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

June 27, 2023

SOPHIE ACKERMANN, Complainant, v. MINDLANCE, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2023B00004

Appearances: Sophie Ackermann, pro se Complainant
Kathryne Hemmings Pope, Esq. and Christopher J. Gilligan, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

This matter 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. On October 28, 2022, Complainant Sophie Ackermann filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) asserting claims of discrimination based on national origin and citizenship, retaliation, and unfair documentary practices arising under 8 U.S.C. § 1324b against Respondent Mindlance, Inc. On January 4, 2023, Respondent filed a Motion to Dismiss the Complaint. Complainant filed a response to the Motion to Dismiss on March 17, 2023. For the reasons discussed below, the Complaint will be stayed as to Complainant's discrimination and unfair documentary practices claims, and Respondent's Motion to Dismiss Complainant's retaliation claim is denied.

II. PROCEDURAL HISTORY AND BACKGROUND

On May 31, 2022, Complainant filed a charge with the Immigrant and Employee Rights Section (IER) alleging that in April 2022 Respondent, a recruitment agency located in Union, New Jersey, (1) discriminated against her because of her citizenship status, (2) retaliated against her for asserting rights protected under 8 U.S.C. § 1324b, and (3) engaged in unfair documentary

practices. Compl. 18–20. In a letter dated July 29, 2022, IER informed Complainant that IER was dismissing her charge because IER did not have reasonable cause to believe that Respondent discriminated or retaliated against her in violation of 8 U.S.C. § 1324b. *Id.* at 16–17. IER informed Complainant that she could nevertheless file her own complaint with this Court, which she did on October 28, 2022. *Id.*

On January 4, 2023, Respondent filed a Motion to Dismiss, but did not file an answer after requesting an extension of time to do so. *See Ackermann v. Mindlance, Inc.*, 17 OCAHO no. 1462 (2022).[1] Thus, on January 24, 2023, the Court issued an Order to Show Cause, requiring Respondent to file an Answer as well as a submission demonstrating good cause for its failure to timely file an answer. *Ackermann v. Mindlance,* 17 OCAHO no. 1462a (2023). On February 2, 2023, Complainant filed a Motion for Default Judgment, arguing that the Court should find Respondent in default for failure to timely file its answer. Respondent filed its opposition to the Motion for Default Judgment on February 7, 2023.

On February 3, 2023, Respondent filed its Answer as well as a Statement of Good Cause, and on February 15, 2023 the court discharged the Order to Show Cause, and denied Complainant's Motion for a Default Judgment.

The Motion to Dismiss is now ripe for adjudication.

III. POSITIONS OF THE PARTIES

A. Respondent

Respondent moves to dismiss the Complaint in its entirety for failure to state a claim upon which relief can be granted pursuant to 28 C.F.R. § 68.10.[2] Mot. Dismiss 3.[3]

[1] 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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[2] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

First, Respondent argues that Complainant's national origin discrimination claim must be dismissed because Complainant has not alleged that she is a member of a protected class. *Id.* at 14–15. Even if she had, Respondent argues that she has not alleged facts supporting a reasonable inference that an individual outside of her protected class was hired for the position or that the position remained open, and Respondent has provided a legitimate, non-discriminatory reason for the rescission of Complainant's job offer. *Id.* at 15–16.

Second, Respondent argues that Complainant's citizenship status discrimination claim must be dismissed because although she alleges that she is a member of a protected class as a United States citizen, she has not alleged facts that would support a reasonable inference that Respondent treated her differently based on her citizenship status, and Respondent has proffered a legitimate, non-discriminatory explanation for rescinding her job offer. *Id.* at 16–18.

Third, Respondent argues that Complainant's retaliation claim must be dismissed because Complainant has failed to allege facts that would tend to establish that any adverse action taken by Respondent was causally connected to her exercising her rights under § 1324b. *Id.* at 18–21.

Finally, Respondent asserts that Complainant's unfair documentary practices claim must be dismissed because Complainant has not alleged that Respondent refused to accept any of her documents and has not alleged that Respondent's request for certification of Respondent's Form I-9 was done with the purpose or intent of discrimination. *Id.* at 21–24.

B. Complainant[4]

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[3] Respondent's Motion to Dismiss and Memorandum of Law are not paginated; accordingly, this Court refers to the pages in the combined submission.

