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

April 24, 2020

MANIKANDAN SIVASANKAR, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00016
STRATEGIC STAFFING SOLUTIONS, Respondent.	)	

ORDER ON SUMMARY DECISION

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b(a) (2018). Manikandan Sivasankar (Complainant) filed a complaint, pro se, with the Office of the Chief Administrative Hearing Officer (OCAHO) on November 12, 2019, alleging that Strategic Staffing Solutions (Respondent) violated § 1324b by discriminating against him based on his citizenship and national origin, retaliated against him, and committed document abuse. Respondent filed a timely Answer.

On December 11, 2019, Respondent filed a Motion to Dismiss. On February 12, 2020, this office issued a decision granting the motion to dismiss as to the claims for discrimination based on national origin and citizenship status, and converting the remaining claims to a motion for summary decision. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343 (2020). The decision allowed Respondent twenty-one days to submit evidence in support of the motion, and provided Complainant with twenty-one days thereafter to file evidence in opposition. Respondent filed Materials of Evidentiary Support of Its Motion for Summary Decision on March 3, 2020. The United States, through the Immigrant and Employee Rights Section of the Department of Justice (IER), filed a Statement of Interest on April 1, 2020. On April 3, 2020, Respondent filed a motion for leave to respond to IER's Statement of Interest and included its response. Respondent's motion for leave to file a response to IER's Statement of Interest is GRANTED and the Court will consider Respondent's response. Complainant did not file a response to Respondent's Materials of Evidentiary Support or IER's Statement of Interest.

II. BACKGROUND AND RESPONDENT'S POSITION

In his Complaint, Complainant alleges that Respondent discriminated against him because of his citizenship status and national origin, retaliated against him for exercising his rights under § 1324b, and asked for more or different documents than required for the employment eligibility verification process. Compl. at 8–12.[1] He indicated that Respondent refused to hire him on January 10, 2019, as a Project Manager and business analyst for its client, USAA Company, because of his "visa status." *Id*. at 8. He also asserted that he was fired a month later because of his national origin. *Id.* at 10. In his IER charge, Complainant asserted that Respondent hired him for two weeks and then fired him without giving any reason, and the managers threatened him for reporting. Charge Form at 2; Compl. at 11. Complainant asserts that Respondent refused to accept his employment authorization card (EAD) and H-1B Notice, indicating that it asked for a "green card or EAD copy." Compl. at 12. Complainant stated in his Complaint that he is an alien authorized to work in the United States based upon an H-1B visa and is also a pending asylum seeker. *Id.* at 5.

Respondent argues in its Motion for Summary Decision that Complainant submitted expired and unacceptable documents to satisfy Section 2 of Form I-9, and attached an affidavit from its onboarding specialist, Nicole Flattery, as well as the documents Complainant submitted. Mot. Summ. Dec. at 1, Ex. A. Respondent also argues that Complainant was terminated because of unprofessional behavior and, further, the official that terminated him was unaware of any of Complainant's alleged complaints of discrimination or allegations of document abuse. Mot. Summ. Dec. at 1, 6. Respondent provided an affidavit from Greg Williams in support. Mot. Summ. Dec. Ex. B.

Complainant has not responded to the Motion. Complainant has been served with the Notice of Case Assignment, the Answer and Motion to Dismiss, this Court's Notice of Intent to Convert Motion, Respondent's Materials of Evidentiary Support, IER's Statement of Interest, and Respondent's Motion for Leave to Respond to the Statement of Interest with Respondent's response to the Statement of Interest. This Office has received no indication that Complainant has not received the filings, nor has this office received a notice of a change of address.

III. LEGAL STANDARDS

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

[1] Complainant's national origin and citizenship status-based discrimination claims were previously dismissed. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343 (2020).

issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[2] Section 68.38(c) is similar to and based on Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence 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]

"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)). The party seeking summary decision assumes the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997). In determining whether the moving party has met its burden of proof, all evidence and reasonable inferences are drawn in favor of the nonmoving party. *Id.* Once the moving party has met its burden, the opposing party must come forward with specific facts showing there is a genuine issue of material fact. *Id*; *see* 28 C.F.R. § 68.38(b) ("a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial.").

