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

IN RE CHARGE OF
LUIS A. AGUILERA

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	CASE NO. 90200143
JOHN SARGETIS, TED SARGETIS and JIM SARGETIS, INDIVIDUALS and CASTLE VALLEY SALES INC., and C.V.S. AUTO SALES, Respondents.	)	

DECISION AND ORDER
(March 5, 1992)

E. MILTON FROSBURG, Administrative Law Judge

APPEARANCES:

Anita J. Stephens, Esquire, Office of Special Counsel, for Complainant

Randall Gaither, Esquire, for Respondents,

TABLE OF CONTENTS

I. *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted Section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States, and mandated civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

As a complement to the employer sanctions provisions contained in section 101, section 102 of IRCA, Section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. § 1324b, these anti-discrimination provisions were passed to provide relief for those employees, or potential employees, who are authorized to work in the

United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent. These protected individuals include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

Section 102 of IRCA authorizes a protected individual to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual. If, however, the OSC does not file such a charge within 120 days of receipt of the claim, the protected individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

The aims of IRCA are thus dual in nature. The intent is to prevent employers from hiring unauthorized workers, but at the same time to prevent these same employers from being overly cautious or zealous in their hiring practices by avoiding certain classes of employees or, alternatively, treating them in a discriminatory fashion.

With its enactment, the IRCA legislation expanded the national policy on discriminatory hiring practices found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Claims under Title VII did not raise a distinction between national origin and alienage discrimination. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). Further, Title VII provided for claims solely against employers of fifteen (15) or more employees.

Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business in order to avoid overlap with Title VII claims. Specifically, Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three (3), but less than fifteen (15) employees, and also allows for causes of action based upon citizenship discrimination against all employers of more than three (3) employees.

II. *Procedural History*

On behalf of Luis A. Aguilera, the charging party in this case, the OSC filed a Complaint Regarding Immigration Related Unfair

Employment Practices on April 17, 1990. The Complaint included Aguilera's charge of discrimination which was filed October 12, 1989. It alleged that Respondent had wrongfully terminated Aguilera's employment on the basis of his national origin in violation of 8 U.S.C. §1324b(a)(1)(A). The Complaint, which originally named only Castle Valley Sales, Inc., as Respondent party, stated that Respondent employed more than three (3), but fewer than fifteen (15) persons on the date of the alleged discriminatory act, July 19, 1989.

On April 20, 1990, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint advising Respondent of the filing of the Complaint and assigning me to hear the case. The Notice also informed Respondent of its right to Answer the Complaint within thirty (30) days of its receipt and advised that the location of the hearing was to be in or around Salt Lake City, Utah.

On May 15, 1990, Respondent submitted its Answer, denying the substantive allegations of the Complaint and stating that it offered work to Aguilera which he declined to perform. Further, Respondent denied the allegation of knowing and intentional discrimination against Aguilera.

The first prehearing telephonic conference was held on June 1, 1990. The parties discussed discovery matters and a hearing date of September 18, 1990, was set.

On July 5, 1990, a status report was submitted by counsel for Complainant which indicated that depositions had been taken and that additional discovery was planned. Moreover, although the parties had discussed settlement, it did not appear that settlement would be possible.

On July 23, 1990, Complainant filed a Motion to Amend Complaint in order to add C.V.S. Auto Sales, and John Sargetis, Ted Sargetis, and Jim Sargetis, individually, as Respondent parties. Complainant's basis for the motion was its allegation that since the inception of the instant action, a new business, C.V.S. Auto Sales, had been formed from the assets of Castle Valley Sales, Inc., and that the named individuals were the sole owners of both business entities.

A second telephonic conference was held on July 26, 1990, during which the hearing date of September 18, 1990 was continued indefinitely to allow for more discovery. Respondent stated it would submit a written response to the Motion to Amend. This response was filed on July 30, 1990 and contained the argument that the three named

individuals had never made employment decisions in their individual capacities nor had any of them individually employed Luis Aguilera or any other employee. Also asserted was that Castle Valley Sales, Inc. was still operating in good standing in Utah and that no new business entities had been created which employed more than three (3) employees.

Respondent simultaneously submitted a Motion for Summary Deci-sion, contending that Complainant had not established a reasonable basis in law or fact for the alleged discriminatory practice and that the extensive discovery completed by both parties did not reveal any knowing and intentional discriminatory practice. In response, on August 8, 1990, Complainant requested an extension of time in which to respond to the Motion for Summary Decision. However, on August 15, 1990, I denied Respondent's Motion, without the benefit of the Complainant's response, because it appeared that issues of material fact still existed, i.e., whether Aguilera's termination was discriminatorily based.

On that same day, I also granted Complainant's Motion to Amend, adding C.V.S. Auto Sales and John Sargetis, Ted Sargetis, and Jim Sargetis as Respon-dent parties. The new caption was ordered to read: "John Sargetis, Ted Sargetis, and Jim Sargetis, Individually and d.b.a. Castle Valley Sales, Inc., and C.V.S. Auto Sales."

On August 20, 1990 Respondent filed a Supplementary Motion For Summary Decision based upon a ruling by which he had just received, the State of Utah Department of Employment Security, that held that Luis Aguilera was not entitled to unemployment compensation. The Utah Administrative Law Judge had found that, in 1990, Aguilera was separated for good cause, and that he, not the employer, was at fault for his termination.

Complainant's response to this motion was filed on August 27, 1990. Complainant argued that the rulings of the State of Utah were inappli-cable to the present action. Complainant reiterated its position that genuine issues of material fact were present, thereby precluding summary decision.

On September 10, 1990, I held that the decision by the Administrative Law Judge for the Utah Department of Employment Security was not binding on this court since, despite the similarity of the parties and facts, the underlying applicable law was different. I denied Respondents' Supplemental Motion for Summary Decision.

On September 12, 1990, I issued an Order confirming the prehearing telephonic conference held on September 11, 1990, in which I ordered Complainant to prepare an Amended Complaint and to serve it upon each of the newly added parties. I also provided Respondents with fifteen (15) days (plus five [5] for mailing) from receipt of the Amended Complaint in which to provide their answers. I tentatively set the hearing in this matter for October 23-24, 1990, but on September 26, 1990, I ordered the hearing date to be continued indefinitely to permit the newly added parties to engage in meaningful discovery.

On September 28, 1990, Respondents' Motion to Enter Order to Compel Answers to Respondents Interrogatories to the Complainant and Motion to Continue the Hearing were filed based upon Complainant's failure to timely respond to discovery requests. On October 1, 1990, a similar request from Complainant was filed, based upon Respondents' failure to adequately and fully respond to certain interrogatories.

Respondents responded to the Complainant's Motion to Compel on October 9, 1990, stating that they had timely and appropriately answered the discovery requests propounded. Respondents, at that time, also filed a Motion for Protective Order with a supporting memo-randum regarding the Complainant's use of ex parte subpoenas duces tecum to obtain documents from non-parties. Respondents asserted that these subpoenas constituted harassment and resulted in strained business relationships between the recipients and Respondents.

