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

March 5, 2021

ZAJI OBATALA ZAJRADHARA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2020B00010
GIG PARTNERS, Respondent.	)	

ORDER ON SUMMARY DECISION

I. INTRODUCTION

This action arises under the antidiscrimination 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. Complainant, Mr. Zaji Obatala Zajradhara, a U.S. citizen, alleges that Respondent, GIG Partners, Inc., which is a company located in Saipan, Commonwealth of the Northern Mariana Islands (CNMI), violated the anti-discrimination provisions § 1324b. Respondent denies these allegations. The Court received a dispositive motion from Complainant and a response from Respondent. The matter is ripe for resolution.

For the reasons provided below, Complainant's Motion for Summary Decision will be DENIED in full and the complaint as to GIG Partners is DISMISSED.

II. PROCEDURAL HISTORY

On April 4, 2017, Complainant received correspondence from the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice (IER) related to a charge he had filed against Respondent, Charge Number 197-103-39, which he included in his instant Complaint. Compl. 23.[1] Complainant wrote a letter, dated February 21, 2018, to IER, in

[1] Pinpoint citations to the Complaint refer to the internal page numbers of the portable document format (PDF), as opposed to the inconsistent pagination of the Complaint.

which Complainant described communication related to settlement discussions with Respondent about a matter in which IER was involved. Compl. 32.

On April 24, 2019, Complainant filed a charge with IER in which he alleged that "on or about [February] 2019, [Complainant] requested that [the CNMI Department of Labor] refer [him] for the CW-1 renewal position of waitstaff… [He] was interviewed for the bar managers' position, but not the waitstaff position[.]" Compl. 1, 14. According to Complainant, Respondent informed Complainant of his non-selection. Compl. 15. Complainant alleged the rationale for his non-selection was because of the numerous complaints he had filed with IER, the Equal Employment Opportunity Commission (EEOC), and the CNMI Department of Labor. Compl. 15. Complainant alleged that Respondent's routine practice in hiring is to "hire CW-1 workers from abroad with less skills and education than [Complainant.]" Compl. 15

On August 20, 2019, Complainant received a letter from IER indicating he could proceed with filing a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Compl. 1.

On October 31, 2019, Complainant filed a complaint with OCAHO. Notice of Case Assignment 1. Complainant indicated he did not know the number of employees that Respondent employed. Compl. 4. Complainant alleged that his non-selection for a position in February 2019 was because of his national origin and status as a U.S. citizen. Compl. 6. He also alleged that he was retaliated against when he was "denied entrance into the establishment [and] had Police called on [him] for no reason[.]" Compl. 10.

On January 6, 2020, Respondent, through counsel, filed an answer. In its Answer, Respondent indicated there was a vacant waitstaff position, and Complainant was not selected for the position as Respondent hired a different individual. Answer 3.

On September 17, 2020, the Court ordered the parties to file a summary decision motion or status report on or before October 8, 2020.

On October 8, 2020, Complainant sent via email what appeared to be a request for an extension on the filing deadline with an attached draft filing that was unsigned.[2] In his email, Complainant cited to acute medical issues experienced by a close family member as good cause for needing an extension. On October 19, 2020, the Court received Complainant's filing, entitled "Affidavit of Zaji O. Zajradhara In Support of Motion for Summary Judgement," a fifty-one page document.

[2] The parties were previously invited to participate in OCAHO's Electronic Filing Pilot Program, but the parties did not provide e-filing registration forms, and thus the Court never issued a formal order permitting e-filing. Nevertheless, the parties began e-filing. Given the pandemic and the parties' physical location in the CNMI, the Court has informally permitted e-filing.

Motions filed by pro se litigants may be liberally construed. *See M.S. v. Dave S.B. Hoon – John Wayne Cancer Institute*, 12 OCAHO no. 1305b, 5 (2018) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).[3] Given Complainant's status as a pro se litigant, the explanation provided by Complainant, and the short amount of time ultimately required to respond to the September 17, 2020 Order, the Court deems Complainant's response to be timely filed. The Court construes Complainant's "Affidavit" filing received on October 19, 2020 to be his Motion for Summary Decision.[4]

On October 23, 2020, the Court received by email (and by mail on November 4, 2020), Respondent's Opposition to Complainant's Motion for Summary Judgment (Opposition), along with an affidavit and an exhibit.

On October 26, 2020, Complainant e-filed "Laymans' Complainant Reply to Opposition Motion for Summary Judgment, Layman's Affidavit of Zaji O. Zajradhara in Reply Opposition to Respondent's Motion for Summary Judgment," and eighteen exhibits. Additionally, Complainant e-filed "Layman's Affidavit of Zaji O. Zajradhara in Reply Opposition to Respondent's Motion for Summary Judgment," "Layman's Motion to Cure/Correct Issues Regarding Oct 26th, 2020 Motions," "Exhibits Sent to the Court," and nineteen exhibits on December 7, 2020. At no point did the Court indicate to the parties that it would accept replies to responses, counter-responses to replies, or any further responsive documents.

