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

MARIA FERNANDEZ, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00024
GMRI, INC., Respondent.	)	

Appearances: Elvis J. Adan, Esq., for Complainant
Sean M. McCrory, Esq., and Matthew A. Swanger, Esq., for Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. BACKGROUND

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Complainant Maria Fernandez filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on November 21, 2023. Complainant alleges that Respondent GMRI, Inc. violated 8 U.S.C. § 1324b(a)(1)(B) by firing her on the basis of her citizenship status. Respondent filed its Answer and Affirmative Defenses on January 24, 2024.

On July 29, 2024, Respondent filed its Motion for Summary Decision. Complainant filed her Response in opposition to the motion on August 28, 2024. Respondent filed its Reply Brief on September 13, 2024.

For the reasons outlined below, Respondent's motion is granted, and the Complaint is dismissed with prejudice.

II. FACTS

a. Facts Not in Dispute from Respondent's Motion for Summary Decision

Complainant Maria Fernandez is a United States citizen; she worked at Respondent GMRI's restaurant "Cheddar's" as a prep cook in Kendall, Florida. *See* Mot. Summ. Dec. Ex. A 9:4–13; Ex. B ¶ 3; Ex. C. Her most recent stint at Cheddar's began on December 5, 2022, when Respondent's Managing Partner Patrick Mattix hired her, although she had worked at the restaurant previously. Id. at Ex. A 11:18–12:5; Ex. B ¶ 5.

In February 2023, Mr. Mattix hired Stella Tunjo as a prep cook and trainer at the Kendall Cheddar's. Id. at Ex. A, 16:19–23, 18:7–9. Ms. Tunjo's I-9 form indicates that she is a U.S. Citizen. Id. at Ex. B ¶ 7.

Ms. Fernandez believed that Ms. Tunjo received preferential treatment at the workplace by being assigned better jobs and receiving more work hours. Id. at 18:1–20:17. Ms. Fernandez also believed that Ms. Tunjo was related to Mr. Mattix by marriage, and that Ms. Tunjo was not authorized to work in the United States. Id.

Mr. Mattix attested that "Ms. Tunjo is not and has never been [his] mother-in-law." Id. at Ex. B ¶ 9.

On April 22, 2023, Mr. Mattix corresponded with Cheddar's manager Lidya Davila concerning workflow needs at the restaurant. Id. at Ex. B ¶ 10. Ms. Davila messaged Mr. Mattix that there was not enough work for two prep cooks that evening; she asked Mr. Mattix whether she should call Ms. Tunjo or Ms. Fernandez to tell them to not come to work. Id. at Ex. K ¶ 12. Mr. Mattix told Ms. Davila that Ms. Fernandez' should be told not to come to work as Ms. Tunjo was asked to leave early the day before. Id.; Ex. E; Ex. K ¶ 12.

Ms. Davila contacted Ms. Fernandez that afternoon. Id. Ex. K ¶ 13. The circumstances of their encounter are contested; Ms. Davila asserts that she informed Ms. Fernandez that Fernandez should not come to work that day, and subsequently Ms. Fernandez voluntarily resigned. Id. ¶¶ 13–14. Ms. Fernandez in the opposition to the motion for summary decision and in her deposition asserted that Ms. Davila informed her that Respondent was terminating her employment. Opp'n 5–6; Mot. Summ. Dec. Ex. A 13:1–14:19. However, in other places, Ms. Fernandez asserts that she resigned voluntarily. Mot. Summ. Dec. Ex. A 29:25–30:3, Ex. I. For the purposes of this motion, the Court presumes that Ms. Fernandez was fired as she has asserted.

Later that same day, Mr. Mattix texted two of Complainant's managers informing them "that April 21 was Ms. Fernandez's last day. She leaves tomorrow to move to [C]hicago." Id. Ex. B ¶ 12; Exhibit E.

Ms. Fernandez later filed a charge with IER, asserting that she was terminated due to her citizenship status. Id. Ex. G.

III. LEGAL STANDARDS

a. Summary Decision

Under the OCAHO rules, the Court "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[1] "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).[2] "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." Hajiani v. ESHA USA, Inc., 10 OCAHO no. 1212, 6 (2014).