On October 15, 1990, Complainant filed a Motion for Default Judg-ment against the newly added parties based upon their failure to timely answer the Amended Complaint. On October 19, 1990, having learned that Complainant had provided the discovery responses sought by Respondents' Motion to Compel, I denied Respondents' motion. Then, with regard to Complainant's similar motion, I identified each of the discovery responses sought by Complainant and the sufficiency of Respondents' respective responses thereto. Based on my determinations, I granted Complainant's Motion To Compel in part and denied it in part.

On October 22, 1990, Respondent C.V.S. Auto Sales filed its Answer to the Amended Complaint and simultaneously moved for a dismissal of the action. This Respondent argued that the amended pleading was defective in form and content because, inter alia, it was not designated as an Amended Complaint and was not properly signed. Further, alleged was that C.V.S. Auto Sales was not a separate business entity, but was another name used by Castle Valley Sales,

Incorporated. This matter was ruled on in my February 12, 1991 Order.

On the same date, Respondents Castle Valley Sales and C.V.S. Auto Sales responded to the Motion for Default Judgment, arguing that they were not provided thirty (30) days in which to submit their answers, pursuant to the regulations. They again raised the argument that C.V.S. Auto Sales was not a separate business entity and was not properly joined in this action.

On October 20, 1990, counsel for the three individual Respondents provided an Answer, a Motion to Dismiss and a Motion to Award Attorney Fees, in which John Sargetis, Ted Sargetis, and Jim Sargetis stated that none of them had ever individually employed the requisite number of employees to bring them within the jurisdiction of this administrative proceeding. These Respondents also stated that they had never done business as either Castle Valley Sales, Inc., or C.V.S. Auto Sales. They asserted, moreover, that the Complaint was defective insofar as it did not properly allege any facts supporting a claim of knowing and intentional discrimination.

On November 27, 1990, I held a prehearing conference in Utah. Respondent, Castle Valley Sales, Inc., filed a Motion to Dismiss the Amended Complaint alleging defects in the form and content of the pleading along with a Motion for Summary Decision which stated that Complainant had presented no evidence supporting its allegation that Luis Aguilera was discharged because of his national origin.

On November 30, 1990, I issued an Order which confirmed the pre-hearing conference and disposed of several outstanding motions. I excused counsel for the individual Respondents based upon the circumstances articulated in his request to withdraw. In addition, I granted Respondents' Motion for Protective Order insofar as I ordered Complainant to provide copies of all ex parte subpoenas issued and any new applications for same. Further, I stated that the Answers of the newly added parties to the Amended Complaint were not timely filed in accordance with my September 12, 1990 Order. However, I held my ruling regarding default in abeyance until my final ruling on the the dismissal of the Amended Complaint. I also withheld ruling on Respondents' several motions to dismiss the Amended Complaint to provide Complainant with limited additional time to complete dis-covery, based on Complainant's assertions that Respondent had failed to provide adequate responses to discovery requests.

During this prehearing conference, the parties agreed to complete discovery by February 1, 1991, and to exchange witness and exhibit lists by January 15, 1991. The dates of March 5-7, 1991 were tentatively set for the hearing. Counsel for Respondent stated that he was withdrawing the latest Motion for Summary Decision. Moreover, I ruled that a monthly joint status report would be required from the parties.

On December 27, 1990 Respondents filed a Motion for Protective Order, requesting me to prohibit Complainant from deposing four intended witnesses for Respondents, to limit the depositions of two additional persons, and/or to reschedule the depositions. On the same date, Respondents John Sargetis, Ted Sargetis, and Jim Sargetis submitted a Motion for Summary Disposition, requesting that they be eliminated as parties. On January 2, 1991, I denied the Motion for Protective Order in part, authorizing deposition subpoenas for the intended witnesses and allowing for the accommodation of counsel's calendar in their scheduling.

On January 7, 1991, Complainant filed its response to the Respondent's Motion for Summary Disposition by stating that it would prepare its memorandum justifying the inclusion of the additional parties Respondent once it received deposition transcripts of the principal parties. Complainant's status report, dated January 10, 1991, stated that it awaited receipt of documents from Respondent and that depositions were being conducted as noticed.

On January 16, 1991, Complainant filed a Memorandum in Support of the United States' Amended Complaint and in Opposition to Respondent's Motion to Dismiss. Complainant contended that its investigation yielded no evidence that C.V.S. Auto Sales was a registered d.b.a. of the corporation.

Its findings demonstrated that C.V.S. Auto Sales had assumed the business activities and financial structure of the corporation and that Castle Valley Sales, Inc., had basically ceased operations in favor of C.V.S. Auto Sales. Complainant also pointed out that all three indivi-duals were the sole owners or corporate officers of the business both during the relevant time period of the alleged discriminatory act and after the change in structure. Complainant further requested attorney's fees and expenses incurred in responding to the motions to dismiss.

On January 22, 1991, I received Respondents' witness and exhibit lists, dated January 15, 1991, followed on January 30, 1991 by their

Memorandum in Support of Respondents' Motion to Dismiss. Respondents reiterated their previous arguments that Castle Valley Sales, Inc., and C.V.S. Auto Sales were not separate business entities, and that the individuals could not be properly joined as parties due to jurisdictional deficiencies in the proposed amendment.

I received Complainant's List of Witnesses and Exhibits on February 4, 1991. On February 12, 1991, after considering both parties' argu-ments, I ordered that C.V.S. Auto Sales and John, Ted, and Jim Sargetis be retained as parties to this action. However, at that time, I did not find any evidence supporting the existence of a d.b.a. relationship, therefore, I ordered the caption to read: "John, Ted, and Jim Sargetis, Individuals, and Castle Valley Sales, Inc., and C.V.S. Auto Sales Respondents."

On March 5, 1991, Complainant filed a prehearing statement, setting forth its theory of the case. The hearing on the merits was conducted in Salt Lake City, Utah on March 12-13, 1991. I heard testimony from twelve (12) witnesses, and received thirty-six (36) exhibits into evidence. A hearing record of five hundred nineteen (519) pages was compiled. On April 30, 1991, I ordered that the parties would be given until May 10, 1991 in which to submit written corrections to the transcript. I also set June 10, 1991 as the cutoff date for receipt of post-hearing briefs and memoranda.

As of May 10, 1991, I had not received proposed corrections to the transcript, therefore, I considered it to be correct. I received Complainant's Post-Hearing Brief on June 7, 1991 and Respondent's submission of Relevant Facts With Citation to the Record on June 10, 1991.

III. *Proper Parties*

There has been much concern about the proper Respondent parties in this case. On August 15, 1990, I granted Complainant's Motion to Amend The Complaint and changed the Respondent to "John Sargetis, Ted Sargetis and Jim Sargetis, individually and d.b.a. Castle Valley Sales, Inc., and C.V.S. Auto Sales" from "Castle Valley Sales, Inc.". At that time I granted Complainant's motion, I did so based on its limited information, Complainant's good faith belief and assertions, and Respondent's answers to Complainant's interrogatories. At that time I found that there was no prejudice to any party in granting the motion. Since that time there have been many motions from Respondent parties requesting that they be dropped as parties from this suit.

