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

December 18, 2001

DANIEL JOSEPH BENDIG, ET AL., Complainants,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 20B00033
CONOCO, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This case arises in the context of a reduction in force (RIF) instituted by the respondent Conoco, Inc., a worldwide energy corporation incorporated in Delaware and headquartered in Houston, Texas. At issue are four consolidated cases involving separate complaints based on the same or similar allegations. The first complaint, filed by Daniel Bendig, alleged that Conoco eliminated Bendig's job in the course of a RIF for reasons prohibited by the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA). It was followed by a companion case filed by the Office of Special Counsel (OSC), which alleged that Bendig's employment was terminated because of his status as a United States citizen. Substantially similar complaints were subsequently filed separately by David Stemler and OSC based on similar allegations with respect to the elimination of Stemler's job because of his status as a United States citizen. All the cases were consolidated because they arose from a common factual basis and presented similar legal issues. Bendig and Stemler, together with some other former employees of Conoco, are also parties to related litigation pending in the federal district court for the Southern District of Texas, Houston Division, in which the plaintiffs allege that they were terminated on the basis of their national origin, their age, and/or their race.

I previously issued an order denying complainant OSC's motion for partial summary decision in this

matter. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1065 (2001).[1] That order was followed by the cross motion of the respondent Conoco for summary decision, accompanied by supporting materials. OSC filed a response, also accompanied by supporting materials, after which Conoco filed a reply brief and OSC filed a surreply with additional evidentiary materials. Bendig and Stemler did not respond separately. The motion is ripe for adjudication.

II. FACTUAL BACKGROUND

As noted in my prior order denying OSC's motion for summary decision, many of the basic facts in this case are undisputed. Additional details about Conoco's downsizing emerged from the exhibits filed in support of and in opposition to the instant motion, and many of these appear uncontradicted as well.

Conoco, Inc. is a global energy corporation involved in many areas of the oil and gas industry, including worldwide exploration, production, transportation, marketing and refining. Exploration and Production (EP) is the component responsible for petroleum liquid and gas production and consists of business units and subsidiaries all over the world which perform various tasks involved in the exploration and production processes. At the time of the events at issue in this proceeding, Glen Bishop, as the Upstream Finding Team Leader, was accountable for the exploration part of the upstream business. He reported to Rob McKee, Vice President of the Upstream Division, who in turn reported to Archie Dunham, the CEO.

In the fall of 1998, Bishop and other members of top management learned from McKee that the exploration budget, previously anticipated at 400-450 million dollars for the following year, would be nearer to 250-300 million and that major funding reductions would consequently be required across the board. Preliminary discussions were undertaken about reducing investment in exploration projects, after which Bishop gave the projected budget numbers for each component to John Swann, the manager of Finding Skills Management for Exploration, whose responsibilities included coordination of the Global Skills Manager Network which manages geoscience and civil engineering skills throughout the world.

All the exploration managers were advised that there was to be a major restructuring and that the

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[1] 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 therefore omitted from the citation.

reorganization would likely result in a 20% - 30% reduction in the global pool of exploration personnel within Conoco and its subsidiaries. Each manager was asked to match employment in his or her respective group with the anticipated workload and projected budget and to develop a proposal for reducing operating costs and overhead for that component. "Straw models" were prepared for each of the exploration business units and work groups. These were models on paper showing the future units and projects and the approximate numbers of geologists, geophysicists and reservoir engineers that would be needed in each group. The straw models were the starting point for discussion.

Bishop himself prepared a memo to top management with respect to the performance of senior exploration managers at the executive salary grade level (sgl) 7 and above, but requested Swann to develop a process for making decisions about staff cuts at lower levels. Several steps were involved in the process. Swann e-mailed the managers of each of the components asking them to rate their staffs and to divide their employees into four groups based on their performance and potential (the "forced rankings").[2] At Bishop's request, Swann also planned the rest of the process and scheduled the time frames.

The managers of Conoco's various business units and work groups developed initial proposals for their respective components. Then a global selection meeting was convened, at which representatives from each of the affected business units and work groups met to discuss the changes proposed and to work toward consensus on the overall plan. Swann and Bishop were the architects and coorganizers of that meeting, which was held in January 1999 in Houston, Texas. Among the representatives for the business units and work groups were John Williams for Aberdeen, Mark Wheeler for Indonesia, Glen Bishop for Lafayette, Tina Langtry for Lobo, Barbara Sheedlo for Dubai, Laura Miller for Canada, Kathy McGill for Norway, Robert M. Spring for the Integrated Interpretation Center (IIC), David Jenkins for the Advance Exploration Organization (AEO), and Allen Huffman for the Seismic Imaging Technology Center (SITC). Roger Pinkerton, Jeff Jurinak, William Dougherty and John Donovan and some others were also present; the record is not entirely clear as to the capacities in which they attended. Jan Gandy was there as a representative of the Human Resources division. Prior to the meeting, Swann e-mailed the ground rules to all the participants and told them what materials they needed to bring to the meeting.

At the global selection meeting, each of the exploration managers in turn presented proposed organizational changes for his or her component and identified the employees best suited to the needs of the restructured unit as well as those available for transfer. After the representatives presented their

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[2] Forced or "stacked" rankings are not based upon a bell curve but upon a similar principle: regardless of the caliber of their individual performances, a group of employees must each be ranked in one four quartiles representing the most to the least valuable categories. Some people might have to be forced into a category in order to equalize the numbers in each category.

initial proposals, the other managers had an opportunity to question and challenge the recommendations made by their colleagues. People for whom their particular home components did not have places were put up for open positions. The meeting went on for four days, with some break-out small group sessions and other sessions with the whole group. When it was over, the representatives of each business unit and work group came away with a list of filled positions which they subsequently discussed with their own top level managers to obtain the final approvals. After all the decisions were finalized, notice to the affected employees was synchronized and given simultaneously. As a result of the process the number of geologists was reduced by almost 22%, the number of reservoir engineers by a little more than 13%, and the number of geophysicists by less than 11%. Approximately 70 geoscientists were ultimately laid off.

The Integrated Interpretation Center (IIC) was one of the work groups affected by the RIF. It is located in Houston, Texas where its principal function is to provide geoscientific support to the company's business units around the world. Robert M. Spring is a Canadian citizen whose position as the manager of the IIC requires him to manage the geologists and geophysicists in that work group, who in turn provide global technical support to various business units. At the time of the RIF the people reporting directly to Spring included two team leaders for Integrated Interpretation Projects (IIP), Daniel Bendig and Steve Solomon; the unit's Chief Geologist, Jeff Bruce; its Leader of Structure and Basin Modeling, Arild Skjervoy; and its Leader of Predictive Stratigraphy, Chris Parry. Five individuals were ultimately severed from the IIC: one of the team leaders for Integrated Interpretation Projects, the complainant Daniel Bendig; three geologists, Thorbjon Pederson, Wayne Orlowski, and Van Odell; and one geophysicist, the complainant David Stemler.

Daniel Bendig, the first complainant, holds a baccalaureate degree in physics and master's degrees in stratigraphy and geology. He is a dual citizen: of the United States by birth and of the United Kingdom by naturalization in 1996. Bendig was employed at Conoco from 1978 to 1999 in various capacities at the company's facilities in Aberdeen, Scotland; London, England; Houston, Texas; Jakarta, Indonesia; and Ponca City, Oklahoma. Before the RIF, Bendig held the salary grade level (sgl) 6A and was one of the two IIP Team Leaders at IIC. He and Steve Solomon, also a citizen of the United Kingdom, each supervised a group of geologists, geophysicists and geodata specialists working on different projects. Solomon was retained while Bendig was severed.

David Stemler, the second complainant, is also a United States citizen and holds a baccalaureate degree in geology. Stemler was employed by Conoco in various capacities from 1980 to 1999, at facilities in London, England; Ponca City, Oklahoma; Stavanger, Norway; and Houston, Texas. Before the RIF Stemler was a Senior Geophysical Advisor, sgl 6, at the IIC. Stemler was one of a three-man team working under Bendig's supervision on the Gulf of Paria project (Offshore Venezuela) with another geophysicist, and a geologist, Van Odell. The other geophysicist on the project was Patrick Jonklaas, who holds degrees in marine geology and geophysics as well as geology, and is a

citizen of the United Kingdom. At the time of the RIF Jonklaas held an L-1A visa and was also employed at sgl 6. He had previously been employed in other Conoco facilities in London and Aberdeen.

Bendig's duties were assumed by Jeff Bruce, also a United States citizen. Stemler's job was eliminated, as was Odell's; neither was replaced. Instead, Stemler's duties were sent to the seismic imaging group at the SITC in Ponca City, Oklahoma. Jonklaas continued to work on the Paria project until he was transferred to Vietnam in July of 2000.

III. STANDARDS APPLICABLE TO THE MOTION

Rules applicable to OCAHO proceedings[3] provide that summary decision on all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision. 28 C.F.R. § 68.38(c). Only facts that might affect the outcome of the proceedings are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994). Doubts are resolved in favor of the party opposing summary decision. *Id.*

The moving party bears the initial burden of demonstrating an absence of evidence supporting the nonmovant's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). 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 in the record supporting the issue. *Id.* at 323-24; *Nat'l Ass'n of Gov't Employees v. City Public Serv. Bd.*, 40 F.3d 698, 712 (5th Cir. 1994). Thus to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with evidence to support all the essential elements of its claim.
Id. (citing *Celotex*, 477 U.S. at 321-23). OCAHO case law is in accord that a failure of proof on any element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000), *petition for review denied*, No. 00-2052, 2001 WL 114717 (7th Cir. Feb. 5, 2001), *cert. denied*, 122 S.Ct. 89 (2001).

