEDURAL HISTORY

Benjamin Barone filed a pro se complaint in which he alleged that Superior Washer and Gasket Corp. (Superior) discriminated against him on the basis of his United States citizenship and national origin by firing him on May 17, 2011 in order to hire noncitizens, all of which was done in violation of 8 U.S.C. § 1324b (2006). Superior filed an answer denying the material allegations of the complaint and contending that Barone was not terminated for the reasons he alleged but for his abuse of a co-worker, insubordination, and violation of company policies.

Superior also filed a motion to dismiss, which was subsequently granted in part and denied in part. The motion was granted as to Barone's claim of national origin discrimination because INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 (2006). 8 U.S.C. § 1324b(a)(2)(B). The motion was denied with respect to the allegation of citizenship status

discrimination and the parties were given the opportunity to pursue discovery as to that claim pursuant to 28 C.F.R. §§ 68.18- 68.23.[1] It appears that neither party took advantage of that opportunity.

A telephonic prehearing conference was conducted at which the parties were asked to identify any genuine issues of material fact and directed to file evidence in support of their respective versions of the facts. When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision. *See United States v. Frank's Meat Co.*, 3 OCAHO no. 513, 1094, 1096 (1993).[2] If a motion is to be so converted, the parties must be given appropriate notice so that they have a reasonable opportunity to present relevant materials. *See Sahu v. Union Carbide Corp.*, 548 F.3d 59, 67 (2d Cir. 2008). I gave the parties oral notice at the prehearing conference, followed by a written memorandum and notice of conversion of motion advising them that the previous motion to dismiss would be reopened and converted to a motion for summary decision. The parties were given a deadline for filing evidentiary submissions and both did so.

II. BACKGROUND INFORMATION

Superior is an S-corporation having its headquarters in Hauppauge, New York. Its president and chief executive officer is Allan A. Lippolis. The company produces, sells, and delivers shims, washers, gaskets, and small stampings. Superior has manufacturing plants in Hauppauge and South Carolina and employs approximately 104 people. About seventy of the employees work in New York and the remainder in South Carolina. The New York facility at issue in this case is composed of different departments; twelve individuals work in the office and the remainder work in production.

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[1] Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at http://www.usdoj.gov/eoir/OcahoMain/ocahosib pagehtm#Published.

Benjamin Barone is a U.S. citizen who worked in Superior's warehouse for about fifteen years before being fired on or about May 17, 2011 for reasons that the parties dispute. Warehouse supervisor Michael Broussard fired Barone after consulting with Joe Cannizzaro, Jr., the plant superintendent. Barone was replaced by Jarrett M. Reyes. Barone thereafter filed charges with nondiscrimination agencies challenging his termination, first with the New York Human Rights Commission on August 11, 2011, and second with the Office of Special Counsel for Unfair Immigration Related Employment Practices on August 16, 2011.

Barone's OSC charge stated, "I worked there for 15 years but the last 5 years the owner was fireing (sic) Americans and hireing (sic) non-American for a 1/3 the salary. When I started there was all Americans now there are all non-Americans working there. They fired me for no reason." On December 9, 2011, OSC sent Barone a letter advising him that his charge had been dismissed, and he filed the instant complaint on December 19, 2011. All conditions precedent to the institution of this proceeding have been satisfied.

III. THE PARTIES' SUBMISSIONS

A. Superior Washer

Superior filed a motion for summary judgment that was accompanied by the affidavits of Allan A. Lippolis and Michael Broussard, each of which had exhibits attached. The Lippolis affidavit states that the company hires only legally authorized workers and utilizes the E-Verify program to ensure that it does so, and that it has no agenda to replace American workers. The affidavit states further that Barone's replacement, Jarrett M. Reyes, was a U.S. citizen. Between May 1, 2011, the month Barone was discharged, and December 31, 2011, the company hired sixteen employees, only one of whom was not a U.S. citizen. In 2013 five new employees were hired, all of whom were citizens. The affidavit says further that on Barone's last day, May 12, 2011, Superior had 102 employees, nine of whom were not U.S. citizens (approximately 8.8%). The affidavit concludes by stating that Barone was terminated for his insubordination and his antagonizing treatment of co-workers, not for any other reason. Exhibits included A) a portion of the employee handbook, B) a portion of the employee handbook, and C) an I-9 form and supporting documents for Jarrett M. Reyes.

The Broussard affidavit states that Broussard became warehouse supervisor in about 2007, and when Barone was employed there were approximately four other warehouse employees whose responsibilities included providing materials and servicing machines to keep the presses running at maximum production. Broussard details a number of specific incidents during Barone's

tenure when he fought with or thwarted the efforts of co-workers. For example, he called one co-worker an "asshole" and accused the individual's wife of sleeping with the milkman. There was one particular co-worker he cursed at and taunted for years, including calling him a "faggot" and a "culero" and hanging an insulting and offensive picture in the warehouse referring to him. This employee was the target of repeated cursing, taunting, and offensive name calling by Barone.

