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

October 10, 2013

JOHN A. BREDA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00077
KINDRED BRAINTREE HOSPITAL, LLC, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act (INA) as amended, 8 U.S.C. § 1324b (2012), in which John A. Breda, M.D., a citizen of the United States, filed a complaint alleging that Kindred Braintree Hospital, LLC (Kindred, KBH, or the hospital) retaliated against him in violation of § 1324b(a)(5) because he previously filed a discrimination charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The hospital filed a timely answer denying the material allegations of the complaint and raising an affirmative defense, following which discovery and other prehearing procedures were undertaken.

The schedule for this case had to be amended twice because of issues related to discovery. Presently pending is Breda's motion for sanctions for failure to comply with an order compelling the production of documents. Kindred filed a memorandum in opposition to the motion and Breda filed a reply. The motion is ripe for resolution. Also pending are the parties' cross motions for summary decision. Breda's motion was timely filed in accordance with the revised schedule; Kindred's was not. Each party responded to the other's motion and both are ripe for resolution. Both motions are considered.

II. BACKGROUND INFORMATION

Kindred Braintree Hospital LLC describes itself as a limited liability company organized under Delaware law and registered to do business in the Commonwealth of Massachusetts. Kindred and Breda were parties to a Physician Scheduling Services Agreement ("Scheduling Agreement") and an Emergency Medical Services Agreement ("Physician's Agreement"), each of which was dated and effective as of December 15, 2009. Pursuant to these agreements, Breda was engaged in scheduling physicians to provide overnight emergency services at KBH and also in providing overnight emergency services there himself. Kindred notified Breda on April 6, 2010 that it would terminate both agreements in sixty days, but subsequently reinstated the Physician's Agreement briefly. On May 7, 2010, however, Kindred gave Breda notice that it was terminating the Physician's Agreement effective July 12, 2010. The reasons the agreements were not renewed are disputed by the parties.

The record reflects that Breda then filed OSC charge number 197-36-142 on June 2, 2010, alleging that Kindred discriminated against him based on his U.S. citizenship by terminating the Scheduling Agreement and the Physician's Agreement and replacing Breda's services with those of Dr. Ziad Hinedi. Breda identified Hinedi as an alien working under an H-1 visa who may not have been authorized under the terms of that visa to work for KBH. OSC investigated the charge and subsequently sent Breda a letter advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of his receipt of the letter. Breda did not elect to do that; instead he filed a civil lawsuit against the hospital in the Superior Court of the Commonwealth of Massachusetts, C.A. No. 10-5005, charging KBH with breach of contract and deceptive practices under Massachusetts law.

Kindred filed an answer to Breda's Massachusetts complaint, together with a counterclaim seeking damages and attorney's fees. Paragraphs 16, 17, 19, 20, 21, 22, 23, 27, 29, 30, 31, 34, and 35 of the hospital's counterclaim make various allegations about Breda himself and about the charge he filed with OSC. Paragraph 35 concludes that,

> *As a result of Breda's bad-faith filing of a frivolous DOJ Complaint* and this frivolous Complaint, *Kindred has suffered and will continue to suffer damages including time, costs, and expenses incurred in responding to the DOJ Complaint by Kindred employees and outside counsel* and time, costs, and expenses incurred in responding to this Complaint by Kindred employees and outside counsel.

(emphasis added). Paragraph 36 of the counterclaim seeks damages and interest, as well as

attorney's fees and costs.

Breda then filed a motion to dismiss the counterclaim and KBH filed a response in opposition elaborating upon the ways in which the hospital claimed it was injured by having to respond to Breda's OSC charge (which it referred to as his DOJ Complaint), stating that the hospital was forced to spend several months and $21,703 in attorney's fees "to respond to the DOJ complaint and subsequent OSC investigation." Kindred's response to Breda's motion to dismiss the counterclaim also argues at length about the merits of the OSC charge itself and Breda's motives for filing it.

KBH's opposition memo in the Massachusetts action was accompanied by the Affidavit of Ron Lazas dated October 10, 2011 detailing the services of both in-house and outside counsel over a period of several months in dealing with the OSC charge and reiterating that the hospital "was forced to retain outside counsel . . . to represent it during the OSC investigation," and that Kindred "incurred significant costs and expenses, including approximately $21,703 in attorneys' fees in responding to the DOJ Complaint." The Superior Court for the Commonwealth of Massachusetts issued a ruling in C.A. No. 10-5005 on December 19, 2011, finding that Kindred Braintree Hospital LLC had no valid counterclaim, and that the purported counterclaim was properly a post-adjudicatory motion and not a cause of action.

Breda filed his second OSC charge, number 197-36-148, on November 9, 2011. OSC subsequently sent Breda a letter dated March 8, 2012 advising him that he had the right to file a complaint with OCAHO within ninety days of his receipt of the letter. He did so, and all conditions precedent to the institution of this proceeding have been satisfied. The instant complaint is premised upon Breda's second charge, which asserts, as does his OCAHO complaint, that the counterclaim Kindred filed in the Massachusetts action was made in retaliation for Breda's filing his original OSC charge.

III. BREDA'S MOTION FOR SANCTIONS

A. The Positions of the Parties

Discovery in this matter did not proceed smoothly. Breda filed a motion to compel production of documents on May 29, 2013, which was granted in part and denied in part on June 25, 2013. The resulting order directed Kindred to produce documents on or before July 19, 2013 in response to requests Breda had originally propounded in March 2013. But Kindred did not produce the documents on July 19, 2013; instead on that same day the hospital filed a request for what it characterized as a one-week extension of time to prepare a protective order and to complete the production of documents. Breda subsequently filed a motion for discovery

sanctions on July 23, 2013.

KBH's extension, had it been granted, would have expired on July 26, 2013, but Kindred did not produce all the documents that day either. Instead, on July 29, 2013, Kindred filed what purported to be a stipulated protective order. Notwithstanding the caption, the document was not a stipulated order because it was signed only by KBH. The hospital's filing reflects that the "stipulated" protective order was sent to Breda on July 26, 2013 and that its scope extended well beyond confidential personal information related to Dr. Hinedi, the individual who allegedly replaced Breda. Breda had previously agreed to treat Dr. Hinedi's materials in confidence. The purported stipulated order, however, instead gave KBH the apparently unlimited authority to designate as confidential a wide range of unidentified and undifferentiated documents with business or financial information, depositions, electronic media, and other vague descriptions. The proposed order also sought to create retroactive protection for unidentified documents that had been produced previously, and to preclude Breda from using any of the documents in connection with his contract action.

On August 1, 2013, Kindred filed a response to Breda's motion for sanctions in which it asserted that it had complied with the order of June 25, 2013, with some exceptions, and that,

> Because Dr. Breda had previously agreed to execute a protective order and KBH could not disclose such information without first obtaining a signed protective order from Dr. Breda, KBH sought a short, one-week extension until July 26, 2013 to prepare and provide Dr. Breda with a proposed protective order to safeguard this information before turning it over to him.