I have now heard and reviewed all the evidence in this case. There has been testimony from several witnesses regarding the issue of the type of business entity Castle Valley Sales, Inc., is, the type of business entity C.V.S. Auto Sales is, and the relationship between the two. I have heard testimony from the insurance agent, Linda Molyneux, who testified that the two entities were represented to her to be separate and distinct, with C.V.S. Auto Sales being a sole proprietorship. (Tr. 296-303)*. In fact, one insurance policy that she placed for Respondent reads "Ted Sargetis d.b.a. C.V.S. Auto Sales". Ms. Molyneux stated that this was the used car wholesaling business. (Tr. 298, 303). She has also placed a separate insurance policy for Castle Valley Sales Inc. which is a business doing auto detailing. (Tr. 302-303). I have heard testimony from the Respondent's accountant who testified that although Respondent had asked how to make the two entities separate, he did not follow through and do so. He stated that the entities would file one federal tax return under one tax identification.

However, at the time of the hearing, he testified that no tax returns had been prepared or filed. (Tr. 324-329, 332). I have heard testimony that on February 14, 1991, Castle Valley Sales, Inc. registered C.V.S. Auto Sales as a d.b.a. of the corporation. (Tr. 301; Ex. C-21). I have heard testimony from John Sargetis that the two entities are "two arms, but the same body" and that although he had intended to form two separate entities in order to take care of his insurance problems brought on by his DUI (driving under the influence), he did not follow through on his intent based on his attorney's advice. (Tr. 391-397).

I have reviewed this conflicting testimony and the evidence. Complainant has submitted into evidence a copy of a state of Utah application for registration of C.V.S. Auto Sales as a d.b.a. of Castle Valley Sales, Inc. along with a copy of a paid receipt. The application is signed by John Sargetis, Ted Sargetis and Jim Sargetis. I have no evidence or testimony from Respondent or any other witness that indicates that this registration was revoked or that it is null and void.

Thus, I find that Castle Valley Sales, Inc., d.b.a. C.V.S., Inc. is a proper Respondent party. The remaining issue is whether or not the three named individuals should remain as Respondent parties.

In order to pierce the corporate veil in Utah, the court must find:

* Due to the volume of testimony and evidence in this case, there may be further transcript references not cited.

1. Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and,

2. If observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity.

Coleman, supra.

In this case, Complainant has shown that John Sargetis considers his business a family partnership, that his yearly meetings are informal, that the corporation has purportedly lent money to one of the directors, that the president, John Sargetis, has lent money to the corporation, that the records of these loans are, at the very least, poorly kept, if not nonexistent, and that the president basically ran the business, not the board of directors. The evidence has also shown that Respondent is a subchapter S corporation incorporated and in good standing in the state of Utah. It has further shown that the corporation has issued stock to its three shareholders. Bylaws have been promulgated. Sargetis is the president of the corporation with his two sons as directors. Informal meetings are held yearly and corporate tax returns are filed. Testimony shows that the corporation profits are distributed to the shareholders annually.

Although Complainant has raised the issue of whether the Sargetis' are the alter egos of the corporation, especially John Sargetis, the evidence before me has not persuaded me to pierce the protection of the corporate veil. "Ordinarily, a corporation is regarded as a separate and distinct legal entity from its stockholder." (Colman v. Colman, 743 P.2d 782 (Ct. App. 1987) (citations omitted). "Consequently, the corporate veil which protects stockholders from individual liability will only be pierced reluctantly and cautiously." Id.

Courts are reluctant to find that the corporate veil should be pieced under the equitable alter ego doctrine. Colman, supra, citing to Ramsey v. Adams, 603 P.2d 1025, 1027 (1979). Although evidence that business records are not well kept may be considered significant by the courts, in this case, I do not find that the evidence persuades me that the records were of such a deficient nature that would justify the piercing of the corporate veil. Colman, supra. There was no evidence that the corporate officers paid their personal bills through the corporation, that the assets of the corporation were bought or owned by the officers of any other evidence that would show that commingling of corporate and personal funds. Considering the evidence in

total, I find that Complainant did not meet its burden of proof that such that I am persuaded that any of the named individuals were the alter ego of the close corporation. Thus, the three named individuals in this case, John Sargetis, Ted Sargetis and Jim Sargetis, are dismissed from this suit as individual parties.

IV. *Facts*

Complainant in this case, Luis Aguilera, alleges that he was discriminatorily terminated from his position with Respondent, Castle Valley Sales, due to his national origin. (Tr. 16).

Respondent, Castle Valley Sales, Incorporated, is a subchapter S corporation, incorporated in Utah, operating a used car wholesaling business. (Tr. 310, 334; Ex. R-14)). As part of its business, it also operates a car detailing shop. (Tr. 334, 355). At the time of the initiation of this action, there were three corporate shareholders, its president, John Sargetis (hereinafter Sargetis) and its other directors, Ted Sargetis and Jim Sargetis, Sargetis' sons. (Tr. 311, 343; Ex. R-14).

Car detailing (hereinafter detailing) is the process of cleaning and refurbishing a used car so as to put it into as "close to new" condition as possible. (Tr. 16, 343, 346-7). This process consists of interior detailing, which is regarded as an unskilled position involving the general cleaning and repairing of the interior of the car, and exterior detailing a skilled position requiring training and practice in several different areas. (Tr. 16, 351).

Respondent inventory consisted of cars he had bought at auctions for resale or from other dealers. (Tr. 344, 352; Ex. R-15-16). In 1989 through early 1990, Respondent received much of his work from Wagstaff Toyota with whom he had an unwritten working agreement. (Tr. 347, 401, 408, 409). Respondent, at Wagstaff's direction, would act as its agent at an automobile auction, and buy automobiles for them. (Tr. 404, 405). Respondent would then bring the cars back to its own facility. After fully detailing the cars, Respondent would deliver them to Wagstaff ready for immediate sale. (Tr. 344, 401). Wagstaff paid Respondent one hundred dollars ($100) per automobile plus all incurred expenses, including the detailers' fees for this service. (Tr. 404-5). These cars though, never appeared on Respondent's monthly inventory or sales reports. (Tr. 348, 353; Ex. C-9).

In Utah, the detailing business is seasonal and fluctuates based on supply and demand, peaking in summer and bottoming out in winter

(approximately from October to March). (Tr. 20, 131, 224-5, 375). Due to the nature of the business, employers and employees, as a rule, usually do not enjoy long term relationships. (Tr. 33, 123, 128-129, 155; Ex. C-13). Layoffs or lack of work for both interior and exterior detailers are common and expected. (Tr. 128-129, 155).

It is understood that in the industry, each business sets its own payment scale and job responsibility. Some shops have their detailers specialize in one type of detailing only, while others require their detailers to detail the whole car. In one shop a detailer may be required to perform both inside and outside detailing and will receive separate amounts for each, while another shop would pay one amount per car for the same job. There are detail shops which employ individuals on a salaried basis, thereby paying the employee whether or not there is work, and others that pay by piece work.

Respondent's detailers, in 1989, were specialists, doing only one type of detail work, but in 1990, they were required to detail interior and exterior. (Tr. 47-8, 346-7, 372). Respondent has always paid his detailers a set amount for each type of detail work completed, i.e., payment was on a piece work basis. (Tr. 22, 124, 365, 368; Ex. C-10). Respondent employed a varying number of detailers during the relevant time period, depending on both Respondent's need and the detailer's desire to work. (Tr. 20, 22-24, 26, 31, 43-5; Ex. C-13).