Broussard also describes an incident in April 2011 when Barone was removed from the presses for a couple of days because he deliberately did not feed the presses, and another incident on or about May 12, 2011 when Barone was directed to weigh a scrap barrel and move it but replied that he was busy and someone else should do it. When Broussard offered to help Barone do it, Barone refused to do so and insisted that they "settle this" by going to the plant superintendent. Barone was then suspended for insubordination. After consulting with Cannizzaro, Broussard determined that Barone had to go.

Broussard characterizes Barone as "a long-time, skilled employee with very good attendance" whom he tried hard to keep and whom he counseled "many, many times" about trying to get along better with co-workers. The affidavit states that during the two years preceding Barone's separation, Broussard had at least twenty meetings with him and spent many hours counseling him, but Barone's hostile and disruptive behavior continued. Exhibits accompanying the affidavit included A) a portion of the employee handbook, B) an I-9 form and supporting documents for Juan M. Romero, C) a photo captioned "May Juan R.I.P.," and D) a portion of the employee handbook.

B. Benjamin Barone

Barone filed an unsworn statement made by Denis Janusz, who says that he worked at Superior for twenty-five years and was harassed by new supervisors, and that Joe Cannizzaro fired him for no reason. Janusz says he noticed Ben Barone being harassed by his supervisor who fired him "and replaced him with a non-American worker Jarrett Reyes for less labor and hiring non Americans with false social security numbers." Janusz says further that "I know that because my presses are in the warehouse. I am in charge of four machines in the warehouse so I see everything that goes on there. Juan Romano abuse (sic) everyone in the factory." Janusz also states that "Allan (owner)" abused and fired him.

IV. LEGAL STANDARDS TO BE APPLIED

A. Summary Decision

OCAHO rules provide that summary decision as to all or part of a complaint may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which permits the entry of summary judgment in federal cases. OCAHO jurisprudence accordingly looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *See Celotrex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000). Thus to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the claim. While the facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), summary decision may nevertheless issue if no specific facts demonstrate a contested material factual issue. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.18 (1970).

A fact is material if it might affect the outcome of a case. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A factual issue is genuine only if it has a real basis in the record. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In the absence of any proof it will not be assumed that the nonmoving party could or would prove the necessary facts. A party opposing a motion for summary decision may not demand a trial simply based on a speculative possibility that a material issue might turn up at trial. *Cf. United States v. Manos & Assocs., Inc.*, 1 OCAHO no. 130, 877, 884 (1989).

B. The Relative Burdens of Proof

The familiar burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must

articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *Id.; see generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999).

This means that an employer that puts forth a legitimate nondiscriminatory reason will ordinarily be entitled to summary resolution unless the complainant can show that the decision was more likely than not based in whole or in part on discrimination. *Cf. Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 157 (2d Cir. 2010) (stating that an employee's ultimate burden is to establish that discrimination played a role in the decision); *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) (employee must "point to evidence that reasonably supports a finding of prohibited discrimination").

As recently explained in *Chin v. Port Authority*, an individual establishes a prima facie disparate treatment case by showing four elements: 1) that the individual belonged to a protected class, 2) that the individual was qualified for the position he or she held, 3) that the individual suffered an adverse employment action, and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. 685 F.3d 135, 151 (2d Cir. 2012); *see also Yefremov v. NYC Dep't of Transp.*, 3 OCAHO no. 562, 1556, 1583 (1993).

V. DISCUSSION AND ANALYSIS

Superior's initial motion to dismiss the complaint for failure to state a claim upon which relief may be granted was predicated upon the company's assertion that Barone's complaint failed to state a prima facie case of citizenship discrimination under *McDonnell Douglas*, 411 U.S. 792 at 802-05. Because the *McDonnell Douglas* elements provide an evidentiary standard and not a pleading requirement, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510-11 (2002), the motion to dismiss on that ground was denied. It is well established that there is no requirement for the *McDonnell Douglas* elements to be pleaded at the outset in an OCAHO complaint. *United States v. Capitol Arts and Frames, Inc.*, 1 OCAHO no. 229, 1514, 1516 (1990) (noting that a complaint need not relate every factual detail or its evidentiary foundation, which are matters properly reserved for the discovery stage). *Cf. Swierkiewicz*, 534 U.S. at 511. The complaint was accordingly found facially sufficient under liberal OCAHO pleading standards.