[4] Much of Complainant's opposition is devoted to arguing that she did not receive the Respondent's Motion to Dismiss until February 13, 2023, when she received Respondent's response to her Motion to Default, which included a copy. *See* C's Opp'n 1–2, 12, 15–18 (including copies of United States Post Office tracking pages). To the extent that Complainant's argument addresses the deadline for her response to the Motion to Dismiss, the Court acknowledged potential confusion regarding filings in the Order Discharging Order to Show Cause, and set a new date for Complainant's response to the Motion to Dismiss of March 8, 2023. Complainant did not file her response to the Motion to Dismiss until March 17, 2023, did not request an extension, and has not addressed why her submission was untimely. Nonetheless, given the confusion regarding filings, Complainant's proffer that she did not receive the original Motion to Dismiss, Complainant's pro se status, the relatively short delay of 9 days, the fact that Respondent has not objected to the Court's consideration of Complainant's late submission, and the fact that there has not been prejudice to Respondent, the Court will exercise discretion to consider the late filing. *See Ehere v. HawaiiUSA Fed. Credit Union*, 17 OCAHO no. 1471, 2–3 (2023) (setting forth the good cause standard for accepting late filings).

In her opposition, Complainant largely reiterates the allegations in the Complaint. She asserts that Respondent's request for her to get the signature of a third-party on her Form I-9 was unnecessary, given that Respondent could have used the E-Verify system, and would not allow her to come to their Union, New Jersey office in-person for onboarding. C's Opp'n 3. Complainant also asserts that she followed Respondent's onboarding procedures and completed the required documentation immediately "according to Federal Standards." *Id.* As to Respondent's argument regarding her allegedly racist remarks, Complainant responds that she had "no favoritism or otherwise 'racist' feelings to Mindlance," and never met any of their employees in-person or saw any of the employees virtually. *Id.* at 3–5. Complainant claims that she is disabled and that she "completed a document" to Respondent regarding this; therefore, Complainant asserts, "whatever their reason to deny my onboarding [i]s not sufficient and is reason for discrimination." *Id.* at 5. Complainant also attaches several emails with Respondent and IER and her offer of employment from Respondent. *Id.* at 4, 6–8, 20.

IV. STANDARDS OF LAW

An OCAHO Administrative Law Judge (ALJ) may dismiss a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10. This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016) (citing *United States v. Spectrum Technical Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1).

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." *Udala v. N.Y. State Dep't of Educ.*, 4 OCAHO no. 633, 390, 394 (1994). The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. *Id.*

To meet OCAHO pleading standards, a complaint must contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3). Statements made in the complaint only need to be "facially sufficient to permit the case to proceed further," *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012) (citations omitted), as "[t]he bar for pleadings in this forum is low," *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021). Section 1324b complainants must provide more than legal conclusions, but need not plead a prima facie claim of discrimination, to overcome a motion to dismiss. *See Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016) ("[A] § 1324b complaint must nevertheless contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination."). To give rise to an inference of discrimination, complaints must include information that links the complainant's protected class and the employment action in question. *See id.*; *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 5 (2022). Moreover, the evidentiary standards set forth in *McDonnell*

Douglas Corp. v. Greene, 411 U.S. 492 (1971) do not apply in the motion to dismiss context. *Heath v. Tringapps, Inc.*, 15 OCAHO no. 1410, 5 (2022).

Since the allegations at issue in this case occurred in New Jersey, the Court may look to the case law of the relevant United States Court of Appeals, here the Third Circuit. *See* 28 C.F.R. § 68.57.

V. DISCUSSION

A. Facts[5]

Complainant is a United States Citizen of American, German, and/or Italian national origin. Compl. 2, 19, 29. Respondent is a recruiting staffing agency. *Id.* at 25.

A recruiter for Respondent contacted Complainant via phone about an opportunity with Bristol-Myers Squibb (BMS) on March 23, 2022, and about several other opportunities with BMS through April 13, 2022. *Id.* Complainant applied for a position as a Learning Management System Administrator at BMS through Respondent on April 8, 2022. *Id.* at 6. Complainant received two interviews with BMS. *Id.* at 25. During her telephonic interview on April 20, 2022, Sharon Brower, a BMS hiring manager, told Complainant that she was "#1" and "hinted she was hiring" Complainant. *Id.* at 7, 25. On April 22, 2022, Complainant was offered the position of Regulatory & Medical Affairs – Learning Technology Administrator at $83,200 annually, with a start date of May 5, 2022, which was later pushed to May 23, 2022.[6] *Id.* at 7, 25; *see also* C's Opp'n 20 (Complainant's April 27, 2022 offer of employment letter from Mindlance with a start date of May 23, 2022).

On April 28, 2022, Mindlance Human Resources representative Hera Iqbal emailed Complainant requesting that Complainant have an "authorized representative" for Mindlance, such as a family member, friend, or neighbor sign Section 2 of her Form I-9. Compl. 25; *see also* C's Opp'n 3–4. Complainant was "taken aback," and called Hera Iqbal, who confirmed that this was their

[5] The facts are drawn from the Complaint and its attachments, *see* Fed. R. Civ. P. 10(c), as well as an April 28, 2022 email from Hera Iqbal to Complainant and an offer of employment letter submitted with Complainant's opposition brief as incorporated by reference into and integral to the Complaint. C's Opp'n 3–4, 20; Compl. 7 (discussing Complainant's offer of employment from Mindlance), 25 (discussing Ms. Iqbal's April 28, 2022 email); *see Pinkney v. Meadville, Pa.,* No. 21-1051, 2022 WL 1616972, at *2, 2022 U.S. App. LEXIS 13824, at *5 (3d Cir. May 23, 2022) ((in resolving a motion to dismiss, "[c]ourts may consider 'matters incorporated by reference or integral to the claim . . .'").

[6] Complainant alleges May 9, 2022, elsewhere, *see* Compl. 25.

"procedure moving forward." Compl. 25. Complainant "expressed [her] displeasure." *Id.* Complainant then sent a color copy of her passport to Ms. Iqbal, and went to the bank, post office, and her neighbors, all of whom refused to sign the Form I-9. *Id.* at 25–26.

Complainant then called the IER hotline and received a call back from Trial Attorney Angela Miller. *Id.* at 26. Ms. Miller contacted Ms. Iqbal, who agreed to a video conference with Complainant. *Id.*

On May 3, 2022, at 5:43pm—five hours after Attorney Miller contacted Ms. Iqbal—Mindlance employee Emily Guidera emailed Complainant that they were "removing [her] from candidacy effective immediately" for job posting #47088-1. *Id.* at 8–9. Ms. Guidera wrote that during Complainant's April 28, 2022 phone call with Ms. Iqbal, Complainant stated that her "identity does not require a lawyer or an Indian Sheep." *Id.* Ms. Guidera wrote that they considered "Indian Sheep" to be a racial slur, which was strictly against corporate policy. *Id.* In addition, Complainant made other comments that had "racist undertones." *Id.* Ms. Guidera wrote that they had a recording of the phone call. *Id.* Complainant alleges that the accusation that she used a racial slur was "found not to be true by DOJ's investigation." *Id.* at 9.

Following her rejection from employment with BMS through Mindlance, Complainant has been "told by numerous recruiting firms" that Mindlance "blacklisted" her from applying since June 17, 2022. *Id.* at 29 (indicating that Respondent wrote "Do Not Represent" or "Do No Re-Submit"), 7 (alleging that she "became blacklisted on June 21, 2022 from many/all recruiter[s]"). Complainant alleges that Respondent affected her ability to get a job at the four BMS locations in New Jersey, for which she applied for around 25 positions, "eliminate[d her] from the job boards," and slandered her name to BMS and "throughout the entire recruiting industry." *Id.* at 29–30.

B. National Origin-Based Discrimination

Title 8 U.S.C. § 1324b(a)(1)(B) prohibits an employer from discriminating against an individual with respect to hiring, recruitment or referral for a fee, or termination because of the individual's national origin.