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

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

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, both that the defendant's articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. 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 (1981).

A prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir. 1995) (per curiam). Alternatively, in a case alleging disparate treatment the discharged employee may establish the fourth prong by a showing "that others similarly situated were treated more favorably." *Okoye v. Univ. of Texas Houston Health Sci. Ctr.*, 245 F.3d 507, 513 (5th Cir. 2001) (quoting *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999)). For purposes of a disparate treatment analysis, another person is similarly situated to the plaintiff only if different treatment occurs under "nearly identical" circumstances. *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991).

The Fifth Circuit has developed a more stringent modification of the traditional elements of the classic *McDonnell Douglas* paradigm for a prima facie showing in a RIF case where jobs are abolished. *See Williams v. Gen. Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See also Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5th Cir. 1996); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996). Unlike a traditional discharge case where unacceptable conduct or performance by the discharged employee must ordinarily be shown, it is the essence of a RIF that employees who may otherwise be perfectly satisfactory can nevertheless become expendable because of downsizing. *See generally EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1184 (5th Cir. 1996) (an employer might sever good performers in a skill category no longer critical to the business). The *Williams* formulation accordingly calls for 1) a showing that the plaintiff is a protected class member who was adversely affected by a RIF, 2) a showing that the plaintiff was qualified to assume another position, and 3) production by the plaintiff of "evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." 656 F.2d at 129.

Whatever initial formulation is employed, once the employer sets forth and supports a facially valid reason for the employment decision, the presumption created by the prima facie case disappears and the burden reverts to the employee to prove that the employer's reason is pretextual. *Stults v. Conoco, Inc.*, 76 F.3d 651, 656-57 (5th Cir. 1996); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 377 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992). To prevent summary judgment, there must be sufficient evidence of pretext to permit a rational fact finder to find that the employer discriminated on

the basis alleged. *Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir. 2001).

IV. CONOCO'S EVIDENCE AND CONTENTIONS

In support of its motion for summary decision, Conoco submitted the following exhibits: A) Bendig's EEOC charge and a Petition in the Harris County Court, Bendig's OSC charge and OCAHO Complaint; B) Stemler's EEOC charge and Complaint in the Southern District of Texas, an Amended Petition in the Harris County Court, Stemler's OSC Charge and OCAHO Complaint; C) OSC's Complaints on behalf of Bendig and Stemler; D) the Affidavit of Robert M. Spring; E) the Deposition of Daniel Bendig with 13 exhibits; F) the Deposition of Helen Ione Myers; G) the Deposition of Philip Mark Boyd with 2 exhibits; H) the Deposition of Barbara Ann Sheedlo with 2 exhibits; I) INS Petition Approval Notices for Boyd and Jonklaas; J) the Deposition of Robert M. Spring Volumes 1 and 2, with 13 exhibits; K) the first Deposition of David Stemler with 8 exhibits; L) Bendig's Certificate of British Naturalization; M) the Deposition of Glen Bishop; N) the Deposition of David Jenkins with 6 exhibits; O) the Deposition of Mark Thomas Wheeler; P) the second Deposition of David Stemler; Q) Approval of an Immigrant Petition for Keith James; R) Resume and supporting Letters for Keith James; S) the Affidavit of John Swann; T) Approval of a Nonimmigrant Petition for Arild Skjervoy; U) Resume and a letter of support for Arild Skjervoy; V) the Deposition of John Swann with 2 exhibits.

In seeking a summary decision, Conoco first contends that no prima facie case can be shown as to either Bendig or Stemler because a RIF is itself a legitimate nondiscriminatory reason for both terminations. *See Texas Instr.*, 100 F.3d at 1181. It reasons that because Bendig's and Stemler's jobs were both eliminated and neither was replaced, the traditional fourth element of a discharge case, replacement by someone outside the protected class, cannot be shown.

Second, Conoco asserts that its evidence in any event shows the employment decisions affecting Bendig and Stemler were made based upon individualized nondiscriminatory reasons including the relative qualifications of all the IIC employees in light of Conoco's projected needs, as well as the complainants' own performance problems, and not on the basis of anyone's citizenship or visa status. Conoco's explanation of the employment decisions affecting Bendig and Stemler relies principally upon the deposition testimony of Robert Spring and others.

As the manager of the IIC, Spring was the person responsible for developing and presenting the initial recommendations for that component and for representing its interests throughout the global selection meeting. Spring explained the mechanics of the process by which he developed the IIC's proposal and his presentation for the global selection meeting. First, Spring said he looked at the different projects being conducted in the IIC and got estimates from the various project owners as to how active each of

those projects would be in the future (Exh. J at 37). He looked at the level of activity for each, and how many hours of clearable time went into each of the projects in the previous year (Exh. J at 38). Then looking to the future he determined from the shrinkage which projects would be reduced and concluded that about six people needed to be reallocated or severed (Exh. J at 39). He then looked at the critical people and the specialist groups and also considered performance issues based on his own knowledge of the performance of people in the group (Exh. J at 39-40). He asked the various project owners and business unit managers for their opinions about his staff members, consulting with John Williams (formerly Caracas), Glen Jones (Caracas), Dave Jenkins (Trinidad), Raymond Marchand (Nigeria) and Tom Dreen (New Zealand) (Exh. J at 40-41). He also solicited input from the supervisors, Bendig, Solomon, Skjervoy and Parry, about the individuals they supervised (Exh. J at 41). He sent a spreadsheet to each of the supervisors and asked for their comments on the performance and potential of each person they supervised, and requested each to rank all his subordinates (Exh. J at 42-43). After further discussions, he created a master spreadsheet, which included both his own rankings and the input he got from business unit customers and supervisors, and sent the spreadsheet to John Swann (Exh. J at 44). The eventual master list was blown up to wall size and Spring used it to assist in his presentation at the global selection meeting (Exh. J at 48).

A. The Decision to Eliminate Bendig's Job

Spring said that in mid-1998, he had begun to receive complaints about Bendig from clients of the IIC (Exh. D). Spring was informed that, during negotiation with one of Conoco's partners, Bendig committed Conoco to drilling much deeper on a project than had been authorized, resulting in a significant financial loss, and that Bendig had referred to Conoco's management as "lame" (Id.). There were also personnel issues about Bendig's treatment of people and about his supervisory style (Exh. D; Exh. E, deposition exh. 12). There was low morale on both his teams and there were also complaints about his making insulting comments and being unwilling to help the team (Exh. J, deposition exh. 4; Exh. E, deposition exh.12). Spring said there were no significant performance problems with any of the other supervisors at the time (Exh. J at 80), but there were significant problems with Bendig and they were discussed with him in late 1998 or early 1999 (Exh. J at 79-80). These problems were summarized in a memorandum and included complaints from managers as well as from subordinates, particularly on the Trinidad project (Exh. J, deposition exh. 4).[4] There were also some problems with

[4] David Jenkins was the owner of the Trinidad project and was dissatisfied with Bendig's handling of it. Jenkins' account of the drilling incident, related that in 1998 when Bendig was a team leader and Jenkins was on the Technical Decision Board there was a major issue because Bendig's decision to drill deeper cost Conoco millions of dollars it would not have had to pay if Bendig had followed management instructions (Exh. N at 19). There were several meetings about the incident involving Spring, Jeff Jurinak, William Daugherty, the overall Team Leader for Trinidad, and John

(continued...)

the partners on the Venezuela project (Exh. J at 63).[5] Spring said the IIC didn't have the workload to keep all of the supervisors, and that because of the situation on the Trinidad project there had been a breach of trust with Bendig (Exh. J at 66). Bendig was also the lowest ranked of the supervisors at the IIC.

B. The Decision to Eliminate Stemler's Job

Spring summarized his decision about Stemler's job by stating that there was only enough work for one geophysicist on the Paria project and Jonklaas was chosen because of his outstanding skills in seismic interpretation and because he was the one doing it at the time of the discovery (Exh. J at 92-93). Jonklaas was one of the top interpretation geophysicists in the company and he had premier skills (Exh. J at 185-86). Stemler was excellent in acquisitions and processing, but that wasn't what was really needed (Id.).

Spring noted that Stemler did a good job acquiring seismic data in the Offshore Venezuela project (Exh. J at 88). Stemler's skills were strong in seismic acquisition and processing (Exh. J at 89), but his skills in seismic interpretation were not competitive (Exh. J, deposition exh. 6), and he also had problems with promptness (Exh. J at 89-90). John Williams had expressed frustration about Stemler not delivering on time (Exh. J at 90). Williams said there were difficulties with the Esmerelda well location (Exh. J at 174). Stemler's performance problems had been discussed earlier with Dave Jenkins, Bill Schmidt and Bendig on a project in Columbia where there were complex structural projects that Stemler said he would do, then didn't get done on time (Exh. J at 90, 174). Bishop too had questioned Stemler's ability to undertake projects on a timely basis and said he was slow (Exh. M at 95-96). Other managers had warned that Stemler was stubborn and missed deadlines (Exh. J, deposition exh. 6). There was criticism from the exploration managers and from the chief geophysicist on Venezuela, as well as from the AEO on the Columbia project where numerous requests for urgent action went unaddressed and the project had to be reassigned (Exh. J, deposition exh. 6).