Complainant, Luis Aguilera, a native Argentinian, adjusted his status to that of a United States lawful permanent resident on September 13, 1987 based on his marriage to his United States citizen wife. (Tr. 18-19). By profession, he is a car detailer, having learned the business as a teenager. (Tr. 18).

On or about May 4, 1989, Complainant approached Respondent for employment as an experienced detailer and began work the following day, on or about May 5, 1989. (Tr. 20-22; Ex. C-2). At that time, his duties were limited to outside detailing and he was paid twenty-two ($22) per car he completed. (Tr. 22, 24). Also employed at that time were Tracey Leonard, (hereinafter Leonard) the detail shop manager, who did outside detailing and was paid twenty-two dollars ($22) per car and Brent Morris, (hereinafter Morris) who only did inside detailing. (Tr. 22, 24-25; Ex. C-13). For his managerial duties, which included ordering supplies for the detail shop and supervising and checking the other two detailer's work, Leonard received an additional four or five dollars for every fully detailed car.

After Complainant's hire, two more inside detailers were hired, Terry Tatum (on or about May 12, 1989), and Dave Miller, (between June 30, 1989 and July 7, 1989). (Tr. 23, 423-5; Ex. 1, C-13). Both men were non-Hispanic and were paid eight dollars ($8) dollars per inside detail. (Tr. 425). Tatum went on vacation around July 7, 1989 and returned to work on or around July 24, 1989. (Tr. 164-5; Ex. C-1).

On or about July 14, 1989, Leonard told Darin Tedrick, a non- Hispanic United States citizen, about an upcoming opening for a detailer's position at Respondent's shop and was advised by Tedrick that he needed an answer quickly or else an advertisement was to be placed in the newspaper. (Tr. 123, 127). Approximately two days later, on or about July 17, 1989, Tedrick accepted the job and gave notice to his employer. (Tr. 125, 146).

On July 19, 1989, Sargetis explained to Complainant that he was a good detailer but that business had slowed down and he had to let him go due to lack of work. (Tr. 27, 416). Complainant timely filed a Com-plaint to the Utah Industrial Commission Anti-Discrimination Division. (Tr. 28-31, 33, 203-4, 213; Ex C-12).

On July 19, 1989, Complainant returned to Respondent's shop and asked for a letter of recommendation (Tr. 29, 360). Sargetis told him to return the next day because he was busy. (Tr. 29, 360). Complainant did so on July 20, 1989, but was again told to come back. (Tr. 30). During this visit, Complainant observed a truckload of cars being delivered to Respondent for detailing. (Tr. 30, 356). On July 21, 1989, Complainant again returned, received a letter of recommendation and spoke with Sargetis about the possibility of Complainant's moving to California. (Tr. 30, 360; Ex. R-12, Ex. C-19).

On or about July 22, 1989, Tedrick began work as a detailer for Respondent. (Tr. 31, 125, 417; Ex. C-1, C-13). He was fired on August 18, 1989. (Tr. 128; Ex. C-1, C-13).

From September 27, 1989 until October 4, 1989, an experienced state investigator, Bill Cunningham, from the Utah Anti-Discrimination Division investigated Complainant's complaint (Tr. 230). However Cunningham had to dismiss it for lack of jurisdiction. (Tr. 230; Ex. C-12). Cunningham referred it, through, to the Office of Special Counsel (OSC) which investigated the Complaint and contacted Respondent. (Tr. 227-8, 412). As a result, in early 1990, Leonard contacted Complainant and told him that he would be offered employment again. (Tr. 43, 44). When Complainant went to speak with Leonard he was not there, but Complainant spoke with Morris

and Sargetis. (Tr. 44, 45). Morris informed him that the personnel and duties had changed in the shop and that he, Morris, was now the shop manager, receiving the same pay as Leonard had. (Tr. 46, 458). Sargetis explained to Complainant that there was no work for him at that time, but that he should check back. (Tr. 46). Complainant did so weekly until he was rehired on Saturday, March 17, 1990. (Tr. 46, 453; Ex. C-10).

Although not specifically told his duties would be different from the previous year, by the time he had finished his first car, he had learned that he was expected to detail both interior and exterior with payments of ten dollars ($10) and twenty dollars ($20) respectively. (Tr. 47, 455-7; Ex. C-10). Approximately, two days later, on or about March 19, 1990, OSC informed Respondent that it was filing a Complaint on Complainant's behalf for back pay. (Tr. 454).

At the time of rehire, Respondent was in the process of implementing a new pay scale. (Tr. 454-8). Within a few days of Complainant's rehire, on or about March 20, 1990, Complainant was informed that the detailers would receive only fifteen dollars ($15) for an outside detail and five dollars ($5) for an inside detail. (Tr. 48, 49, 50; Ex. C-10). It was Complainant's understanding and Respondent's intention that this would be a temporary rate reduction. (Tr. 50). Morris would continue to receive his managerial bonus. (Tr. 458). In late April until late June, Respondent sent thirteen cars to Personal Touch for detailing instead of doing the work in house. He paid approximately $850/per car to Personal Touch for the service.

On or about April 1, 1990, Respondent gave up his separate detail shop facility for alleged financial reasons and moved that portion of his operation back into his main facility. (Tr. 142, 367). His old facility was taken over by Personal Touch. (Tr. 142-3).

At about this time, Complainant began to work with Ms. Linda Molyneux, a marketing specialist and insurance agent regarding the corporation's insurance. (Tr. 292-3). Sargetis and another employee, Kim Dangerfield, had been convicted of driving under the influence which had led to difficulties with either of them driving under the company's insurance policy. (Tr. 293-6). Without insurance though, Sargetis could not operate his business. (Tr. 392). Different strategies were discussed, including making the detail shop a separate enterprise from the auto sales portion. (Tr. 295-299, 306, 391-398). Respondent expressed concern about doing this due to the pendancy of this case. (Tr. 305, 394-395).

On June 11, 1990, after approximately two and one-half months, Aguilera approached Sargetis about increasing his pay scale for an inside detail to ten dollars ($10). (Tr. 58, 472). Respondent refused, stating that if he did this, he would also have to increase Miller's pay scale and he could not afford to do that. (Tr. 472). At that point, Complainant refused to detail any more interiors. (Tr. 61, 62, 64). On June 12, 1990, Sargetis spoke with Aguilera about his refusal to detail interiors, and upon the continued refusal, Sargetis asked another employee, Ron Kennedy, to join them as a witness. (Tr. 66-7). He then informed Complainant that he was firing him because of his refusal to perform his job, and not for any reason related to race, nationality or color. (Tr. 68).

V. *Applicable Standards of Law*

An allegation of discrimination may be proven by a showing of deliberate discriminatory intent on the part of an employer, regardless of the employer's motive. See 52 Fed. Reg. 37404. Discrimination or disparate treatment (as opposed to disparate impact) is defined as when "the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." See Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), citing to Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Under IRCA, it is a violation to discriminate with respect to hiring, recruitment or referral for a fee, of the individual for employment or the discharge from employment because of an individual's national origin. Section 274B9(a)(1)(A).

The majority of IRCA discrimination cases previously decided have relied upon the body of law pertaining to Title VII discrimination cases. It should be noted at this point that I agree with the reasoning in United States v. Marcel Watch Co., 1 OCAHO Case No. 143 (3/22/90) that "(t)itle VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases."

The Supreme Court established the order and allocation of proof to be used in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The claimant must first establish a prima facie case of discrimination or disparate treatment by showing that: (i) he belongs to a minority or suspect class; (ii) he applied and was qualified for employment by the employer; (iii) he was rejected for employment despite his qualifications; and (iv) after being rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants. The burden of production then shifts to the

employer who must show a legitimate, nondiscriminatory reason for its refusal to hire the claimant. Upon this production, the claimant will then be given the opportunity to prove that the reason offered by the employer was a pretext used to cover an illegal motive.

This analysis was followed again by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Court expanded upon its ruling in McDonnell Douglas by explaining that the employer bears only the burden of explaining the nondiscriminatory reasons for its actions. The employer need not prove by a preponderance of the evidence that its reasons for rejecting the claimant were legitimate. Burdine supra, at 254. The employer must only meet and contradict the claimant's prima facie case with evidence of a nondiscriminatory explanation for its actions. Marcel, supra at 14. citing to Howard v. Roadway Express, 726 F.2d 1529 (11th Cir. 1984); see also Burdine, supra at 254. The burden of persuasion remains at all times with the claimant, who then has the opportunity to show that the employer's reason was pretextual. Burdine, supra at 253.

Although the elements required to make out a prima facie case of employment discrimination as set forth in McDonnell Douglas focus on the "refusal to hire" scenario, wrongful termination of employment is also encompassed in 8 U.S.C. § 1324b(a)(1). See Prieto v. News World Communications, Inc., 1 OCAHO Case 178 (5/24/90); Fayyaz v. The Sheraton Corp., 1 OCAHO Case No. 152 (4/10/90).

The shifting burden scheme of McDonnell Douglas and Burdine is equally applicable to a discriminatory discharge scenario. In fact, in a Tenth Circuit discriminatory termination case, the court stated that they accepted the first three steps in the McDonnell Douglas test and did not see a reason not to accept the last step in favor of a stricter standard. Crawford v. Northeastern Oklahoma State University, 713 F.2d 586 (10th Cir. 1983); see also Brown v. Parker-Hannifin Corporation, 746 F.2d 1407 (10th Cir. 1984); Whately v. Skaggs Companies, Inc., 707 F.2d 1129 (10th Cir. 1983). Thus the Tenth Circuit has held that a complainant can establish a prima facie case of discriminatory termination by showing: (1) that he was a member of a protected group; (2) that he was qualified for the position from which he was dismissed; (3) that he was removed from that position; and (4) he was replaced by someone not a member of the protected group. Whately v. Skaggs Companies, Inc., supra.

As in a case of discriminatory hiring or failure to promote, once the claimant makes out a prima facie case of discrimination, the burden of production shifts to the employer who must explain the legitimate

reasons his action. Id. The claimant must then attempt to show that the reasons offered are pretextual. Id.; see also Ryba v. Tempel Steel Co., 1 OCAHO 289 (1/23/91).

It is instructive to consider other Supreme Court discrimination cases. In the age discrimination case of Trans World Airlines, Inc., v. Thurston, 469 U.S. 111 (1985), the Court stated that in cases where direct evidence of discrimination is shown, the McDonnell Douglas test does not apply. The Court reasoned that the shifting burden test was necessary to provide a plaintiff a day in court despite the unavailability of direct evidence. In Thurston, the Court found that TWA's policy was discriminatory on its face; therefore, direct evidence was shown. See Tovar v. United States Postal Service, 1 OCAHO Case 269 (Nov. 19 1990) (policy of U.S. Postal Service which excluded all aliens but permanent residents from employment found to be discriminatory on its face, but found to be an exception within the parameters of 8 U.S.C. § 1324b(a)(2); therefore, the claimant did not prevail).

Therefore, it appears that to bypass the McDonnell Douglas/Burdine test, the direct evidence must show that the contested employment practice is discriminatory on its face. Thurston, 469 U.S. at 121. When the direct evidence excludes the McDonnell Douglas/Burdine scheme, Thurston permits the employer to attempt to prove an affirmative defense to its discriminatory practice. Id. at 122.

VI. *Analysis and Discussion*

Discrimination may be proven by direct or indirect evidence. U.S. v. Weld County School District, 2 OCAHO 326 (5/14/91). In this case, there has been no evidence of direct discrimination. In fact, Complainant, as well as all the other knowledgeable witnesses, testified that there had never been any comments or behavior directed at anyone that could be classified as discriminatory. (Tr. 133, 166, 168, 512; Ex. R-18). The only incident that Complainant could point to which might arguably hint at discrimination is a time when Leonard asked Complainant to change his Spanish music radio station. (Tr. 25-6). This one situation is not sufficient to establish direct discrimination.

Based on this lack of direct evidence, I will analyze this case under the McDonnell Douglas/Burdine tests. Thus, in this circuit, in order for Complainant to establish his prima facie case, he must show that:

1. he was a member of a protected group;

2. he was qualified for the position from which he was dismissed;

3. he was removed from that position; and,

4. he was replaced by someone not a member of the protected group.

See Whately v. Skaggs Companies, Inc supra; Crawford v. Northeastern Oklahoma State University, supra; McDonnell, supra; Burdine, supra.

A. Claimant Must Establish a Prima Facie Case of Discrimination

At hearing on March 12, 1991, I found that Complainant had met his burden based on the following evidence:

1. Aguilera is a legal permanent resident of the United States and is of Argentinean national origin. (Tr. 18, 19).

2. Aguilera testified that he presented himself for employment as an experienced detailer on or about May 4, 1989 and began work on or about May 5, 1989. (Tr. 20, 22, Ex. C-1). Sargetis testified that Aguilera did indeed work for him at that time and that he was a very good worker and detailer. (Tr. 359).

3. Both Aguilera and Sargetis testified that Complainant was fired by Respondent on July 19, 1989. (Tr. 27, 68, 416).

4. Both Aguilera and Sargetis testified that on or about July 24, 1989, Darin Tedrick, a non-Hispanic, began to work for Respondent doing the same work Aguilera had been doing. (Tr. 31, 417).

With Complainant's establishment of a prima facie case, an inference of discrimination is raised. Burdine, supra at 253; Weld County, supra at 21. Under McDonnell Douglas and Burdine, the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory explanation for Complainant's termination.

B. The Burden Shifts to Respondent to Articulate a Legitimate, Nondiscriminatory Reason for Complainant's Termination

The Supreme Court in Burdine explained that in a discrimination suit, after the Complainant has established a prima facie case, the burden shifts to Respondent to articulate a legitimate, nondiscriminatory explanation for the alleged discriminatory act. However, this burden does not rise to the level of proof. The Court in Burdine stated:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. (citation omitted.) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation must be legally sufficient to justify a judgment for the defendant.