Kindred said that as to Breda's remaining requests the hospital either already produced documents or had none that were responsive. It also stated that although Breda had not yet responded to the proposed protective order, no prejudice would result to Breda from KBH's nonproduction.

I issued an order on August 2, 2013, advising KBH that the time for requesting a protective order is before, not after, the date production is required to be made, and directing the hospital to complete its production of documents within three days. On August 12, 2013, Breda filed a reply to Kindred's response in which he stated that Kindred still had not produced documents responsive to a number of his requests. In particular, the hospital still failed to produce documents showing that it followed proper protocol to hire alien workers and showing that Dr. Hinedi was authorized to work in the United States.

Breda's motion for sanctions suggests that proper sanctions for failure to comply with the order

would include striking Kindred's answer, holding the hospital in default, ruling in Breda's favor, and ordering such relief as is just and appropriate. KBH's opposition contends that sanctions are unwarranted because "there has been no unnecessary delay and Dr. Breda has not suffered prejudice." The hospital contends that it complied with the discovery order, and that Breda is misrepresenting the facts. It also contends that "the volume and the relevance of the few confidential documents withheld pending Dr. Breda's execution of the protective order are negligible," that "waiting to produce these few documents until Dr. Breda signs the protective order cannot be deemed prejudicial," and that Breda can easily obtain the documents by signing the protective order.

B. Discussion and Analysis

A litigant in this forum is not permitted to unilaterally graft ex post facto conditions on its compliance with an unqualified order to produce documents. The hospital cites no authority to support the view that it is free to grant itself an extension of time and then impose unacceptable conditions upon Breda by fiat before it has to produce documents in compliance with a judicial order. The order I issued was unconditional. It did not authorize KBH, under the guise of requesting "a short one-week extension," to hold documents hostage for an indefinite period of time until Breda meets its unilaterally demanded terms, nor did it otherwise permit any delay in producing the documents as ordered. What KBH characterizes as a delay of one week has turned into considerably more than that, and while KBH characterizes the relevance of the documents related to Dr. Hinedi as "negligible," I already determined otherwise in compelling their production.

Contrary to Kindred's argument, sanctions are warranted and will be imposed. KBH failed to produce documents related to Dr. Hinedi in sufficient time for Breda to use them for purposes of filing his dispositive motion. In accordance with 28 C.F.R. § 68.23,[1] I accordingly infer and conclude that the documents would have been adverse to KBH and that for purposes of this proceeding KBH has forfeited any claim that Breda's first OSC charge was without merit. As was previously explained in the order compelling production, it was Kindred itself that put the merits of Breda's original charge in issue by contending in its counterclaim that Breda's charge was frivolous and made in bad faith. The order compelling discovery expressly advised KBH that having raised the issue, the hospital would not be heard to resist discovery related to the merits of Breda's original charge.

The purpose of the nonretaliation provision is to protect an employee who asserts rights pursuant to § 1324b, and that purpose would be wholly thwarted if Kindred is permitted to unilaterally

[1] *See Rules of Practice and Procedure*, 28 C.F.R. pt. 68 (2013)

determine the truth or falsity of Breda's OSC charge, attribute bad faith to him, initiate legal process against him based on the alleged absence of merit in the charge, then deny him the benefit of discovery he needed to defend against KBH's contention that his charge was frivolous. That is precisely what Kindred sought to do. It should not reap any benefit from that attempt. Breda's motion for summary decision asserts that KBH still had not produced the documents pertaining to Dr. Hinedi's authorization to work at the hospital. Because Kindred failed to timely produce documents showing that the terms of Hinedi's visa authorized him to work for KBH, I conclude for purposes of this action that he was not so authorized. No argument to the contrary will be entertained, nor will any argument be entertained respecting the merits of Breda's original charge. While the parties' respective motions for summary decision continue to argue the merits of that charge, the subject is closed and it is established for purposes of this action that Breda's first OSC charge was filed in good faith with a reasonable belief that KBH violated the provisions of § 1324b.[2]

This is the most modest of sanctions because it is in any event well established that the right to file a charge of employment discrimination without being retaliated against is not extinguished simply because the charging party's position does not ultimately prevail, *see, e.g.*, *Sanders v. Madison Square Garden*, 525 F. Supp. 2d 364, 367 (S.D.N.Y. 2007), and that the underlying claim does not have to be valid to warrant protection from retaliation, *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994). Retaliation against an individual for filing a charge is prohibited regardless of the merits of the underlying charge. *Cf. Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011) (citing *Soileau v. Guilford of Me., Inc*., 105 F.3d 12, 16 (1st Cir. 1997)).

IV. STANDARDS TO BE APPLIED TO THE PARTIES' CROSS-MOTIONS

A. Summary Decision

OCAHO rules provide that summary decision as to all or part of a complaint may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to

[2] Contrary to KBH's contention, moreover, the nonrenewal of a contract for employment *can* qualify as an adverse action for purposes of a discrimination case. *See Leibowitz v. Cornell Univ.*, 584 F.3d 487, 499-502 (2d Cir. 2009) (collecting decisions from five circuits so holding), *superseded by regulation on other grounds, Mihalik v. Credit Agricole Chevreux N. Am., Inc.*, 715 F.3d 102, 108 (2d Cir. 2013); *accord, Ainsworth v. Loudon Cnty. Sch. Bd.*, 851 F. Supp. 2d 963, 976-77 (E.D. Va. 2012). *But see Suzal v. U.S. Info. Agency*, 32 F.3d 574, 579 (D.C. Cir. 1994) (questioned in *Parker-Darby v. DHS*, 869 F. Supp. 2d 17, 21-22 (D.D.C. 2012)).

a summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which permits the entry of summary judgment in federal cases. OCAHO jurisprudence accordingly looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[3]

The filing of cross motions does not necessarily mean that summary decision should issue in favor of either party; each motion must be considered on its own merits. *See United States v. Anodizing Indus.*, 10 OCAHO no. 1184, 3 (2013); *see also Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 11 (1st Cir. 2012). The party seeking summary decision bears the initial burden of showing the absence of a material factual dispute. *See Celotrex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to come forward with evidence that a genuine issue of material fact does exist. *See Primera Enters.*, 4 OCAHO no. 615 at 261 (citing Fed. R. Civ. P. 56(e)).

B. The Relative Burdens of Proof

In interpreting § 1324b, OCAHO jurisprudence has looked for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and to other federal remedial statutes prohibiting discrimination and retaliation. *See, e.g., Cruz v. Able Svc. Contractors, Inc.*, 6 OCAHO no. 837, 144, 154-55 (1996). Pursuant to that body of law, the familiar burden shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), is applied as well to the analysis of retaliation claims. *Cf. Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 115 (1st Cir. 2013) (applying framework to retaliation claim under Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.); *Lockridge v. Univ. of Me. Sys.*, 597 F.3d 464, 472 (1st Cir. 2010) (applying to retaliation claim under Title VII). First, the plaintiff must establish a prima facie case. The burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for the challenged employment action. If the defendant does so, the inference raised by the prima facie case drops from the

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

picture and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is false and that the defendant intentionally discriminated or retaliated against the plaintiff. *See Kelley*, 707 F.3d at 115; *cf., e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-57 (1981).

A prima facie case of retaliation can be shown under the *McDonnell Douglas* formulation by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009); *cf. Carmona-Rivera v. P.R.*, 464 F.3d 14, 19 (1st Cir. 2006) (treating the first two elements together as one). As explained in *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 643-44 (7th Cir. 2002), however, an individual can bypass the *McDonnell Douglas* paradigm altogether by producing direct evidence that an adverse action was in fact taken for retaliatory reasons, in which case there is no need to invoke *McDonnell Douglas*. OCAHO case law has similarly long held that the traditional *McDonnell Douglas* analytical minuet is unnecessary where an injured party presents direct evidence of discriminatory intent. *See United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1164 (1993); *United States v. Lasa Mktg. Firms*, 1 OCAHO no. 141, 950, 959 (1990); *cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (stating that the *McDonnell Douglas* framework does not apply in an ADEA case where the plaintiff presents direct evidence of discrimination).

C. General Scope of Antiretaliation Provision

OCAHO case law also has long recognized that litigation can be initiated in another forum with the intent or purpose of retaliating against individuals for engaging in statutorily protected conduct. Thus, for example, where an employer filed abuse of process and malicious prosecution claims in the New York Supreme Court against three individuals who filed charges with or gave information to OSC, those state law claims were found to constitute prohibited retaliation. *See United States v. Hotel Martha Washington*, 6 OCAHO no. 846, 215, 227 (1996) (*Martha Washington II*); *see also United States v. Hotel Martha Washington*, 5 OCAHO no. 786, 543-44 (1995) (*Martha Washington I*) (finding retaliatory motive and no reasonable basis for state law claims); *cf. EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775, 778 (W.D. Va. 1980) (filing state court defamation action was "unquestionably retaliatory" under Title VII).

Even before the decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 64 (2006) (finding that antiretaliation provision in Title VII is not limited to actions that affect the terms and conditions of employment), moreover, some courts had already held that the same principle could be applied to the filing of a counterclaim and that a counterclaim could also be an

adverse action for purposes of a retaliation claim. *See EEOC v. Outback Steakhouse, Inc*., 75 F. Supp. 2d 756, 760 (N.D. Ohio 1999); *cf. Blistein v. St. John's College*, 860 F. Supp. 256, 269 (D. Md. 1994). Courts appear to be divided, however, as to whether litigation needs to be baseless as well as retaliatory before it may be held to violate a nonretaliation provision. *Compare Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 157 (3d Cir. 1999) (finding lawsuit retaliatory in Title VII context even without finding that there was no reasonable basis for it) *with Beltran v. Brentwood N. Healthcare Ctr., LLC*, 426 F. Supp. 2d 827, 833-35 (N.D. Ill. 2006) (finding that because counterclaim was not baseless it could not furnish a cause of action for retaliation). *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 473 (S.D.N.Y. 2008) (holding that bad faith *or* groundless legal proceedings can be actionable retaliation in a case under the Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (FLSA)).[4]

Burlington Northern clarified that even under the restrictive language of Title VII, prohibited retaliation may consist of actions not directly related to an individual's employment and may include harms outside the workplace. 548 U.S. at 63. As examples, the *Burlington* court cited two cases with approval. The first, *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir 2006), observed that the scope of the antiretaliation provision of Title VII is not limited to acts constituting an adverse employment action or otherwise relating to employment, but can include such acts as the FBI's alleged retaliatory refusal to investigate death threats made against an agent and his wife. The second, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996), found that protection from retaliation encompassed allegedly retaliatory false criminal charges the employer filed against a former employee. *Burlington Northern*, 548 U.S. at 63.

V. KBH'S MOTION FOR SUMMARY DECISION

A. The Grounds Asserted for the Hospital's Motion

Kindred's motion argues first that the hospital is entitled to summary decision based on the undisputed factual record because Breda cannot establish one of the essential elements of a prima facie retaliation case inasmuch as he was not subjected to any adverse employment action. KBH says it is clear that Breda was an independent contractor and was never employed by KBH. The hospital says, moreover, that even putting Breda's independent contractor status aside, it is "temporally impossible" for Breda to suffer an adverse employment action after July 2010, when the parties had their last workplace contact. KBH's motion asserts that because the allegedly

[4] Compulsory counterclaims under FLSA are treated differently from separate litigation or permissive counterclaims. A compulsory counterclaim must be totally baseless before it will be found retaliatory. *See Spencer v. Int'l Shoppes, Inc*., 902 F. Supp. 2d 287, 299 n.5 (E.D.N.Y. 2012).

retaliatory conduct did not occur until thirteen months after the last professional contact between the parties, it is "astonishing for Dr. Breda to allege and impossible for him to prove that he suffered any retaliatory adverse employment action by Kindred." The hospital asserts that it had "no reason or means" to interact with Breda and no ability to inflict an adverse employment action on him after July 2010 "[b]ut for Dr. Breda's deliberate effort to attack Kindred in the Massachusetts Litigation."

Second, the hospital asserts that it is entitled to summary decision because its counterclaim does not seek to recover damages related to Breda's OSC charge, but only describes the "factual history of the dispute" between the parties. Kindred says that because Breda's contract action includes some of the same allegations made to OSC and because "what happened at the OSC is highly relevant to the legitimacy of the claims" in the Massachusetts case, the overlapping factual allegations required discussion of both cases.

Finally, the hospital contends that the allegedly retaliatory conduct Breda complains of relates solely to a counterclaim filed under a specific Massachusetts statute the scope of which is limited to the costs of defending Massachusetts lawsuits, and that the Massachusetts action does not deal with matters within the purview of OCAHO. KBH points out that while Breda sought to recoup his costs and fees in the Massachusetts action, the court did not award them. The hospital says Breda should not be allowed to relitigate similar issues in this forum because this forum has no authority to award fees for litigation taking place in Massachusetts courts.