Spring had previously talked to Bendig about Stemler's inability to finish work on time and to meet deadlines and schedules (Exh. J at 89, 174). A series of e-mails shows that Bendig counseled Stemler about his failure to meet targets and noted that, despite coaching, it didn't seem to get through (Exh. E, deposition exh. 13). According to Spring, Bendig did not think that Stemler was in the upper quartile of interpreters (Exh. J at 174). Stemler acknowledged that Spring had expressed concerns about his

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[4](...continued)
Donovan, the regional manager (Exh. N at 20).

[5] There were two commercial partners on Offshore Venezuela, AGIP (an Italian company) and OPIC (a Taiwanese company).

interpretation skills (Exh. P at 25; Exh. K at 105).

Spring stated unequivocally that he did not consider either Bendig or Stemler to be as qualified as Jonklaas for Jonklaas' job because Jonklaas was one of the top interpretation geophysicists in the company and had current hands-on skills in interpretation and integration of the data involved in the project (Exh. J at 185).

C. The Decisions about Transfers to Other Components

Spring said that at the meeting each exploration manager or service group manager identified the people from his or her component that would be transferable (Exh. J at 46-47). A list was maintained of available people, and as people were placed in vacancies they would be crossed off the list (Exh. J at 48). Whenever a vacancy came up, the managers would look at the list of available people, identify the three or four most technically suited people, and discuss it from there (Exh. J at 68).

When Spring made his presentation, he told the other exploration managers that Bendig was available and asked for comments on Bendig's transferability (Exh. J at 66). He also explained the reasons why Bendig had been selected for severance from the IIC. John Williams spoke up about people problems in the Venezuela project that hadn't been handled smoothly and said he agreed that a change of leadership was needed (Id.). Bishop spoke and said he felt there were too many late surprises and a lack of control on the Trinidad project (Id.).[6] All the exploration managers were there (Exh. J at 67).

Bendig did not make it onto the short list for any available vacancy that Spring could remember (Id.). According to Jenkins, there were no jobs Bendig qualified for (Exh. N at 22). He was a candidate, but none of the exploration managers selected him (Exh. N at 22, 42). Bendig's name was mentioned for two supervisory jobs which were open at the SITC, but he was not among Allen Huffman's top three candidates for either of those jobs (Exh. J at 70).

Spring initially thought that Stemler could be a candidate for transfer to SITC, but as it turned out the seismic budget had shrunk and they didn't have a slot for him (Exh. J at 91). Allen Huffman said there was not enough work for all the acquisition and processing people there (Id.). Spring said that because acquisition and processing skills weren't going to be needed in IIC, those skills were put in seismic imaging where they belonged (Exh. J at 171). Spring said that since the IIC's main function is integrated interpretation (Exh. J, deposition exh. 6) (as its name implies), Stemler really belonged in the

[6] Bishop himself said he did not specifically recall the discussion about Bendig at the reorganization meeting, but he did recall earlier discussions about him and also the fact that at a meeting between Conoco UK and Conoco Norway, Bendig had treated a member of the UK staff rather roughly. (Exh. M at 64-65).

SITC, not the IIC. The reprocessing work for Offshore Venezuela was in fact done by the processing and acquisition groups in the SITC (Exh. J at 155). John Sinton, the leader of the group, lobbied for the work and got it (Exh. J at 94). Sinton just did the processing part, because they weren't doing any acquisition (Exh. J at 156).

According to Bishop, there was discussion at the meeting about the future outlook for reduction of seismic acquisition and processing (Exh. M at 68). Conoco was moving toward relying on contractors in this area, and a lot of business units now rely on contractors (Exh. M at 68). Bishop, who manages the Deep Water business unit now (Exh. M at 14), said Deep Water uses contractors and has reduced in-house seismic acquisition and processing significantly (Exh. M at 69).

D. The Final Approvals

When Spring presented his proposals for the IIC at the global selection meeting, not all of his recommendations were adopted, but most were, including the elimination of Bendig's and Stemler's jobs. After the meeting concluded, Spring, Jurinak and Huffman all had to get verbal approval from John Hopkins, the Vice President for EP Technology, in order to proceed with the implementation of the final proposals for their respective components (Exh. J at 50-51). According to Spring, by the time Hopkins was notified the decisions were pretty much *fait accompli* (Exh. J at 46). Hopkins was quite distant from the discussion of specific individuals (Id.). Spring said Hopkins did know both Bendig and Orlowski (Exh. J at 52), but nothing in the record suggests that Hopkins had personal knowledge about the specific reasons any particular individual was selected for severance.

Conoco contends that the complainants have no evidence which undermines the accuracy of these explanations or shows them to be pretextual. Finally,[7] Conoco asserts not only that no inference of discrimination arises from any of the evidence presented, but also that, because Robert Spring was the person responsible for Bendig and Stemler being hired into IIC in the first place as well as for their severance, it is entitled to an inference of nondiscrimination by virtue of the "same actor" presumption, which is recognized in the Fifth Circuit. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) (the "same actor" presumption operates to create an inference that discrimination was not the motivation where the actor responsible for the former employee's termination is also the person who hired him or her in the first instance).

V. OSC'S RESPONSE

[7] Conoco also asserts that OSC appears to have abandoned its allegations of systemic discrimination because it has produced no evidence to support them. I do not, however, find any systemic allegations in the complaints.

In opposition, OSC initially submitted Exhibits 17-20.[8] Exhibit 17 is the second Affidavit of Daniel Bendig dated April 18, 2001, together with a newspaper clipping dated March 22, 1999, and an on-line announcement dated May 3, 2000. Exhibit 18 is a Petition for Immigrant Worker for Philip M. Boyd. Exhibit 19 is a letter dated November 16, 2000, from Conoco to INS, and Exhibit 20 is a sworn statement from Genize Walker Burks dated April 24, 2001. OSC's surreply was accompanied by Exhibits 21 and 22, consisting respectively of Guidelines for the Filing of Amended H and L Visa Petitions and the Affidavit of Kenneth R. Story.

OSC asserts in response to Conoco's motion that questions as to the prima facie case and as to pretext are "inappropriately" raised because there are genuine issues of material fact remaining. OSC contends that Bendig and Stemler should have been retained, either in Jonklaas' job on the Paria project, or in a different job as the Senior Geophysical Advisor in Conoco's Lobo business unit in Houston, to which Mark Boyd was transferred. OSC says that both Jonklaas' job and Boyd's new job at Lobo required them to have L-1B visas (visas for persons with specialized knowledge) rather than the L-1A visas (visas for managers and executives) they each actually had. In support of its assertion that there are genuine issues of material fact, OSC cites as examples "whether temporary L-1A visa holders were working in positions not authorized by their visas, for which the charging parties were more qualified, by virtue of their U.S. citizenship; and whether the Respondent intended to treat the charging parties differently on the basis of their U.S. citizenship." OSC also maintains that there is a genuine issue of material fact regarding "whether L-1A visa holders were qualified for nonmanagerial positions," questioning specifically whether Boyd and Jonklaas were "qualified" for their particular jobs. OSC's surreply urges further that Boyd's immigration status raises genuine issues of material fact because, if Boyd was transferred to a nonmanagerial position, no comparison of his skills with those of the complainants would be necessary. Finally, OSC asserts that in any event there is evidence of pretext.

VI. DISCUSSION AND ANALYSIS

A. Whether a Person with the Wrong Visa is Unqualified for His Job

It should be observed initially that some of the "facts" which OSC alleges are in dispute are 1) conclusions, not facts, or 2) not material. The principal thrust of OSC's argument is that because Jonklaas and Boyd had the wrong visas for their jobs they were "not qualified at all" to hold those jobs.

[8] The exhibits accompanying OSC's earlier motion for partial summary decision were captioned as Exhibits 1-16; the numbering of the exhibits in opposition to the instant motion is apparently sequential. I have reviewed and considered the evidentiary materials previously submitted by both the parties in support of and in opposition to OSC's motion for partial summary decision although many, but not all, of those materials are duplicative.

It follows, according to OSC's reasoning, that Bendig and Stemler were therefore "more qualified for the jobs by virtue of their United States citizenship." OSC thus returns to the premise underlying its own previous motion for partial summary decision: that a person working in a particular job with the wrong visa is ineligible for the job, even though, as in Jonklaas' case, the person may have been performing the same job for some time. OSC's theory of the case essentially concludes that no comparison of job qualifications is necessary because no explanation of Conoco's reasons would ever be acceptable. Adoption of this premise would thus obviate the need for OSC to make any showing that the reasons stated by Conoco are a pretext for discrimination.