III. FACTUAL BACKGROUND

A. Complainant's Position

[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

[4] Complainant entitled his dispositive filing "Affidavit of Zaji O. Zajradhara in Support of Motion for Summary Judgment" but, for clarity, it will be referred to as his Motion for Summary Decision. Pinpoint citations to the Motion for Summary Decision refer to the internal page numbers of the PDF, as opposed to the inconsistent pagination of the motion.

In the Complaint, Complainant asserts that he applied for a waitstaff position on February 20, 2019 and was not hired. Compl. 6. He also was interviewed for a bar manager position and was not hired. Compl. 6, 14–15. Complainant asserts a non-United States citizen was hired instead of him for this position.[5] Compl. 8. He claims that he has filed federal and local discrimination claims against this employer, as well as an "MGA" complaint. *Id.* Additionally, he states that he has been retaliated against (presumably by Respondent), refused entry into Respondent's establishment during business hours, and harassed by Respondent, among other things. Compl. 10. Relevant to his retaliation claim, Complainant interacted with IER regarding allegations against Respondent. Compl. 23, 32.

In his Motion for Summary Decision, Complainant provides information related to vacant employment positions in Respondent's business for which he was not selected in 2017. He provided a copy of a "Settlement," which outlined a business agreement related to provision of services (providing music and marketing) by Complainant in Respondent's nightclub. Mot. Summ. Decision 6–18. The creation of the Settlement and the alleged breach thereof occurred in 2017. Mot. Summ. Decision 3. Complainant's submission includes portions of email correspondence, most of which are undated. Mot. Summ. Decision 19–37. The content of the correspondence includes discussions of conflicts related to execution of services provided by Complainant to Respondent's business.

Complainant describes an incident occurring on or about December 31, 2018,[6] wherein he claims he was banned from Respondent's establishment "for no apparent reason," however, Complainant subsequently claims the ban was enacted "in order to discriminate against myself because . . . I have repeatedly pointed out that said company is in violation of various federal and local labor laws." Mot. Summ. Decision 32–33. Further, Complainant includes an additional, undated, email in which he states that Respondent's security personnel informed him that Respondent's ban was the result of Complainant "harass[ing] a female gig employee in the past[.]" *Id.* at 33. Complainant includes what purports to be correspondence from Respondent, who provides the following rationale for Respondent's decision to refuse service: "There have been too many complaints against you from customers/guests and also staff[.]" *Id.* at 34.

B. Respondent's Position

Respondent admitted that it was looking for eligible workers as alleged by Complainant. Answer 3. Respondent also conceded that it did not hire Complainant following his application

[5] Complainant ultimately did not provide any supporting evidence of this proposition in his Complaint or subsequent filings.

[6] The majority of the correspondence included supporting documentation which is undated; however, a date for one incident appears – December 31, 2018. Mot. Summ. Decision 33.

to a vacant waitstaff position on February 4, 2019. Answer 3; Opp'n 2. According to Respondent, Complainant was not interviewed for the waitstaff position because he had already interviewed for the position previously and had submitted the same resume as before. Opp'n 2. Thus, according to Respondent, there was nothing in his application demonstrating he met qualifications. *Id.* Respondent ultimately hired a U.S. citizen for the waitstaff position. *Id.*

Respondent admitted it did not hire Complainant following his interview for a vacant bar manager position on March 18, 2019 because it ultimately deemed him unqualified. Opp'n 3. Respondent did not find a qualified candidate and ultimately expanded the duties of the assistant bar manager, who is a U.S. citizen. *Id.*

Respondent conceded that Complainant was banned from entering Respondent's establishment. Opp'n 3. Respondent asserted the rationale for the ban is nondiscriminatory in nature, explaining Complainant was banned due to his "long and documented history of violence and harassment against [Respondent's] employees and customers." *Id.* Respondent admitted that when Complainant enters the establishment, he is reminded of the ban. *Id.* When Complainant refuses to leave, Respondent calls the police. *Id.*

Respondent claims that Complainant cannot show Respondent acted with discriminatory intent. Answer 5. Respondent also asserts that OCAHO lacks subject matter jurisdiction related to allegations of national origin discrimination, but it provides no evidence in support of this assertion. Respondent requests as a form of relief an award of costs, attorney's fees, and interest. *Id.*

IV. ISSUES BEFORE THE COURT

On the issue of timeliness, § 1324b(d)(3) states, "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with [IER]." IER's regulations and OCAHO's regulations also state that IER charges must be filed within 180 days of the violation. 28 C.F.R. § 44.300(b); 28 C.F.R. § 68.4(a). Timely filing a charge with IER "is a prerequisite for filing a private action with OCAHO." *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 793 (1996) (citing *Bozoghlanian v. Hughes Radar Sys. Grp.*, 5 OCAHO no. 741, 148, 154 (1995)). Here, Complainant filed his charge with IER on April 24, 2019; thus, any allegations involving actions taken prior to October 26, 2018 are not properly before this Court as they are untimely. Those allegations will not be considered, and are DISMISSED.