Kindred's motion was accompanied by the affidavit of Brian P. Dunphy together with exhibits consisting of 1) Emergency Medical Services Agreement dated December 15, 2009 (10 pp.) (a duplicate of Breda's exhibit E); 2) Physician Scheduling Services Agreement dated December 15, 2009 (9 pp.) (a duplicate of Breda's exhibit D); 3) a portion of the transcript of the deposition of John A. Breda, M.D. (4 pp.); 4) Emergency Medical Services Agreement dated March 25, 2010 (11 pp.) (a duplicate of Breda's exhibit H); 5) a letter to Ziad Hinedi, M.D., dated March 19, 2010; 6) checks from Kindred Healthcare Operating Inc. to Mt. Auburn Professional Services (4 pp.); 7) a letter to Breda from Katherine Eskew dated April 6, 2010 (a duplicate of Breda's exhibit J); 8) a letter to Breda from Katherine Eskew dated April 8, 2010 (a duplicate of Breda's exhibit K); 9) a letter to Katherine Eskew dated May 4, 2010 from Mt. Auburn Professional Services; 10) a letter to Breda from Katherine Eskew dated May 7, 2010 (a duplicate of Breda's exhibit L); 11) Breda's original OSC charge with attachments (a duplicate of Breda's exhibit A) (8 pp.); 12) a letter dated June 6, 2010 from Breda to Dr. Deborah Markowitz; 13) an undated letter from Erik Lang to Keith Carroll (3 pp.); 14) Breda's complaint in the Massachusetts Superior Court, C.A. no. 10-5005 (a duplicate of Breda's exhibit B) with attachments A and B (32 pp.); 15) M.G.L. c. 231 § 6F (3 pp.); 16) Kindred's answer with affirmative defenses and counterclaim in civil action 10-5005 with cover letter (a duplicate of Breda's exhibit C) with attachments (45 pp.); 17) a portion of the transcript of the deposition of John A. Breda, M.D. (6

pp.); 18) Special Motion to Dismiss Under G.L. c. 231, § 59H with attachments (45 pp.); 19) Special Motion to Dismiss Under G.L. c. 231, § 59H with hand-written notes (2 pp.); 20) the complaint in this matter (9 pp.) with 156 pages of attachments (mostly duplicates of other exhibits already in the record multiple times); 21) a letter to Erik Lang from Keith Carroll dated February 14, 2012 with attachments (erroneously identified in the affidavit of Brian Dunphy as a letter from Erik Lang to Keith Carroll) (14 pp.); and 22) a portion of the transcript of the deposition of John A. Breda, M.D.

B. Breda's Response

Breda responds to Kindred's motion by asserting that for purposes of a retaliation claim he need not be employed by Kindred and the adverse action need not be temporally connected to his work at the hospital. He notes that *Burlington Northern* resolved a circuit split by concluding that the antiretaliation provisions of Title VII are not limited to employment-related actions. Breda points out that he meets all the elements of a retaliation claim under 8 U.S.C. § 1324b, citing *Martha Washington I.*

Breda argues that KBH's motion misstates facts, mischaracterizes its counterclaim, and misquotes documents. In particular, he states that the Massachusetts court did not deny his motion to dismiss the counterclaim and did not reach the issues the motion presented. Thus there is no ruling on any claim of retaliation that could collaterally estop OCAHO from finding retaliation. Breda says further that while Kindred represents that its counterclaim did not seek damages related to his first OSC charge, examination of the counterclaim reflects otherwise. He notes as well that he incurred substantial attorney's fees in defending against the allegations Kindred made about his OSC charge in its counterclaim.

C. Discussion and Analysis

Few of the operative facts in this matter are in dispute. The principal conflicts between the parties involve the legal consequences flowing from those facts, and the parties' divergent views as to the law to be applied. As an initial matter, the hospital is simply incorrect in contending that use of the term "independent contractor" in the agreements it had with Breda is sufficient to deprive Breda of the protection of 8 U.S.C. § 1324b(a)(5) or to preclude an action for retaliation in this forum. Unlike the language of Title VII, 42 U.S.C. § 2000e-3(a), which prohibits an employer from retaliating against "any of his employees or applicants for employment," the comparable provision in 8 U.S.C. § 1324b(a)(5) is considerably broader, and provides instead that "[i]t is . . . an unfair immigration-related employment practice for *a person or other entity* to intimidate, threaten, coerce or retaliate against *any individual*" for engaging in protected conduct (emphasis added). While KBH continues to insist that it was not an employer and Breda was not an employee, the hospital does not, and cannot, contend that it is not an entity within the

meaning of 8 U.S.C. § 1324b(a)(5), or that Breda is not an individual protected from retaliation by that section.

OCAHO case law confirms that § 1324b(a)(5) has broad application. In *Martha Washington I*, for example, the administrative law judge found that each of three individuals was retaliated against in violation of the statute despite the respondent's contentions that all three had committed wrongful acts against it, that one was an unauthorized alien, and that another was not even an employee of the Hotel. 5 OCAHO no. 786 at 537. These contentions had no effect on the outcome of the case even if true, because the retaliation provision applies to actions against "any person." *Id.* The three individuals in *Martha Washington I* participated in protected activity known to the respondent, they were adversely affected by incurring attorney's fees to defend against the abuse of process case, and the state court pleading itself was found sufficient to demonstrate the requisite causal connection. *Id.* at 537-38.

While KBH argues that it is "temporally impossible for Dr. Breda to assert he suffered an adverse employment action," it is causation, not temporal proximity, that is vital to a retaliation case, *see Sodhi v. Maricopa Cnty. Special Health Care Dist.*, 10 OCAHO no. 1127, 8-9 (2008), and neither the timing nor the nature of the retaliatory act alleged here entitles KBH to summary decision. Notwithstanding the hospital's claim that it lacked any ability to take adverse action against Breda after July 2010, it was clear even before the decision in *Burlington Northern* that the severance of an employment relationship does not end an individual's protection from retaliation under Title VII. Any doubts with respect to the continuing viability of antiretaliation provisions after the severance of an employment relationship were resolved long ago in *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997) (holding Title VII antiretaliation provision applicable to former employees). *See also Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 11 (1st Cir. 1998) (following *Robinson* in case arising under Family and Medical Leave Act (FMLA)). When arguments similar to Kindred's were advanced in *Darveau v. Detecon, Inc*., 575 F.3d 334, 341-42 (4th Cir. 2008), the court observed that the company's rationale "rests on outdated Title VII precedent" that the Supreme Court has "clearly rejected."

KBH cited no authority to support its position, and contrary to the hospital's contention, the Supreme Court recently confirmed once more that Title VII's antiretaliation provision must be broadly construed and that a retaliatory act need not be employment related. *See Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 867-68 (2011). The *Thompson* court explained that retaliation may take a variety of forms encompassing a broad range of conduct and is not limited to acts that affect the terms and conditions of employment. *Id.* at 68. While the protection of nonretaliation statutes does not extend to trivial or petty annoyances, any action that would dissuade a reasonable worker from engaging in protected conduct may come within its ambit. *Id.; see also Colon v. Tracey*, 717 F.3d 43, 50 (1st Cir. 2013) (adverse action must be one that could dissuade worker from making or supporting a charge of employment

discrimination). Kindred's contention that it was incapable of engaging in an adverse action against Breda after July 2010 is premised upon a flawed legal analysis, and as a matter of law cannot provide a basis for summary decision in the hospital's favor.

Next, although Kindred asserts that the hospital is entitled to summary decision because it referred to the OSC charge in the counterclaim only to set out "the factual history of the dispute" between the parties, this characterization is belied not only by the language of the counterclaim itself, as Breda pointed out, but also by the hospital's response to Breda's motion to dismiss it and the affidavit that accompanied the response. Both these documents are addressed almost entirely to arguing that Breda's first OSC charge was without merit and that KBH was injured by it. Any reference to the contract action itself is at best tangential. The response concludes that Kindred "established by a preponderance of the evidence that the DOJ Complaint was devoid of any reasonable factual support or any arguable basis in law and that the filing of the DOJ Complaint caused actual injury to Kindred Hospital." The counterclaim is quite specific as to what damages KBH claimed it incurred as a result of having to participate in the OSC administrative investigation.

The language of the counterclaim leaves little doubt that the pleading is principally addressed to Breda's original OSC charge rather than to the contract claim. KBH's counterclaim explicitly so reflects on its face. Paragraph 20, for example, accuses Breda of using the OSC charge for purposes of extortion. Paragraphs 17 and 19 assert that Breda knew when he filed it that facts stated in his OSC charge are false. Paragraphs 27 and 29 assert that Breda's OSC charge was frivolous and that he knew it. Paragraph 31 again accuses Breda of extortion, and paragraphs 34 and 35 accuse Breda of frivolous conduct or bad faith or both in filing his DOJ complaint. The affidavit of Ron Lazas that accompanied KBH's response to Breda's motion to dismiss the counterclaim specifically recites that KBH employees and in-house counsel "were forced to spend significant time over the course of several months responding to the OSC investigation, including providing interview documents, and information for the OSC." The Lazas affidavit says further that the hospital "was forced to retain outside counsel . . . to represent it during the OSC investigation," and that Kindred "incurred significant costs and expenses, including approximately $21,703 in attorneys' fees in responding to the DOJ complaint."

Despite Kindred's representations, its opinions about what Breda knew, or thought, or intended, when he filed his OSC charge, and KBH's accusations that Breda's OSC charge was frivolous, not advanced in good faith, or filed with the intent to extort a settlement, are not "factual history;" they are allegations, opinions, and accusations. No reasonable or objective factfinder could construe the hospital's allegations as a "factual history," when on their face they reflect argument pure and simple about the merits of Breda's first OSC charge, and why, in Kindred's

view, the charge was filed in bad faith.[5] Notwithstanding Kindred's insistence that its counterclaim is limited to the contract action, the document itself reflects otherwise.

And notwithstanding Kindred's characterization of its counterclaim as being limited to its costs and fees in the contract action, the document also shows otherwise. The request for relief made in Kindred's counterclaim is not limited, as the hospital represents, to attorney's fees and costs for that action. The request for costs and fees is only one of four separate requests KBH makes for relief: 1) for judgment on the counterclaim, 2) for an order to Breda "to pay to Kindred such damages as have been sustained in consequence of Breda's violation of law, together with interest and costs," 3) for an order to Breda "to pay to Kindred its reasonable attorneys' fees and costs of suit," and 4) for such other relief as the court deems proper. Nothing in the pleading suggests that the "damages" Kindred asks for in its second request are intended to exclude the $21,703 in attorneys' fees Laza's affidavit says were incurred by participating in the OSC investigation.

Kindred's characterization of its counterclaim simply cannot withstand scrutiny. Contrary to KBH's representations, the paragraphs in its counterclaim referring to Breda's OSC charge are by no means limited to a factual history, the hospital's counterclaim is not limited to costs and fees for the contract action but seeks to recover damages as well, and Kindred is not entitled to summary decision based on its misleading characterization of the counterclaim's contents.

Finally, the fact that the judge deferred the issues posed by Kindred's counterclaim until after resolution of the contract dispute is not a reason to dismiss this action either. Kindred suggests that Breda is seeking to relitigate issues the court resolved, but the record reflects that the court's ruling did not resolve any issue posed by Breda's motion to dismiss the counterclaim. The ruling was made by a handwritten notation on Breda's motion that reads in its entirety,

> After hearing, the Court determines that Defendant, Kindred, has no valid counterclaim - its [the word 'purported' is handwritten and crossed out here] filing referenced as a "counterclaim" under G.L 231 § 6F is properly a post-adjudicatory motion and not a cause of action. See Corliss v. Corliss, 2008 WL 2875370 (Mass. Super. Ct. 2008) citing Ben v. Schultz, 47 Mass. App. Ct. 808, 814 (1999). Given the non-viability of the claimed cause of action, the court does not reach issues relating to the anti-SLAPP dismissal claim.

[5] Both motions for summary decision spend an inordinate amount of time arguing the merits of Breda's first charge, which is not an issue in this proceeding.

The court thus made no ruling or determination as to whether the counterclaim was a "strategic lawsuit against public participation" under the Anti-SLAPP Statute, General Laws of Massachusetts, chapter 231, § 59H, upon which Breda's motion to dismiss the counterclaim was premised. It ruled only that the so-called counterclaim was not a valid counterclaim at all.

But while the hospital is correct in pointing out that resolution of issues arising under Massachusetts law are wholly within the purview of the Superior court, KBH omits acknowledgement of the corollary: that consideration of the issues arising under 8 U.S.C. § 1324b(a)(5) are wholly within the purview of OCAHO, subject to review only by the court of appeals pursuant to § 1324b(i). The issue posed in this proceeding is whether Kindred violated § 1324b(a)(5). That question is not susceptible to resolution in any forum other than OCAHO, and as a matter of federal law must be resolved in this proceeding.

Thus none of the arguments KBH advances in support of its motion establishes that the hospital is entitled to judgment as a matter of law, and the hospital's motion for summary decision must be denied.

VI. BREDA'S MOTION FOR SUMMARY DECISION

A. The Grounds Asserted for Breda's Motion

Breda first points out that as a citizen of the United States, he has standing to bring this action. He argues that notwithstanding his independent contractor status, KBH maintained sufficient control over hiring, discharge, work schedules, and work assignments to qualify as a joint employer under § 1324b, *citing General Dynamics*, 3 OCAHO no. 517. Breda argues further that even were this not the case, the protections of 8 U.S.C. § 1324b(a)(5) extend to persons retaliated against for participating in protected conduct regardless of the employment status of the individual, *citing Hotel Martha Washington II*, 6 OCAHO no. 846. Breda also cites *Monda v. Staryhab*, 8 OCAHO no. 1002 (1998), for the proposition that a retaliation claim may be pursued in this forum regardless of the merits of the underlying charge.

Finally, Breda points out that his evidence establishes all the elements of a prima facie case: as a citizen of the United States, he is a protected individual; he engaged in protected conduct by filing his first OSC charge, of which Kindred was well aware; and he suffered an adverse action when KBH initiated its counterclaim against him, the allegations of which virtually mirror the retaliatory allegations of abuse of process made in *Hotel Martha Washington I*. Breda says he was clearly injured because to date he has incurred attorney's fees in the amount of $12,274.99 for his defense against Kindred's retaliatory counterclaim, and $1921.19 for assistance and advice in the instant matter.