The fact that an employee is working in a particular job in violation of his specific visa status does not, however, in itself provide an adequate factual basis for an inference that other employees in other jobs are victims of discrimination. 9 OCAHO no. 1065, at 13. Neither does it establish, as OSC contends, that a person with the wrong type of visa is either an undocumented worker or "unqualified" for his job. This is so because it is well established that even a motivation which is unlawful under a different body of law can satisfy an employer's burden under *McDonnell Douglas* to produce a nondiscriminatory reason. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (firing an older employee to prevent his pension benefits from vesting does not violate the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2001) (ADEA), even though it would constitute a violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (2001) (ERISA)). For similar reasons the court in *Simms v. First Gibralter Bank*, 83 F.3d 1546, 1556 (5th Cir.), *cert. denied*, 519 U.S. 1041 (1996), held that an act which may have been unsound, unfair, or even unlawful did not thereby violate the Fair Housing Act in the absence of evidence that race actually was a factor in the decision. *Cf. Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir.), *cert. denied*, 510 U.S. 976 (1993). It follows that employing a person who holds the wrong visa for his particular job is not necessarily a violation of §1324b, even though this practice may violate some other statute.

In support of its argument that Jonklaas and Boyd are ineligible for their jobs, OSC cites to cases from the Fourth Circuit which hold that undocumented workers are not permitted to obtain any relief under nondiscrimination and other labor laws. *See Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999); *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), *cert. denied*, 525 U.S. 1142 (1999); *Reyes-Gaona v. North Carolina Growers Ass'n*, 83 FEP 891 (M.D.N.C. 2000). Reliance on these cases is inapposite because they were decided by a different circuit and because they do not address the issues to be decided in this case.[9]

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[9] They represent, moreover, at least thus far, only a minority view. *See, e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir.), *cert. granted*, 122 S.Ct. 23 (2001); *Del Rey Tortelleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989); *EEOC v. Tortilleria La Mejor*, 758 F.Supp.

(continued...)

As pointed out at greater length in the earlier order denying OSC's motion for summary decision, the questions of whether certain jobs fall within the INS definition of "managerial capacity" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(B), or whether Jonklaas or Boyd should have had L-1B rather than L-1A visas, were not material to and thus had no dispositive effect on the resolution of that motion. 9 OCAHO no. 1065, at 8. For the reasons stated in that order, those questions are wholly tangential as well to the issues that must be resolved here. While there may be a genuinely disputed factual issue about the appropriate visa classification of Boyd's and Jonklaas' jobs, I do not find that issue to be material to the resolution of this motion.

I therefore assume, without deciding, and only for purposes of this motion, that OSC's assertion is correct, that Patrick Jonklaas and Mark Boyd should have had L-1B rather than L-1A visas, and that therefore they are (or were at any relevant time)[10] working in jobs outside their proper visa classifications. That does not establish, as OSC insists it does, either that these individuals are per se "unqualified" for their jobs or that Bendig and Stemler are better qualified for those jobs "by virtue of their United States citizenship" absent some showing that anyone's citizenship status actually was a determining factor in Conoco's employment decisions. Such a showing requires more than mere hypothesis or conjecture; it requires evidence. OSC's theory that the outcome of this motion hinges on anyone's visa classification is therefore rejected; the case is subject to the same analysis and the same standards as are applicable to any other disparate treatment case involving a RIF.

B. The Threshold Question

It is uncontested that Bendig and Stemler are members of a protected class and that they were adversely affected in Conoco's restructuring. They were qualified for the jobs they were performing at the time they were terminated. The parties disagree, however, as to whether the fourth element of a prima facie case can be satisfied. Case law in the Fifth Circuit requires for the final element in a RIF case "evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 812 (5th Cir. 1991). Under this standard, the evidence must lead the fact finder to conclude either that 1) the defendant consciously refused to consider retaining or relocating a plaintiff because of a protected characteristic, or 2) the defendant regarded the protected characteristic as a negative factor in such consideration. *Id. See also Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149-50 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996). I find the record to be devoid of such evidence. OSC nevertheless contends that discrimination is shown

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[9](...continued)
585 (E.D. Cal. 1991).

[10] Jonklaas has actually been working in Vietnam since July of 2000.

because similarly situated noncitizens were more favorably treated than Bendig and Stemler were.

As the Fifth Circuit has observed, the case law has not been consistent in its treatment of the appropriate stage at which to perform the inquiry into who is similarly situated. *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623 n.5 (5th Cir. 1997). Some cases have said that a showing of better treatment of a similarly situated person outside the protected class is just one means of establishing a prima facie case. *E.g., Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 381 (5th Cir. 1988). The same inquiry, however, has also been characterized as being relevant to a showing that the employer's decision is pretextual. *McDonnell Douglas*, 411 U.S. at 804. The *Nieto* court elected not to reconcile the apparent confusion in the case law on this issue, but to bypass the prima facie case question altogether and proceed directly to the question of whether the plaintiff had proffered evidence sufficient to create a fact issue as to the motivating factor in his termination. 108 F.3d at 623 n.5.

The court's reluctance to decide the question of who was similarly situated at the threshold may have stemmed from the fact that doing so would have precluded examination of the bona fides of the defendant's explanation, since a plaintiff's disparate treatment case necessarily fails when the plaintiff compares his treatment to another employee but cannot show that the other employee was similarly situated. *Ceasar v. Lamar Univ.*, 147 F.Supp.2d 547, 552 (E.D. Tex. 2001) (citing cases). In order to survive summary judgment it is up to the employee to make a showing "that the other employees who allegedly received more favorable treatment actually were similarly situated." *Martin v. Kroger Co.*, 65 F.Supp.2d 516, 552 (S.D. Tex. 1999), *aff'd* 224 F.3d 765 (5th Cir. 2000).

Because the record here contains Conoco's explanations as well, it is unnecessary to dwell at length on the threshold issue. We may thus proceed to the issues of whether the evidence creates a factual question as to the legitimacy of the explanation and whether Conoco intentionally discriminated against Bendig and Stemler.

C. Who was Similarly Situated to the Proposed Comparators

To establish disparate treatment, it is necessary for the complainant to show that a similarly situated nonprotected person was treated differently under circumstances which are "nearly identical" to his. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995). Accordingly, the first step is to determine whether the employment decisions complained of were made under similar circumstances in order to ascertain whether the proposed comparators truly are similarly situated. Some of the decisions OSC seeks to compare appear to have been made under quite different surrounding circumstances. As pointed out in *Coleman v. Exxon Chem. Corp.*, 162 F.Supp.2d 593, 608 (S.D. Tex. 2001), the standard for determining who is similarly situated is a strict one: "Employees with different responsibilities, different supervisors, different capabilities, different work rule violations or different disciplinary records are not considered to be 'nearly identical'" (citing cases). Employment

decisions are not made under "nearly identical" circumstances when the decisions being compared are made by different supervisors. *Okoye,* 245 F.3d at 514; *Little*, 924 F.2d at 97. Notwithstanding the claim in OSC's brief that all the severance decisions for every component worldwide were made in Houston at the global selection meeting by a single decision maker, "Conoco," the facts demonstrate that this is not exactly what happened. Inquiry at a higher level of specificity is required to ascertain who actually made each of the employment decisions OSC seeks to compare and under what circumstances each of the decisions was made.

Conoco, like any other artificial person, can make decisions to select, terminate or transfer employees only through its authorized agents. *Ipina v. Michigan Jobs Comm'n,* 8 OCAHO no. 1036, 559, 576 (1999). The decision to eliminate Bendig's and Stemler's jobs was made by an actual person, Robert Spring, the manager of the IIC, not by "Conoco" or "the Respondent" generally. John Williams and Glen Jones concurred in Spring's decision to let Bendig, Stemler and Odell go by severance (Exh. J at 63), but the decision was Spring's. Other managers made decisions for their own components.

Swann's testimony was that Dave Jenkins had the authority to make decisions for AEO, Spring for IIC, Glen Bishop for Lafayette, and Mark Wheeler for Indonesia. (Exh. V at 33-34). While Swann initially thought it was Barbara Sheedlo, now the asset manager there, who had the authority to make decisions for Lobo (Id.), he subsequently corrected himself to state that Tina Langtry, who represented Lobo at the meeting, was the person responsible for the staffing there (Exh. V at 71). Allen Huffman was the decision maker for the SITC.

1. Who was Similarly Situated to Jonklaas

OSC first contends that Bendig was better qualified to perform Pat Jonklaas' job as a staff geophysicist on the Gulf of Paria project. No explanation is offered, however, as to the basis for any assumption that Bendig was similarly situated to Jonklaas. No evidence was identified which showed any person to be similarly situated to Bendig except for other incumbent supervisors and managers at the IIC who reported directly to Spring at the time of the RIF: Jeff Bruce, Arild Skjervoy, Chris Parry and Steve Solomon. The only person who occupied Bendig's same position as an IIP team leader was Solomon, a citizen of the United Kingdom, as Bendig also is.

Bendig's and Jonklaas' circumstances are clearly not "nearly identical" or even similar when Bendig was a supervisor and Jonklaas was one of several geophysicists under Bendig's direct supervision. There is nothing in § 1324b which suggests that a supervisor has the right to displace or "bump" his subordinates in a RIF, and OSC did not identify any source for such a right. At the time of the RIF Jonklaas had been performing his same job for some years; it was not vacant. A comparison of Bendig's and Jonklaas' work skills therefore misses the point and adds little value to the analysis where

Bendig was never a candidate for Jonklaas' job.[11]

Spring did not decide to eliminate Bendig's job by comparing Bendig's skills to those of the people he supervised or to other people employed in different business units or work groups. He compared Bendig to the other supervisors in the IIC. Bendig was the lowest ranked of the IIC supervisors, and there were also concerns about his skills and his supervisory style as well as what Spring characterized as "a breach of trust." There was an announcement at the meeting that Bendig was available for other vacant jobs, not for jobs under his own supervision in which there already were incumbents. The only two jobs for which Spring remembered Bendig's name being specifically mentioned at the meeting were both supervisory jobs.