It is at the summary decision stage, however, that the *McDonnell Douglas* formulation actually does come into play. A complainant's burden at this stage requires more than is needed to survive a motion to dismiss; the complainant is obligated not only to establish the elements of a prima facie case, but also to point to evidence sufficient to call into question the legitimacy of the employer's explanation. It is clear that as a U.S. citizen, Barone is a member of a protected class. He held his position at Superior for fifteen years and the company acknowledged that he was a long-term skilled employee qualified to perform his job. It is undisputed that being fired is an adverse employment action.

But while his general and conclusory allegation that Superior preferred foreign workers was sufficient at the pleading stage, Barone did not follow through to present evidence that would satisfy the fourth element of the *McDonnell Douglas* paradigm. Barone's complaint alleged that he was fired "for no reason." While both Barone himself and the Janusz statement suggest that Barone was replaced by a non-American, no objective evidence supports such a conclusion. The only evidence respecting Jarrett M. Reyes' status reflects that he is, like Barone, a U.S. citizen. Barone did not identify any other individual who engaged in the same or similar conduct but was not fired, or point to any specific individual who was similarly situated, was not in his protected class, and was treated more favorably.

Barone's assertions that the company preferred to hire "non Americans" and that "now there are all non Americans working there" are not supported by evidence either. The company in fact provided evidence showing affirmatively that these bald conclusions are simply incorrect. The suggestion that Jarrett Reyes was a "non American" was similarly unsupported by evidence and Reyes' I-9 form reflects that Reyes is actually a U.S. citizen. Barone presented no scintilla of evidence that would support Janusz's suggestion that Superior ever hired anyone who was unauthorized for employment in the United States. Barone also failed to point out any facts or circumstances from which an inference of discriminatory discharge could reasonably be drawn.

Assuming arguendo for purposes of this motion that Barone could make out a prima facie case, moreover, Superior put forward a legitimate nondiscriminatory reason for firing him. The company said Barone was unable to get along with others, abused coworkers, and refused specific orders from his supervisor. Numerous specific incidents of unacceptable and offensive behavior are set forth in Broussard's affidavit. Barone failed to produce evidence sufficient to create a factual issue as to whether Superior's explanation is a pretext for discrimination. While he is not required at this stage to prove that the company's reasons are false, Barone is obligated at minimum to offer some evidence that calls into question the legitimacy of Superior's explanation, and this he has not done. Because Barone failed to produce or point to evidence rebutting the company's proffered reasons for terminating him, or raising a genuine issue as to whether the reasons given were pretextual, his complaint will be dismissed.

Discrimination cases require some evidence of discrimination. *Cf. Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 25 (2007). In order to withstand a motion for summary decision there must be some factual basis that would permit an inference that citizenship status played a role in the employment decision in question. That basis is wholly lacking here.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Benjamin Barone is a United States citizen.

2. Superior Washer & Gasket Corp. is an S-corporation having its headquarters in Hauppauge, New York. Its president and chief executive officer is Allan A. Lippolis.

3. Superior Washer and Gasket Corp. produces, sells, and delivers shims, washers, gaskets, and small stampings.

4. Benjamin Barone was employed by Superior Washer and Gasket Corp. from January 31, 1996 until May 16, 2011 as a warehouse employee.

5. Benjamin Barone was fired by Superior Washer and Gasket Corp. on or about May 17, 2011.

6. Michael Broussard, warehouse supervisor, fired Benjamin Barone after consulting with Joe Cannizzaro, Jr., the plant superintendent.

7. Benjamin Barone was replaced by Jarrett M. Reyes, a United States citizen.

8. Benjamin Barone filed charges with nondiscrimination agencies challenging his termination, first with the New York Human Rights Commission on August 11, 2011, and second with the Office of Special Counsel for Unfair Immigration Related Employment Practices on August 16, 2011.

B. Conclusions of Law

1. Benjamin Barone is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) (2006).

2. Superior Washer and Gasket Corp. is an entity within the meaning of 8 U.S.C. § 1324b(a)(1) (2006).

3. All conditions precedent to the institution of this proceeding have been satisfied.

4. An individual establishes a prima facie disparate treatment discharge case by showing four elements: 1) that the individual belonged to a protected class, 2) that the individual was qualified for the position he or she held, 3) that the individual suffered an adverse employment action, and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. *See Chin v. Port Authority*, 685 F.3d 135, 151 (2d Cir. 2012).

5. Benjamin Barone failed to establish a prima facie case of discrimination pursuant to 8 U.S.C. § 1324b(a)(1) (2006) because he provided no factual basis from which an inference of discriminatory intent could arise.

6. Assuming arguendo that Benjamin Barone established a prima facie case of discriminatory discharge, Barone did not produce or point to evidence sufficient to create a factual issue respecting the legitimacy of Superior Washer and Gasket Corp.'s explanation of the basis for its decision to terminate him.

7. In order to withstand a properly supported motion for summary decision, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

8. Where a nonmoving 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 will ensue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

9. When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *See Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).

10. The complaint must be dismissed.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 19th day of April, 2013.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.