Respondent argues that Complainant's national origin discrimination claim must be dismissed for failure to state a claim because: (1) Complainant does not plead that she is a member of a protected class, (2) Complainant does not plead facts from which it reasonable to infer that Respondent treated her differently based upon her national origin, and (3) even if Complainant has alleged a prima facie case of discrimination, her own pleadings establish a legitimate, non-discriminatory reason for rescinding her job offer. Mot. Dismiss 13–16.[7]

[7] Although Respondent has not based its motion to dismiss on failure to allege subject matter jurisdiction, the Complainant states in the Complaint that she does not know how many

As a threshold matter, it is not clear from the Complaint what Complainant alleges is her national origin. The only place where Complainant indicates discrimination based on national origin is in the checked boxes on the OCAHO complaint form. Compl. 6 (checking "YES" for the question "Were you discriminated against because of your national origin[?] and checking both "Citizenship status" and "National origin" for the question "Why did the Business/Employer refuse to hire you?"). OCAHO's complaint form does not otherwise ask what the complainant's national origin is, and Complainant did not specify in the written portions, or in the attachments to the Complaint, which include a relatively detailed narrative appended to the IER form. She does indicate that she is a United States citizen, Compl. 2, and mentions that she has a "30[] year career as an American Citizen," *id.* at 29. On the IER Form, the Complainant did not raise national origin discrimination—only citizenship status discrimination, retaliation, and unfair documentary practices—but did specify that her national origin is "Italian/German." *Id.* at 19.

As to Respondent's first argument—that Complainant cannot establish that she is a member of a protected class "based upon her status as a natural born American citizen," Mot. Dismiss 15—the question of whether "American" is a protected class for purposes of discrimination based on national origin under 8 U.S.C. § 1324b(a)(1)(A) does not appear to have been directly addressed in published OCAHO case law.[8]

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employees Respondent employs. Compl. 4. Were the claims based on nationality and citizenship not subject to dismissal on other grounds, the Complainant would need to assure this tribunal of its jurisdiction. *See Patel v. USCIS Boston*, 14 OCAHO no. 1353, 2 (2020) ("[A] court has 'an obligation to inquire *sua sponte* into its own subject matter jurisdiction.'") (citation omitted); 8 U.S.C. § 1324b(a)(2) (stating that OCAHO has subject matter jurisdiction over § 1324b citizenship status claims if the employer employs more than three employees); *id.* § 1324b(a)(2)(B) (OCAHO's subject matter jurisdiction for hearing § 1324b national origin allegations is limited to cases in which an employer employs between four and fourteen employees).

[8] *See, e.g.*, *Lewis v. Ogden Servs.*, 2 OCAHO no. 375, 593, 596 n.2 (1991) (noting that a claim based on "American national origin" was "apparently a matter of first impression" and that while the ALJ was "not certain that 8 U.S.C. § 1324b is available for such a claim it may be arguable that American citizenship is a viable category for discrimination jurisdiction if, for example, an employer were to hire only United States citizens of Salvadoran national origin as opposed to other persons of 'American' national origin"); *Lewis v. McDonald's Corp.*, 2 OCAHO no. 383, 696, 701 (1991).

In the context of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq., in *Espinoza v. Farah Mfg. Co., Inc.*, the Supreme Court "concluded that Title VII 'prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin[]' . . . and thus, while national origin discrimination and

The Court need not decide that question, because even assuming that Complainant has alleged she is a member of a protected class, the Court agrees with Respondent that Complainant has not adequately stated a claim for discrimination based on a national origin of American, Italian, or German. Complainant does not allege any facts suggesting that Respondent was aware of these national origins, nor that Respondent treated her differently based on her American, Italian, or German origins when it rescinded her job offer with BMS (for example, any comments made by Respondent's employees regarding her national origin, or the national origin of the person placed by Respondent in the position at BMS). *See, e.g.*, *Zajradhara v. GIG Partners*, 14 OCAHO no. 1363c, 12 (2021) (dismissing national origin discrimination claim on summary decision when the Complainant had not "establish[ed] Respondent's knowledge of his national origin").

Complainant also alleges that she was "told by numerous recruiting firms" that Mindlance "blacklisted" her from applying since June 17, 2022, Compl. 7, 29, which affected her ability to get a job at the four BMS locations in New Jersey, for which she applied for around 25 positions, "eliminate[d her] from the job boards," and slandered her name to BMS and "throughout the entire recruiting industry," *id.* at 30. Complainant alleges that Respondent's actions "seemed to coincide and determined by [IER's] intervention to assist on the on-boarding issue of the I9." *Id.* at 9. This appears to be an allegation that Respondent retaliated against her, and will be analyzed as such. *See, e.g.*, *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("[P]laintiffs may be able to state a claim for retaliation, even though they are no longer employed by the defendant company, if, for example, the company 'blacklists' the former employee, wrongfully refuses to write a recommendation to prospective employers, or sullies the

