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

November 21, 2014

R.O.,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 13B00085
	)	
CROSSMARK, INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

Appearances:

Martin Brown
For the complainant

Michael Bell
For the respondent

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2012). R.O. filed a complaint in which she alleged that Crossmark, Inc. discriminated against her on the basis of her citizenship and national origin, retaliated against her for engaging in activity protected under 8 U.S.C. § 1324b, and engaged in document abuse. Crossmark filed an answer denying the material allegations of the complaint and raising seven affirmative defenses.

Crossmark also filed a simultaneous motion for partial dismissal for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. R.O. filed a response to the motion stating that she would withdraw her claims of discrimination based on citizenship

status and national origin, acknowledging first, that for purposes of a claim of citizenship status discrimination she was not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3), and second, that her claim based on national origin discrimination was covered under section 703 of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq. (Title VII). 8 U.S.C. § 1324b(a)(2)(B). Crossmark's motion for partial dismissal was accordingly denied as moot, and R.O.'s claims in this proceeding are limited to her allegations of retaliation and document abuse.

Presently pending, fully briefed, and ready for resolution are the parties' cross-motions for summary decision, as well as R.O.'s motion for sanctions, to which Crossmark filed a response in opposition.

II. BACKGROUND INFORMATION

Crossmark is a corporation that provides merchandising services to manufacturers and retailers throughout the United States and has its headquarters in Plano, Texas. R.O. was born in Nairobi, Kenya, and is an alien authorized to work in the United States. Crossmark hired R.O. on June 6, 2011 to work as a project administrator in the company's Plano office. R.O. was scheduled to work Tuesdays through Saturdays, and to be off on Sundays and Mondays. At all times pertinent to this matter, R.O.'s direct supervisor was client services manager Cynthia Wood; the regional employee relations manager was Esmeralda Graham; and the company's human resources manager was Teresa Hicks.

When she was initially hired, R.O.'s Employment Authorization Document (EAD) was scheduled to expire on April 18, 2012. As that date approached, Crossmark sent R.O. periodic email notices advising her that she needed to renew her authorization before April 18, 2012.[1] Crossmark's Full-Time Associate Policy Manual provides, "[s]hould you be hired under a temporary work permit with a future expiration date on your right-to-work documentation, it is your responsibility to provide the Company with proof of extension of this date. Failure to do so will result in your suspension or termination of employment." R.O. timely renewed her EAD and presented Crossmark with a new authorization document that was scheduled to expire on March 8, 2013.

Starting ninety days in advance, Crossmark's internal I-9 management system automatically generates periodic reminder notices that are forwarded to employees whose EADs are approaching their expiration dates. Teresa Hicks sent a series of such notices to R.O. starting in December 2012, reminding R.O. that her work authorization was set to expire on March 8, 2013

[1] While Crossmark characterized these notices as courtesy reminders, R.O. characterized them as harassment.

and that "[i]n order for us to continue to employ you, we must re-verify your employment eligibility." On Thursday, March 7, 2013, when R.O. still had not presented a new work permit, Wood and Graham convened a meeting with her. A series of emails between Graham and Wood on March 6-7, 2013, reflect Wood's concerns that despite all that R.O. had been told, she still appeared to believe that her job would be held for her. The purpose of the March 7, 2013 meeting was to make clear to R.O. that it would not.

Graham told R.O. at the meeting that, unless her card was renewed, she would be terminated at the end of the next day, Friday March 8, 2013, she would lose her health benefits, and she would be put on COBRA.[2] Graham told R.O. that Crossmark would send her last paycheck to her and would also pay her for any unused, accumulated vacation time. She also told R.O. that she would have to clean out her desk the next day and return company assets and that she would have to reapply for employment when she obtained a new work permit. Immediately after this meeting, R.O. told Cynthia Wood that the company was clueless about immigration law and that she intended to report Crossmark to USCIS[3] to get help and training for the company. She told Wood again the next day that she would report Crossmark, but provided no specific details about what or to whom she would report.

At the end of the day on Friday, March 8, 2013, R.O. cleaned out her desk, turned in her laptop and employee badge, and took her personal effects with her. Hicks prepared a personnel action form (PAF) for R.O. that same day. A PAF consists of three parts: the form itself, an Asset Recovery Checklist, and a Returned Asset Receipt. The form Hicks prepared reflects that Cynthia Wood collected all of R.O.'s company-issued equipment on March 8, 2013. Wood also prepared a separate PAF for R.O. that day; she testified at her deposition that she was previously unaware of a company policy pursuant to which HR prepared the PAF when a termination was the result of work-authorization issues.

There were some communications between R.O. and Crossmark personnel after March 8, 2013. On Saturday, March 9, 2013, Wood sent a text to R.O. asking if R.O. could help with a credit card issue. On Monday, March 11, 2013, Wood sent R.O. a text asking about an accounts payable code for certain A&P events, and R.O. responded. On Tuesday, March 12, 2013, Wood sent R.O. another text asking about an email that referred to some audit reports not being posted, and requesting R.O. to call Jessica Brade to assist her with the audit reports. R.O. did so. She also responded to another text from Wood asking about a grand-opening event. R.O. kept a log of these contacts and estimated that she spent approximately four hours on Crossmark business

[2] The reference is to insurance benefits available to a terminated employee pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985.

[3] The reference is to the United States Citizenship and Immigration Services, a component of the Department of Homeland Security.

between March 11 and March 14, 2013.

R.O. received a text message from USCIS on the afternoon of Tuesday, March 12, 2013 notifying her that her new EAD had been approved. R.O. then telephoned and advised Graham that her card had been renewed and was in production. At 10:30 a.m. on Thursday, March 14, 2013, R.O. also sent Wood a text message saying she had called "the Washington, D.C. Immigration office" and that "[t]hey have an attorney on staff for workers (sic) rights who will call me back. This isn't to admonish anyone but crossmark (sic) HR really needs education on immigration matters." [4] R.O. says she also spoke with Wood on the phone that morning and told Wood she was going to contact DOJ or report Crossmark to DOJ.

R.O. also sent Wood a text message that day saying her new card was in the mail. R.O. sent Wood another text at 6:51 p.m. on Thursday, March 14, 2013, asking for the requisition number for the project administrator job so she could start applying. She advised Wood that she anticipated her new card would arrive "latest Monday morning." At 8:48 p.m. on March 14, 2013, R.O. sent another series of texts to Wood including one stating, "Req opened and filled mysteriously after I told you I would contact DOJ about the way I was treated. You agreed with me reporting crossmark then went behind my back to fill the position." She also texted, "I see you accepted the req for Greg[5] to replace me," and that a "scheme was put in place to replace me before dept of justice (sic) contacts crossmark."

R.O. filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on March 26, 2013 alleging that she was subjected to discrimination, retaliation, and document abuse,[6] and OSC sent R.O. a letter on May 14, 2013 advising her that she had the right to file a complaint. The parties had some correspondence after that, and on June 10, 2013, Crossmark sent R.O. a letter stating that, while the company did not believe R.O. was entitled to any unpaid wages, it was sending her a check, out of an abundance of caution, for $60.86 "representing wages [R.O.] claims are owed for four hours of conversation she allegedly had with Cynthia Wood from March 9, 2013 through March 13, 2013."

R.O. filed a complaint with this office on June 28, 2013, and all conditions precedent to the

[4] R.O. said in her deposition that the call was to the National Immigration Law Council.

[5] R.O. said in her deposition that she accessed Wood's email account and learned from doing so that the position had been filled by Greg Castillo. Crossmark denies that R.O.'s was the same position for which Castillo was hired.

[6] R.O.'s charge reflects that she visited the Dallas District Office of the Equal Employment Opportunity Commission (EEOC) on March 26, 2013, and that EEOC referred her to DOJ.

institution of this proceeding have been satisfied.

III. THE PARTIES' CROSS MOTIONS FOR SUMMARY DECISION

A. Standards to be Applied

1. Retaliation

It is an unfair immigration-related employment practice for an employer "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." 8 U.S.C. § 1324b(a)(5). To qualify as protected conduct for purposes of this provision, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *See, e.g., Harris v. Haw. Gov't Emps. Ass'n*, 7 OCAHO no. 937, 291, 295 (1997);[7] *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO jurisdiction over threats to report employer to "EEOC, the Immigration Department (sic), the American Counsel General, the ALCU (sic), the NAACP, Georgia Legal Services," or agencies other than OSC or this office); *see Palacio v. Seaside Custom Harvesting*, 4 OCAHO no. 675, 744, 754-56 (1994) (no cause of action under § 1324b(a)(5) where employee complained to legacy INS that employer was not complying with § 1324a).

In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination. *See, e.g., Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 154-55 (1996). The familiar burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) is applied to retaliation claims,

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[7] 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.

just as it is to other claims of discrimination. *See Breda v. Kindred Braintree Hospital, L.L.C.*, 10 OCAHO no. 1202, 7 (2013); *Gorman v. Verizon Wireless Tex., L.L.C.*, 753 F.3d 165, 170-71 (5th Cir. 2014). A prima facie case of retaliation is established 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 Breda*, 10 OCAHO no. 1202 at 8; *see also Willis v. Cleco Corp*., 749 F.3d 314, 317 (5th Cir. 2014) (implicitly incorporating the element of employer knowledge into the element of causality). Such a showing shifts the burden to the employer to set forth a legitimate, nondiscriminatory reason for the challenged employment action. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013).

The employer's burden is one of production, not persuasion, and the complainant retains the ultimate burden of persuasion throughout. *Ameristar Airways, Inc. v. DOL*, 650 F.3d 562, 567 (5th Cir. 2011). The employer's nondiscriminatory explanation dispels any inference of retaliation, after which the employee must show that the proffered explanation is a pretext and was not the real reason for the decision. *Id.* A complainant may establish that the employer's explanation is pretextual by showing a prohibited motive more likely caused the adverse employment decision. In *Ameristar*, for example, a finding of pretext was shown by examining the employer's series of constantly shifting and evolving explanations for its decision. *Id*. at 569 . Pretext may also be established by evidence that similarly situated individuals who did not engage in protected conduct were more favorably treated, or by any other evidence demonstrating that the employer's explanation is unworthy of credence. *See generally Haire v. Bd. of Supervisors of LSU Agric. & Mech. Coll*., 719 F.3d 356, 363 (5th Cir. 2013); *Jenkins v. Cleco Power, L.L.C.*, 487 F.3d 309, 316-17 (5th Cir. 2007); *Medina v. Ramsey Steel Co*., 238 F.3d 674, 684 (5th Cir. 2001).

To raise an inference of pretext, the employee must produce or point to substantial evidence. *See Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 402-03 (5th Cir. 2001). Evidence is substantial when "it is of such quality and weight that reasonable and fair-minded men (sic) in the exercise of impartial judgment might reach different conclusions." *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996)(quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

2. Document Abuse

It is unlawful for an employer to hire or continue to employ an alien in the United States knowing that the alien is or has become unauthorized for employment. 8 U.S.C. § 1324a(a)(1), (2). Employers are obligated under the employment eligibility verification system to physically examine documents enumerated in a List of Acceptable Documents, 8 U.S.C. § 1324a(b);

8 C.F.R. § 274a.2(a)(3), (b)(1), and to attest under penalty of perjury to the examination of original documents to ensure that their employees are eligible for employment in the United States.

Document abuse occurs when an employer requests, for the purposes of satisfying section 1324a(b), more or different documents than are required or refuses to honor documents tendered that reasonably appear to be genuine and to relate to the individual, and does so with discriminatory intent. 8 U.S.C. § 1324b(a)(6). The relative burdens of proof and production in a document abuse case are allocated in the same manner as in any other discrimination case using the traditional burden-shifting analysis originally set out in *McDonnell Douglas*.

B. R.O.'s Motion

R.O. asserts that the central issue in this case is when she was actually terminated. She denies that her discharge took place on Friday, March 8, 2013, when her authorization expired, but says instead that she continued to be a Crossmark employee until Thursday, March 14, 2013. In support of this view, she points out that Wood sent an email to Crossmark partners on March 10, 2013 stating that "[R.O.] will be off for an indefinite period of time," that she continued to perform work for Crossmark until March 14, 2013, and that she was paid for work she performed for the company between March 9 and March 14, 2013. R.O. also points to the confusion about whose responsibility it actually was to complete her final personnel action form, as well as to the discrepancies in the conflicting forms completed by Hicks and Wood on March 8, 2013. The form Teresa Hicks prepared said the reason for R.O.'s termination from Crossmark was "Voluntary—Work authorization." The form Wood prepared said the reason for R.O.'s exit was "Voluntary—Personal (school, home, family)."

R.O. also contends that there is no basis for Crossmark's position that it was required to terminate her, because the company policy gave it the option of suspending her. She also asserts she had a valid work permit for each day that she was actually scheduled to work. R.O. points out that she still had a valid permit on Friday, March 8, that she was not scheduled to work on Saturday, March 9; Sunday, March 10; or Monday, March 11, and that her permit was renewed as of Tuesday, March 12, 2013. She contends that Crossmark knew she had a valid permit after March 8, 2013, that Crossmark continued to employ her, and that the company so represented to its vendors.

R.O.'s motion asserts further that she started raising issues with management as early as January 19, 2012 and March 19, 2012, about harassing email notices to employees, and further that she advised her supervisors on March 7 and 8, 2013 that Crossmark needed training on immigration issues. R.O. contends that she has satisfied the requirements to show a prima facie case of retaliation because she informed Cynthia Wood on March 7, 2013 that she would report

Crossmark to USCIS, and that immediately after she told Cynthia Wood on the morning of March 14, 2013 that she would contact DOJ, she was terminated. She says the close temporal proximity between her threat to contact the Department of Justice and the adverse employment consequence is sufficient to raise an inference of retaliation. R.O. says further that Crossmark's purported reason for terminating her, that her work permit expired, has no basis in fact and is insufficient to explain Crossmark's actions.

R.O.'s motion was accompanied by exhibits consisting of: C-1) excerpts from R.O.'s deposition transcript (63 pp.); C-2) excerpts from Cynthia Wood's deposition transcript with deposition exhibits (68 pp.); C-3) excerpts from Esmeralda Graham's deposition transcript with deposition exhibits (64 pp.); C-4) excerpts from Babatunde Oyedipe's deposition transcript with deposition exhibits (42 pp.); C-5) R.O.'s Employment Authorization Document; C-6) facsimile from U.S. Citizenship and Immigration Service; C-7) email dated March 8, 2013 from R.O. to Cynthia Wood, Esmeralda Graham, and Teresa Hicks; C-8) Texas Workforce Commission documents (7 pp.); C-9) OSC charge forms (3 pp.); C-10) Crossmark's objections and response to R.O.'s first request for production; C-11) R.O.'s renewed work permit; C-12) email dated March 10, 2013 from Cynthia Wood to Crossmark partners; C-13) paycheck and payment request form (2 pp.); C-14) Form 1099, C-15) Form W-2; C-16) Crossmark's offer letter to R.O.; and C-17) Crossmark's Full-Time Associate Policy Manual (3 pp.).

C. Crossmark's Response

Crossmark's response says that R.O. characterizes disputed facts as undisputed and makes many assertions that are either factually incorrect or unsupported by the record. The company says R.O. presented no evidence whatsoever to contradict two essential dispositive facts: first, that Crossmark terminated her on March 8, 2013 because her EAD expired, and second, that Teresa Hicks, the employee responsible for the decision to terminate R.O., had no idea that R.O. engaged in any statutorily protected activity, if she did, prior to her termination.

Crossmark's response denies absolutely R.O.'s assertions that she was still employed at any time after March 8, 2013, and that R.O. worked from home as a Crossmark employee. Crossmark notes that it would have been illegal for the company to employ R.O. after her authorization expired on March 8 and that any payment the company made to her in June 2013 was in response to R.O.'s settlement demands and is inadmissible under Rule 408 of the Federal Rules of Evidence. The company says Wood made work-related contacts with R.O. after her termination just as she did with other recently terminated employees when doing so would assist in providing services to Crossmark's clients, but such contacts did not alter R.O.'s status as a terminated employee.

While R.O. asserts that she knew of no other employee who was terminated for failing to renew

an EAD, Crossmark says this is factually incorrect. Teresa Hicks testified in her deposition that company policy was to terminate every employee who failed to timely renew an expiring temporary work permit, and Crossmark's response to R.O.'s amended interrogatories indicates that a total of eighty employees were terminated company-wide between January 2010 and March 2013 for this reason. Crossmark's first supplemental response to R.O.'s interrogatories provided R.O. with the names and addresses of four other specific individuals who were terminated from the Plano facility during the same period for precisely the same reason that R.O. was terminated. Crossmark contends as well that R.O. fails to show a prima facie retaliation case because no causal link is even possible where R.O.'s termination occurred six days before she told Wood she would contact the Department of Justice. R.O. was told unequivocally starting by at least February 2013 that she would be terminated if her EAD was not renewed by March 8, 2013.

D. Crossmark's Motion

Crossmark's motion reiterates first that R.O. was terminated on March 8, 2013 because her EAD expired that day, that R.O. was well aware of the company policy, and that R.O. had been specifically and repeatedly warned for months in advance that this was going to happen on March 8, 2013 if her EAD was not renewed by then. Second, Crossmark points out that Teresa Hicks had no idea on March 8, 2013 that R.O. had engaged in any protected activity, and, moreover, that no arguably protected activity occurred until at least six days after R.O. had already cleaned out her desk and should have understood that her job was not being held for her.

The company also says that after R.O. was terminated, she secretly accessed and read Wood's emails and saw that Crossmark had posted a job opening for a project administrator on March 4, 2013. Although R.O. characterizes the posting of this position as retaliatory, Crossmark says it obviously could not have been in retaliation for protected activity R.O. engaged in on March 14, 2013 because the posting had already been made ten days earlier on March 4, 2013.

Crossmark's motion was accompanied by exhibits consisting of: R-1)[8] excerpts from R.O.'s Deposition (pp. 1-40); R-2) R.O.'s Employment Authorization Document, valid from April 20, 2011 to April 18, 2012 (p. 41); R-3) digital signature page for R.O.'s receipt of Crossmark's

[8] Instructions set forth in the order for prehearing statements in this matter indicated that respondent's exhibits should be labeled sequentially starting with R-1. While Crossmark followed these instructions with respect to exhibits with its prehearing statement, it disregarded them when submitting these exhibits. Crossmark instead submitted one appendix with pages numbered sequentially 1-122. Crossmark's appendix will be conformed to the proper format, while preserving the page numbers of the original appendix. For instance, the notation "pp. 1-40" indicates that this exhibit can be found on pages 1-40 of the appendix.

policy manual (p. 42); R-4) Crossmark's policy manual (pp. 43-57); R-5) R.O.'s OCAHO complaint (pp. 58-72); R-6) letter dated June 10, 2013 from Michael Bell to Martin Brown (pp. 73-76); R-7) email containing re-verification reminder from Teresa Hicks to R.O., dated February 1, 2013, with attachments (77-82); R-8) R.O.'s Employment Authorization Document, valid until March 8, 2013 (p. 83); R-9) emails between R.O. and Teresa Hicks from February 1, 2013 to March 4, 2013 (pp. 84-92); R-10) email from R.O. to Esmeralda Graham dated March 8, 2013, with attachments (pp. 93-95); R-11) Crossmark's asset recovery checklist for R.O. (p. 96); R-12) emails from R.O. to Crossmark leadership, from March 14, 2013 to March 18, 2013 (pp. 97 - 101); R-13) various printouts from Crossmark's database (pp. 102-112); and R-14) excerpts from Cynthia Wood's deposition (pp. 113-122).

E. R.O.'s Response

R.O. responds by contending that company policy requires that managers, not the HR department, be responsible for terminating employees, and that Cynthia Wood was therefore the decisionmaker responsible for her termination. She points to Crossmark's termination policy as well as to the deposition of Babatunde Oyedipe, the regional manager for Crossmark's Walmart events team in arguing that managers have the final say-so on terminating employees. R.O. says it makes "perfect sense" that managers have the final say-so because managers have first-hand knowledge of an employee's performance. R.O. also criticizes the fact that the affidavits of Teresa Hicks and Cynthia Wood were prepared so close to the deadline for dispositive motions, and says Crossmark "continues to 'cook up' documents to substantiate its pretextual explanation." R.O. says further that Hicks' affidavit is defective because it does not expressly state that Hicks was the decisionmaker, or even use that term. It says only that Hicks completed a PAF, but Cynthia Wood also completed a PAF that day.

R.O.'s response contends that the reason R.O. cleaned out her desk on March 8, 2013 was not because she was terminated, but just in case her permit was not renewed in time, and it actually was renewed in time. She says the statement Wood issued to vendors stating that R.O. would be off for an indefinite period meant that R.O. was suspended pending her renewed permit. R.O. contends that Crossmark's explanation is a pretext because she had a valid permit for each day she was actually scheduled to work, and the company knew that she did.

The response was accompanied by exhibits consisting of C-1) excerpts from the deposition of R.O. (17 pp.); C-2) excerpts from the deposition of Cynthia Wood (6 pp.); C-4) excerpts from the deposition of Babatunde Oyedipe (6 pp.); and C-18) Crossmark's Termination Procedures (3 pp.).

IV. DISCUSSION AND ANALYSIS

A. Document Abuse

The nature of R.O.'s document abuse claim is not entirely clear and her motion does not directly or specifically address the elements of a cause of action for document abuse. Part V of her complaint, the section that addresses document abuse, says in pertinent part that Crossmark "refused to accept claimant's renewed work permit." To the extent R.O. complains of Crossmark's failure to accept what she characterizes as a valid permit for every day she was scheduled to work between March 8 and March 12, 2013, the record does not support a claim for document abuse.

Employers are required for purposes of verification or reverification under § 1324a and 8 C.F.R. § 274a.2 to examine specific documents that are enumerated on a List of Acceptable Documents. 8 C.F.R. § 274a.2(b)(1)(v). That list does not include a text message from an employee stating that receipt of a document is anticipated. It is the original document itself that must be presented to the employer for physical examination.[9] Contrary to R.O.'s assertion that she had a "valid permit" as of March 12, 2013, moreover, the record reflects that while R.O. was informed on March 12 of the renewal of her authorization, she did not have the new document in her possession and could not possibly have presented the document to Crossmark for physical examination at any time up to and including March 14, 2013. According to a text she sent, R.O. did not anticipate receiving the document in the mail until March 18, 2013.[10]

Document abuse occurs when an employer refuses to accept a document that reasonably appears to be genuine and to relate to the employee, or requests more or different documents than are required for purposes of employment eligibility verification. 8 U.S.C. § 1324b(a)(6). Crossmark could not have refused to accept R.O.'s new EAD because R.O. never presented it. An employer's refusal to accept the promise of a document in lieu of the actual document does not constitute document abuse. Because the reverification process was never engaged, R.O.'s claim of document abuse is unsupported by evidence and her motion for summary decision will be denied with respect to that claim.[11]

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[9] In some circumstances, an employer must accept a receipt for the application of a replacement document, 8 C.F.R § 274a.2(b)(1)(vi), but such circumstances are not present here.

[10] R.O. said in her deposition, however, that the document was received by her attorney's office on March 13 or 14, and that she went to pick it up "later on."

[11] Although R.O. also asserted in her complaint and deposition that Crossmark "requested an I485 receipt," she neither elaborated upon nor offered evidence with respect to this allegation and it is deemed waived.

B. Retaliation

Although R.O. is not a protected individual within the meaning of 8 U.S.C. §1324b(a)(3), she nevertheless has standing to maintain an action for retaliation because, unlike §1324b(a)(1)(B), §1324b(a)(5) protects "any individual." The parties address at length the issue of when and by whom R.O. was terminated. Other critical questions, however, also include when R.O. first engaged in conduct protected under § 1324b(a)(5), when the decision to terminate R.O. was actually made, and the precise sequence in which various events, including her termination, occurred.

When Did R.O. Engage in Statutorily Protected Conduct

It is beyond cavil that R.O. engaged in quintessentially protected conduct on March 26, 2013 when she filed a charge with OSC specifically complaining of discrimination, retaliation, and document abuse. Her charge alleged that Cynthia Wood "found out I would report the company for discrimination, egged me on to do so, as she was a witness, then she turned around and conspired with her boss and HR to replace me within minutes of knowing I would contact the US Dept. of Justice."

It is also clear, however, that R.O.'s vague and nonspecific statements on March 7 and March 8 about reporting violations of immigration law to USCIS or other unidentified entities do not constitute conduct protected by § 1324b(a)(5). *See De Araujo*, 10 OCAHO no. 1187 at 9-10; *Torres v. Pac. Cont'l Textiles, Inc.*, 10 OCAHO no. 1203, 5-6 (2013). To the extent R.O. made complaints about Crossmark's lack of knowledge of immigration law or noncompliance with the requirements of § 1324a, these complaints do not constitute conduct protected under § 1324b either, nor do her comments that Crossmark was clueless about immigration law and generally needed education on the subject. R.O.'s motion for summary decision asserts in part that she was terminated because she "brought her concerns regarding the company's misapplication of immigration laws to those responsible for applying those laws," but this generalized assertion fails to state a claim upon which relief may be granted under § 1324b. *See Cavazos v. Wanxiang Am. Corp.*, 10 OCAHO no. 1138, 1-2 (2011); *Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 813-14 (7th Cir. 2003) (observing that § 1324b(a)(5) does not provide a remedy for individuals who filed a charge or complaint about violations of immigration law rather than about discrimination).

While the parties appear to assume, moreover, that R.O.'s statement to Wood on March 14, 2013 that she would contact DOJ or report Crossmark to DOJ does constitute protected conduct, this conclusion is by no means self-evident where R.O. made no mention either of discrimination or of OSC. The statutory language refers specifically to OSC, not to DOJ as a whole. *See Adame v.*

Dunkin Donuts, 5 OCAHO no. 722, 1, 6-8 (1995) (stating that where complainant made no reference to OSC prior to her discharge, complaint fails to state a claim upon which relief may be granted). Neither is there evidence that R.O. ever told anyone at Crossmark prior to filing her charge that her complaints were about discrimination, rather than about violations of immigration law. Assuming arguendo that R.O.'s bare statement about contacting or reporting to DOJ could qualify as protected activity, March 14, 2013 is the earliest possible date on which R.O. can be found to have engaged in protected activity.

When was the Decision to Terminate R.O. Made

While Crossmark's written policy provides the option of suspension as well as termination for employees whose temporary work authorizations expire, the evidence reflects that Crossmark's consistent policy and practice was to terminate employees whose temporary work permits were not renewed prior to their expiration dates. Crossmark pointed to evidence that during the period from January 2010 to March 2013, eighty employees were terminated company-wide when they failed to present new authorization documents prior to the expiration of their old ones, including four employees, in addition to R.O., from the Plano facility. The evidence reflects further that pursuant to this practice, R.O. was told repeatedly starting in December 2012, ninety days prior to the expiration of her permit, that her employment would be terminated on March 8, 2013 if her EAD document was not renewed by then.

R.O. characterizes the decision to discharge her as the sudden and spontaneous reaction of Cynthia Wood "within minutes of knowing I would contact the US Dept. of Justice," and the parties debate vigorously as to whether it actually was Teresa Hicks who made the decision on March 8, 2013 or Cynthia Wood who made it on March 14, 2013. But the termination of R.O.'s employment appears instead simply to be the inexorable consequence of Crossmark's decision to follow a pre-existing and facially neutral policy and practice of terminating all its employees who failed to renew a temporary work permit prior to its expiration date. R.O. identified no similarly situated individual who was offered suspension in lieu of termination, and there is not a scintilla of evidence that R.O. was treated any differently from any other similarly situated employee who didn't engage in protected conduct, but who did fail to present a new EAD prior to the expiration of the old one.

An adverse employment action occurs when the employment decision is made and communicated to the affected employee. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 77-80 (1994); *Chester v. AT&T. Co.*, 907 F. Supp. 982, 985 (N.D. Tex. 1994). The focus is on the decision itself and not on the date the inevitable consequences of the decision become most painful. *Ricks*, 449 U.S. at 258. In *Williams v. Conoco, Inc.*, 860 F.2d 1306, 1307-08 (5th Cir. 1988), for example, where the employee was told on November 3, 1986 that she would be laid off effective December 31, 1986,

the court found that the date of the adverse action was the date of notification, not the date of the discharge itself. *See also Jay v. Int'l Salt Co*., 868 F.2d 179, 180-81 (5th Cir. 1989). From this perspective, it appears that the decision to terminate R.O. unless she timely presented a new EAD was not made on March 8 or March 14, 2013 but well in advance of that time, and that, whoever made it, the decision itself was clearly communicated to R.O. in a series of reminders commencing in December 2012.

Because Crossmark's internal I-9 management system generated the reminder notices automatically, pinpointing a particular "decisionmaker" other than the HR department itself is problematical. R.O. referred to Hicks, the head of HR, as a "rubber stamper" or "paper pusher," and in one sense she was, because terminating R.O. on March 8, 2013 was simply a ministerial act carrying out an employment decision that had already been made well in advance of the actual date of termination.

When Was R.O. Actually Terminated

The theory that Crossmark would have spent three months trying to make clear to R.O. that she would be discharged on March 8, 2013 if she failed to present a valid EAD, including most emphatically at a meeting the day before, only to change its mind without comment or explanation and retain her as an employee, lacks any substantial evidentiary basis and requires a considerable stretch of the imagination. R.O. said in her deposition that, "I felt I was fired on March 14, 2013 because that's when I stopped receiving any communication from Cynthia or Crossmark." But it is not an employee's feeling or belief that determines whether she was an employee or when she ceased to be one.

While R.O. asserts that she cleaned out her desk just in case her permit was not renewed on time, it appears that she was warned for three months that she would be terminated and that Esmeralda Graham told her unequivocally more than once on March 7 that her employment would end the next day. And so it did. Notwithstanding R.O.'s feeling, the only reasonable inference to be drawn from the objective evidence is that, whether or not she accepted the fact, R.O.'s status as a Crossmark employee ended on March 8, 2013. Her subjective feeling or belief alone cannot change her employment status, nor can it create a genuine issue of material fact.

Assuming arguendo, that R.O. could state a prima facie case, Crossmark set forth its nondiscriminatory policy of terminating employees whose work authorization documents expired, and provided evidence that four other similarly situated employees at the Plano facility who did not engage in protected activity were also terminated upon the expiration of their work authorization documents. The burden is thereby shifted to R.O. to identify evidence of pretext.

Whether Crossmark's Explanation is Pretextual

R.O.'s argument that the explanation is pretextual rests on three points. First, R.O. points to an opaque memo Wood sent to vendors on March 10, 2013 advising them about a change in contact points for outside agency staffing. The memo states that R.O. will be off "for an indefinite period," and R.O. says this shows she was still employed. Cynthia Wood testified in her deposition, however, that HR instructions are that the company does not tell outside parties that an employee has been terminated. It is hardly to be expected that an employer would announce a termination to its clients or otherwise publicize the fact that an individual has been discharged.

Second, R.O. says she continued in her employment because Crossmark paid her for work she performed between March 9 and March 14, 2013. Cynthia Wood said in her affidavit that her contacts with R.O. between March 9 and March 13, 2013 reflected nothing more than her routine practice in other instances where recently terminated employees had information that would assist the company in serving its clients. That Crossmark sent R.O. $60.86 in June 2013 to settle the matter of her assistance to Wood for these few days is not sufficient to restore R.O. to employee status retroactively. R.O. does not suggest that Crossmark actually kept her on the payroll after March 8, nor does she suggest that she failed to receive her final paycheck, her vacation pay, or her COBRA letter. She does not suggest that her employee badge or company computer was reissued to her or does she identify other objective indicia of continuing employment.

Finally, R.O. asserts that because only managers have the authority to terminate employees, Wood was the only person who could have terminated her. But the record reflects that managers are responsible for decisions about terminating employees for performance or disciplinary reasons, while HR handles terminations based on work authorization issues. There is nothing suspicious in this division. Managers and supervisors usually have first-hand knowledge about performance and discipline issues, but not necessarily about work authorization issues. Babatunde Oyedipe, for example, testified that he thought the immigration status of the employees under his supervision was none of his business.

HR people, on the other hand, have specialized knowledge and expertise about work authorization issues while managers and supervisors may not. Esmeralda Graham testified that Crossmark's HR component had a whole department known as onboarding that dealt with those issues. When asked who made the decision to terminate R.O., she said, "That would have been onboarding. That would have been Teresa Hicks, in the onboarding department." Graham said that Teresa Hicks had the authority to terminate R.O. and notification of Hicks' decision "would have gone directly to the payroll department from Teresa in onboarding." That the preparation of the paperwork to document the decision may have been flawed or the two PAFs inconsistent

does not call this evidence into question. Wood testified that the PAF offered a limited number of boxes to check and that she just selected the closest one she could to cover R.O.'s situation.

Conclusion

No causal connection can be shown between R.O.'s arguably protected conduct on March 14, 2013 and her termination on March 8, 2013. A showing of causation requires a showing that the decisionmaker knew of the employee's protected activity. *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007). Just as an employer does not violate the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1),(3) by discharging an employee whose protected conduct the decisionmaker doesn't even know about, *Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 418 (5th Cir. 1981), Crossmark cannot have discriminated against R.O. for conduct that did not occur until after she was already discharged. *Cf. Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 9 (2003), and cases cited therein.

To establish retaliation within the meaning of 8 U.S.C. § 1324b, moreover, there must be some reason to believe that the adverse employment action would not have taken place but for the complainant's protected activity. *See Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999); *cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). To survive a motion for summary decision on a claim of retaliation, a complainant must identify a conflict in substantial evidence on the ultimate issue of retaliation. *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc)). No such conflict in substantial evidence has been identified, and no reasonable trier of fact could conclude on this record that Crossmark's explanation is a pretext for retaliation or that R.O. would not have been discharged but for her alleged protected activity.

V. R.O.'S MOTION FOR SANCTIONS

A. The Positions of the Parties

R.O.'s motion for sanctions was neither preceded nor accompanied by a motion to compel discovery. The motion sets out the history of R.O.'s attempts to schedule the deposition of Randy Douglas, Crossmark's Vice President for Business Development. The motion was accompanied by an offer of proof in the form of R.O.'s affidavit stating that, had he been deposed, Randy Douglas would have testified that R.O. was a stellar employee, that she worked well with vendors and clients, and that she had saved the company thousands of dollars. R.O.'s affidavit says Douglas would also have testified that R.O.'s termination was a shock to him, that the company was aware of R.O.'s OSC charge, and that her termination was retaliatory.

Crossmark's response says the motion should be denied because R.O. never filed a motion to compel the Douglas deposition and there is no order compelling it. The company says R.O. waited until shortly before the close of discovery to request this deposition, that Douglas resides and works in Illinois, not Plano, Texas, and that Douglas neither supervised R.O. nor had any input into or personal knowledge about her termination. The response says further that the company was unable to be forthcoming about the reason for delaying this deposition because Crossmark was in the process of negotiating with Douglas' attorney about a potentially confidential termination agreement with respect to Douglas' employment at Crossmark.[12]

B. Discussion and Analysis

OCAHO rules[13] provide that a party that fails to comply with an order, including an order for the taking of a deposition, may be subject to sanctions. 28 C.F.R. § 68.23(c). The rule plainly contemplates and the case law plainly reflects that discovery sanctions are ordinarily imposed in this forum only after a prior judicial order has been issued compelling discovery. *See United States v. Primera Enters, Inc.*, 3 OCAHO no. 560, 1547, 1548-49 (1993); *Palancz v. Cedars Med. Ctr.*, 3 OCAHO no. 443, 503, 510-11 (1992) (imposing sanctions where party failed to comply with discovery orders); *United States v. Ulysses, Inc.*, 2 OCAHO no. 390, 732, 732-33, 736 (1991) (granting motion for sanctions that was preceded by two judicial orders compelling discovery responses).

It is evident, in any event, that even were R.O.'s motion to be granted, it would have no effect on this case. To begin with, no question has been raised with respect to the quality of R.O.'s job performance as a project administrator and her termination involves no issues respecting discipline or performance. Neither her performance nor her value to the company is a material issue. A fact is material only if it might affect the outcome of a case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Cynthia Wood, R.O.'s supervisor, said in her deposition that R.O. was good at her job, there is no evidence to the contrary, and the matter is not in dispute. Neither is there any dispute over whether Crossmark was aware of R.O.'s OSC charge, which was not filed until more than two weeks after her termination.

Nothing in R.O.'s motion or her affidavit, moreover, provides any reason to believe that Randy Douglas actually had personal knowledge of the facts and circumstances surrounding R.O.'s termination. There is no suggestion that he even knew R.O.'s work authorization had expired.

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[12] Douglas no longer works at Crossmark. His termination agreement includes a confidentiality clause.

[13] Rules of Practice and Procedure, 28 C.F.R. pt 68.

For all that R.O.'s submission shows, Douglas formed his opinions based solely on what R.O. told him.[14] Even were I to accept R.O.'s proffer as to what Douglas would say, his lay opinions as to Crossmark's motivation and as to the ultimate legal determination to be made in this case would be entitled to no weight at all.

While there may be circumstances under which sanctions could be imposed on a party without the necessity of a preceding motion to compel or a motion for a protective order, no such circumstances have been presented here. R.O. identified no authority in OCAHO case law to support the issuance of the sanctions she requests, and her citations to bankruptcy cases decided under a different set of rules are inapposite. *See United States v. Nu Look Cleaners of Pembroke Pines*, 1 OCAHO no. 274, 1771, 1780-81 (1990) (order by the Chief Administrative Hearing Officer vacating sanctions purportedly imposed pursuant to federal rules and noting that where OCAHO rules themselves address discovery sanctions, there is no occasion to look to other rules).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Crossmark, Inc. is a corporation that provides merchandising services to manufacturers and retailers throughout the United States, and has its headquarters in Plano, Texas.

2. R.O. is a citizen of Kenya and an alien authorized to work in the United States.

3. Crossmark, Inc. hired R.O. as a project administrator at its office in Plano, Texas, on June 6, 2011, at which time R.O. possessed an Employment Authorization Document that was valid until April 18, 2012.

4. At all times pertinent to this matter, R.O.'s direct supervisor was client services manager Cynthia Wood; the regional employee relations manager was Esmeralda Graham; and the company's human resources manager was Teresa Hicks.

5. R.O. renewed her Employment Authorization Document before it expired and presented Crossmark with a new Employment Authorization Document that was valid until March 8, 2013.

[14] Curiously, while R.O.'s prehearing statement said Douglas had knowledge about her termination, when she was asked in her deposition whether he had such knowledge, R.O.'s response was, "That I do not know."

6. Teresa Hicks, Crossmark, Inc.'s human resources manager, sent R.O. periodic email notices starting in December 2012 advising that her work authorization was set to expire on March 8, 2013 and that "[i]n order for us to continue to employ you, we must re-verify your employment eligibility."

7. Esmeralda Graham and Cynthia Wood held a meeting with R.O. on March 7, 2013, during which time Esmeralda Graham told R.O. that she would be terminated the next day, March 8, 2013, if her EAD was not renewed by the end of the day.

8. At a meeting with Cynthia Wood and R.O. on March 7, 2013, Esmeralda Graham told R.O. that a termination meant that R.O. would lose her health benefits and be put on COBRA, that her last paycheck would be sent to her, that her job would not be held for her, and that she would have to reapply for work once she obtained a valid work authorization document.

9. After meeting with Cynthia Wood and Esmeralda Graham on March 7, 2013, R.O. told Cynthia Wood that Crossmark, Inc. was clueless about immigration laws and that R.O. would report Crossmark to "USCIS" (United States Citizenship and Immigration Services) to get help and more training for the company.

10. R.O. told Cynthia Wood on March 8, 2013 that she would report Crossmark, Inc. but did not provide any details or identify a particular entity to which she would report the company.

11. At the end of the work day on March 8, 2013, R.O. cleared out her desk and turned in her company laptop and her employee badge.

12. Teresa Hicks and Cynthia Wood each prepared a Personnel Action Form for R.O. on March 8, 2013.

13. Cynthia Wood had periodic contact with R.O. about work-related matters after March 8, 2013, and R.O. estimated that she spent four hours on such matters between March 11 and March 14, 2013.

14. After R.O. received a text message from USCIS on the afternoon of Tuesday, March 12, 2013 that her new EAD had been approved, she telephoned Crossmark and advised Esmeralda Graham that her card had been renewed and was in production.

15. R.O. sent a text message to Cynthia Wood on the morning of March 14, 2013 stating that R.O. had called the "Washington D.C. Immigration office" because the company needed education on immigration matters; R.O. said in her deposition that she was referring to the National Immigration Law Council.

16. R.O. called Cynthia Wood on the morning of March 14, 2013 and told Wood that she, R.O., would contact DOJ or would report Crossmark to DOJ.

17. R.O. visited the Dallas District Office of the Equal Employment Opportunity Commission on March 26, 2013, and the Equal Employment Opportunity Commission referred R.O. to the Department of Justice.

18. R.O. filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on March 26, 2013.

19. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent a letter to R.O. on May 14, 2013 telling her she had the right to file a complaint directly with the Office of the Chief Administrative Hearing Officer.

20. On or about June 10, 2013, Crossmark, Inc. sent R.O. a check for $60.86 to resolve disputed issues related to payment for any services R.O. rendered to the company between March 11 and March 14, 2013.

21. R.O. filed a complaint with the Office of the Chief Administrative Hearing Officer on June 28, 2013.

B. Conclusions of Law

1. R.O. is not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).

2. Crossmark, Inc. is an entity within the meaning of 8 U.S.C. § 1324b(a)(5).

3. Crossmark, Inc. is an employer within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (Title VII).

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

5. A prima facie case of retaliation is shown by 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 Breda v. Kindred Braintree Hospital, L.L.C.*, 10 OCAHO no. 1202, 8 (2013) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)).

6. If an employee establishes a prima facie case of retaliation, the burden of production shifts to the opposing party to articulate a legitimate non-retaliatory reason for the employment action. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013).

7. Once the employer provides a legitimate non-retaliatory reason for the employment action, any inference of retaliation is dissipated and the burden shifts back to the employee to prove that the stated reason is a pretext for retaliation. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013).

8. A complainant's evidence of pretext must be specific and substantial to overcome an employer's legitimate non-retaliatory reason for an employment decision. *Torres v. Pac. Cont'l Textiles, Inc.*, 10 OCAHO no. 1203, 9 (2013).

9. To qualify as protected conduct in this forum, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *Harris v. Haw. Gov't Emps. Ass'n*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994).

10. Protected conduct pursuant to § 1324b(a)(5) does not include generalized complaints about violations of immigration law or threats to report an employer for violations of immigration law. *See De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 5-6 (2013); *Cavazos v. Wanxiang Am. Corp.*, 10 OCAHO no. 1138, 1-2 (2011).

11. An adverse employment action occurs when the employment decision is made and communicated to the affected employee. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Lardy v. United Airlines, Inc.*, 4 OCAHO no. 595, 31, 77-80 (1994); *Chester v. Am. Tel. and Tel. Co.*, 907 F.3d 982, 983 (N.D. Tex. 1994).

12. Crossmark presented evidence of a legitimate non-retaliatory reason for terminating R.O. in the form of the company's consistent policy and practice of terminating employees who fail to renew their temporary work permits prior to the expiration date on the permit.

13. Assuming arguendo that R.O. could establish a prima facie case of retaliation, she failed to present substantial evidence that Crossmark's stated reason was pretextual.

14. To state a claim of retaliation within the meaning of 8 U.S.C. § 1324b, there must be some reason to believe that the adverse employment action would not have taken place but for the complainant's protected activity. *See Hajiani v. ESHA, USA, Inc.*, 10 OCAHO no. 1212, 6 (2014) (citing *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999)); *cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

15. R.O. was unable to demonstrate any causal connection between her termination and any conduct she engaged in that is protected under 8 U.S.C. § 1324b(a)(5).

16. Document abuse occurs when an employer requests, for the purposes of satisfying section 1324a(b), more or different documents than are required, or refuses to honor documents tendered that reasonably appear to be genuine and to relate to the individual, and does so with discriminatory intent. 8 U.S.C. § 1324b(a)(6).

17. R.O. failed to satisfy her burden of proof as to her claim of document abuse.

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

R.O.'s motions for summary decision and for sanctions are denied. Crossmark, Inc.'s motion for summary decision is granted and the complaint is dismissed.

SO ORDERED.

Dated and entered this 21st day of November, 2014.

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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 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.