Only admissible evidence may be considered in establishing the presence or absence of a fact. *See* 28 C.F.R. § 68.38(b); Macuba v. Deboer, 193 F.3d 1316, 1323–24 (11th Cir. 1999) (holding that in the context of a summary judgment motion, the relied upon evidence "must be admissible at trial for some purposes"); Fed. R. Civ. P. 56(c)(2) ("[A] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."); Taylor v. City of Gadsden, 958 F. Supp. 2d 1287, 1290–91 (N.D. Ala. 2013) ("[Rule 56(c)(2)] objections are significant in resolving a motion for summary judgment, because a district court may not consider evidence, at this juncture, which could not be reduced to an admissible form at trial."); Campbell v. Shinseki, 546 Fed. Appx. 874 (applying Rule 56(c)(2)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" United States v. 3679 Com. Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

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[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

[2] Citations to OCAHO precedents in bound volumes one through eight include the volume and case number of the particular decision followed by the specific page in the bound volume where the decision begins; the pinpoint citations which follow are to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents after volume eight, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1 and is accordingly omitted from the citation. Published decisions may be accessed through the Westlaw database "FIM OCAHO," the LexisNexis database "OCAHO," and on the United States Department of Justice's website: https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

"It is not the court's role to weigh conflicting evidence or to make credibility determinations; the non-movant's evidence is to be accepted for purposes of summary judgment." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996); *see also* Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986) ("[T]he court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied.").

b. Citizenship-Status Discrimination

"An employer may not terminate a 'protected individual' because of the individual's citizenship status." Simon v. Ingram Micro Inc., 9 OCAHO no. 1088, 13 (2003) (citing 8 U.S.C. § 1324b(a)(1)(B)). In the employment discrimination context, "the complainant must establish a prima facie case of discrimination; then the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and, if the respondent does so, the complainant must show . . . that the respondent's reason is untrue and that the respondent intentionally discriminated against the complainant." Id.

To establish a prima facie case of employment discrimination, a complainant must show that "(1) 'she belongs to a protected class,' (2) 'she was subjected to an adverse employment action,' (3) 'she was qualified to perform the job in question,' and (4) 'her employer treated "similarly situated" employees outside her class more favorably.'" Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939, 944 (11th Cir. 2023) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

IV. DISCUSSION

The parties do not dispute two elements of the prima facie case — Complainant is within the protected class as a U.S. Citizen, and there is no evidence that she was anything other than qualified for the position she held at the time of her separation of employment. The parties dispute the adverse employment action — Respondent presents evidence from its managers' testimony, as well as Complainant's own assertions to the worker's compensation board, and in other conversations, to support its assertion that she voluntarily ended her employment. If true, Complainant would be unable to satisfy the "adverse employment action" requirement because a voluntary separation is not "adverse."[3] Complainant counters that she was terminated rather than asked not to come into work that afternoon. She offers her own statement in the deposition, as well as her statement in her Complaint.

As stated previously, at the summary decision stage the Court is obliged to construe all facts in the light most favorable to the non-moving party. Respondent offers an apparent contradiction in Complainant's own testimony, however the summary decision stage is a less-than-ideal forum to attempt to reconcile these apparent inconsistencies. The Court cannot adduce

[3] Insofar as the Court has concluded, for the purposes of the motion, that Complainant's separation was involuntary, it need not address the constructive discharge theory's application to this case. However, for a detailed discussion of the constructive discharge theory and its relation to involuntary separation of employment, *see* MacLean v. City of St. Petersburg, 194 F. Supp. 2d 1290, 1299 (M.D. Fla. 2002).

evidence concerning the relatedness of the statements to the worker's compensation board relative to Complainant's claims in this forum, or Complainant's understanding of the import of those words, or her motives for having made those assertions. Moreover, an attempt to credit one plausible statement over another would be to engage in a form of credibility assessment which the summary decision rules expressly prohibit. Accordingly, for the purposes of this motion the Court presumes that Complaint was terminated. Consequently, Complainant establishes this element of the prima facie case.