The persons who do appear to be similarly situated to Jonklaas are the other individuals who were working as staff geophysicists at the IIC under Bendig's direct supervision. Stemler was working as a salary grade level 6 geophysicist on the Gulf of Paria project and so was Jonklaas. Stemler was severed while Jonklaas was retained; Spring was the person who made both decisions. In consequence, Stemler and Jonklaas appear initially to have been similarly situated. It also appears, however, that there were significant differences between them because each had a different area of specialized expertise; Jonklaas in seismic interpretation and Stemler in seismic acquisition and processing. In addition, many of the managers thought that Stemler had a serious problem with timeliness, while there is no suggestion that Jonklaas had performance issues. The discussion at the meeting of Stemler's job performance was highly critical while there is no evidence of any unfavorable discussion of Jonklaas' performance. In terms of their specialized skills and work performance, they were not similarly situated.

2. Who was Similarly Situated to Boyd

OSC also contends that both Bendig and Stemler were better qualified for the job of Senior Geophysical Advisor at Lobo to which Mark Boyd was transferred,[12] but offered no evidence that either was similarly situated to Boyd.

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[11] Bendig himself acknowledged in any event that his own skills as a geophysicist were not as strong as Jonklaas' (Exh. E at 112, 124).

[12] The parties appear to assume that the failure to offer a job transfer is an act covered by § 1324b, which is on its face directed to events involving the hiring, recruitment, referral for a fee or discharging of employees. Ordinarily terms and conditions of employment such as promotion and compensation are not encompassed in § 1324b. I have for purposes of this motion treated the failure to offer a transfer as a hiring event, but the question is not free from doubt.

Mark Boyd had never worked at the IIC. He was previously employed in various capacities in Conoco facilities in Aberdeen, Scotland; London, England; and Ponca City, Oklahoma. Immediately prior to Conoco's restructuring he was the group leader for the Seismic Analysis Group at the SITC in Ponca City, where he reported to Allen Huffman. Boyd holds baccalaureate and doctoral degrees in geophysics as well as an MBA. In his capacity as group leader at the SITC he supervised geoscientists doing specialized research and providing services in seismic analysis including geostatistics, AVA (amplitude versus angle) analysis, acoustic impedance inversion analysis and vertical seismic profiling. Boyd is a citizen of the United Kingdom and at the time of the events in question had an L-1A visa.

Although Boyd, like Bendig, was a manager prior to the RIF, the record reflects that he was transferred to Houston at his own request for family reasons (Exh. G at 26). Boyd's job as Leader of the Seismic Analysis Group at the SITC was not one which had been identified by his manager Allen Huffman as one to be eliminated, nor was Boyd a person Huffman had targeted for severance. There is no suggestion that Boyd had any performance issues or that he was the subject of any negative criticism at the meeting. Neither is there evidence that Spring played any significant role in the decisions affecting Boyd. The evidence shows that Tina Langtry was the relevant decision maker for Lobo, not Robert Spring.

For the same reason that Bendig and Boyd are not similarly situated, Stemler was not similarly situated to Boyd either. Neither Bendig nor Stemler was perceived by the other exploration managers as being among the top three or four contenders for Boyd's job or for jobs in any other component. The comparison of either Bendig or Stemler to Boyd is thus not one in which the circumstances are even similar, much less "nearly identical." *See generally Okoye*, 245 F.3d at 514-15.

3. The Persons Transferred to Lobo

The record reflects that there were a number of positions filled at Lobo, the one component which gained people during the reorganization process (Exh. H at 23). Geophysicists, geologists and reservoir engineers were placed there (Exh. J at 24). Sheedlo remembered some of the people selected for Lobo in addition to Boyd as including Mike Challis, Hal Harper, Wendy Houghton, Susan Young, John Snow, Pat O'Connell, Dave Brewster and Roy Leadholm (Exh. H at 24). These individuals were discussed at the meeting (Exh. H at 25). There is no evidentiary basis for finding Bendig or Stemler to be similarly situated to any of them.

The process utilized was that described by Spring (Exh. J at 68), but there is nothing in the record to suggest, and OSC does not contend, that Spring played any major role in the decision to transfer Boyd or any other individual to Lobo. Spring did say that Stemler had the basic skills for the jobs Boyd and Challis took at Lobo, but he said those positions were primarily geophysics interpretation positions, a different area of expertise (Exh. J at 97). The skills needed involved hands on 3-D, three dimensional

seismic interpretation, and current Landmark working skills (Exh. J at 68).

So far as the record discloses, no one specifically asked Langtry why Bendig and Stemler were not chosen for Lobo.[13] Although neither party has specifically so indicated, the record also reflects that except for Challis, who was Canadian, the remainder of the persons Sheedlo remembered were United States citizens. (Deposition Exh. 2 accompanying Exh. V at pp. DJCOJS00005-00013). At least nine other individuals were placed in Lobo as well; they too were United States citizens.[14]

While not outcome determinative, these facts are material to the question of whether an inference may be drawn that citizenship status was a factor in the selections for Lobo. Of the seventeen persons known to have been sent to Lobo, fifteen were United States citizens. These are not the kind of circumstances which give rise to an inference that the nonselection of Bendig or Stemler was influenced by a bias against United States citizens. To the contrary, the reasonable inference from the facts and circumstances presented is the obvious one: that the deterrent factor for a manager, if any, who might have considered Bendig and Stemler for transfer, was the comments made and the discussions had about them at the meeting.

VII. WHETHER CONOCO'S EXPLANATIONS ARE PRETEXTUAL

OSC and the complainants have the burden of creating a factual issue as to whether Conoco's explanation is a cover up for citizenship status discrimination. A pretext for discrimination cannot be shown unless there is some evidence introduced that permits the fact finder to believe that the reason given was false and that illegal discrimination was the actual reason. *Nichols v. Lewis Grocer*, 138 F.3d 563, 566 (5th Cir. 1998) (citing *St. Mary's Honor Ctr.*, 509 U.S. at 515 and *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1185 (5th Cir. 1997)). In order to avoid summary decision, sufficient

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[13] Sheedlo said she did not know Bendig or Stemler (Exh. H at 37), and she did not know at the time of the meeting that she would soon be going to Lobo herself (Exh. H at 22). At the time of the meeting, Sheedlo was the Executive Assistant to Ted Davis, President of Conoco operations in Africa, Asia and the Middle East (Exh. H at 7). She represented Dubai at Davis' request (Exh. H at 13). Like the other exploration managers, she participated in the Lobo decisions only as a team member (Exh. H at 30). Langtry evidently did know Stemler; he identified her as having been the business unit manager for one of the projects he worked on when he was in Norway (Exh. K at 66).

[14] Joseph Bechel, Chris Chrisopoulos, Farhad Ghassemi, Mike Kozimko, Flemming Mangol, Richard Mountfield, Ben Sargent, Marc Shannon and Ken Yarbrough were placed in Lobo. It is unclear whether Cah Chi and/or John Conway were ultimately placed there or elsewhere. They too are United States citizens (Deposition Exh. 2 accompanying Exh. V at pp. DJCOJS00005-00013).

factual evidence must be tendered to create a genuine issue as to whether the explanation is false and whether the employer intentionally discriminated on a prohibited basis. *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997).

OSC contends that an actual comparison of skills would show that Bendig and Stemler were better qualified for Jonklaas' and Boyd's jobs than Jonklaas and Boyd themselves were, and that comparative evidence also shows a) that noncitizens with performance problems were retained while Bendig and Stemler were not, and b) that low-ranked citizens of Norway and Indonesia were retained in their home countries while Bendig and Stemler were severed in theirs. OSC also alleges that a nexus has been shown between citizenship and the questioned employment decisions.

A. The Qualifications for Boyd's Job

As evidence of pretext, OSC offered the Affidavit of Kenneth R. Story (Exh. 22), which sets forth Story's opinion about the relative qualifications of Stemler, Bendig and Boyd for Boyd's job at Lobo. Story, a geophysicist with 25 years of project experience with a rival oil company, states that in order to form his opinion, he reviewed two affidavits, three resumes and two depositions submitted as evidence in this matter. Based on that review Story said he would have selected Stemler first, then Bendig, then Boyd for Boyd's job. Because the three people Story compares were not similarly situated, the comparison has minimal utility.

Even assuming arguendo that the individuals had been similarly situated, the affidavit still would not create an inference of discrimination for several reasons. First, the affidavit presents an opinion or a judgment, not facts. It is replete with inferences, suppositions and conclusions. Second, the affidavit wholly fails to acknowledge that the decisions actually made by Conoco involved considerations based on performance problems or interpersonal problems, and fails as well to recognize that such factors legitimately affect employment decisions. The affidavit simply ignores the discussions which took place at the meeting about Bendig's and Stemler's performance issues. Third, a genuine issue of material fact cannot be created by making skill comparisons which are so transparently based upon controlled sources of information and the affiant's own selected criteria. For example, Story devalued Boyd's doctoral degree for no discernable reason as being "very likely of narrow scope and technically oriented," while contrasting Boyd's "academic" credentials to the more extensive work histories of Stemler and Bendig which he used as his principal criterion for selection. While Story acknowledged that Stemler "does not have the depth of knowledge of the more technical aspects of geophysics such as geostatistics, amplitude vs. offset (AVO), and vertical seismic profiles (VSP's) relative to that of Mr. Boyd" and that Boyd "was highly regarded in a technical capacity at Conoco," he nevertheless concluded that Stemler's "more applied and practical experience" should be preferred.

But Conoco had no obligation to consider only the factors Story elected to consider or to weigh the

criteria in the same way he would. It is crystal clear from the record that the employment decisions in question were not made on the basis of the relative length or breadth of anyone's work experience. An employee's history of work experience standing alone has little bearing on the quality of the employee's performance or his ability to complete assignments on time. The Fifth Circuit, moreover, has repeatedly said that an attempt to equate years of service with qualifications is unpersuasive:

> [G]reater experience alone will not suffice to raise a fact question as to whether one person is clearly more qualified than another. More evidence, such as comparative work performance, is needed.

Loral Vought Sys., 81 F.3d at 42 (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 959 (5th Cir. 1993)). Comparative work performance is precisely the factor which the Story affidavit ignores.

Finally, as the Fifth Circuit has plainly instructed, the level of disparity in qualifications required to create an inference of discrimination means that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. *Deines v. Texas Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999). The circuit says as well that,

> unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.

EEOC v. Louisiana Office of Cmty. Servs., 47 F.3d 1438, 1445 (5th Cir. 1995); *Scott v. Univ. of Mississippi*, 148 F.3d 493, 507-08 (5th Cir. 1998), *abrogated on other grounds, Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The differences Story sets out are simply not of such character.

The record reflects that neither Bendig nor Stemler was ever a serious candidate for Lobo because they had major performance deficiencies and none of the exploration managers thought either was among the top three or four candidates for any job. That Story's review of selected evidence led him to a different conclusion would not suffice to create a question of fact even had the three individuals been similarly situated.

B. The Qualifications for Jonklaas Job

Although OSC contends that Bendig and Stemler were better qualified than was Jonklaas for Jonklaas' job, there is no evidence to support that assertion. Bendig acknowledged that interpretation was Jonklaas' strength (Exh. E at 121) and that Jonklaas technical skills were stronger than his own ("Pat

Jonklaas is technically more qualified than I am.") (Exh. E at 112). When he rated his subordinates at Spring's request, Bendig gave Jonklaas a score of 1 ("strong geophysical talent, has potential to grow") and Stemler a score of 2 ("Best A + P in the company, always will be technical") (Exh. E, deposition exh. 10). According to Spring's testimony, Bendig did not think Stemler was in the upper quartile of interpreters (Exh. J at 174).

The second Bendig affidavit (Exh. 17) asserts that had he been forced to decide between Stemler and Jonklaas, Bendig would have elected to retain Stemler instead because in his judgment the needs of the next phase of the Gulf of Paria project would have been reprocessing and new acquisition rather than interpretation. Bendig thus does not contend that Stemler is better qualified than Jonklaas to perform the seismic interpretation work which Jonklaas actually performed; rather, Bendig says that he would have chosen to retain seismic acquisition and processing skills at the IIC rather than seismic interpretation skills. Presumably then he would not have elected to transfer the reprocessing work to the SITC or to contract out the acquisitions work.

The fact that Bendig's business judgment might have differed from Spring's, however, does not create an inference of discrimination or a factual issue. The record reflects that the reprocessing work was in fact sent to the SITC where it was performed by John Sinton, and that new acquisition work was not done in-house. Conoco now contracts out much of its seismic acquisition work. The question at issue in this proceeding is not whether acquisition and processing skills are better placed in Ponca City at the SITC or in Houston at the IIC, or whether Spring made a wise or an erroneous business decision; it is whether Spring's decision was made for a prohibited reason and whether his explanation is a cover up for discrimination on the basis of Stemler's status as a citizen of the United States. *Cf. Mayberry,* 55 F.3d at 1091. There is not a scintilla of evidence that the decisions to locate processing skills in the SITC rather than in the IIC or to contract out the seismic acquisition work were made for discriminatory reasons. Neither is there evidence from which any reasonable fact finder could infer that Stemler's United States citizenship was a factor in the decision to retain Jonklaas and to eliminate Stemler's job.[15]

C. Whether there are Factual Issues about Bendig's Performance

OSC also attempts to challenge the factual accuracy of Conoco's reason for Bendig's severance by pointing out that Bendig's 1998 evaluation had been good, that he was on the "Bench Strength" list as a potential exploration manager, and that he had been promoted in 1998 from sgl 6 to 6A. OSC contends there is an issue of fact presented as to whether Bendig was regarded as a capable manager.

[15] It should be noted that Bendig's affidavit did not address the complaints about Stemler's timeliness, nor did it acknowledge his own frustration with Stemler's pace, or the fact that he had been directed to intervene or reassign another project.

I take OSC's evidence as true on this point but do not find any inconsistency in the evidence showing that Bendig was well regarded in early 1998,[16] but that serious complaints and criticisms had begun to surface during that year. But for Conoco's need to downsize, both Bendig and Stemler probably would have remained in their jobs. They just became expendable when the company needed to downsize; this is the essence of a RIF. Evidence of satisfactory or even superior work performance in the past does not contravene the fact that when Spring compared him with the other supervisors in the IIC in late 1999, Bendig was found to be the least valuable.

Bendig's second affidavit (Exh. 17) also took issue with Spring's assessment of the needs of the Offshore Venezuela project, contending that there was no need to reduce personnel on his projects because the workload was increasing, not decreasing. That Bendig's assessment of the needs of the Venezuela project differed from Spring's is not surprising given that each was looking at the project from a different perspective. Spring had to choose between the needs of that project and the competing demands of all the other IIC projects; Bendig was focused only on his own projects. A difference in perspective does not create a question of fact, and it is not my role in summary decision proceedings to decide who made the better business judgment. Section 1324b is not a cause of action for faulty business judgment. OSC has not produced evidence which would lead a rational fact finder to infer that Spring's explanation is a cover up for discrimination based on Bendig's United States citizenship.

D. Whether Noncitizens with Performance Problems were Retained

1. James and Keen

OSC also contends that there were two noncitizens who had performance problems, but they were retained while Bendig and Stemler were terminated. First, OSC contends that several unidentified individuals at the global selection meeting expressed concern that Keith James was not contributing globally to the company, and that James was not terminated from his position but instead was "promoted" to Manager of Functional Excellence,[17] citing to the deposition of David Jenkins (Exh. N at 23-24). Next, OSC cited to the deposition testimony of Robert Spring (Exh. 4 at 98) (The same deposition is also Exh. J) for the proposition that Richard Keen was retained even though he had a conflict with a previous manager for using foul language on a job. OSC offered no evidence which

[16] There is, however, also evidence that there had been a history of personnel problems when Bendig was in the United Kingdom (Exh. J, deposition exh. 4).

[17] The term "functional excellence" evidently relates to Quality Assurance and Quality Control (Exh. V at 17). There is nothing in the record which suggests that James' reassignment was a promotion.

suggests that the problems either of these individuals had were similar to Bendig's or to Stemler's, or that either had engaged in similar conduct. Neither did it identify any other evidence tending to show that either of those individuals was similarly situated to Bendig or to Stemler.

Keith James was not a geophysicist or a team leader at IIC; he was the Chief Geologist in a totally different work group at the AEO, a job to which he had been initially recruited at sgl 8 in 1995. He had a different supervisor, David Jenkins, who wanted to retain him. Jenkins, who was the manager of the AEO at the time of the RIF, did not identify James' job as one to be eliminated. When Jenkins made the presentation for his component at the global selection meeting he was an advocate for James; his opinion was that James should be retained and that the criticism of James stemmed from a misperception of his role. There was disagreement at the meeting and James was ultimately replaced as Chief Geologist and assigned to a different position. These circumstances are not sufficiently similar to those of Bendig or Stemler to make any comparison between them productive. The fact that unidentified persons at the meeting thought James didn't contribute enough globally is neither similar nor analogous to the circumstances surrounding Spring's decision to eliminate Bendig's and Stemler's jobs.

Although he too was employed in the IIC, Keen is not similarly situated to Bendig or Stemler either. Spring's testimony was that Keen was initially loaned to IIC in 1996 to work on the Indonesia project because Robert Kunemund, the manager of the Nigeria business unit, said he only needed one geophysicist and that was Jerry Thornburg (Exh. J at 98). Kunemund had a conflict with Keen because the two of them didn't like each other (Id.). Kunemund said that Keen had used foul language to him in a meeting in early 1997 (Id.).

While Keen evidently had a personality conflict with his former supervisor and used foul language to him on one occasion, there is no indication that Keen had any job performance problems or was unable to complete jobs in a timely manner. Neither is there any suggestion that Spring found Keen's conduct or performance objectionable in any way; in fact, Spring and Jenkins subsequently made the decision to make Keen the Chief Geophysicist for the IIC and had obtained the concurrence of all the exploration managers in that decision (Exh. J at 101). A single use of unspecified "foul" language to a former supervisor is not comparable to anything either of the complainants did, and neither OSC nor the complainants have provided any basis to find him similarly situated to them. Employees who engage in different conduct or different violations of company policy are not similarly situated. *See Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990).