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citizenship status discrimination may at times overlap [they are] 'distinct phenomena.'" *Kamal-Griffin v. Curtis*, 3 OCAHO no. 550, 1454, 1459 (1993) (citing, inter alia, *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973)). The Supreme Court defined "national origin" as referring to the "country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Some Courts have found that being "American" does not fall within this definition of national origin. *See, e.g.*, *English v. Misys Int'l Banking Sys.*, No. 05-cv-2540, 2005 WL 1703199, at *5, 2005 U.S. Dist. LEXIS 29474, at *15 (S.D.N.Y. Nov. 18, 1983) ("Here, Plaintiff's national origin discrimination claim must be dismissed because being 'American' does not fall within the definition of 'national origin,' which is determined by looking only to his ancestry." (citation omitted)). Other courts have found national origin claims based on being "American" actionable under Title VII. *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 223 (2d Cir. 2014) (finding that the plaintiff "who is white and of United States national origin" was a member of a protected class for the purpose of race and national origin discrimination claims, and that the plaintiff had stated plausible claims of discrimination based on treatment compared to similarly situated employees of Japanese national origin); *Tippie v. Spacelabes Med., Inc.*, 180 F. App'x 51, 55 (11th Cir. 2006); *Pickens v. Shell Tech. Ventures, Inc.*, 118 F. App'x 842 (5th Cir. 2004).

plaintiff's reputation."). Complainant does not allege any facts that the "blacklisting" was due to her nationality.

As noted above, Complainant need not plead a prima facie case of discrimination, but the complaint must nevertheless contain sufficient minimal factual allegations to satisfy 28 C.F.R. § 68.7(b)(3) and give rise to an inference of discrimination. *See Jablonski*, 12 OCAHO no. 1272 at 6 ("Where a complainant alleges no facts from which an adjudicator could reasonably conclude that the opposing party violated the law, dismissal is the appropriate result."). Based on the pleadings, it appears Complainant did not plead the minimal factual allegations to support a national origin discrimination claim.[9]

However, because the Court finds itself in a position wherein it is unable to execute a final case disposition, it now issues a stay of these proceedings as to the national origin claim.[10] *A.S. v. Amazon Web Servs.*, 14 OCAHO no. 1381h, 2 n.4 (2021); *see, e.g.*, *Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388g, 2 (2022); *Rodriguez Garcia v. Farm Stores*, 17 OCAHO no. 1449, 2–3 (2022); *Zajaradhara v. Li Yong Hong Corp.*, 17 OCAHO no. 1472, 2–3 (2023). *See also* Department of Justice Unified Agenda, RIN 1125-AB28, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1125-AB28 (last accessed June 27, 2023). The Court therefore will not make a final determination regarding the motion to dismiss on this ground.

C. Citizenship-based discrimination.

Respondent argues that Complainant's citizen-based discrimination claim must be dismissed because: (1) her citizenship claim "should be considered with and treated as a nationality discrimination claim," because "although nationality and citizenship are not entirely synonymous, the distinction has little practical impact in the world today," Mot. Dismiss 17 (citing *Miller v. Albright*, 523 U.S. 420, 467 (1998)); (2) Complainant does not plead facts that would support a finding that she was discriminated against based on her citizenship status, *id.* at 17–18; and (3) a legitimate, non-discriminatory reason for rescinding her job offer is clear from the face of her pleadings, *id.* at 18.

[9] As to Respondent's argument that Complainant's pleadings allege a legitimate, non-discriminatory reason for Respondent's decision not to place Complainant for employment at BMS, the Court need not reach that argument, given the finding that Complainant has not adequately alleged national origin discrimination, and the *McDonnell Douglas* burden-shifting framework does not apply at the motion to dismiss stage. *See Heath*, 15 OCAHO no. 1410, at 5.

[10] A stay of proceedings is generally defined as "a ruling by a court to stop or suspend a proceeding . . . temporarily or indefinitely. A court may later lift the stay and continue the proceeding." *Heath v. I-Services, Inc.*, 15 OCAHO no. 1413a, 2 n.4 (2022) (citations omitted).

Title 8 U.S.C. § 1324b(a)(1)(B) prohibits an employer from discriminating against an individual with respect to hiring, recruitment or referral for a fee, or termination on account of the individual's citizenship status if she is a "protected individual."