Complainant's difficulties arise in the final element of the prima facie case, in demonstrating that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. A party may establish this element by many means, however the one which Complainant appears to have opted for is by comparison to a similarly situated person outside the protected class. Complainant argues that Ms. Tunjo, her comparator, is not authorized to work in the United States, and that she (presumably) continued working after Complainant was fired.

However, Complainant offers no evidence to create a material question of fact on its central contention — that Ms. Tunjo is an undocumented person. Respondent submits Ms. Tunjo's I-9 form, in which she attests that she is a U.S. Citizen, and Complainant offers only argument that the document should not be believed.

Complainant's argument that Ms. Tunjo's I-9 should not be believed because it is self-serving is insufficient in the context of dispositive motions practice. The Court's function at the summary decision stage is not to determine whether it should find one piece of evidence more credible than the other, but rather to see if any evidence exists which permits a neutral factfinder to arrive at a different factual conclusion from the one offered in the motion. In this context, an example of evidence which might create a material question of fact might be testimony from Ms. Tunjo stating that she was born abroad and never naturalized, or an affidavit from a percipient witness addressing Ms. Tunjo's citizenship, or a document from a foreign country attesting to Ms. Tunjo's foreign citizenship. Complainant offers no admissible evidence whatsoever speaking to this point.[4]

Moreover, Complainant's subjective beliefs concerning Ms. Tunjo's alleged foreign citizenship are not buttressed by any facts which might make them admissible evidence — she offers no evidence that she ever saw any documents attesting to Tunjo's citizenship or had a conversation with Tunjo on the subject. Complainant asserts in her deposition that she believes Tunjo is undocumented because her coworkers said so, however these secondhand assertions are classic hearsay, inadmissible because the Court has no way of determining the source of those persons' base of knowledge, or of testing the accuracy and veracity of those claims. Moreover,

[4] It is unclear to the Court whether Complainant's objection concerning Ms. Tunjo's I-9 has an evidentiary or civil procedure basis, or if it is related to credibility. To the extent it relates to credibility, the Court has addressed that argument previously, asserting that at the summary decision stage the court may not weigh the credibility of competing evidence. Insofar as it is an evidentiary or civil procedure-based objection, Complainant cites no rule of evidence, civil procedure, or an OCAHO regulation to support it. Finally, insofar as Complainant's arguments are based on the redactions in the I-9 in Respondent's Exhibit D, which make it impossible to determine what documents Ms. Tunjo provided to authenticate her identity, Respondent's Exhibit N resubmits Tunjo's I-9 with several redactions removed. The I-9 indicates that Ms. Tunjo submitted her driver's license and social security card to prove her identity.

the purported testimony is also irrelevant, in that the second hand and unverified statements of third parties have no probative value with regard to Ms. Tunjo's citizenship. *See* United States v. Commander Produce, LLC, 16 OCAHO no. 1428d, 9 n.5 (2023) ("Probative value is determined by how likely the evidence is to prove some fact."). Assuming *arguendo* that these rumors concerning Ms. Tunjo have some minimal probative value, it is far outweighed by the unfair prejudice which would arrive through its admittance. 28 C.F.R. § 68.40(b) ("All relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice . . . .").

In that Complainant offers no evidence that Ms. Tunjo was a noncitizen at the time of Complainant's separation of employment, Complainant fails to establish that Tunjo is a similarly situated person outside Complainant's protected class who was treated differently.

Complainant offers no alternate evidence which might otherwise satisfy the fourth element of the prima facie case — Complainant offers no evidence of statements by Respondent's managers evincing a bias against U.S. Citizens, or other circumstantial evidence from which one might reasonably conclude that the reason that they terminated her was because of her citizenship status.

In that Complainant fails to establish the prima facie case, Respondent's motion will be granted.

V. ORDERS

Respondent's Motion for Summary Decision is GRANTED.

Complainant's claim of citizenship-status discrimination is DISMISSED WITH PREJUDICE.

SO ORDERED.

Dated and entered on April 2, 2025.

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Honorable John A. Henderson
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review 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. *See* 8 U.S.C. § 1324b(i)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.