2. Unnamed Indonesians and Norwegians in Their Home Countries

OSC next complains that Conoco was inconsistent in its approach to selecting employees for severance globally. It says that as a result Indonesian and Norwegian citizens working in their own countries were

retained even though they ranked in the fourth quartile in the forced rankings prepared by their managers.

It is clear that there were inconsistencies globally because components in different countries used different approaches to the development of their initial proposals. For example, while most of the units did the forced rankings, some units, such as Canada, did not do them at all (Exh. V at 26-27, 52-61, 97). Moreover, it does not affirmatively appear that any component ultimately relied upon the forced rankings in making final decisions. They were just one factor which some units used initially while others did not. Jenkins said he did not use them in developing his initial recommendation for AEO, but he reviewed the performance appraisals (Exh. N at 13); Spring prepared the forced rankings, but he said he relied on input from others as well as his own knowledge of the performance of the individuals in his work group. According to Bishop, individuals may or may not have used the rankings as part of their input, but as far as he was concerned, the purpose of doing the forced rankings was for use in case they didn't otherwise achieve the reductions they needed (Exh. M at 104). Because they achieved their goals, they didn't have to resort to using the forced rankings to make the ultimate decisions (Id.). Contrary to OSC's suggestion, there is no evidence that any business unit or work group used the forced rankings as a governing factor in determining who would be severed, either for Indonesia or for any other business unit or work group; the record in fact strongly suggests otherwise.

OSC also complained that the payrolls in Norway and Indonesia were reduced only 10% while the reduction in the United States payroll was 17.4%.[18] It is unclear whether OSC seeks to allege that the RIF had a disparate impact on United States citizens; if so the short answer is that OCAHO jurisprudence does not recognize the disparate impact theory. *See Yefremov v. New York City Dep't of Transp*., 3 OCAHO no. 562, 1556, 1580 (1993); *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1664 (1993).

OSC's analysis appears to assume that all the business units and work groups were obligated to apply exactly the same single criterion and achieve the same proportionate results worldwide, regardless of who made the decisions and regardless of differing situations or different laws in different countries. The assumption, as OSC contends in its brief, that Conoco should have taken pains to avoid disparate treatment globally by using the same severance policy in all countries where it does business is unwarranted because it is unsupported by authority and because it fails to recognize the effect of differences in circumstances.[19] Contrary to OSC's view, and as another circuit has observed, "The law

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[18] OSC overlooks the fact that the payroll hardest hit was not the United States, it was the Netherlands (Exh. V at 41).

[19] It should be noted that § 1324b has no application to the employment of foreign citizens

(continued...)

does not require, nor could it realistically ever require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic hindsight equality." *EEOC v. Flasher Co.*, 986 F.2d 1312, 1319 (10th Cir. 1992) (explaining that Title VII does not make all unexplained differences in treatment illegal). OSC simply elects to ignore the fact that there may be valid reasons for different procedures in different circumstances.

For example, Mark Wheeler, who made the presentation for Indonesia at the global meeting, said that the Indonesian nationals working for Conoco in that country are government employees as well as Conoco employees, and as such they are governed by local law (Exh. O at 29). In order for an Indonesian national to be severed, the person had to agree to the severance package. The two Indonesian nationals who were severed, a geophysicist and a reservoir engineer, both agreed to the severance package.[20] Wheeler also said that the ranking of his employees was only one factor for consideration (Exh. O at 35). The circumstances surrounding the decisions in Indonesia were neither similar nor comparable to any of the circumstances surrounding Bendig's and Stemler's severance.

The record also reflects that Kathy McGill did the rankings for Norway (Exh. V at 54-55) and that eight Norwegian citizens were ranked in the fourth quartile (Exh. V at 56-57, deposition exh. 2 at pp. DJCOJS00054-00055). All were retained (Exh. V at 56). It does not appear that anyone was actually severed from Norway, although six individuals were repatriated from there to the United Kingdom and six to the United States (Exh. V at 56, deposition exh. 2 at pp. DJCOJS00054-00055). OSC has tendered no evidence to show which, if any, of the Norwegian employees worked in similar positions to Bendig or Stemler or had the same or comparable problems, and I find nothing in the record which suggests that Robert Spring played any role in the employment decisions in Norway. Those decisions appear to have been made in Norway (Exh. S), but no detailed information was provided as to precisely how the decisions were made. OSC's argument appears to be that because Norway evidently elected to reduce its budget by repatriating citizens of other countries and retaining its own nationals, the IIC should have done the same and repatriated its foreign nationals in order to retain United States citizens. This was an option which was available to Conoco; I find nothing in § 1324b

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[19](...continued)
outside the United States. *Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 54 (1994).

[20] Wheeler said that the decisions on severance in Indonesia were finalized when he went back and discussed them with his boss, Jim McColgin, then the President of Conoco, Indonesia. (Exh. O at 31-32). According to the Affidavit of John Swann (Exh. S), approval for the selection of non-U.S. based employees for severance and placement was done locally in those countries, including the United Kingdom, Indonesia, Norway, Nigeria, Canada, Dubai, Russia, Venezuela, the Netherlands, Taiwan, and Vietnam. Swann also stated that United States based business units did not have the final authority over placement of geologists or geophysicists outside the United States.

which requires that it be elected.

E. Whether a Nexus to Citizenship Status has been Shown

OSC further asserts that the Deposition of Helen Myers (Exh. F) and deposition exhibit 2 attached thereto establish a nexus between Conoco's employment decisions and citizenship status because they demonstrate "a preference" for L-1A visa holders. It urges further in its surreply that Conoco "concedes" that it "presented a nexus involving citizenship status - the preference for L-1A visa holders over L-1B visa holders."[21]

The exhibit consists of a letter dated October 7, 1998, addressed to Helen Myers and Randy LaBouve of Conoco's Human Resources Department, from an attorney, Rebecca P. Burdette. It appears to be a response to a specific inquiry about a notice related to Richard Keen's change of visa status from L-1B to H-1B. The attorney's letter summarizes various options under the circumstances, including a change to L-1A, which would have the advantage of bypassing the lengthy labor certification process. OSC contends that Conoco sought to avoid the labor certification process so that it could avoid offering the job to United States citizen workers.[22]

Leaving aside the disputed question of whether the letter is either privileged or admissible, it simply does not show what OSC claims it does. The fact that Conoco might have preferred to have Richard Keen in L-1A visa status rather than L-1B visa status, does not, as OSC seeks to suggest, create any nexus between Bendig's and Stemler's United States citizenship status and Conoco's decision to eliminate their jobs. A preference for an L-1A visa holder rather than an L-1B visa holder, assuming there were one, would establish nothing at all with respect to any alleged preference for or against United States citizens. Although OSC urges that Conoco manipulated the visa process to avoid "hiring" the complainants, a fair reading of the letter suggests that if Conoco manipulated the visa process, it did so because Richard Keen was already employed and going through the labor certification process for his job would be lengthy and burdensome.

The reality of a large scale corporate structure such as Conoco's is that the geoscientist managers who

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[21] The statement refers to the sentence in Conoco's brief which says that rather than establishing a "nexus" between the employment decision and citizenship status, "the only 'nexus' that Complainant has presented is an alleged preference for L-1A visa status over other non-immigrant categories." OSC does not explain how the acknowledgment of what it alleges translates to a concession that its allegation is accurate.

[22] The actual recommendation of the attorney was that Conoco should initiate the labor certification process for Keen.

make employment decisions are not the same people who handle visa processing and vice versa, as the record plainly discloses. Spring testified that he doesn't even know how the visa process works (Exh. J at 23). He said that when they bring someone in from a subsidiary, they rely on counsel and the Human Resources people to handle the details and the paperwork (Id.). The main work is done by outside counsel (Exh. J at 20). Counsel and the Human Resources people in turn do not make decisions about the employment and placement of geoscientists; they just do whatever is involved in getting the person management selected on board.

F. Whether Bendig's Purported Statistics Suggest Pretext

Bendig's second affidavit (Exh. 17) further offered what he characterized as statistical evidence of discrimination. He stated that an unidentified person had extracted "data pertinent to the Integrated Interpretation Center" from documents supplied by Conoco, and that a chi-square test was performed for the IIC. According to Bendig, "The result was a chi square value of 6.606. This means there was less then (sic) a 1.0 percent chance that discrimination did not occur." I assign no weight to this portion of the affidavit.[23] With respect to affidavits submitted with a motion for summary decision, OCAHO rules provide that such affidavits "shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein." 28 C.F.R. § 68.38(b). The purpose of the rule to ensure that facts are established in a manner designed to ensure their reliability and veracity. The federal rule, Fed.R.Civ.P. 56(e), is similar, and portions of an affidavit not complying with it are not considered on summary judgment. *See Richardson v. Oldham*, 12 F.3d 1373, 1378 (5th Cir. 1994). Neither are conclusory affidavits sufficient to create or negate an issue of fact. *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992).