It is undisputed that Complainant, a United States citizen, is a protected individual. *See* § 1324b(a)(3)(A). The Court does not find Respondent's argument that Complainant's "[United States] citizenship discrimination claim should be considered with and treated as a[n American] nationality discrimination claim" persuasive. *See* Mot. Dismiss 17. Respondent cites to a footnote in the Supreme Court decision in *Miller*, 523 U.S. at 467 n.2, which noted that although one can be an American national and not a United States citizen, the only "remaining noncitizen nationals are residents of American Samoa and Swains Island." But the cases Respondent cites do not support the proposition that such claims must therefore be treated as the *same*. *See, e.g.*, *English v. Misys Int'l Banking Sys.*, No. 05-cv-2540, 2005 WL 1703199, at *6, 2005 U.S. Dist. LEXIS 29474, at *18 (D. N.J. July 20, 2005) (noting that when a plaintiff claimed he suffered discrimination as an "American" under the New Jersey Law Against Discrimination, such a claim could "fall under either citizenship or 'nationality'").

Nonetheless, as with the claim based on national origin, the Complaint contains no facts from which this Court could infer that Complainant's job offer was rescinded due to her United States citizenship. While the allegations do allow for an inference that Respondent knew of Complainant's citizenship status, *see* Compl. 26 (alleging that Complainant sent Ms. Iqbal a copy of her passport), there are no allegations suggesting that the rescission of Complainant's job offer was because of this citizenship status. The only factual allegations regarding her citizenship status are: (1) she checked the box on the OCAHO complaint form and IER charge indicating discrimination based on citizenship, Compl. 6 (answering both "Citizenship status" and "National origin" to the question "Why did the Business/Employer refuse to hire you?"), 19; (2) her assertion that she "wouldn't have a 30y career as an American Citizen with numerous references [she] also provided" if she did not "take the path of least resistance," *id.* at 29; (3) describing the ways that an employee may prove citizenship on a Form I-9, *id.*; and (4) alleging that she had "never had to obtain a representative for another company to vouch for [her] US citizenship in the last 32 years of working various jobs," *id.* at 25. None of these allegations suggest, either directly or indirectly, that the rescission of her job offer was because of her citizenship status. These references appear to relate to the dispute over the process Respondent used to verify employment, but not to the decision to rescind her employment offer. In sum, Complainant offers no facts that would permit a reasonable factfinder to infer that she was discriminated against on the basis of her United States citizenship in hiring, firing, or recruitment for a fee. *See Jablonski*, *supra.*[11]

[11] For the reasons detailed above, Complainant has also not alleged a citizenship status discrimination claim based on "blacklisting," and the Court need not consider Respondent's arguments regarding the legitimate, non-discriminatory reason for the rescission of her job offer.

However, because the Court finds itself in a position wherein it is unable to execute a final case disposition, it now issues a stay of these proceedings as to the citizenship claim. *See supra* Section V.B. The Court therefore will not make a final determination regarding the motion to dismiss on this ground.

D. Retaliation

Respondent first argues that Complainant's retaliation claim must be dismissed because Complainant has not alleged sufficient facts to support a reasonable inference of retaliation; in particular, Complainant has not alleged sufficient facts that would tend to establish that any adverse action was causally connected to her exercising her rights under section 1324b. Mot. Dismiss 19–20. Respondent states that Complainant's allegations are conclusory and unsupported accusations without facts to suggest a nexus between her protected activity and the rescission of her job offer. *Id.* at 19. Further, Respondent argues that the pleadings and attached documents demonstrate that Respondent cooperated with IER, but was unwilling to move forward not due to her protected activity, but due to her utterance of a racial slur. *Id.* at 20. Finally, Respondent states that Complainant makes a number of allegations about the actions of BMS, but this is a third-party company not owned, operated, or affiliated with Respondent, and their actions should not be attributed to Respondent. *Id.* at 20–21.

Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." Although Complainant does not have to plead a prima facie case at this stage, the elements are instructive: A prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual's protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action. *Rainwater v. Doctor's Hospice of Georgia, Inc.*, 12 OCAHO no. 1300, 17 (2017) (citing *Chellouf v. Inter American University of Puerto Rico*, 12 OCAHO no. 1269, 5–6 (2016)). Moreover, the U.S. Supreme Court has held that "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *see also Chellouf*, 12 OCAHO no. 1269 at 14 (following *Nassar*); *accord Babb v. Wilkie*, 140 S. Ct. 1168 (2020).