OCAHO rules also provide that evidence to support or resist a summary decision must be presented through means designed to ensure its reliability. *Parker v. Wild Goose Storage*, 9 OCAHO no. 1081, 3 (2002). Affidavits must set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557 and should show affirmatively that the affiant is competent to testify as to the matters stated therein. *Id.*; 28 C.F.R. § 68.38(b).

IV. DISCUSSION

A. Document Abuse Claim

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

[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.

"Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 8 (2015).

Complainant asserts that, in February 2019, Respondent refused to accept his EAD and H-1B Notice, indicating that it asked for a "green card or EAD copy." Compl. at 12. Respondent argues that there is no genuine issue of material fact because Complainant did not submit appropriate documents to satisfy the employment eligibility verification requirements. Respondent provided an affidavit from its onboarding specialist, Nicole Flattery, who reviewed the documents that Complainant submitted. Mot. Summ. Dec. Ex. A. Copies of the documents were submitted with the affidavit. *Id.* at 1-5. Ms. Flattery states that Complainant submitted a driver's license and a restricted social security card. *Id.* at 3. Since the restricted social security card is not an acceptable List C document on the Form I-9, Ms. Flattery asked Complainant to submit either a document from List A, or one document from both List B and C. *Id.* Complainant submitted a copy of his EAD card, a copy of an E-Verify form, an I-94, and a copy of his Indian passport. *Id.* The EAD card expired on December 11, 2018 and was therefore not an acceptable List A document. *Id.* According to Ms. Flattery, none of the other documents were acceptable documents. *Id.* at 3-4. Ms. Flattery then again asked Complainant for acceptable documents. *Id.* at 4. Complainant submitted an I-797A Notice of Action, listing Amysoft Americas Inc. as the petitioner and Complainant as the beneficiary of an approved H-1B visa. *Id.* at 4. The I-797A is valid from July 27, 2018 to October 5, 2020. *Id.* Before Respondent could transfer Complainant's H-1B visa from Amysoft to Respondent, Mr. Williams, a manager, terminated Complainant. *Id.* Ms. Flattery states, lastly, that Complainant never told her he was going to report the matter. *Id.* at 5.

As Ms. Flattery noted, an employee must present either a document from the list provided on the Form I-9 designated as List A, or a document from each of Lists B and C. 8 C.F.R. § 274a.2(b)(1)(v). The documents must be valid and not expired. § 274a.2(b)(1)(v). According to the affidavit, Respondent did not provide valid documents initially. A restricted social security card is not sufficient as the social security card cannot be restricted. § 274a.2(b)(1)(v)(C). The EAD card was expired. Mot. Summ. Dec. Ex. A2. Further, the Indian passport must contain an endorsement, which a visual inspection of the passport does not establish. Mot. Summ. Dec. Ex. A5. § 274a.2(b)(1)(v)(A)(5). The I-94 indicated that Respondent was admitted as an F-1 nonimmigrant (student). Mot. Summ. Dec. Ex. A4. Complainant did not have the document that must be provided for someone in such a status—the Form I-20, Certificate of Eligibility. *See* UNITED STATES CITIZENSHIP & IMMIGRATION SERVS, HANDBOOK FOR EMPLOYERS M-274, § 7.4.2 (2017) [hereinafter Handbook for Employers]. Lastly, the H-1B visa may allow an employee to change to a new employer, but the employee may not work for the new employer until the employer petitions for the worker. according to

Ms. Flattery, while Respondent was willing to submit the petition, it had not yet done so when it terminated Complainant. Mot. Summ. Dec. Ex. A at 4, Ex. B6; *see* Handbook for Employers, § 7.5. Ms. Flattery's affidavit and attachments establish that the Respondent rejected invalid documents and only asked for valid List A or List B and C documents. It did not ask for more or different documents, but continued to ask merely for valid documents. Further, there is no evidence that the employer requested such documents for a discriminatory reason. As such, the Respondent established that there is no genuine issue of material fact, and it is not liable for document abuse. As the Complainant has not provided any evidence or arguments in opposition, there is no genuine issue of material fact and Complainant has not established a claim for document abuse. Respondent's motion for summary decision related to the document abuse claim is GRANTED and Complainant's document abuse claim is DISMISSED.

B. Retaliation

The familiar burden shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), and its progeny, applies to retaliation cases. *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7 (2013). First, the complainant must establish a prima facie case of retaliation; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of retaliation raised by the prima facie case disappears, and the complainant then must prove by a preponderance of the evidence that the respondent's articulated reason is false and that the respondent intentionally retaliated against the complainant. *Id.* at 7–8; *see generally 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, 252–53 (1981).

An individual can show a prima facie case of retaliation by presenting evidence that: 1) the individual engaged in conduct protected by § 1324b; 2) the employer was aware of the protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009). To establish causation, the complainant must show that the decision-maker knew of the employee's protected activity. *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007).

In his complaint, Complainant states that he was retaliated against on February 12, 2019. Compl. at 11. In the narrative portion of the complaint, he states, "I was not given any reason and threatened by the managers for reporting and told will not be allowed to work for client anymore by any other agencies as well." *Id*. In his IER charge, Complainant states that he was fired without any reason for documentation verification, and when he reported it he was fired immediately without any reason. IER Charge at 2.

Respondent argues that Complainant did not establish a *prima facie* case of retaliation.[4] Respondent argues that Complainant did not establish the first, second or fourth prong of a *prima facie* retaliation claim. The Court agrees that respondent has not established a prima facie case of retaliation. Complainant did not establish when and to whom he reported an alleged document abuse violation. He filed his claim with IER a month after he was terminated. While he asserted a causal connection between the requests for documents and the termination, he has not come forward with evidence to support his retaliation claim.

Even if Complainant could establish a prima facie claim, Respondent has provided a legitimate, nondiscriminatory reason for his termination. Mr. Williams states in his affidavit that he was Respondent's Account Manager to its USAA customer, and in that role also served as Complainant's supervisor. Mot. Summ. Dec. Ex. B. at 1. Mr. Williams states that Complainant was hired as an IT Business Analyst on November 7, 2018, and began his assignment with USAA on January 29, 2019. *Id.* He states that on February 11, 2019, he received feedback from USAA regarding Complainant's behavior and work product, specifically, USAA was concerned that he did not have the necessary skills. *Id.* Mr. Williams states that he called Complainant on the night of February 11, 2019, to share the feedback and create an action plan for Complainant's success. *Id.* at 2. As he explained the feedback, however, Complainant became upset and began yelling at Mr. Williams. *Id.* Mr. Williams states that Complainant used profanity, cursing at him. *Id.* Mr. Williams attempted to calm the Complainant, but was unsuccessful, and then Complainant hung up the telephone while Mr. Williams was mid-sentence. *Id.* Mr. Williams called the Complainant back, who apologized about his behavior and language. *Id.* Mr. Williams terminated him due to his behavior and the language he used during the conversation. *Id.* Mr. Williams states that he was not aware that Complainant reported or intended to report claims of discrimination due to his national origin or citizenship, or claims of document abuse, that his decision to terminate Complainant was based entirely on his unprofessional behavior and foul language. *Id.*

As noted above, once the moving party has met its burden, the opposing party must come forward with specific facts showing there is a genuine issue of material fact. *Id*; *see* 28 C.F.R. § 68.38(b) ("a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial."). Complainant has not responded to either the motion to dismiss or this Court's order providing an opportunity to come forward with evidence in opposition to the motion for summary decision. He has therefore not established that the legitimate, non-discriminatory reason proffered by Respondent is false. Accordingly, there is no genuine issue of material fact.

[4] The Statement of Interest submitted by IER argues that § 1324b protects all individuals, without limitation, from intimidation, threats, coercion, or retaliation in connection with exercising § 1324b rights. This is consistent with OCAHO caselaw. *See Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 12 (2014).

Thus, Respondent's motion for summary decision as it relates to the retaliation claim is GRANTED and Complainant's document abuse claim is DISMISSED.

V. CONCLUSION

Respondent's motion for leave to file a response to IER's statement of interest is GRANTED. Respondent's motion for summary judgment related to Complainant's document abuse and retaliation claims is GRANTED.

SO ORDERED.

Dated and entered on April 24, 2020.

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Jean C. King
Chief 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.