Burdine, supra, at 254-5.

In other words, the Respondent's burden of meeting Complainant's prima facie case under the McDonnell Douglas/Burdine analysis is only one of production. See Weld, supra, at 20 (citing to B. Schlei & P. Grossman, Employment Discrimination Law, Five-Year Cumulative Supplement, 22-23 (1989)). The ultimate burden of persuasion always remains on the Complainant. Burdine, supra, at 253.

Respondent, in this case, testified that he terminated Complainant's employment in July, 1989 due to a business slowdown. (Tr. 355, 356). Respondent testified that he had, in 1989 through the early part of 1990, an unwritten working agreement with Wagstaff Toyota Inc. which provided him with much of his detail work, amounting to at least fifty percent of the business activity. (Tr. 356, 357). Respondent further testified that in or around June, 1989, he had the feeling, and might have heard rumors, that Wagstaff's business was in financial trouble. (Tr. 356, 357). Respondent based this on the fact that he was receiving less work from Wagstaff and that he was having difficulty receiving payment for his work. (Tr. 356-8, 399, 400-1). Respondent testified that at about this time, Wagstaff had canceled some orders after he had purchased the automobiles they requested. (Tr. 356). Respondent testified that although he had his doubts about Wagstaff's business stability, he knew that they had opened a new facility that summer. (Tr. 357). Respondent testified that based on both this loss of business and the fact that he was evaluating a decision to cut back on the detail shop business, he could not afford to keep Aguilera employed. (Tr. 356, 358). Wagstaff did in fact go out of business in early 1990. (Tr. 357).

As to the fact that Tedrick actually began work almost immediately after Aguilera's firing, Sargetis testified that he had told Leonard, his manager, that he was looking for temporary help for about two to three weeks to get over an unexpected influx of Wagstaff business occasioned by its new business opening. (Tr. 358). Respondent assumes now that Leonard misunderstood his instructions in regard to hiring Tedrick. (Tr. 358).

Respondent also testified that prior to terminating Aguilera, he had taken his seniority into consideration and had offered him a position as an interior detailer, but Aguilera turned the offer down. (Tr. 359-60).

On its face, Respondent has articulated a legitimate, nondiscriminatory reason for Complainant's discharge. Basically he testified that due to a loss of business from his main client, and his reasonable expectation that this loss would continue and become permanent, he engaged in a total restructuring of his detail shop business. This included a reduction in staff, a reduction in pay scales, and plans for and the actual giving up of, the physical facilities of his detailing shop so as to reduce expenses. He further explained that Tedrick was a temporary hire necessitated by an unexpected temporary business surge. He testified that he did not offer this temporary position to Complainant in part because it came up so unexpectedly and, in part, because he believed Complainant was relocating to California.

Since Respondent's burden was not one of persuasion, but only one of production that meets the prima facie case and establishes a question of fact, I find that Sargetis has met his burden of production and has articulated a legitimate, nondiscriminatory reason for his action. Thus, the burden now shifts to Claimant to prove by a preponderance of the evidence that this explanation is a pretext for discriminatory action. McDonnell Douglas, supra. Although Respondent has met his burden, I specifically note at this point that I do have concerns about his explanation of the timing and circumstances surrounding Tedrick's hire and employment.

C. Burden Shifts to Complainant to Prove by a Preponderance of the Evidence that Respondent's Articulated Legitimate Business Reason for Complainant's Termination is a Pretext

Under the McDonnell Douglas/Burdine analysis, the burden of proof shifts back to Complainant upon Respondent's articulation of a legitimate business reason for Complainant's termination that meets Complainant's prima facie case to prove, by a preponderance of the evidence, that the articulated business reason is a pretext. Evidence and testimony brought forth in the establishment of Respondent's prima facie case may be merged with new evidence to satisfy this burden. Burdine, supra, at 256, note 10

Complainant has presented evidence and testimony which has raised several significant issues which directly challenged Respondent's

testimony and has addressed the possibility that his explanation might very well be a pretext. Complainant's examination of Respondent revealed that Respondent had produced no records establishing the number of cars he had purchased and detailed for Wagstaff, that he had produced no records regarding which employees had detailed these cars nor how many had been detailed, that he had produced no records as to how many times Wagstaff had canceled orders, how many cars were involved or when they were canceled, and that he had produced no records of how much money, if any, had been lost when Wagstaff had canceled their orders. (Tr. 282, 287, 408-9).

Complainant has also presented testimony regarding the business fluctuation of the detailing industry as a whole. Testimony from several witnesses, including Respondent, showed that although the detailing business is seasonal with the slow season beginning with the cold weather, i.e., late autumn/early winter, and continuing until late winter or early spring. Further, a state discrimination investigator testified that in addition to his personal interest and knowledge of the auto industry, in September 1989, he had checked other detailing businesses and had found that there was no general business slowdown in July, 1989. (Tr. 203, 224, 225). He testified that it would have been most unusual for a detail business to have a slowdown at the particular time that Complainant was terminated, since it preceded by only a few days the busiest holiday of the year, Utah Independence Day. (Tr. 224). This testimony is in striking contrast to the testimony that Complainant was terminated due to an alleged lack of work.

It can be assumed that in a contested case, the Respondent's testi-mony would oppose Complainant's. In this case, for instance, Respondent testified that he had offered Complainant a position as an interior detailer as an alternative to being fired, but Complainant testified that he was not offered this position. Respondent also testified that work was slow when Complainant was fired, but Complainant testified that there was plenty of work available at that time. However, in this case, Respondent's testimony is generally at odds with the testimony of almost every other witness regarding important and relevant facts.

I will not address each and every instance wherein the Respondent's testimony differs significantly from the witnesses. However, I will review and discuss several of those that have presented themselves and have impressed me.

Of importance, it was Respondent's testimony that he had hired Darin Tedrick, on a temporary basis, after Tedrick was laid off from his job with Personal Touch. (Tr. 128-9). However, Tedrick testified that he had not been laid off from the position nor had the position with Respondent' been offered on a temporary basis. (Tr. 128-9). As a matter of fact, Tedrick testified that he given his former employer, George Cornick of Personal Touch, about one week's notice of his leaving. (Tr. 125). Tedrick's testimony that he had had previous job offers from Respondent's manager and that he took the position this particular time based on the assurance of a good earning potential due to the amount of work available was very persuasive. (Tr. 123, 126). Also of interest was Tedrick's testimony that Respondent's manager had told him, before he accepted his position, that Complainant was to be fired. (Tr. 123).

Cornick's testimony fully supported Tedrick's testimony as to Tedrick's not being laid off prior to his accepting Respondent's job offer and to Tedrick's giving notice prior to his leaving Personal Touch. (Tr. 143). Both witnesses testimony was also contradictory of Respondent's.

Respondent's accountant's testimony also raised concerns about the credibility of Respondent's testimony. In response to certain questions at his deposition, Respondent testified that his accountant, Larry Johnson, was in possession of certain promissory notes related to the business. (Tr. 485-6). However, at hearing, his accountant testified that although he had made a brief note as to the existence of the pro-missory notes on certain business papers, he had never seen any promissory notes nor were they in his possession. (Tr. 310-313). He simply notated them based on Respondent's oral representations of their existence. (Tr. 313). When questioned about this discrepancy at hearing, Respondent testified that he had been mistaken about the location of the promissory notes and that they might be in a file or storage box; he wasn't sure and couldn't find them. (Tr. 490).