Here, Respondent does not contest that Complainant has alleged the first three elements of a prima facie case, i.e., that she engaged in protected conduct of which Respondent was aware, and suffered an adverse employment action. *See* Mot. Dismiss 19–21. Respondent only contests the

third element: whether Complainant has adequately alleged that her protected activity was the but-for cause of the adverse action. *Id.*

Respondent argues that Complainant has not alleged facts suggesting a nexus between her protected activity and the rescission of her job offer, and any facts she alleges are conclusory. However, temporal proximity between an employer's knowledge of a protected activity and the adverse employment action may alone establish causality. *See, e.g.*, *Eskridge v. Philadelphia Hous. Auth.*, 722 F. App'x 296, 300 (3d Cir. 2018). "For 'temporal proximity' between protected activity and an adverse action to establish causation on its own, the gap must be 'very close.'" *Id.* (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam)); *see also Martinez v. Superior Linen*, 10 OCAHO no. 1180, 7 (2013).

Here, Complainant alleges, and the email purportedly from IER confirms, that she reached out to IER regarding the Respondent's I-9 practices regarding attestation of her documents, after which IER contacted Respondent to attempt to resolve this issue. Compl. 8–9, 26. Complainant's job offer was rescinded five hours after IER contacted Respondent. *Id.* Given the very close temporal proximity between the contact with Respondent by IER and Respondent's email to Complainant rescinding the job offer, the Court finds that Complainant pled sufficient facts to support an inference of retaliation. *See, e.g.*, *Rosencrans v. Quixote Enters., Inc.*, 755 F. App'x 139, 143 (3d Cir. 2018) (finding gap of a single day between female employee's marriage and termination supported inference of discrimination under Title VII and state law as there was "very close temporal proximity" between the two events).

As to the argument that BMS' actions should not be attributed to Respondent, the Court does not find that this argument supports dismissal of Complainant's retaliation claim. Complainant alleges that IER contacted one of Respondent's employees (Ms. Iqbal), and her job offer was then rescinded via an email by another of Respondent's employees, stating that "*[w]e* are removing you from candidacy effective immediately." Compl. 8 (emphasis added). This action was allegedly taken by Respondent, not BMS.

The Court recognizes Respondent's argument that Complainant has advanced, within the four corners of the Complaint, a legitimate, non-retaliatory reason for the hiring rescission. Mot. Dismiss 19–20. The Complaint contains a reproduced text of an email in which the company indicates that the reason for not moving forward with the hiring process was due to the racist slur. Compl. 8. The Complaint also includes an email from the IER attorney who indicates that her intervention was unsuccessful because the company had elected not to move forward with Complainant's onboarding for this same reason. *Id.* at 13.

As discussed above, *supra* Note 9, the *McDonnell Douglas Corp.* analysis is normally an analysis left for summary decision because it is an evidentiary standard. However, "where sufficient non-discriminatory reasons are apparent from the face of the complaint, they may undermine the 'causation' element of a plaintiff's prima facie case, particularly where 'but-for'

causation is required." *Rubert v. King*, No. 19-cv-2781, 2020 WL 5751513, at *7 n.6, 2020 U.S. Dist. LEXIS 177648, at *22 n.6 (S.D.N.Y. Sept. 25, 2020) (citing *Duplan v. City of N.Y.*, 888 F.3d 612, 625 (2d Cir. 2018), and then citing *Amaya v. Ballyshear LLC*, 295 F. Supp. 3d 204, 222 (E.D.N.Y. 2018)); *see also Blomker v. Jewell*, 831 F.3d 1051, 1060 (8th Cir. 2016).

Nonetheless, this case is at a very early stage where the allegations in the complaint must be viewed in the light most favorable to the complainant, with all the well-pleaded factual allegations accepted as true, with all reasonable inferences drawn in the complainant's favor, and with all doubts resolved in favor of the nonmoving party. *See Caspi v. Trigold*, 6 OCAHO no. 907, 957, 959 (1997). Complainant does not appear to concede that she made this statement, indicating in her Complaint that the IER investigator found the allegation that she made a racist statement not to be true. Compl. 9. At this point, therefore, this fact is disputed. Given this, and the inference created by the temporal proximity, the Court finds that such an analysis is premature. Complainant need only plead sufficient facts to state a claim, and this she has done. Respondent's motion to dismiss is DENIED as to the retaliation claim.

