

resident of the United States. Id. Part I ¶ 4. On November 25, 2002, Respondent filed its Answer. The Answer denied that Complainant was terminated due to citizenship status discrimination, national origin discrimination, or retaliation. Respondent's Answer.

Respondent filed its Motion for Summary Decision on November 14, 2002. The Motion for Summary Decision argues that Complainant has “failed to allege discrimination in any manner” and was fired because he was “rude to the customers.” See Respondent's Motion for Summary Decision at 2.

According to the certificate of service dated November 12, 2002, Respondent served the Motion on Complainant by first-class certified mail, return receipt requested, postage prepaid. As provided by 28 C.F.R. §§ 68.8(c)(2), 68.11(b), and 68.38(a), Complainant had fifteen days after the date of service to file his response to the Motion. Thus, Complainant's response to Respondent's Motion for Summary Decision had to be filed by Wednesday, November 27, 2002. As of the date of this Order, this Court has not received a response to the Motion for Summary Decision or a request for additional time to respond from Complainant.

III. STANDARDS GOVERNING MOTIONS FOR SUMMARY DECISION

The OCAHO Rules of Practice and Procedure (OCAHO Rules) permit me to “enter a summary decision for either party 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 a party is entitled to summary decision.” See 28 C.F.R. § 68.38(c) (2002). OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure (FRCP) 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, FRCP 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. See United States v. Aid Maintenance Co., Inc., 6 OCAHO no. 893, 810, at 813 (1996), 1996 WL 73594, at *3; United States v. Tri Component Prod. Corp., 5 OCAHO no. 821, 765, at 767 (1995), 1995 WL 813122, at *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the case are deemed “material.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, an issue of material fact must have a “real basis in the record” to be considered “genuine.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them “in the light most favorable to the non-moving party.” Id. at 587.

The party requesting summary decision bears the initial burden of asserting the absence of any genuine issues of material fact by “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting in part FRCP 56(c)). After the moving party has met its initial burden, the nonmoving party must then come forward with “specific facts showing that there is a genuine issue for trial.” Matsushita, 475 U.S. at 587. In seeking to

satisfy this burden, the nonmoving party may not rely on mere conclusory allegations or denials contained in its pleadings; however, the nonmoving party's evidence need not be produced "in a form that would be admissible at trial. . . ." Celotex Corp., 477 U.S. at 324; see also 28 C.F.R. § 68.38(b) (2002), Fed. R. Civ. P. 56(e).

IV. ANALYSIS

A. Factual Finding

Complainant asserts that Respondent engaged in national origin discrimination, citizenship status discrimination, and retaliation. Respondent's Answer and Motion for Summary Decision dispute those allegations. Respondent's Motion for Summary Decision is supported by documentation and this Court has not received any response from Complainant. Consequently, pursuant to the OCAHO Rules of Practice and the pertinent case law cited above, I accept the uncontradicted assertions in Respondent's supporting documents attached to the Motion, as true. Having accepted the uncontradicted supporting documents as true, I find that they establish one material fact: Respondent employed more than fifteen employees at all times relevant to this discrimination claim. Complaint (attached OSC Charge), Respondent's Motion for Summary Decision, Exhibit 2. Indeed, in the Charge Form filed with OSC, at ¶ 3, Complainant concedes that Respondent has fifteen or more employees and handwrites next to the question "approx. 30 employees."

B. Legal Conclusions

After establishing the factual finding in this case, the remaining legal issue is whether Complainant has a viable national origin discrimination claim under 8 U.S.C. § 1324b.

This Court does not have jurisdiction over national origin claims that are covered under section 703 of the Civil Rights Act of 1964. 8 U.S.C. § 1324b(a)(2)(B). During the relevant time period, Respondent employed more than fifteen full-time employees and consequently any acts by Respondent constituting national origin discrimination would be covered by section 703 of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e(b), 2000e-2 (2002). Accordingly, Respondent's Motion for Summary Decision on Complainant's claim of national origin discrimination is granted.

Respondent argues that Complainant "failed to allege discrimination in any manner." This baffling assertion is untrue, as Complainant alleges citizenship status discrimination and retaliation on pages 3, 5, and 6 of the Complaint.

Respondent fails to demonstrate that there is no genuine issue of material fact with respect to Complainant's citizenship status claim. In its Motion for Summary Decision, Respondent refutes the citizenship status discrimination claim by pointing to the payroll records and stating "there was no issue hiring Hispanic workers." Respondent's Motion for Summary Decision at 2, Exhibit 2. Rebutting a citizenship discrimination

claim requires a showing that Respondent does not discriminate based on an individual's country of citizenship or an individual's citizenship status in this country. A showing that Respondent hires many Hispanic workers may refute a national origin discrimination claim, but not a citizenship discrimination claim. Accordingly, Respondent's Motion for Summary Decision on the citizenship status discrimination claim is denied because it has failed to show that there is no genuine issue of material fact.

Furthermore, Respondent fails to present any argument regarding Complainant's retaliation claim in its Motion for Summary Decision. Respondent has not shown that there is no genuine issue of material fact with regard to Complainant's retaliation claim, thus Summary Decision will not be granted on Complainant's retaliation claim. See generally Cruz v. Able Service Contractors, Inc., 6 OCAHO 144, 149-50 (1996), 1996 WL 229220 (OCAHO) (OCAHO has jurisdiction over a retaliation claim, even in the absence of a citizenship status discrimination claim or a national origin discrimination claim).

In the Second Circuit Court of Appeals, a party seeking summary judgment against a pro se party must inform the non-moving party that failure to respond to the motion may result in a judgment entered against the pro se party. Champion v. Artuz, 76 F.3d 483, 486 (2d Cir. 1996). A court should not enter summary judgment against a plaintiff who has not been given notice that failure to respond would be considered a default. Id. Respondent failed to include this warning in its Motion for Summary Decision. However, for purposes of this Motion, that deficiency is of no consequence because the grant of summary decision on the national origin discrimination claim was based primarily on assertions made by Complainant in his Complaint. Complainant conceded that Respondent employed more than fifteen employees, which deprives this court of authority to hear the national origin discrimination claim. The citizenship status discrimination and retaliation claims still remain and summary decision is denied with respect to those causes of action. If another motion for summary decision is made, Respondent shall include language in the motion informing the pro se Complainant of the consequences if he fails to oppose the motion.

V. CONCLUSION

For all of the reasons above, I grant Respondent's Motion for Summary Decision with respect to Complainant's national origin discrimination claim under 8 U.S.C. § 1324b. Respondent's Motion for Summary Decision is denied with respect to Complainant's citizenship status discrimination claim and retaliation claim under 8 U.S.C. § 1324b. The uncontradicted facts demonstrate that Respondent employs more than fifteen employees and Complainant's national origin claim is covered under section 703 of the Civil Rights Act of 1964. Therefore, I grant Respondent's Motion for Summary Decision only with respect to Complainant's national origin discrimination claim.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE