

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

February 28, 2019

LOLEITHA ATHERIA WILSON,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 18B00011
)	
WASTE CONNECTIONS, INC.,)	
Respondent.)	
_____)	

ORDER GRANTING SUMMARY DECISION

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Complainant alleges Respondent discriminatorily discharged her based on her citizenship status in violation of § 1324b(a)(1). Pending before the Court is Respondent’s Motion for Summary Decision. All conditions precedent to the institution of this proceeding have been satisfied.

I. BACKGROUND

Complainant, Loleitha “Tina” Wilson, became a lawful permanent resident (LPR) on July 1, 2013. Compl. at 5. Complainant is a former employee of God Bless the USA, Inc., a subsidiary of Waste Connections, Inc. (referred to collectively as Respondent or Waste Connections). Mot. at 2.¹ In February 2016, Respondent hired Complainant as a temporary employee. On March 9, 2017, Respondent hired Complainant for a permanent position. Complainant’s Prehearing Statement at 1; Respondent’s Prehearing Statement at 2. After Complainant accepted the full time position, Complainant and Respondent’s office manager, Lynn Williams, completed Complainant’s Form I-9. Mot. Ex. B at 1; Complainant’s Prehearing Statement at 1. In section one of the Form I-9, Complainant’s name was listed as “Tina Wilson,” and Complainant signed section one as “Tina Wilson.” Mot. Ex. A at 1. Williams entered Complainant’s information in E-Verify as it was stated in section one of her Form I-9. Mot. Ex. B at 1; Ex. D at 1.

¹ The Motion for Summary Decision and exhibits thereto will be abbreviated at “Mot. Ex #.”

Complainant also provided her driver's license and social security card, which listed her legal name as "Loleitha Wilson." Mot. Ex. B at 1; Complainant's Prehearing Statement at 1. After Williams submitted Complainant's information in E-Verify, she noticed Complainant's identification documents listed her name as "Loleitha." Mot. Ex. B at 1. On March 14, 2017, Complainant received a tentative nonconfirmation (TNC) from E-Verify. Mot. Ex C at 1. Complainant and Williams received an email from E-Verify that notified them of the TNC and Complainant's right to contest the TNC. *Id.* Williams met with Complainant and provided her with the Social Security Administration (SSA) referral form to contest the TNC. Mot. Ex. B at 1. Complainant chose to contest her TNC on March 14, 2017. Mot. Ex. D at 1. On March 16, 2017, Lynn Williams drove Complainant to the SSA office. *Id.* Complainant claims the SSA told her that her employer just needed to correct her information and resubmit it to E-Verify. Complainant's Prehearing Statement at 1. Complainant alleges that she shared this information with Lynn Williams. *Id.*

On March 16, 2017, E-Verify prompted Respondent to review and update Complainant's information and resubmit it to E-Verify. Mot. Ex. D at 1. Respondent did not correct Complainant's information or resubmit it. *See id*; *see* Mot. Ex. B at 1–2. On March 26, 2017, Complainant received a final nonconfirmation (FNC) from E-Verify. Mot. Ex. D at 1–2. On June 13, 2017, after Respondent conducted an internal audit, Respondent discovered Complainant received an FNC. Mot. Ex. B at 2. Respondent terminated Complainant that same day. *Id.* On June 15, 2017, Respondent presented Complainant with an application to re-apply for her same position. Mot. Ex. E; Compl. at 24, 26–28. Complainant did not submit a new application for employment.

In June 2017, Complainant filed a charge with IER. Compl. at 1. On October 24, 2017, IER informed Complainant of her right to file a complaint with OCAHO. Compl. at 15. Complainant filed her complaint on November 28, 2017, alleging discriminatory discharge based on her citizenship status in violation of 8 U.S.C. § 1324b. On September 28, 2018, Respondent filed its motion for summary decision. Complainant did not file a response.

II. STANDARDS

A. Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).² "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit."

² *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).³

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

B. Discriminatory Discharge

Complainant may use direct or circumstantial evidence to prove a § 1324b discrimination case. *U.S. v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 n. 3 (1983)). Direct evidence is evidence that, on its face, establishes discriminatory intent. *Id.* “If the evidence is ambiguous or susceptible to varying interpretations, it cannot be treated as direct evidence.” *Id.* However, only on rare occasions can the complainant present direct evidence. *Id.* at 14 (citing *Nguyen v. ADT Eng’g, Inc.*, 3 OCAHO no. 489, 915, 922 (1993) (“It is rare that the victim can prove that the employer conceded discrimination, e.g. ‘I don’t want any permanent resident aliens working here.’”)).

A complainant may also rely on circumstantial evidence to establish an employment discrimination claim. *Id.* In a circumstantial evidence case, the Court applies the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993). *Id.* First, Complainant must establish a prima facie case of discrimination. *Id.* If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory

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 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>.

reason for the challenged employment actions. *Id.* If Respondent articulates such a reason, “the inference of discrimination raised by the prima facie case disappears, and [Complainant] then must prove, by a preponderance of the evidence, that [Respondent’s] articulated reason is false and that [Respondent] intentionally discriminated against [Complainant].” *Id.*

To establish a prima facie case of discriminatory discharge, Complainant must prove (1) she is a protected individual; (2) her job performance was satisfactory; (3) she suffered an adverse employment action; and (4) different treatment from similarly situated employees outside her protected class. *Coleman v. Md. Ct. App.*, 626 F.3d 187, 190 (4th Cir. 2010). Alternatively, on the fourth prong, Complainant could prove “that the position was filled by a similarly qualified applicant outside the protected class.” *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 219 (4th Cir. 2016).

III. DISCUSSION

A. Prima Facie Case

Complainant alleges Respondent terminated her based on her citizenship status in violation of § 1324b(a)(1)(B). Complainant does not offer any direct evidence of discrimination; thus, she must establish a prima facie case of discriminatory discharge.

There is no dispute that Complainant was a protected individual under 8 U.S.C. § 1324b(a)(3) when Respondent terminated her employment. Generally, under § 1324b(a)(3), an LPR is a “protected individual.” *Id.* However, an LPR loses her protected status if she does not naturalize within six months of becoming eligible. *Id.* To be eligible to apply for naturalization, an LPR must be a permanent resident of the United States for at least five (5) years. 8 U.S.C. § 1427(a). Complainant became an LPR on July 1, 2013, and Respondent discharged Complainant on June 13, 2017. Compl. at 4, 10. Therefore, Complainant was a LPR who was not yet eligible to apply for naturalization when Respondent discharged her. § 1324b(a)(3)(B). As such, Complainant established she was a protected individual at the time of discharge.

Respondent does not dispute that Complainant’s job performance was satisfactory. The evidence shows that Respondent originally hired Complainant as a temporary employee and later hired Complainant for a permanent position. Further, Respondent admits that it only terminated her employment because she received a FNC from E-Verify. Mot. at 7. Additionally, two days after her termination, Respondent presented Complainant with an application to reapply for her same position. Thus, there is no dispute that Complainant’s job performance was satisfactory. There is also no dispute that Complainant suffered an adverse employment action when Respondent terminated her employment.

Finally, to establish a prima facie case of discriminatory discharge, Complainant must identify a similarly situated individual outside of the protected class who received different treatment. *Coleman*, 626 F.3d 187, 190. Complainant identifies someone named “Alana” and asserts Alana’s Form I-9 was completed correctly. Complainant’s Prehearing Statement at 4. However, Complainant does not provide any other information about this individual. Specifically, Complainant does not show Alana is similarly situated or is outside Complainant’s protected class. Thus, Complainant has not identified any similarly situated individuals outside of her protected class who received different treatment.

However, the Fourth Circuit has also held that in a discriminatory discharge case, Complainant may establish the fourth prong of her prima facie case by showing “that the position was filled by a similarly qualified applicant outside the protected class.” *Guessous*, 828 F.3d at 219 (quoting *King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003)). Complainant alleges Respondent hired Carmen Lacey to fill Complainant’s position. Compl. at 11. Complainant only identifies Lacey as “Lynn’s friend.” *Id.* However, Complainant does not offer any evidence of Lacey’s membership in any particular class or evidence suggesting that Lacey was outside of Complainant’s protected class. As such, Complainant did not establish a prima facie case for discriminatory discharge under § 1324b(a)(1).

B. Legitimate, Nondiscriminatory Reason and Pretext

Even if Complainant established a prima facie case, Respondent offered a legitimate, non-discriminatory reason for her discharge. Respondent cites an OCAHO decision for the proposition that “the employer [is] required to [terminate the employee] after receiving a final nonconfirmation from E-Verify, and [has] no choice in the matter.” Mot. at 7 (quoting *Guth v. Kaiser Permanente*, 10 OCAHO no. 1190, 6 (2013)). However, the statute states an employer “**may** terminate” an employee who received an FNC. Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, Div. C, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Title IV, Subtitle A, § 403(a)(4)(C)(i), 110 Stat. 3009 (codified at 8 U.S.C. § 1324a Note) (emphasis added).⁴ The employer is not required to terminate an employee because of an E-Verify FNC. *Id.* Nonetheless, Respondent has offered a legitimate, non-discriminatory reason for terminating the employee as the statute permits an employer to terminate an employee after receiving a FNC.

Since Respondent established a legitimate non-discriminatory reason for her termination, the burden shifts back to Complainant to establish that Respondent’s reason is pretextual. *Diversified Tech.*, 9 OCAHO no. 1095 at 14. “A complainant may establish that the employer’s explanation is pretextual by showing a prohibited motive more likely caused the adverse

⁴ The E-Verify User Manual states, “The employer **may** terminate employment based on a case result of Final Confirmation” DEP’T OF HOMELAND SECURITY, E-VERIFY USER MANUAL, § 3.6, “FINAL NONCONFIRMATION” (2018) (emphasis added).

employment decision.” *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 6 (2014). “To raise an inference of pretext, the employee must produce or point to substantial evidence.” *Id.* “Evidence is substantial when ‘it is of such quality and weight that reasonable and fair-minded [people] in the exercise of impartial judgment might reach different conclusions.’” *Id.* (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996)).

Complainant argues Williams submitted incorrect information to E-Verify, which triggered the tentative non-confirmation. Specifically, Complainant contends that although her legal name is “Loleitha Wilson,” Lynn Williams submitted her information to E-Verify under her nickname Tina Wilson.” Section one of Complainant’s Form I-9 listed her name as “Tina Wilson,” Complainant signed her Form I-9 as “Tina Wilson,” and Complainant was known in the workplace as “Tina Wilson.”

After receiving the TNC, Lynn Williams drove Complainant to the SSA office. Complainant asserts the SSA informed her that Respondent just needed to correct the error with Complainant’s name and resubmit her information under “Loleitha Wilson.” Complainant contends that she informed Lynn Williams about the SSA instructions and Lynn Williams said she did not know how to resubmit the information in E-Verify. Complainant contends that several days later, she asked Williams if she worked everything out with E-Verify, and Williams told her everything was okay. Lynn Williams states she thought everything was resolved after Complainant visited the SSA. Mot. Ex. B at 1.

The E-Verify report shows that on March 16, 2017, the same day Complainant visited the SSA office, E-Verify prompted Respondent to correct the data entered and resubmit Complainant’s information. Mot. Ex. D at 1; Ex. B at 1. However, Respondent failed to correct Complainant’s data and resubmit her information. Complainant received the FNC on March 26, 2017. Respondent admits that it was unaware of Complainant’s FNC until June 13, 2017. Respondent only became aware of the FNC after an internal audit. The evidence suggests that Respondent neglected to check E-Verify after Complainant received the TNC.

While Respondent neglected to check and follow prompts from E-Verify, Respondent’s carelessness, alone, does not evidence discriminatory intent. Rather, the evidence shows immediately after Respondent discharged her, Respondent wanted to rehire Complainant for the same position she previously held. Complainant refused to do so and filed a complaint instead. As such, Complainant does not provide any evidence to support an inference that Respondent’s reason for her termination “was a cover-up for a discriminatory motive or intent.” *Guth*, 10 OCAHO no. 1190 at 7.