E. Document abuse

Lastly, Respondent argues that Complainant's final claim for document abuse should be dismissed. Respondent argues that there is no allegation that it refused to accept Complainant's passport or any other documents. Mot. Dismiss 22. Rather, Complainant alleges that the request of Respondent, who onboards its employees virtually, to have a third-party of her choosing physically review her documents, violated IRCA. *Id.* Respondent argues that this practice does not violate IRCA, and even if it did, the pleadings do not support a reasonable inference that Respondent discriminated or intended to discriminate against her based on Complainant's citizenship or national origin. *Id.* at 23–24.

"Document abuse . . . 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." *United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 25 (citing *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5–6 (2015)). "Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents, and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status." *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017). "These two elements, an act and an intent, are essential to a claim of document abuse." *Id.*

In her Complaint, Complainant challenges the process by which her documents would be verified. As an initial matter, whether the process by which the Respondent verified documents is appropriate under the regulations is beyond the scope of this Complaint.[12] The issue here is whether the Complaint pleads sufficient facts to support a claim that the employer rejected her documents or requested more or different documents than required, and whether any facts are pled that support an inference of discrimination.

First, Complainant does not allege that Respondent refused to accept any of her documents or requested more or different documents than necessary. Complainant alleges that she sent a copy of her passport to Respondent, and does not allege that it was refused. Compl. 25–26. Rather, Complainant alleges that Respondent requested that she have an "authorized representative" sign Section 2 of her Form I-9. *Id.* at 15. Complainant's narrative attached to the IER form suggests that she was still attempting to comply with this procedure when she was notified that the offer was rescinded, given that Complainant called IER for assistance in finding another way to verify her documents. *See id.* at 25–26.

Further, Complainant pleads no facts to support an inference that the rejection, if there was one, was based upon Respondent's citizenship or national origin. Complainant vociferously disputes the process that was put in place by Respondent as "illegal," but does not attribute its application to her as based upon discrimination; in other words, she does not assert that she was treated differently than any other applicant, much less that she was treated differently based upon her national origin or citizenship. Complainant alleges that she was told by Ms. Iqbal that Respondent's requirement of having an authorized representative sign the Form I-9 was Respondent's "procedure moving forward," suggesting that this was Respondent's policy, and was not discriminatorily applied towards her. *See id.* at 25.

Because the Court finds itself in a position wherein it is unable to execute a final case disposition over Complainant's document abuse claim, it now issues a stay of these proceedings as to the

[12] Pursuant to 8 C.F.R. § 274a.2, within three business days after the first day of employment (i.e., the first day of work in exchange for wages or other remuneration), employers must *physically examine* the documentation presented by new employees from the Lists of Acceptable Documents (i.e., "Form I-9 documents") to ensure that the documents appear to be genuine and to relate to the individual who presents them. *See* 8 C.F.R. § 274a.2(b)(1)(ii)(A). Employers must then complete Section 2, "Employer Review and Verification," of the Form I-9. *See id.* § 274a.2(b)(1)(ii)(B). Recruiters and referrers may designate agents to complete the employment verification procedures on their behalf including but not limited to notaries, national associations, or employers. *Id.* § 274a.2(b)(1)(iv). ICE permitted remote inspection during the pandemic, but only for employers who were entirely remote due to the pandemic. *See* https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance (last updated Mar. 31, 2021).

document abuse claim. *See supra* Section V.B. The Court therefore will not make a final determination regarding the motion to dismiss on this ground.

VI. CONCLUSION

The motion to dismiss is DENIED as to the retaliation claim. All other claims are stayed. During the stay of proceedings the Court will not consider or adjudicate submissions filed by the parties regarding Complainant's citizenship, nationality or document abuse claims, with the exception of a motion to amend, should Complainant seek to file one to remedy the deficiencies in the Complaint. If Complainant seeks to amend, she should also address how many employees Respondent employs. Parties should bear in mind that the Court will timely inform the parties in writing when the stay is lifted.

The Court will issue a litigation order under separate cover, and will schedule a prehearing conference.

SO ORDERED.

Dated and entered on June 27, 2023.

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Honorable Jean C. King
Chief Administrative Law Judge