Breda seeks summary decision in his favor, an order directing Kindred to remove unfavorable information from his personnel file, a cease and desist order directing KBH to stop pursuing damages for his filing an OSC complaint, civil money penalties in an amount up to $3200, attorney's fees, and such other relief as is appropriate. Breda's motion was accompanied by an affidavit and exhibits consisting of A) Breda's original OSC charge with attachments (8 pp.); B) Breda's complaint in the Massachusetts Superior Court, C.A. no. 10-5005 (10 pp.); C) Kindred's answer with affirmative defenses and counterclaim in civil action 10-5005 with cover letter (20 pp.); D) Physician Scheduling Services Agreement dated December 15, 2009 (9 pp.); E) Emergency Medical Services Agreement dated December 15, 2009 (10 pp.); F) email dated December 30, 2009 from Katherine Eskew; G) email dated March 8, 2010 from Katherine Eskew; H) Emergency Medical Services Agreement dated March 25, 2010 (11 pp.); I) Hospitalist Physician Services Agreement dated November 13, 2009 (9 pp.); J) a letter to Breda from Katherine Eskew dated April 6, 2010; K) a letter to Breda from Katherine Eskew dated April 8, 2010; L) letter from Katherine Eskew dated May 7, 2010; M) letter from Erik Lang dated September 8, 2011; N) Affidavit of Douglas C. Reynolds dated May 2, 2013; O) email from Brian McKenna dated January 22, 2010; and P) various legal bills from The New Law Center dated between August 31, 2011 and August 1, 2012 (10 pp.).

B. KBH's Response

Kindred asserts first that Breda's claim is predicated on a fiction because its counterclaim did not seek fees and costs for defending against his OSC charge, and that recovery of fees and costs pursuant to Mass. Gen. Laws ch. 231, § 6F is limited to fees and costs incurred in state court litigation. The hospital contends that Breda's reliance on the *Martha Washington* cases is misplaced, and that this case can be distinguished in at least two ways. First, in *Martha Washington*, it was the hotel itself that initiated litigation even before OSC had finished its investigation. Here, in contrast, Kindred took no action against Breda during the OSC investigation or even after Breda failed to file a complaint with OCAHO within ninety days of OSC's notice letter. In *Martha Washington*, the hotel sought to recover up to five million dollars, while here Kindred's counterclaim was brought under a specific state statute that does not offer recovery for defending against the first OSC charge. The hospital argues that Breda was never put in jeopardy for having initiated the OSC charge.

KBH argues in rebuttal that even if its counterclaim sought to recover attorney's fees and costs for defending against the first OSC charge, that action still does not constitute retaliation as a matter of law because even in OCAHO proceedings, respondents are authorized to seek attorney's fees under 8 U.S.C. § 1324b(h). Kindred says that, had Breda brought his first OSC charge to OCAHO, the hospital would have been entitled to seek and recover fees under § 1324b(h) at the conclusion of the case and would not have been subject to a claim of retaliation

for doing so. The hospital also contends that it "prevailed" when OSC determined there was no "reasonable cause" to believe Kindred discriminated against Breda, and when Breda did not pursue his claim with OCAHO. The hospital asserts that it is absurd to think that Breda would have been intimidated by a request for fees.

C. Discussion and Analysis

The affidavit of Douglas C. Reynolds, who represented Breda in responding to the counterclaim, states that between December 28, 2010 and August 10, 2011 the affiant had conversations with Kindred's counsel who told him that Kindred would file a counterclaim "based on Dr. Breda's having filed his claim of unfair immigration-related employment practices against Kindred with the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration-Related Employment Practices under the Unfair Immigration-Related Employment Practices Statute . . . ."

And so it apparently did. Kindred did not challenge the Reynolds affidavit or file countervailing evidence, and while KBH contends that its counterclaim is addressed only to the contract action, the face of the counterclaim reflects that the contrary is true. KBH also insists it did not seek costs and fees for the OSC investigation, but ignores its own language in the counterclaim alleging that it suffered damages in responding to the DOJ complaint, and requesting an order that Breda pay not only its costs and fees for the contract action, but also "such damages as have been sustained in consequence of Breda's violation of law, together with interest and costs."

As in any civil case, a complainant may prove a retaliation case by direct or circumstantial evidence. *Cf. U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). Direct evidence is evidence that proves the fact at issue without the aid of any inference or presumption. *See Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11 (2003). As observed in *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991), employers who discriminate are unlikely to "leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent." KBH provides the exception here because review of the multiple paragraphs of the hospital's counterclaim referring to Breda and his OSC charge reflects, contrary to KBH's representations, a strong animus against Breda for filing the OSC charge, a demand for damages the hospital allegedly incurred as a result, and a causal connection between the two.

A retaliatory motive is apparent on this record not as an inference drawn from the *McDonnell Douglas* paradigm but by direct evidence. But assuming arguendo that the *McDonnell Douglas* framework were applicable to this case, Breda satisfied the requirements of a prima facie case, as his motion points out. As a U.S. citizen, he is a protected individual; he engaged in conduct protected by the statute when he filed his first OSC charge, as was known to Kindred; Breda

suffered an adverse action in having to pay at least $13,996 to defend against Kindred's counterclaim; and the causal connection between the charge and the counterclaim is reflected in the document itself. Whether or not KBH might have filed some other counterclaim in the absence of Breda's OSC charge is unknowable. What is knowable is that the hospital would not have filed *this* counterclaim but for that charge, as is evident on the face of the pleading. It is also readily apparent that the prospect of having to pay damages is sufficiently harmful to dissuade a reasonable worker from making or supporting a charge of discrimination. *See Burlington Northern*, 548 U.S. at 57.

Breda's prima facie case is sufficient to shift the burden of production back to Kindred to provide a legitimate nonretaliatory reason for filing the counterclaim. KBH did not offer any real explanation apart from seeking to mischacterize its allegations as factual history, and arguing that the counterclaim was addressed only to Breda's contract action. It is doubtful that there can ever be a legitimate reason proffered for an action that is retaliatory on its face, but it is clear that when a respondent proffers an "explanation" that does not actually explain the reason for the challenged decision, the respondent has not satisfied its burden of production. *Cf. Mister v. Ill. Cent. Gulf R.R. Co.*, 832 F.2d 1427, 1434-35 (7th Cir. 1987) ("When the defendant pronounces a reason unrelated to the plaintiff ('a midget can't do the job,' followed by silence on the plaintiff's height), it has not adequately articulated a neutral reason within the meaning of *Burdine*."). Even if KBH's characterization of the counterclaim were to be considered as an explanation, the reason offered is clearly pretextual because it is objectively inaccurate.

Not only is Kindred's counterclaim retaliatory on its face, it is also wholly without basis in law or fact. An objectively baseless lawsuit is defined in the antitrust context as one in which "no reasonable litigant could realistically expect success on the merits." *See Prof. Real Estate Investors, Inc. v. Columbia Picture Indus., Inc.*, 508 U.S. 49, 60 (1993). A somewhat less rigorous standard is applied in the employment context when the question is not whether an ongoing lawsuit may be enjoined, but whether an already adjudicated lawsuit has been shown to be without merit. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 747 (1983). Either standard is satisfied here. Kindred's counterclaim has had its day in court and the decision of the Massachusetts court was, notwithstanding the hospital's representation that its claims were "compulsory counterclaims," that the pleading was not a valid counterclaim, and "not a cause of action."

The most obvious reason that KBH's counterclaim was objectively baseless is that Mass. Gen. Laws ch. 231, § 6 F, the law under which the counterclaim purports to have been filed, expressly provides that motions pursuant to it are to be filed only in actions "in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact." Kindred's counterclaim does not satisfy the basic requirement of the statute because no such finding, verdict, decision, award, order, or judgment had been entered

at the time the counterclaim was filed. There was accordingly no objective basis for filing it, and no objective basis upon which a reasonable litigant could have had any realistic expectation of a favorable outcome on the merits. Contrary to the terms of the statute, the pleading was filed by a nonprevailing party and couched in the form of a counterclaim denouncing Breda and seeking damages for his filing the OSC charge. The lack of any proper legal basis for Kindred's counterclaim is itself sufficient to corroborate the inference that the pleading was filed for some collateral purpose, and not with any realistic expectation of success on the merits.

Attorneys, of course, know that motions pursuant to Mass. Gen. Laws ch. 231, § 6 F are to be filed only at the conclusion of a civil case and not at the outset, and that such motions do not constitute "compulsory counterclaims." Lay people, on the other hand, including potential witnesses and potential charging parties, do not know that. As pointed out in *Bill Johnson's Restaurants,* 461 U.S. at 740-41,

> A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation . . . . [B]y suing an employee who files charges . . . or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit.

The filing of an action like KBH's counterclaim is not only adverse to Breda, but can also put others on notice that anyone who files charges or otherwise engages in protected activity faces the possibility of such litigation. The chilling effect of such a notice harms not only Breda personally, but also potential charging parties or witnesses who may become aware of KBH's counterclaim and be deterred by what facially appears to be an attendant risk of personal liability resulting from having contact with OSC or other agencies.

Enforcement of § 1324b depends upon the willingness of potential witnesses to come forward, file charges, and participate in OSC's investigatory process. *See Martha Washington II*, 6 OCAHO no. 846 at 221. If witnesses and charging parties are intimidated or threatened by the prospect of personal lawsuits, the integrity and effectiveness of the agency's investigative process is undermined. *Id.* at 221-22. This is why courts have consistently held that maintaining unfettered access to statutory remedial mechanisms is one of the primary purposes of antiretaliation provisions. *See Shell Oil*, 519 U.S. at 346. Permitting an employer to retaliate with impunity is destructive of that purpose, so the right to file charges with appropriate agencies without fear of retaliation deserves special protection. As observed in another context, civil rights laws do not exist solely for the benefit of aggrieved individuals, but also for the public good and the national interest. *Cf. McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 358 (1995). One commentator has suggested that retaliation or the threat of retaliation, of

whatever nature or severity, constitutes an attack on the integrity of the rule of law itself. *See* R. George Wright, *Retaliation and the Rule of Law in Today's Workplace*, 44 Creighton L. Rev. 749, 752, 767-68 (2011).

Finally, KBH's hypothesis that a request for costs and fees cannot be retaliatory because Breda could have filed an OCAHO complaint based on his first OSC charge, and KBH could have pursued attorney's fees under § 1324b(h) had it been the prevailing party, shifts the attention away from the issue actually presented. While there are, as KBH asserts, circumstances under which a prevailing party's attorney's fees may be recoverable after adjudicative proceedings in this forum, there are no circumstances under which fees and costs, much less damages and interest, are available for participating in an OSC investigation. No provision in 8 U.S.C. § 1324b or in its implementing regulations authorizes an award of attorney's fees to either party for initiating or participating in an OSC investigation, whether or not a complaint ensues.

Contrary to Kindred's contention that it "prevailed" in the OSC investigation, moreover, there is no "prevailing party" in such an investigation because OSC is not an adjudicative agency and it has no authority to adjudicate cases. More importantly, there is no right of recovery of costs, attorney's fees, damages, or anything else in any forum by a respondent who is the subject of an administrative investigation by OSC. No authority permits such an award, whether by an administrative law judge or by a state court, as KBH now acknowledges. Congress is well aware of how to authorize fee awards for participation in proceedings at the agency level when it wants to do that. The Americans with Disabilities Act (ADA), 42 U.S.C. § 12205 (emphasis added), provides, for example, that

> In any action *or administrative proceeding* commenced pursuant to this chapter, the court *or agency*, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . .

Had the congressional intent been to permit the award of attorney's fees to be available to respondents in investigative proceedings conducted by OSC pursuant to 8 U.S.C. § 1324b(d), the means to accomplish that end were at hand. They were not utilized.

Because the record in this matter reflects both a retaliatory motive and a lack of any reasonable basis for Kindred's counterclaim, *Martha Washington I*, 5 OCAHO no. 786 at 544, Breda's motion for summary decision will be granted as to liability. This result would not be altered if the more rigorous antitrust standard were applied because the counterclaim is objectively baseless under that standard as well.

VII. RELIEF

When a person or entity is found to have engaged in an unfair immigration-related employment practice, the law provides that an order must issue requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A). Other remedies are discretionary, 8 U.S.C. § 1324b(g)(2)(B), and should be tailored to the specific practices they are designed to address. A complainant is entitled only to remedies commensurate with the deprivation he suffered. *Cf. Iron Workers Local 455 v. Lake Const. & Dev. Corp.*, 7 OCAHO no. 964, 632, 697-98 (1997). Relief is warranted in this case only for the retaliation, not for the underlying claim. Breda is not, in other words, entitled to reinstatement, back pay, or other relief based on his original charge.

The purpose of relief is designed to restore the injured party insofar as possible to the position he would have had but for the unlawful retaliation. At minimum, this means that Breda is entitled to injunctive and declaratory relief to prevent the hospital from pursuing its retaliatory counterclaim, whether in that form or in the form of a post-adjudicatory motion. Other remedies that are appropriate in this case include an order that the hospital 1) post notices advising employees about their rights under the statute, § 1324b(g)(2)(B)(v); 2) educate its personnel about the requirements of the law, § 1324b(g)(2)(B)(vi); and 3) remove negative information from Breda's personnel file, § 1324b(g)(2)(B)(vii).

The statute governing this proceeding also gives the administrative law judge the discretion to award attorney's fees to a prevailing party in this forum if the losing party's argument is without reasonable foundation in law and fact. 8 U.S.C. § 1324b(h). While the text of the statute does not draw a distinction between awards to a successful complainant and awards to a successful respondent, OCAHO practice follows the dual standard set out in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978), for attorney's fees in cases arising under Title VII. *See, e.g., Trivedi v. Northrup Corp.*, 4 OCAHO no. 600, 103, 125 (1994). Under that standard, a prevailing plaintiff is ordinarily presumed to be entitled to an award of attorney's fees.

While this presumption would ordinarily authorize an award of attorney's fees to Breda as the prevailing party in this action, Breda is self-represented and it is well-settled law that a pro se litigant in the federal system is not entitled to claim attorney's fees for representing himself.[6] Breda says that he incurred fees of $10,000 in defending against Kindred's counterclaim in the Massachusetts action, but I am without authority to award fees based on proceedings in a different forum. To the extent, however, that at least some of Breda's attorney's fees are attributable to advice and assistance his attorney provided for purposes of this proceeding, Breda

[6] This is true even when the pro se litigant is himself a lawyer. *See Kay v. Ehrler*, 499 U.S. 432, 437 (1991); *Ray v. U.S.Dep't of Justice*, 87 F.3d 1250, 1251 (11th Cir. 1996).

will be given the opportunity to file a petition to recoup those fees.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. John A. Breda, M.D., is a citizen of the United States.

2. Kindred Braintree Hospital LLC is a limited liability company organized under Delaware law and registered to do business in the Commonwealth of Massachusetts.

3. Kindred Braintree Hospital LLC and John A. Breda, M.D., were parties to a Physician Scheduling Services Agreement and an Emergency Medical Services Agreement, each of which was dated and effective as of December 15, 2009.

4. Pursuant to a Physician Scheduling Services Agreement and an Emergency Medical Services Agreement, John A. Breda was engaged in scheduling physicians to provide overnight emergency services at Kindred Braintree Hospital LLC and also in providing overnight emergency services there himself.

5. Kindred Braintree Hospital LLC notified John A. Breda on April 6, 2010 that it would terminate both agreements in sixty days, but subsequently reinstated the Physician's Agreement briefly.

6. On May 7, 2010, however, Kindred Braintree Hospital LLC gave John A. Breda notice that it was terminating the Physician's Agreement effective July 12, 2010.

7. John A. Breda, M.D., filed a charge number 197-36-142 with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on June 2, 2010.

8. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent John A. Breda, M.D., a letter dated September 30, 2010 advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.

9. John A. Breda, M.D., filed a lawsuit in the Superior Court for the Commonwealth of Massachusetts, C.A. No. 10-5005, on December 28, 2010.

10. Kindred Braintree Hospital LLC filed an answer and counterclaim in C.A. No. 10-5005 on

August 10, 2011.

11. John A. Breda, M.D., filed a Special Motion to Dismiss Under Mass. Gen. Laws. c.231, § 59H on September 19, 2011 addressed to Kindred Braintree Hospital LLC's counterclaim in C.A. No. 10-5005.

12. Kindred Braintree Hospital LLC filed its opposition to the Motion to Dismiss in C.A. No. 10-5005 on October 10, 2011.

13. The Superior Court for the Commonwealth of Massachusetts ruled in C.A. No. 10-5005 on December 19, 2011 that Kindred Braintree Hospital LLC had no valid counterclaim and that the counterclaim was properly a post-adjudicatory motion and not a cause of action.

14. John A. Breda filed his second charge, number 197-36-148, with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on November 9, 2011.

15. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent John A. Breda a letter dated March 8, 2012 advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.

16. John A. Breda filed a complaint with the Office of the Chief Administrative Hearing Officer on June 4, 2012.

B. Conclusions of Law

1. John A. Breda, M.D., is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

2. Kindred Braintree Hospital LLC is an entity within the meaning of 8 U.S.C. § 1324b(a)(5).

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

4. John A. Breda, M.D., established a prima facie case of retaliation based on direct evidence.

5. In the event John A. Breda's prima facie case was not shown by direct evidence, it was established pursuant to the traditional standards under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) and *Lockridge v. University of Maine System*, 597 F.3d 464, 472 (1st Cir. 2010).

6. Kindred Braintree Hospital LLC established no affirmative defense to John A. Breda's

complaint.

7. Kindred Braintree Hospital LLC did not proffer a legitimate nonretaliatory reason for filing its counterclaim in C.A. No. 10-5005.

8. Kindred Braintree Hospital LLC's counterclaim in C.A. No. 10-5005 was filed in retaliation for the first charge John A. Breda, M.D., filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

9. Kindred Braintree Hospital LLC's counterclaim in C.A. No. 10-5005 was objectively baseless because no reasonable litigant could realistically have expected success on the merits. *See Prof. Real Estate Investors, Inc. v. Columbia Picture Indus., Inc.*, 508 U.S. 49, 60-61 (1993).

10. There is no genuine issue of material fact and John A. Breda, M.D is entitled to summary decision on his complaint.

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

Kindred Braintree Hospital LLC's motion for summary decision is denied. Dr. John A. Breda's motion for summary decision is granted as to liability. Kindred Braintree Hospital LLC is hereby ordered to cease and desist from pursuing either by counterclaim or by post-adjudicatory motion any damages, costs, attorney's fees, penalties, or other relief against Dr. John A. Breda based on the fact that Breda filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices. Kindred Braintree Hospital LLC is directed to amend or withdraw paragraphs 16, 17, 19, 20, 21, 22, 23, 27, 29, 30, 31, 34, 35, and 36 of his counterclaim/post-adjudicatory motion to remove from that pleading any reference to Breda's OSC charge and any request for damages, costs, attorney's fees, penalties, or other relief based on the allegations in OSC charge no. 197-36-142.

Kindred Braintree Hospital LLC is also directed to remove any negative or derogatory information from John A. Breda's personnel file or other records, and to educate its HR personnel about the requirements of 8 U.S.C. § 1324b(a)(5). Materials providing information about these requirements are available from the Office of Special Counsel for Immigration-Related Unfair Employment Practices. Kindred Braintree Hospital LLC is also directed to post the attached notice for a minimum period of 180 consecutive days commencing

on or before November 15, 2013. The notice is to be prominently posted at a minimum of six locations within the hospital facility and is not to be altered, defaced, or covered by other materials.

John A. Breda, M.D. will have until November 15, 2013 to file a petition for attorney's fees pursuant to 8 U.S.C. § 1324b(h). The petition must show the actual time expended for specific tasks and the rate at which fees are computed. Evidence as to the prevailing market rate in the relevant geographical area must be provided. *See, e.g., Shepard v. Sturm, Ruger, & Co., Inc*., 7 OCAHO no. 990, 1054, 1060-62 (1998). Kindred Braintree Hospital LLC will have until December 16, 2013 to file a response to the petition.

SO ORDERED.

Dated and entered this 10th day of October, 2013.

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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 files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than sixty (60) days after the entry of such Order.

NOTICE TO EMPLOYEES

Pursuant to an order by the United States Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, Kindred Braintree Hospital LLC has been ordered to cease and desist from retaliating against a former worker for exercising rights under the nondiscrimination provisions of the Immigration Reform and Control Act as amended, 8 U.S.C. § 1324b(a)(5).

Kindred Braintree Hospital LLC has also been ordered to educate its HR personnel about the requirements of the Act, and to post this notice.

Employees of Kindred Braintree Hospital LLC are protected against retaliation for providing information to an employer or to the federal government relating to violations of the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Employers may not intimidate, threaten, coerce, or retaliate against any individual for engaging in conduct protected by the statute. Protected conduct includes filing charges or complaints, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under this law.

For more information about these rights, you may contact the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

This is an official notice and must not be altered or defaced. The notice must remain posted for 180 consecutive days from the date of posting and must not be covered by any other material.