Section 1324b(a)(1), which prohibits discrimination based on national origin or citizenship status, covers discrete acts as outlined in the statute, specifically the hiring, firing, recruitment, or referral for a fee of a particular individual.

The statute also prohibits intimidation and retaliation. 8 U.S.C. § 1324b(a)(5). The retaliation prohibitions are triggered when an individual "intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Section 1324b]." *Id.*

With the above-referenced law and regulations in mind, along with Complainant's status as a pro se filer, the Court identifies the contested issues as follows:

1. Did Respondent discriminate against Complainant on the basis of national origin and/or citizenship status when Complainant was not hired for the waitstaff position or the bar manager position in February 2019 and March 2019, respectively?

2. Was Complainant retaliated against by Respondent when on or about, December 31, 2018, Complainant was denied entry into the establishment and had police called upon him?[7]

V. LEGAL STANDARDS

A. Summary Decision

Under OCAHO's 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) (2020). "An issue of material 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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"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." *United States v. Four Seasons Earthworks, Inc*., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v.*

[7] In his Charge of Discrimination filed with the EEOC, Complainant references a possibility of a retaliation allegation with respect to his non-selection for the two positions at issue, Compl. 28; however, in his Complaint that he filed with OCAHO, Complainant does not raise the prospect that he was retaliated against when he was not selected for the two positions, rather he asserted he was retaliated against based on the ban. Compl. 11. Because the allegation related to non-selection due to retaliation was not expressly brought into this forum, it will not be analyzed or considered.

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.'" *United States v. 3679 Com. Place, Inc.*, 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." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

When the party who bears the burden of proof at trial, the complainant, moves for summary decision, it "must come forward with sufficient competent evidence to support each essential element of the claim." *United States v. Saidabror Siddikov*, 11 OCAHO no. 1257, 10 (2015) (citing *Celotex Corp.*, 477 U.S. at 322–23). Failure to do so warrants dismissal of the complaint. *See id.*

B. The Burdens of Proof

"As in any civil case, a [complainant] may prove a case of employment discrimination by direct or circumstantial evidence." *United States v. Diversified Tech. & Servs of Va.*, 9 OCAHO no. 1095, 13 (2003) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). "Direct evidence is evidence which proves the fact at issue without the need to draw any inference or presumption." *Garcia Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11 (2003) (citations omitted). Where there is no direct evidence, the mode of proof of discrimination is by circumstantial evidence. *Id.*

In a non-selection (i.e. hiring) case, a complainant's prima facie case includes, at a minimum, the following: (1) complainant's membership of a protected class (citizenship or national origin); (2) an employer seeking applicants for a position; (3) complainant's application for the vacant position; (4) complainant was qualified for the position; and (5) complainant was not selected for the position. *See Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO no. 550, 1454, 1474 (1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

Under a retaliation theory, a complainant's prima facie case includes, at a minimum, the following: (1) complainant engaged in activity protected under § 1324b; (2) respondent was aware of the protected activity; (3) complainant suffered an adverse employment decision, or in the case of § 1324b(a)(5), he was intimidated, threatened, coerced, or otherwise retaliated against by the entity at issue; and (4) there was a causal link between the protected activity and the retaliatory conduct by the entity at issue. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009) (citations omitted). Once the complainant establishes a prima facie case of retaliation, "the burden of production shifts to the [respondent] to produce a legitimate, nondiscriminatory reason for the adverse action." *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO no. 638, 428, 446 (1994) (citations omitted). If the respondent satisfies this burden, the complainant may still prevail if it demonstrates that the provided reason was pretextual. *Id.* (citations omitted).

As to the third element of the prima facie case of retaliation, the action at issue constituting an adverse employment decision, or intimidating, threatening, coercive or other retaliatory behavior has been construed broadly. *See Ray v. Henderson,* 217 F.3d 1234, 1240–41 (9th Cir. 2000); *Breda v. Kindred Braintree Hosp.*, 10 OCAHO no. 1202, 12–13 (2013).

The causal link between the protected activity and the respondent's employment decision or intimidating, threatening, or coercive behavior must rise to the level of "but for" causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Rainwater v. Dr.'s Hospice of GA., Inc*., 12 OCAHO no. 1300, 17 (2017) (citations omitted); *R.O. v. Crossmark, Inc*., 11 OCAHO no. 1236, 16 (2014) (citations omitted); *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014) (citations omitted). "[I]n order to find that retaliation occurred, there must be some reason to believe that but for the protected activity, the adverse employment decision would not have taken place." *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 578 (1999).

In considering causation in a retaliation context, the amount of time which elapses between the protected activity and the retaliatory event can assist a fact-finder in assessing the causal link. *Id.* at 577 (citing *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986)). Courts, including this one, have not recognized a bright-line amount of time but instead opt to view this issue as more of a continuum.

> While there is no bright line rule that a particular time is either per se too long or per se sufficiently short to infer a causal connection, *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003), generally speaking, the greater the temporal gap, the more attenuated the inference. *See, e.g., Clark Cnty Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (noting that an adverse action occurring twenty months after the protected conduct "suggests, by itself, no causality at all"). Here the adverse action of [the complainant's] termination occurred two years or more after many of the complaints the complainant alleged in his charge … [and thus] the periods between the alleged conduct and the adverse action are simply too long to support a causal link.

Torres v. Pac. Cont'l Textiles, Inc., 10 OCAHO no. 1203, 8 (2013).

The Ninth Circuit, also weighing in on the relationship between elapsed time and causation, determined that:

> [T]iming alone will not show causation in all cases; rather, "in order to support an inference of retaliatory motive, the termination must have occurred 'fairly soon after the employee's protected expression.' " *Paluck v. Gooding Rubber Co*., 221 F.3d 1003, 1009–10 (7th Cir.2000). A nearly 18-month lapse between protected

> activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation. See id. (finding that a one-year interval between the protected expression and the employee's termination, standing alone, is too long to raise an inference of discrimination); *see also Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398–99 (7th Cir.1999) (four months too long) . . . .

Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1068 (9th Cir. 2002).

Ultimately, § 1324b "specifically prohibits retaliatory practices intended to impede a complainant's right to file a charge or complaint under § 1324b(a)(5)." *Ndzerre v. Wash. Metro. Area Transit Auth.*, 13 OCAHO no. 1306a, 8 (2018).

VI. DISCUSSION

A. Pleading Standards

Respondent asserts that Complainant's motion was not filed within the time set by the Court, and does not meet the pleading standards. Opp'n 5. As explained above, the Court construed Complainant's correspondence on October 8, 2020 as a request for an extension and the Court determined the contents of the request were sufficient to demonstrate requisite good cause. While a request for an extension on the day a filing is due is a risky litigation strategy, in this instance and with all applicable circumstances in mind, the Court determined it was in the interests of justice to allow Complainant additional time to submit a fully executed pleading. The decision to liberally construe the correspondence as an extension and provide a grant of additional time is consistent with the Court's "discretion to accept pleadings within a time period [it] may fix." *Villegas-Valenzuela v. INS*, 103 F.3d 805, 811 n.5 (9th Cir. 1996) (citing 28 C.F.R. § 68.11(b)).

Of note, Respondent was provided an opportunity to submit dispositive motions on its own accord and elected not to do so. Moreover, Respondent was provided with an opportunity to, and in fact did, respond to Complainant's filing. Ultimately, the Court's exercise of discretion in considering Complainant's submission a timely filed motion for summary decision does not prejudice Respondent. The Court will consider both Complainant's submission and Respondent's opposition.

Although the Court took a generous view of Complainant's extension request and late filing, a grant permitting consideration of the multiple sur-replies from Complainant is inappropriate. OCAHO's regulations expressly state "[u]nless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive documents shall be filed." 28 C.F.R. § 68.11(b).

A complete disregard for the procedural rules, which vest authority in the ALJ to shape and build the record, is distinct from an exercise of discretion to file a document after a deadline created by an ALJ's order requesting the parties to submit filings. Complainant had ample opportunity to request leave of the Court to file additional matters, yet he elected not to do so. No documents or matters submitted to this Court by Complainant after October 23, 2020, the date upon which Respondent's Opposition was filed, will be accepted or considered in this matter.

B. Evidentiary Submissions

Evidence provided "to support or resist a summary decision must be presented through means designed to ensure its reliability." *Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 3 (2002). While the evidentiary rules in administrative proceedings are more relaxed, "the proponent of documentary evidence must still authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be, even in administrative proceedings." *United States. v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted).

Both parties filed affidavits that meet the requirements set forth in 28 C.F.R. § 68.38(b),[8] and thus will be fully considered.

Complainant also filed a settlement agreement and a contract between Complainant and Respondent executed in 2017. Mot. Summ. Decision 6–18. The document appears fully executed and reliable; accordingly, it will be considered.

Complainant's remaining exhibits attached to his Motion for Summary Decision, however, lack any indicia of reliability. Exhibits 3, 4, 6–15 appear to be emails between Complainant and various individuals, including Respondent's employees and attorney, from 2017 to 2018 in which he recounts various incidents and allegations.[9] The emails appear to have been "cut and pasted" onto a continuous page and are not complete records of correspondence. The remainder of the exhibits, particularly Exhibit 15B, are receipts, again from 2017 and 2018 and appear to relate to the contract. This Court has no means to ensure that these were truly sent, and in any event, they primarily only set out Complainant's view of the events, events that occurred well before Complainant filed his Complaint. Exhibits 3, 4, 6–15 are admitted; however there is an insufficient showing of reliability, thus they will be afforded minimal weight.

In addition to the diminished weight assigned to the unreliable exhibits, they are of minimal relevance to these proceedings. As outlined above, the only two issues before this Court relate to hiring decisions made in spring 2019 and Respondent's decision to ban Complainant from

[8] Section 68.38(b) provides, in relevant part, that affidavits "shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[9] Complainant does not provide an "Exhibit 5," rather he skips from Exhibit 4 to Exhibit 6.

Respondent's establishment in December 2018, and whether that ban constitutes prohibited retaliation.

Respondent, the nonmoving party, submitted evidence with its opposition. Specifically, Respondent submitted an affidavit from Respondent's Controller and Acting General Manager and a document (Exhibit A, Affidavit of Controller/Acting GM) that appears to be a business record created contemporaneously during a job interview of Complainant. As noted above, the affidavit comports with the requirements of the regulation; it is signed and sworn to under penalty of perjury, and its content relate to the dispute before this Court. It is admissible and highly probative. Exhibit A is a summary of questions and answers that appear to have been made contemporaneously as the interview of Complainant was conducted. The affidavit states that Exhibit A is "a true and correct copy of interview notes." Aff. Controller/Acting GM ¶ 22. Based on that reference, Exhibit A has sufficient indicia of reliability, and the Court will accord it similar weight to the affidavit.

C. National Origin Discrimination

Complainant asserted that he was discriminated against based upon his national origin. Compl. 7. Respondent denied engaging in discrimination based on national origin, and asserted that the Court does not have subject matter jurisdiction over national origin claims in the instant case. Answer 5–6.

Respondent asserts that pursuant to Federal Rule of Civil Procedure 12(b)(1), this forum "lacks subject matter jurisdiction to hear Complainant's claims of national origin discrimination… because 8 U.S.C. § 1324b(a)(2) provides that section 1324(a)(1) shall not apply where the alleged national origin discrimination is covered under section 703 of the Civil Rights Act of 1964." Answer 5–6. Respondent attaches no evidence in support of that assertion. "'Mere conclusory allegations or denials' in legal memoranda or oral argument are not evidence . . . ." *United States v. Hudson Delivery Serv. Inc.*, 7 OCAHO no. 945, 368, 376 (1997) (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980)); *accord* 28 C.F.R. § 68.38(b) ("When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading.").

It is well-established that the EEOC covers national origin discrimination and enforcement of the Civil Rights Act of 1964; however employers brought before the EEOC must have fifteen or more employees. *Toussaint*, 6 OCAHO no. 892 at 797–98; *accord* 42 U.S.C. § 2000e(b). When an employer has less than fifteen employees but more than three, they are subject to the INA. *Toussaint*, 6 OCAHO no. 892 at 797 (citations omitted); *see also* § 1324b(a)(2)(B).

In considering this issue, the Court notes that Complainant had ample opportunity to engage, and did engage as indicated by his various motions, in discovery. It was also Complainant, not

Respondent, who elected to file a dispositive motion, in which he provided no evidence on the number of employees Respondent employs. Bearing in mind Complainant's pro se status, the evidentiary record indicates that Respondent appears to have at least four employees. See Opp'n 2, 3 (one waitstaff and security), Aff. Controller/Acting GM ¶¶ 1, 25 (controller/acting general manager, assistant bar manager/security manager, and bartender/bar supervisor).

Ultimately, the record, including Complainant's Motion for Summary Decision, makes no reference to national origin discrimination. More substantively dispositive than the number of employees is the reality that Complainant provides no evidence or information which would cause the Court to conclude there is a national origin issue to adjudicate. Complainant's national origin is presumed to be "American," but that is not entirely clear from the record. Furthermore, Complainant does not establish Respondent's knowledge of his national origin, and again makes no reference to national origin other than a mention at the outset of the pleadings. For these reasons, the claim of national origin discrimination is DISMISSED.

D. Citizenship Status Discrimination

Complainant asserted in his Complaint that he was not hired for a waitstaff position based upon his citizenship status, asserting that Respondent preferred non-U.S. citizens because of their citizenship status. Compl. 6. In his IER charge, Complainant also asserted that he was interviewed for a bar manager position, but he was also not hired. Compl. 14–15.

As explained above, it appears that Respondent has at least four employees, thus, consistent with § 1324b, a citizenship allegation is properly before the Court.

Respondent addressed the two positions that Complainant applied for in 2019 in the Affidavit of the Controller/Acting General Manager. Opp'n 5; Aff. Controller/Acting GM ¶¶ 7, 18. The Controller/Acting General Manager stated that she had previously interviewed Complainant for a waitstaff position and found that he was not qualified, and as his resume did not indicate any new qualifications, she did not interview him when he reapplied for the position in February 2019. Aff. Controller/Acting GM ¶¶ 8–9. Ultimately no one was hired for that position under the posting for which Complainant applied due to a wage error. *Id.* at ¶¶ 12–13. The position was reposted, and a qualified U.S. citizen was hired for the position. *Id.* at ¶¶ 14–16. Of note, Complainant did not apply for the reposted announcement. *Id.* at ¶¶ 14–16.

The second position that Complainant applied for was that of bar manager, and he was interviewed by the Controller/Acting General Manager on March 18, 2019. Aff. Controller/Acting GM ¶¶ 18–21. During that interview, Complainant did not demonstrate that he possessed the skills and experience necessary for the position. *Id.* at ¶ 23. In addition to his lack of qualifications and experience, he was rude and sarcastic towards the interviewer. *Id.* at ¶ 22. After finding no qualified candidates, Respondent gave the position's responsibilities to another employee, who is a U.S. citizen. *Id.* at ¶ 24.

The analysis for both positions is virtually identical. As it relates to both allegations of citizenship discrimination, Complainant is a U.S. citizen, Mot. Summ. Decision 2, which affords him "protected class" status for the purposes of the statute. *See* § 1324b(a)(3)(A). In both instances, Respondent, an employer, was seeking applicants for vacant positions. There is no dispute that Complainant advanced an application for both positions.

Complainant's prima facie case falters when the analysis turns to his qualifications for both positions. Complainant must put forth evidence demonstrating his qualifications for the vacant positions. In his Motion for Summary Decision, Complainant puts forth evidence associated with services he provided as a disc jockey, merchandiser, and advertiser. Mot. Summ. Decision 3–4, 30. Despite being the moving party, Complainant provided no evidence demonstrating his skills or experience related to waiting tables or managing a bar.

Respondent, the nonmoving party, provided preponderant evidence demonstrating Complainant's lack of qualifications for the positions. Respondent had previously interviewed Complainant for the waitstaff position in 2018 and determined at that time, Complainant was unqualified. Aff. Controller/Acting GM ¶¶ 7–9. When Complainant applied again in 2019, Complainant did not provide new information which would lead Respondent to believe he had acquired skills or experience which would render him qualified for the position. *Id.* Respondent interviewed Complainant for the bar manager position, and based on the sworn affidavit of the Controller/Acting General Manager, bolstered by her contemporaneous interview notes, Respondent determined Complainant was not qualified for the position. *Id.* at ¶¶ 17–23.

Complainant cannot establish a prima facie case of citizenship discrimination because he cannot demonstrate he was qualified for the positions for which he applied. While no further analysis is necessary, it is worth noting that Respondent ultimately hired or transferred responsibilities to U.S. citizen employees, a fact which would also undercut a theory of discrimination wherein Respondent prefers non-U.S. citizens over U.S. citizens due to their citizenship status. For these reasons, the citizenship-status discrimination claim is DISMISSED.

E. Retaliation

As noted above, a claim of retaliation must first identify a protected activity. Complainant identified two instances of contact with IER, which are protected under § 1324b(a)(5) as they constitute participation in a charge.[10] Specifically, on April 4, 2017, Complainant received

[10] Although Complainant has filed charges with other forums, including the EEOC, § 1324b(a)(5) only protects against retaliation based on the enumerated rights and privileges of § 1324b. Therefore, only his charges and communications with IER will be considered protected activity for purposes of retaliation. *See Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO

correspondence from IER related to a formal charge against Respondent. Compl. 23–24. This correspondence is a letter informing Complainant of his right to file a complaint with OCAHO. *Id.* The second instance of a protected activity asserted by Complainant is more dubious. Complainant provides a letter he appears to have drafted to IER. Compl. 32–33. It is unsigned and dated February 21, 2018. *Id.*

As to the April 2017 protected activity, Complainant is able to meet his burden demonstrating knowledge on the part of Respondent because Respondent's knowledge can be inferred since IER would have likely made contact with Respondent when it investigated the matter. On this point, Respondent does not provide any evidence or argument indicating a lack of awareness of this protected activity.

The unsigned draft letter from February 2018, however does not appear to have been served on or provided to Respondent. Indeed, the letter is not even addressed to Respondent, rather it is addressed to IER. Compl. 32. Complainant provides no evidence or assertion that Respondent was aware of this letter. Complainant cannot establish knowledge with respect to the letter, and so it is of little to no evidentiary value in a retaliation analysis and will not be discussed further.

While Complainant demonstrates engagement in protected activity and knowledge on the part of Respondent for the April 2017 IER engagement, it is not entirely clear what, specific instance Complainant asserts is retaliatory. The Court can divine from the Complaint and the Motion for Summary Decision that on or about December 31, 2018, Respondent informed Complainant he was not permitted to enter the premises. Mot. Summ. Decision 33–34. Additionally, Respondent either called or threatened to call law enforcement when Complainant went to Respondent's establishment while the ban was in effect. *Id.* at 33. Respondent corroborates the December 2018 date in its filing. Aff. Controller/Acting GM ¶ 28. It is reasonable, particularly when the definitions are construed broadly, that a ban on entering a premises could be threatening or coercive, particularly when there are threats of law enforcement involvement. Furthermore, such a ban would certainly create a barrier or heightened difficulty with respect to seeking employment from Respondent in the future. The ban, as it transpired in this case, does fall under the scope of the statute.

Notably, Complainant cannot establish a prima facie case of retaliation causally linking the April 2017 protected activity and the December 2018 instance where he was asked to leave Respondent's establishment. The case law on temporal proximity does not augur in his favor given the time elapsed between the two events is about 21 months or 636 days. In fact, Complainant provides no evidence or argument on the link between these two events.