The Bendig affidavit fails to meet the standard for minimally acceptable evidence. First, Bendig describes no expertise of his own as a statistician and fails to disclose who actually did the "test" or the qualifications of that person. He offers only summary and conclusory characterizations, both of the data used and the results achieved. Second, the potential statistical validity of a regression analysis performed on a group as small as the IIC is not addressed. Third, there is no indication that the analysis gave any consideration to specific talents, job duties, performance problems, interpersonal problems or any other considerations among possible individualized reasons for particular decisions.

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[23] Conoco made no objection to the Bendig affidavit. Ordinarily formal defects in an affidavit will be held to have been waived where the nonmoving party does not object to or move to strike the defective matter. *Munoz v. Int'l Alliance of Theatrical Stage Employees*, 563 F.2d 205, 214 (5th Cir. 1977) (citing *Auto Drive-Away Co. of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446 (5th Cir. 1966)). Here, however, the defects are not merely formal or technical. It is not clear that the requirement that an affidavit state facts, as opposed to conclusions, is one that may be waived.

Fourth, the affidavit does not even disclose the prohibited basis upon which the "discrimination" it purports to show allegedly occurred, and it appears to misunderstand the limited conclusions which such statistics can demonstrate: that is, the probability that a given result could have occurred by chance. It should be noted as well that the affidavit does not disclose how many regressions were actually run or whether there was collinearity among any of the variables. The affidavit does not even identify what variables were utilized. As Judge Posner has explained,

> [A] high significance level may be a misleading artifact of the study's design; and there is always the risk that the party's statistical witness ran 20 regressions, one and only one of which supported the party's position and that was the only one presented, though, in the circumstances it was a chance result with no actual evidentiary significance.

Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362 (7th Cir. 2001).

The portion of the affidavit dealing with statistical analysis is accordingly devoid of probative value and lacks the minimal indicia of reliability. While the strict rules of evidence governing the admissibility of hearsay evidence in judicial proceedings are not applicable to administrative proceedings, *Richardson v. Perales*, 402 U.S. 389, 400 (1971), and a witness in OCAHO proceedings may therefore testify about what he heard from a third party, this fact does not provide a license for the witness to present conclusory and self-serving opinions which do not either identify the source of the information or disclose the facts which underlie the conclusions. *Stubbs v. DeSoto Hilton Hotel*, 8 OCAHO no. 1005, 148, 156 (1998) (citing *Monroe v. Bd. of Educ.*, 65 F.R.D. 641, 649 (D. Conn. 1975)).

VIII. WHETHER DISCOVERY DISPUTES PRECLUDE SUMMARY DECISION

Finally, OSC also urges that but for the denial of portions of its motion to compel discovery and but for the failure of Conoco to respond to certain discovery requests it would show additional evidence.

The specific document to which access was denied is the presentation Glen Bishop made to the Upstream Leadership Team dealing with the performance of incumbent senior level managers at sgl 7 and above (Exh. M at 6). OSC says this document may contain comparative evidence of other noncitizen managers with performance problems who were retained. Access to the memo was denied because managers at the senior or executive levels were not similarly situated to Bendig or Stemler. Those managers were not discussed at the global selection meeting and were not subject to the same RIF decision making process.

As to what materials Conoco has failed to produce, OSC's assertions are nonspecific, stating only that

Conoco has failed to comply with the Order of April 5, 2001 respecting production of documents. No particular request or document was identified. OSC contends, however, that Bendig and Stemler were qualified for other jobs, and that it has been prevented from obtaining the evidence which might show this. In *Netto v. Amtrak*, 863 F.2d 1210, 1216 (5th Cir. 1989), the court considered whether the existence of a nonmoving party's outstanding discovery requests prevented summary judgment and concluded that it did not when the record showed that the discovery request was unlikely to produce facts sufficient to preclude summary judgment. *See also Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1443 (5th Cir. 1993) (continuance denied when party "failed to demonstrate that further discovery would be anything other than a 'fishing expedition'"). The discovery OSC refers to is precisely the kind of "fishing expedition" criticized in *Krim*. The complainants have already engaged in extensive and broad discovery including requests addressed to matters going well beyond information about others in their work group or RIF universe. *See Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 397-98 (5th Cir. 2000) (discovery properly limited to those in plaintiff's department when decisions were made on a departmental basis, notwithstanding highly deferential, not de novo, review by school-wide tenure committee).

Employees who performed different jobs, with different duties in different facilities in different geographical locations are not similarly situated to Bendig or Stemler, and neither are top management employees who held jobs that these complainants have never held. Because Conoco's RIF decisions had their origin and inception in the various business units and work groups, it is exceedingly unlikely that production of the disputed materials would disclose the identity of anyone remotely similarly situated to Bendig or Stemler. Thus I find no reason to believe that the production of additional materials would assist OSC in avoiding summary decision. More is required than the generalized speculation that there might possibly be other jobs somewhere in the company for which Bendig and Stemler might have the basic qualifications. As one court commented,

> Plaintiff has requested the pond so that it may go fishing. The rules require that plaintiff request the individual fish themselves.

United States v. Bd. of Educ. Caddo Parish, 1995 WL 450984 *3 (W.D. La. April 21, 1995).

In the context of a summary judgment motion, vague assertions of the need for additional discovery are as unavailing as vague responses on the merits. *See Union City Barge Line v. Union Carbide Corp.*, 823 F.2d 129, 136-37 (5th Cir.1987); *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001) (a party cannot rely on vague assertions that additional discovery will provide unspecified facts) (citing *Krim*, 989 F.2d at 1442).

IX. SUMMARY

The ultimate determination here, as in every disparate treatment case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable fact finder could infer discrimination. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902-03 (5th Cir. 2000). Under *Reeves*, the sufficiency of the evidence depends upon whether there is enough evidence that, considering the sum of all the evidence, reasonable people could find discrimination. 530 U.S. at 134-36. If the prima facie case is weak and there is little or no pretext evidence, the evidence as a whole does not permit an inference of discrimination. *Id.* at 148. A mere scintilla of evidence does not create a genuine issue of material fact. *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 301 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

Based upon the record as a whole,[24] I conclude that no reasonable fact finder could infer from the evidence presented that their United States citizenship status was a factor in the employment decisions made about either Bendig or Stemler. Accordingly, Conoco's motion for summary decision should be granted.

X. FINDINGS AND CONCLUSIONS

I have considered the pleadings, briefs and documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. As is more fully explained above, I find and conclude,

Findings

1. Conoco, Inc. is a global energy corporation incorporated in Delaware and headquartered in Houston, Texas.

2. Conoco, Inc. employed more than three employees at all times relevant to the events complained of in this proceeding.

3. Daniel Bendig is and has been at all times relevant to this proceeding a citizen of the United States and of the United Kingdom.

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[24] I reviewed and considered the record as a whole, including other motions, pleadings and evidentiary materials consisting principally of discovery requests and the responses thereto submitted in connection with various motions to compel.

4. David Stemler is and has been at all relevant times a citizen of the United States.

5. At the time of the events complained of, Bendig was employed by Conoco as a Team Leader for Integrated Interpretation Projects, salary grade level 6A, in the Integrated Interpretation Center (IIC), a subgroup of the Exploration Technology business unit.

6. At the time of the events complained of, Stemler was employed by Conoco as a Senior Geophysical Advisor, salary grade level 6, in the Integrated Interpretation Center (IIC).

7. The Integrated Interpretation Center (IIC) is located in Houston, Texas, and employs geologists and geophysicists who provide technical support to Conoco's business units around the world.

8. The manager of the Integrated Interpretation Center (IIC) at all times relevant to this proceeding was Robert Spring, a native and citizen of Canada who holds an L-1A visa.

9. Conoco underwent a major restructuring and reduction in force in 1998-99.

10. Glen Bishop and John Swann developed a process for making decisions about how to reduce the number of geologists, geophysicists and reservoir engineers at salary grade levels below 7.

11. Component heads for the various business units and work groups developed the initial proposals for their respective components.

12. Robert Spring prepared the initial proposal for downsizing the Integrated Interpretation Center.

13. Robert Spring was the person who identified Bendig's and Stemler's jobs for elimination in the RIF.

14. Bendig's United States citizenship was not a factor in Spring's decision to eliminate his job.

15. Stemler's United States citizenship was not a factor in Spring's decision to eliminate his job.

16. Robert Spring was not responsible for making decisions about staffing at Lobo or at any other business unit or work group at Conoco, except for the Integrated Interpretation Center.

17. No evidence was presented from which it could reasonably be inferred that Bendig's United States citizenship was the reason he was not selected for transfer to another business unit or work group.

18. No evidence was presented from which it could reasonably be inferred that Stemler's United

States citizenship was the reason he was not selected for transfer to another business unit or work group.

Conclusions

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

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

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

4. OSC is authorized by 8 U.S.C. § 1324b(d)(1) to be a complainant in this proceeding.

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

6. Conoco met its initial burden to support its motion for summary decision as provided in 28 C.F.R. § 68.38(b).

7. Neither OSC nor the named complainants presented evidence sufficient to show a genuine issue of material fact remaining for a hearing as provided in 28 C.F.R. § 68.38(b).

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

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

ORDER

For the reasons set forth more fully herein, the complaints in this matter should be, and they hereby are, dismissed.

SO ORDERED.

Dated and entered this 18th day of December, 2001.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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