Complainant did not establish a prima facie case of discriminatory discharge and, even if, Complainant could establish a prima facie case, Respondent presented a legitimate, nondiscriminatory reason for the discharge and Complainant did not offer evidence that the reason was pretextual. As such, Complainant’s complaint is DISMISSED.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Loleitha Wilson was a lawful permanent resident when she was terminated.
2. God Bless the USA, Inc. is a subsidiary of Waste Connections, Inc. (collectively referred to as Waste Connections).
3. Waste Connections hired Loleitha Wilson as a temporary employee in February 2016.
4. On March 9, 2017, Waste Connections hired Loleitha Wilson as a permanent employee and Loleitha Wilson completed her Form I-9 with Lynn Williams, an office manager.
5. In Section 1 of Wilson's Form I-9, her name is listed as "Tina Wilson" and she signed the Form I-9 as "Tina Wilson."
6. Loleitha Wilson's legal name is Loleitha Wilson.
7. Lynn Williams entered into E-Verify the information in section 1 of Loleitha Wilson's Form I-9.
8. On March 14, 2017, Loleitha Wilson received a tentative nonconfirmation (TNC) from E-Verify.
9. Loleitha Wilson and Lynn Williams received an email from E-Verify that notified them of the TNC and Complainant's right to contest the TNC.
10. Lynn Williams met with Loleitha Wilson and provided her with the Social Security Administration (SSA) referral form to contest the TNC.
11. On March 16, 2017, Lynn Williams drove Complainant to the SSA office.
12. On March 16, 2017, E-Verify prompted Waste Connections to review and update Loleitha Wilson's information and resubmit it to E-Verify.
13. Waste Connections did not correct Loleitha Wilson's information or resubmit it to E-Verify.
14. On March 26, 2017, Loleitha Wilson received a final nonconfirmation (FNC) from E-Verify.

15. On June 13, 2017, through an internal audit, Waste Connections discovered Loleitha Wilson received an FNC.
16. On June 13, 2017, Waste Connections terminated Loleitha Wilson for receiving a FNC.
17. Loleitha Wilson's performance at Waste Connections was satisfactory and on June 15, 2017, Waste Connections' human resources manager presented Loleitha Wilson with an application to re-apply for her same position.
18. In June 2017, Wilson filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

B. Conclusions of Law

1. Loleitha Wilson was a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3).
2. All conditions precedent to the institution of this proceeding have been satisfied.
3. An Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).
4. "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).
5. "Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *U.S. v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).
6. To establish a prima facie case of discriminatory discharge, Complainant must prove (1) she is a protected individual; (2) her job performance was satisfactory; (3) she suffered an adverse employment action; and (4) different treatment from similarly situated employees outside her protected class. *Coleman v. Md. Ct. App.*, 626 F.3d 187, 190 (4th Cir. 2010).
7. Alternatively, on the fourth prong, Complainant could prove "that the position was filled by a similarly qualified applicant outside the protected class." *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 219 (4th Cir. 2016).

8. Loleitha Wilson failed to establish a prima facie case of discrimination pursuant to § 1324b(a)(1) (2012) because she did not provide an evidence of a similarly situated employee or a similarly qualified applicant outside her protected class.

9. Assuming arguendo that Loleitha Wilson established a prima facie case of discriminatory discharge, Wilson did not produce or point to sufficient evidence to create a factual issue regarding the legitimacy of Waste Connections' explanation of the basis of its decision to terminate her.

10. An employer may terminate an employee who has received a final nonconfirmation from E-Verify. (CITE)

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered on February 28, 2019.

Priscilla M. Rae
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.

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March 5, 2019

LOLEITHA ATHERIA WILSON,)	
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)	OCAHO Case No. 18B00011
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WASTE CONNECTIONS, INC.,)	
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ERRATA

In the Order Granting Summary Decision issued February 28, 2019. This order is hereby amended to correct the following errors:

1. On page 2, the second to the last paragraph is corrected to read, “In June 2017, Complainant filed a charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER).”
2. On page 7, finding of fact number 18 is corrected to read, “In June 2017, Wilson filed a charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice.”
3. On page 8, conclusion of law number 10 is corrected to read, “An employer may terminate an employee who has received a final nonconfirmation from E-Verify. Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, Div. C, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Title IV, Subtitle A, § 403(a)(4)(C)(i), 110 Stat. 3009 (codified at 8 U.S.C. § 1324a Note).”

SO ORDERED.

Dated and entered on March 5, 2019.

Priscilla M. Rae
Administrative Law Judge