---

no. 1259, 6 (2015) (citations omitted) ("A claim of retaliation for the filing of an EEOC charge is not cognizable in this forum and must be referred to EEOC itself.").

Even assuming arguendo that Complainant had demonstrated a prima facie case (which he has not as he cannot show causation), Respondent has provided sufficient evidence in the form of a sworn affidavit that it had a legitimate, nondiscriminatory reason for the ban. Respondent, in its opposition filing, notes that its decision to bar Complainant from its establishment had nothing to do with discrimination but, rather, "[b]ecause of the frequency and level of the incidents involving [Complainant], and in order to protect [Respondent's] employees and customers, [Respondent] made the decision to ban [Complainant] from entering the bar or discotheque." Aff. Controller/Acting GM ¶ 29. Furthermore, Complainant failed to establish that Respondent's legitimate, nondiscriminatory reason was pretextual.

Because Complainant cannot demonstrate a prima facie case of retaliation, the claim is DISMISSED.

VII. CONCLUSION

Complainant failed to establish a prima facie case for national origin discrimination and he failed to establish a prima facie case for citizenship discrimination as he was unqualified for both positions that he applied for. Additionally, Complainant failed to establish a prima facie case for retaliation because he cannot demonstrate a causal link between his protected activity and Respondent's actions in question. Pursuant to 28 C.F.R. § 68.52(d)(5), the Court finds by preponderant evidence that Respondent did not engage in unfair immigration-related employment practices.

As such, the Complaint in its entirety is DISMISSED.

VIII. FINDINGS OF FACT

1. Zaji Obatala Zajradhara is a United States citizen.

2. Zaji Obatala Zajradhara received a letter dated April 4, 2017 from the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice regarding the charge he filed against GIG Partners.

3. GIG Partners, Inc. had knowledge of Zaji Obatala Zajradhara's communications with the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice that occurred on or around April 2017.

4. In 2017, Zaji Obatala Zajradhara had a business relationship with GIG Partners, Inc. for the provision of services, specifically performing as a disc jockey or "DJ" at GIG Partners, Inc.'s establishment.

5. Zaji Obatala Zajradhara drafted an unsigned letter dated February 21, 2018 to the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice regarding his interactions with GIG Partners, Inc.

6. In 2018, GIG Partners, Inc. received Zaji Obatala Zajradhara's resume as an application for a waitstaff position.

7. In 2018, GIG Partners, Inc. interviewed Zaji Obatala Zajradhara for a waitstaff position and determined he was unqualified for the position.

8. In December 2018, Zaji Obatala Zajradhara was informed he could not be on the premises of GIG Partners, Inc.'s establishment, i.e. GIG Partners, Inc. banned Zaji Obatala Zajradhara from the establishment.

9. GIG Partners, Inc. elected to enact this ban on or before December 2018 because of Zaji Obatala Zajradhara's behavior, to wit: harassing a female employee, generating numerous complaints from customers and staff.

10. On or before February 1, 2019, GIG Partners, Inc. advertised for a vacant waitstaff position.

11. Zaji Obatala Zajradhara submitted an application for the February 2019 advertised vacant waitstaff position.

12. GIG Partners, Inc. did not interview Zaji Obatala Zajradhara for the waitstaff position.

13. GIG Partners, Inc. did not hire Zaji Obatala Zajradhara for waitstaff postion.

14. GIG Partners, Inc.'s rationale for not hiring Zaji Obatala Zajradhara was based on his previous interview performance and lack of new information indicating Zaji Obatala Zajradhara updated his skills or experience to become qualified for the waitstaff position.

15. On or before January 24, 2019, GIG Partners, Inc. advertised a vacant bar manager position.

16. Zaji Obatala Zajradhara applied for the vacant bar manager position.

17. Zaji Obatala Zajradhara was interviewed by GIG Partners, Inc. for a vacant bar manager position.

18. GIG Partners, Inc. determined Zaji Obatala Zajradhara was not qualified for the bar manager position based on the interview and Zaji Obatala Zajradhara's application submission.

19. GIG Partners, Inc. has at least four employees.

IX. CONCLUSIONS OF LAW

1. Zaji Obatala Zajradhara is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. GIG Partners, Inc. is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

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

4. Timely filing a charge with IER "is a prerequisite for filing a private action with OCAHO." *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 793 (1996) (citing *Bozoghlanian v. Hughes Radar Sys. Grp.*, 5 OCAHO no. 741, 148, 154 (1995)).

5. 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) (2020).

6. "An issue of material 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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

7. "[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.'" United States v. 3679 Com. Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)).

8. When the party who bears the burden of proof at trial, the complainant, moves for summary decision, it "must come forward with sufficient competent evidence to support each essential element of the claim." *United States v. Saidabror Siddikov*, 11 OCAHO no. 1257, 10 (2015) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

9. Failure to provide sufficient competent evidence to support each element warrants dismissal of the complaint. *United States v. Saidabror Siddikov*, 11 OCAHO no. 1257, 10 (2015).

10. In a non-selection (i.e. hiring) case, a complainant's prima facie case includes, at a minimum, the following: (1) complainant's membership of a protected class (citizenship or national origin); (2) an employer seeking applicants for a position; (3) complainant's application

for the vacant position; (4) complainant was qualified for the position; and (5) complainant was not selected for the position. *See Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO no. 550, 1454, 1474 (1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

11. Under a retaliation theory, a complainant's prima facie case includes, at a minimum, the following: (1) complainant engaged in activity protected under § 1324b; (2) respondent was aware of the protected activity; (3) complainant suffered an adverse employment decision, or in the case of § 1324b(a)(5), he was intimidated, threatened, coerced, or otherwise retaliated against by the entity at issue; and (4) there was a causal link between the protected activity and the retaliatory conduct by the entity at issue. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009) (citations omitted).

12. Once the complainant establishes a prima facie case of retaliation, "the burden of production shifts to the [respondent] to produce a legitimate, nondiscriminatory reason for the adverse action." *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO no. 638, 428, 446 (1994) (citations omitted).

13. If the respondent satisfies this burden, the complainant may still prevail if it demonstrates that the provided reason was pretextual. *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO no. 638, 428, 446 (1994) (citations omitted).

14. The causal link between the protected activity and the respondent's employment decision or intimidating, threatening, or coercive behavior must rise to the level of "but for" causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Rainwater v. Dr.'s Hospice of GA., Inc*., 12 OCAHO no. 1300, 17 (2017) (citations omitted); *R.O. v. Crossmark, Inc*., 11 OCAHO no. 1236, 16 (2014) (citations omitted); *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014) (citations omitted).

15. In considering causation in a retaliation context, the amount of time which elapses between the protected activity and the retaliatory event, can assist a fact-finder in assessing the causal link. *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 577 (1999) (citing *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986)).

16. "While there is no bright line rule that a particular time is either per se too long or per se sufficiently short to infer a causal connection . . . generally speaking, the greater the temporal gap, the more attenuated the inference." *Torres v. Pac. Cont'l Textiles, Inc.*, 10 OCAHO no. 1203, 8 (2013) (first citing *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003); and then citing *Clark Cnty Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001)).

17. "Unless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive documents shall be filed." 28 C.F.R. § 68.11(b) (2020).

18. Evidence provided "to support or resist a summary decision must be presented through means designed to ensure its reliability." *Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 3 (2002).

19. While the evidentiary rules in administrative proceedings are more relaxed, "the proponent of documentary evidence must still authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be, even in administrative proceedings." *United States. v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted).

20. Cases involving national origin discrimination involving employers with more than three but less than fifteen are subject to 8 U.S.C. § 1324b. *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO no. 892, 784, 797 (1996) (citations omitted); *see also* § 1324b(a)(2)(B).

21. Zaji Obatala Zajradhara filed his charge with the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice on April 24, 2019; thus, any allegations involving actions taken prior to October 26, 2018 will not be considered because they are untimely.

22. The claim of national origin discrimination is dismissed because Zaji Obatala Zajradhara has not established a prima facie case of such at this late stage of summary decision.

23. The claim of citizenship status discrimination is dismissed because Zaji Obatala Zajradhara has not established a prima facie case for either the waitstaff position or the bar manager position; specifically, he did not show that he was qualified for either position.

24. Zaji Obatala Zajradhara engaged in two instances of protected activity under 8 U.S.C. § 1324b(a)(5): first, when he received correspondence dated April 4, 2017 from the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice; and second, when he drafted a letter dated February 21, 2018 to the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice.

25. GIG Partners, Inc.'s ban of Zaji Obatala Zajradhara from the premises could be threatening or coercive, particularly when there are threats of law enforcement involvement.

26. The claim of retaliation regarding the February 2018 interaction with the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice is dismissed because Zaji Obatala Zajradhara did not establish a prima facie case; specifically, he did not show that GIG Partners, Inc. had knowledge of that activity or that there was causation.

27. The claim of retaliation regarding the April 2017 interaction with the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice is dismissed because Zaji Obatala Zajradhara has not established a prima facie case; specifically, he did not show causation between the protected activity and the ban.

28. Even assuming arguendo that Zaji Obatala Zajradhara had demonstrated a prima facie case of retaliation, GIG Partners provided a legitimate, nondiscriminatory reason for the ban, and he did not demonstrate pretext.

29. Zaji Obatala Zajradhara is not entitled to summary judgment on his claims of discrimination and retaliation because he has failed to establish prima facie cases for each.

30. There is no genuine issue of material fact where the established facts show by a preponderance of the evidence a prima facie case of discrimination or retaliation.

31. Pursuant to 28 C.F.R. § 68.52(d)(5) (2020), the Court finds by preponderant evidence that GIG Partners, Inc. did not engage in unfair immigration-related employment practices.

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.

SO ORDERED.

Dated and entered on March 5, 2021.

_____

Honorable Andrea R. Carroll-Tipton
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.