The accountant further testified that he had not been given income records for Tracey Leonard for the months of July, August and September, 1989. (Tr. 323). However, testimony from Ms. Dent, a paralegal from OSC, showed that Leonard indeed had been paid substantial amounts of money in those months. (Tr. 183-7; Ex. C-1, C-2, C-13, C-14). Sargetis testified that he was very surprised to hear that there was no information given to the accountant and ascribed it to an oversight on either the bookkeepers part or on the part of the corporation. (Tr. 449).

Terry Tatum's testimony raises more concerns about Respondent's explanations and credibility regarding the business slowdown. Tatum was a non-Hispanic interior detailer, hired shortly after Complainant. (Tr. 161, 162). He testified that on or about the last week of July, 1989, there were two or three interior detailers working for Respondent. (Tr. 164). Tatum was informed by Respondent that work was slow; however, he was not fired. (Tr. 165). Instead, Tatum was allowed to continue to work for Respondent until March, 1990 when he was told that he should look for another job. (Tr. 165). Tatum's treatment by Respondent contrasts with that of Complainant's treatment by Respondent.

Complainant also elicited testimony that after Complainant was rehired in March, 1990, Respondent began to send some cars to Personal Touch, another detail shop, for detailing, instead of having his detailers handle the car. (Tr. 374). Complainant also introduced testimony that showed that the cost of detailing these cars at Personal Touch was higher than what it would have been if Respondent's own detailers had done the work. (Ex. C-11). Respondent testified that he sent only a few cars over to Personal Touch from March through June, thirteen (13) in total, and that he did so because his detailers were too busy to get them out as soon as they were needed. (Tr. 374, Ex. C-11).

I find that Complainant's practice of sending cars to his competitor for detailing in 1990, while he employed several full time detailers at his own shop, to be suspicious in view of the fact that it began shortly after Complainant's rehire and ended shortly after the Complainant's second firing. It is also suspicious that when Respondent employed two exterior detailers in April, May and June, 1990, he had more work than he could handle and that when he employed only one exterior detailer in July, 1990, he had no problem in the workload.

However, I do not find that there is any correlation between the Respondent's farming out business from March, 1990, until June, 1990, and the Complainant's case. The facts show that in early March or April, 1990, Respondent moved into smaller quarters. They further show that Wagstaff had ceased business in the first quarter of 1990 and the Respondent's figures on total sales fell each quarter of 1990. (Ex. C-9). Therefore, it is not unreasonable to believe that due to lack of space and/or changes in the business that some work would need to be sent out. It is further not unreasonable to believe that Respondent's workload was less in July, 1990, than in prior months.

Respondent has testified at length about the alleged business slowdown. However, when asked, Respondent could not delineate a

specific time frame for any alleged examples of the slowdown, although, he did narrow it to within a few months prior to Complainant's first termination in 1989. (Tr. 398-402).

Enhancing Respondent's explanation of the business slow down was testimony that Wagstaff did go out of business in the very early part of 1990 and that Respondent had scaled his business back in early 1990 by reducing his overhead expenses and moving his detailing business back into his main facility from its separate quarters. The quarterly figures for total sales did substantiate a significant business decline in 1990; however, the figures do not show a decline in 1989. See figures below:

		Total Sales	
		1989	1990
1.	1st quarter	$2,000,000	$1,800,000
2.	2nd quarter	3,000,000	900,000
3.	3rd quarter	2,700,000	700,000
4.	4th quarter	2,600,000	630,000

On the other hand, Respondent's testimony that an actual or an anticipated loss of Wagstaff business would affect Respondent's ability to pay Complainant on a piecework basis is not credible. Wagstaff paid all expenses related to the buying and selling and detailing of their cars, including the detailers' fees. Apparently, there was no expense to Respondent if Complainant continued to show up for work, even if there was nothing to do.

Additionally, if indeed Wagstaff had cut back on its orders to Respondent, Respondent would have had a business slow down that had nothing to do with the general business climate. Although, this scenario is possible, when I take into consideration the fact that Respondent could not explain or detail this alleged slow down with dates or figures, Complainant's evidence regarding the general industry conditions makes Respondent's testimony about the slowdown in July 1989, less credible.

In reviewing the testimony and evidence I find Respondent's explanation of the relationship between the sudden influx of detail work, Tedrick's hiring and Complainant's firing is not credible. I do not find it reasonable to believe that, within a few days before its arrival, a businessman of Respondent's experience and success would not be aware of incoming business that would necessitate full-time help for three week's time-frame. Further, as it was not unusual for employees to have nothing to do for a day or so at a time, I do not find

it reasonable to believe that Respondent would fire a good, qualified, reliable, experienced worker because work was slow, especially a day or so before he received an influx of work was received.

Throughout this case, Respondent has brought forth testimony showing that there were no overt discriminatory acts in Respondent's workplace. As I have stated before, this is not the proper standard in this particular case. McDonnell Douglas, Burdine, Furnco, and a myriad of other cases have established that discrimination may be found either by direct evidence or by indirect evidence.

In this case, there is no one factor or piece of evidence which was controlling in my determining whether Respondent's explanation of a business slowdown was a pretext. The prima facie case is very strong. On Wednesday, July 19, 1989, Complainant, an Argentinean national, was terminated from his position with no prior notice. He was told that there was no work for him. However, several days earlier, on or about July 14, 1989, Darin Tedrick, a United States citizen, was offered a job as an exterior detailer with Respondent (the same position Complainant held) and was promised a substantial salary based on the amount of work available. Within two to five days of Complainant's firing, Tedrick began his employment with Respondent.

There are cases in this circuit where the court has found that the evidence supporting the prima facie case and pretext were "very thin and purely circumstantial", but the court found that the evidence and reasonable inferences flowing from them were sufficient to support the Complainant's claim. See, e.g., Anderson v. Phillips Petroleum Co., 861 F.2d 631 (10th Cir. 1988). In this case, although some of the evidence is thin and circumstantial, the totality of the circumstances leaves more than an impression of pretext.

VII. *Findings of Fact and Conclusions of Law*

Based on all the evidence of record, the testimony, the pleadings, motions, and relevant law, I make the following findings of fact and law:

1. I find that I have jurisdiction in this matter.

2. I find that Respondent is a sub S corporation engaged in wholesaling as well as detailing cars.

3. I find that there is not sufficient evidence to show that C.V.S. Auto Sales has been incorporated or that it is an entity separate and apart from Castle Valley Sales, Inc.

4. I find that there is not sufficient evidence of record to show that the three named individuals, John, Ted and Jim Sargetis, act as alter egos of the corporation, Castle Valley Sales, Inc.

5. I find that the three named individuals, John Sargetis, Ted Sargetis, and Jim Sargetis, should be dismissed as parties in this action. I find that the proper Respondent party in this case is Castle Valley Sales, Inc. d.b.a. C.V.S. Auto Sales.

6. I find that the Respondent's business was seasonal and fluctuated on supply and demand.

7. I find that Respondent had an informal working relationship with Wagstaff Toyota, Inc., during the relevant time period in this case, 1989-through early-1990, which was not formalized by a written contract.

8. I find that during the relevant time period in this case, 1989-through early-1990, Wagstaff Toyota, Inc. paid Respondent one hundred dollars ($100) for each car Respondent bought, serviced and detailed for it. In addition, Wagstaff paid all expenses involved in reconditioning the cars, including detailer's fees.

9. I find that Respondent received a considerable number of cars for detail work on or about July 20, 1989.

10. I find that Complainant is a legal permanent resident of the United States who is of Argentinian national origin.

11. I find that Complainant first worked for Respondent as a detailer, from, on or about, May 5, 1989 until July 19, 1989 when he was terminated without consideration of his seniority.

12. I find that a detailer's job is of a transitory nature.

13. I find that Respondent has offered employment to Darin Tedrick prior to Complainant's termination, with Tedrick's first day of employment as an outside detailer being on or about July 22, 1989.

14. I find that Tedrick is a non-Hispanic U.S. Citizen.

15. I find Complainant's has established a prima facie case of national origin discrimination against the Respondent in regard to his termination on July 19, 1989.

16. I find that Respondent has articulated a legitimate business reason for Complainant's termination on July 19, 1989, in that he articulated that his business experienced a slowdown due to loss of Wagstaff's business.

17. I find that there is convincing evidence that Leonard, Complainant's manager, earned significant income from his position with Respondent in June, July, and August, 1989.

18. I find that Tedrick's testimony that he had not been laid off by his former employer, Personal touch, prior to his being offered a position with Respondent, to be credible.

19. I find that there is convincing evidence that Respondent did not make it a practice to terminate detailers when there was a work slowdown.

20. I find that the total sales figures, as evidenced by credible testimony, established that there was no significant loss of sales in 1989, although the same evidence shows a loss in in 1990.

21. I find it not credible that Respondent could not produce proper and sufficient records of his transactions with Wagstaff Toyota, Inc., for 1989 through 1990.

22. I find that Respondent has not produced any evidence, outside of his bold allegations, that would lead me to believe that there was a causal nexus between his anticipated business "slump" and Complainant's termination in July 1989.

23. I find that Respondent's testimony that he could not employ Complainant after July 19, 1989, due to a loss of business and profit not to be credible.

24. I find that Respondent did not experience a business slowdown in July, 1989 that would have necessitated Complainant's firing.

25. I find that Respondent's articulated reason for Complainant's termination to be a pretext for unfair immigration related practice under Section 274B of IRCA.

26. I find that there has been no showing that Respondent's second firing of Complainant in June of 1990 was discriminatory.

Remedies

Complainant has requested relief in this case. One request was that he be rehired to his previous position with no change in the terms and conditions of his employment. Although it is within my sound discretion to order his reinstatement, I do not find that in this case it is appropriate to compel the resumption of an employment relationship between the parties based on the testimony of record, the transitory nature of a detailer's position, the ability of Complainant to obtain other employment, and the changing structure of Respondent's business since the inception of this suit. However, should the parties wish to enter into an employment relationship, there is nothing in this Order which would impede their desire. See Section 274B(g)(2)(B)(iii).

Complainant has also requested back pay in the amount of forty seven thousand two hundred ninety five dollars ($47,295) based on an alleged weekly salary of five hundred twenty ($520), less mitigation, for the time period from July 20, 1989 through June 30, 1991.

Respondent has the burden of showing that Complainant did not use reasonable diligence in mitigating the damages caused by the employer's discriminatory acts. U.S. v. Mesa Airlines, 1 OCAHO 74 (1989) at 57. Respondent has presented several arguments, i.e., that Com-plainant had good cause to fire Complainant, that Complainant found work subsequent to his firing at the same rate of pay that he had received at Respondent's shop, that, for a period of time subsequent to his being fired, Complainant earned a rate substantially higher than what he had received at Respondent's shop, and that testimony indicated that Complainant had not reported all his mitigating income. (Tr. 101-105, Ex. R-13, Ex. C-27).

It is within my sound discretion to award backpay without ordering rehire. U.S. v. Mesa Airlines, supra at 56-57; U.S. v. Marcel Watch Corp., supra. The granting of back pay, and the amount awarded, are discretionary. Id. at 55; See also 8 U.S.C. 1234b(g)(2)(B).

A detailer's job is temporary, transitory and unpredictable. Complainant did not have a weekly salary when he worked for Respondent; neither did any other detailer. He was paid on a piece work basis. During his employment in 1989, his weekly gross wages were:

1. $308.00
2. 500.00
3. 616.00
4. 456.00
5. 441.00
6. 561.00
7. 512.00
8. 627.00
9. 442.00
10. 264.00
11. 520.00

(Ex. C-1).

Complainant testified that since his termination in 1989 he has worked for various employers and has commanded a range of pay from twenty dollars ($20) a detail to forty dollars ($40) a detail. There has been some testimony that indicates that Complainant did not keep or have accurate records of his income since the inception of this suit.

Based on the credible testimony and evidence of record in this case, I have found that Tedrick was hired to take over Complainant's position and that he retained this position for only a few weeks. There was no evidence that after Tedrick, terminated, this position was filled. During Tedrick's employment with Respondent, his record shows that Tedrick earned a total of eight hundred fifty-five dollars ($855). (Ex. C-1, C-13).

Taking all the above into consideration, I find that Complainant did not command a salary of five hundred twenty dollars a week. I further find that, based on the evidence and relevant law, and in the interest of justice, it is reasonable and proper to award Complainant backpay in an amount equal to the amount of pay Tedrick received when he replaced Complainant as an exterior detailer. Further, I do not find that front pay is appropriate in this case.

IX. *Order*

Based on all the testimony and evidence of record as well as the relevant law, I order that the proper Respondent in this case, is Castle Valley sales, Inc., d.b.a. C.V.S. Auto Sales. I further order Respondent:

1. To cease and desist from the unfair immigration related practices found in this case, i.e., termination based on national origin;

2. To comply with the requirements of section 274A(b) with respect to individuals hired (or recruited or referred for employment for a fee) for three years;

3. To retain for three years, and only for purposes consistent with Section 274A(b)(5), the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

4. To pay a civil penalty of five hundred dollars ($500) pursuant to 8 U.S.C. 1324b(g);

5. To post, in a conspicuous place at Respondent's place of business, notice(s) to his employees about their rights under 8 U.S.C. 1324b and his obligations under 8 U.S.C. 1324a;

6. To educate all Respondent's personnel involved in hiring and complying with 8 U.S.C. 1324b and 8 U.S.C. 1324a;

7. To pay Complainant back pay in the amount of eight hundred fifty-five dollars ($855) plus five percent (5%) simple interest from July, 1989 to the date of this Order.

8. To make all payments within sixty (60) days of receipt of this Decision and Order.

9. As Respondent is not a prevailing party, his request for attorney fees is denied:

10. All motions not previously ruled upon by me are denied.

This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek review of the order in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred or in which the Respondent transacts business.

IT IS SO ORDERED this 5th day of March, 1992, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge