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

STEVEN BROWN, BERNARDO GARCIA, JOAQUIN HERNANDEZ, NICOLAS MARTINEZ) AND MARSHALL PITTMAN Complainants, v. PILGRIM'S PRIDE CORPORATION, Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2020B00077

ORDER ON MOTION FOR PARTIAL SUMMARY DECISION

I. INTRODUCTION

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. On June 27, 2020, Complainants Steven Brown, Bernardo Garcia, Joaquin Hernandez, Nicolas Martinez, and Marshall Pittman, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Pilgrim's Pride Corporation ("Pilgrim"). Complainants allege that Respondent discharged Complainants based on their citizenship status in violation of 8 U.S.C. § 1324b. Respondent filed an answer, after the Court granted Respondent an extension to file it, on August 27, 2020.

On February 5, 2021, Respondent filed a Motion for Partial Summary Decision. Complainants filed their opposition; Respondent subsequently filed a reply in support of the motion. All conditions precedent to the institution of this proceeding have been satisfied. For the foregoing reasons, the Court GRANTS Respondent's motion in its entirety.

II. PROCEDURAL HISTORY

On November 25, 2019, Complainants Brown, Garcia, and Martinez each filed charges against Respondent with the United States Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER). Amend. Compl. at 2, ¶ 10. Complainant Hernandez filed a charge with IER on November 26, 2019, and Complainant Pittman filed a charge with IER on December 12, 2019. Id. at 3, ¶ 11. Each Complainant alleged that Respondent discharged them on the basis of their United States citizenship-status in violation of 8 U.S.C. § 1324b. Id. at 10-11, ¶¶ 71-77.

On February 5, 2021, Respondent filed a motion for partial summary decision in this matter. On February 15, 2021, Complainants filed a motion for extension of time to file their opposition. Complainants sought an extension until 30 days after discovery was completed. On March 18, 2021, the Court held a prehearing conference in this matter. During the prehearing conference, the Court granted in part and denied in part Complainants' motion, extending the deadline for responses until April 9, 2021. On April 9, Complainants filed a motion for a one-day extension of time to file their opposition. Respondent opposed; the Court granted the motion. Complainants filed their opposition on April 10, 2021. On April 14, 2021, Complainants submitted an untimely "amended" opposition to Respondent's partial motion for summary decision. The amended opposition included arguments and exhibits which were not present in the submission filed on April 10, including the affidavit of Complainant Brown. Complainants did not file a second motion for extension of time to file their opposition beyond April 10, 2021. Respondent moved to strike the amended opposition as untimely. On April 23, 2021, the Court granted the motion.[1] On April 26, Respondent filed its reply in support of the motion for partial summary decision. This matter being fully briefed, it is ripe for a decision.

III. FACTS NOT IN DISPUTE

As stated previously, Respondent filed its Motion for Partial Summary Decision on February 5, 2021, per 28 C.F.R. § 68.38, including with its submission, per Rule 56 of the Federal Rules of Civil Procedure, a statement of facts not in dispute with citations to the record to support them. Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of the materials in the record[…]").

Both the OCAHO regulations and the Federal Rules direct that when a party relies on an affidavit to support either that a fact is not in genuine dispute, or that a fact is disputed, the affidavit must provide the information in a manner which would be admissible during the hearing. 28 C.F.R. § 68.38(b), (c)[2]; Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to

[1] On April 26, 2021, Complainants moved for reconsideration of the prior order striking their amended opposition as untimely. The Court will address Complainants' motion for reconsideration in a separate order.

[2] 28 C.F.R. § 68.38(b) states: "Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. §§ 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. 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. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(c) directs: "The Administrative Law Judge shall enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

In the places where Complainants oppose the factual assertions in Respondent's motion for partial summary decision, they primarily rely on Complainant Brown's affidavit. However, the affidavit was not provided to the Court by the deadline.

Per Rule 56(e) of the Federal Rules, when a party "fails to properly address another party's factual assertion of fact […] the court may 1) give an opportunity to properly support or address the fact; 2) consider the fact undisputed for the purposes of the motion, or 3) grant summary judgment in the motion and supporting material — including the facts considered undisputed — show that the movant is entitled to it; or 4) issue any other appropriate order." Fed. R. Civ. P. 56(e).

The Court's first inclination under these circumstances, especially when considering a dispositive motion, is to evaluate whether the least severe option among those listed in 56(e) remedies the problem and provides due process. Option one, providing the Complainants with an opportunity to supplement their motion, is the least severe option for Complainants. As addressed in the Order Striking Complainants' Pleading, that option is unavailable.

Complainants have been granted a significant period of time to craft their opposition to the motion for partial summary decision. Respondent filed its Motion for Partial Summary Decision on February 5, 2021. Complainant did not file an opposition to the motion within the ten days delineated by 28 C.F.R. § 68.11, but instead moved to extend its deadline until 30 days after discovery had closed. By the date of the initial prehearing conference, the motion had been pending for roughly one month. During the prehearing conference, the Court partially granted the motion, bifurcating proceedings to address the dispositive motion and extending the deadline for the opposition until April 9, 2021. On April 9, 2021, Complainant sought a one-day extension to file its opposition. Complainant cited illness with family members in justification for the extension. The Court granted the motion. Complainant then filed its opposition, 64 days after the original motion, or roughly six times the deadline in the regulations. The opposition did not include Complainant Brown's affidavit or the discovery responses which it cited in its filing.

On April 14, 2021, Complainant attempted to supplement its opposition with new arguments and exhibits. Complainant offered no good cause for its untimely filing, and indeed it did not file a motion for amendment to the scheduling order to permit the otherwise untimely filing. The Court found that this third extension was a bridge too far, and it struck the supplemental pleading as untimely with no good cause shown. Accordingly, option one, an additional extension of the deadlines to permit supplementation of the motion, is not available to Complainants.

The Court is therefore inclined to deem Complainants' opposition as citing to no facts in the record to support them.

Before advancing to the recitation of the facts not in dispute, the Court will address two other collateral attacks which Complainants make on Respondent's statement of facts: 1) that Ashley Hall, the declarant whose testimony Respondent principally relies upon for its motion, is incompetent to testify, Opp'n. 18; and 2) that Complainants have been deprived of the opportunity to fully develop the record, and that dispositive motions practice is therefore premature (hereinafter, "the Rule 56(d)" argument).

Ashley Hall's Declaration/Competency to Testify

Respondent's motion for partial summary decision is largely reliant on the declaration of Ashley Hall, the Live Operations Manager at Pilgrim's Pride Corporation. Respondent Statement of Undisputed Material Facts Ex. 1, Hall Aff. 1. Complainants argue that Hall is incompetent to testify to the pertinent facts of this case in general, and that, in particular, she has no personal knowledge of the replacement of the Complainants occurring on July 11, 2019. Opp'n. 18, 26-29. Complainants principally argue that Hall's testimony only repeats the information in the contract between Respondent and third-party contractor Raul Pizano, and that her repeating the information exclusively drawn from the contract and not from her personal knowledge is hearsay. Id. at 27-28. The difficulty with this argument is that it fails to square with Hall's attestation at the beginning of the declaration that she "[has] personal knowledge of the matters stated in this Declaration and [she] is competent to testify to the facts set forth therein." Respondent Statement of Undisputed Material Facts Ex. 1, Hall Aff. 1.

Complainants dispute the source of this personal knowledge, stating in the opposition that she "never testified that she has physically observed Pizano's Catchers in the act of catching at any time from when they first started catching for Pilgrim in late 2018." Opp'n. p. 28. Complainants continue that because Hall "was never on the ground, she would have limited (if any) knowledge about whether Pilgrim's supervisors assigned additional work to Pizano's catchers, chose their start times, chose their end times, told them to continue catching past quotas, gave them equipment, or determined when and for how long they could take breaks." Id. However, this criticism on Hall's declaration suffers from two problems: 1) Complainants' reading of the declaration would create a standard for competency higher than the Federal Rules of Evidence, and 2) Complainants offer no admissible evidence to create a material question of fact on the issue of Hall's familiarity with the "on the ground" operations for catchers.

Addressing the first issue, Complainants argue that Hall's declaration should be set aside because she did not attest that she physically observed Pizano's catching operations. However, the rules do not require so much. Rule 601 provides that "every person is competent to be a witness unless these rules provide otherwise." Fed. R. Evid. 601. Rule 602 provides that "a witness may testify to a matter only if evidence is introduced sufficient to support a finding that

the witness has personal knowledge of the matter. Evidence to provide personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602. Rule 56(c)(4) of the Federal Rules of Civil Procedure buttress this requirement, stating that affidavits or declarations used to support or oppose a dispositive motion "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); Macuba v. Deboer, 193 F.3d 1316, 1322-23 (11th Cir. 1999) ("Affidavits must be based on personal knowledge and must set forth facts that would be admissible under the Federal Rules of Evidence.") The courts have made clear that affidavits with no statements of personal knowledge should be disregarded as conclusory. Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000) ("conclusory allegations without specific supporting facts have no probative value."); *see also* Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002) (collecting cases stating that a declarant's assertion that their information is based "upon information and belief" is insufficient). The affidavit must make clear the basis for the person's knowledge, or the basis for the knowledge must be readily inferable from the affidavit. Duke v. Nationstar Mortgage LLC, 893 F.Supp.2d 1238, 1244 (N.D. Ala. Aug. 30, 2012).

Complainants have argued that Hall's statements are largely repetitious of the contract with Raul Pizano, and that this is impermissible hearsay. However, a party's basis of knowledge may include documents they have reviewed in preparing for testimony — this, in fact, is the basis for the business records exception to the hearsay rule. *See* Fed. R. Evid. 803(6); Ekokotu v. Fed. Exp. Corp., 408 F. App'x 331, 335 (11th Cir. 2011) (("[A] person who testifies concerning documents admitted pursuant to the business records exception to the hearsay rule need not have prepared the documents so long as other circumstantial evidence and testimony suggest their trustworthiness."); Duke, 893 F.Supp.2d at 1244 ("Contrary to [plaintiff's] contention, personal knowledge can be based on a review of relevant business records."); Carter v. Companion Life Insurance Company, 338 F.R.D. 413, 417 (N.D. Ala. March 18, 2021) (same).

Further, Hall's competency to speak about the operations of Respondent's chicken catching activities can be readily inferred from her title as the "Live Operations Manager at Pilgrim's Pride Corporation" and her tenure in that position. Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. 1. As of the date of the declaration, Hall has held this role for a little less than four years. Id. A high-level position provides indicia of competency to speak about the activities of a business. Duke, 893 F.Supp.2d at 1245 (citing Dixit v. Kettering Med. Ctr., 1992 WL 19441, at *2 (6th Cir. 1992); Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999 (9th Cir. 1990); Branch Banking & Trust Co. v. Gedalia, No. 4:10-cv-461, 2012 WL 170945, at *3 (E.D. Tex. Jan 20, 2012)). Prior OCAHO case law has recognized that a corporate manager may review specific records of the company and testify as to the facts contained therein. Stubbs v. Desoto Hilton Hotel, 8 OCAHO no. 1005, 148, 154 (1997) (citing Jefferson Constr. Co. v. United States, 283 F.2d 265, 267 (1st Cir. 1960), cert. denied, 365 U.S. 835 (1961). While one might reasonably disagree about whether a "Live Operations Manager" is a "high level position," certainly the specific nature of the title itself and her tenure permits a

reasonable inference that she is familiar with Respondent's chicken catching operations, as she attests.

Addressing the second point, Complainants have argued that Hall is incompetent to testify about the day-to-day activities of the chicken catchers because Complainant Brown has never seen Hall at the contract farms. This argument is weighted down by several contrary considerations: 1) Brown's affidavit is not part of the record, as discussed previously, accordingly his statement cannot be introduced to create a material question of fact; 2) Complainants offer no admissible evidence which might call into question the extent of her knowledge about the day-to-day activities of catchers, and indeed no evidence that Complainants intend to gather this information; and 3) even if Brown's affidavit were admitted for the purposes of dispositive motions practice, it simply is not a reasonable inference that just because Brown never saw Hall at any of the contract farms that consequently Hall was never present at any. Hall attests in paragraph four of her declaration that "Pilgrim assigns 6-8 catchers and one lead catcher to a crew. Pilgrim has approximately six crews at various shifts throughout the day." Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. 1. Brown is one person working on one crew. He is not omniscient, and Complainants present no evidence from any worker on the other crews which might rebut the presumption of Hall's knowledge about the catchers' day-to-day activities.

Accordingly, the Court finds that, at least as of the date of Hall's declaration, Hall establishes her competency to testify about Respondent's Live Operations activities.

Complainants also argue that Hall's testimony is limited to events from August 15, 2019, to February 3, 2021. Opp'n. 28-29. Hall's declaration itself places no such temporal limitation on her testimony. In support of its argument, Complainants note that on paragraphs ten through 13 of Hall's declaration, she speaks in the present tense and she references the contract between Respondent and Pizano, which was signed in August 2019. This argument fails to account for the rest of the declaration, which references events in 2016 (the date of her employment, ¶ 1) and 2018 (absenteeism within the workforce leading to Respondent employing Raul Pizano, ¶¶ 7-8). In short, Complainants' argument reflects a reading of the declaration which does not square with the text of the submission.

Complainants' Arguments of Inability to Complete the Record

Complainants have argued in their response to Respondent's statement of undisputed material facts and in the body of their opposition that they cannot fully oppose the motion due to their inability to engage in discovery. Opp'n 17, 30. Complainants contend that they cannot properly defend their case without subpoenas to third-party witnesses who Complainants argue are too afraid to testify. Id. Complainants further argue that they require subpoenas to depose current and former employees. Id.

As the Court observed during the initial prehearing conference, the traditional method of preserving one's right to postpone consideration of a dispositive motion due to lack of sufficient discovery is Rule 56(d) of the Federal Rules of Civil Procedure.[3] The remedial provisions of Rule 56(d) were described earlier; however, the process by which one obtains the remedy bears discussion.

The rule directs that a party must show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P 56(d); Smedley v. Deutsche Bank Trust Company Americas, 676 Fed. Appx. 860, 861-2 (11th Cir. 2017). In Snook v. Trust Co. of Georgia Bank of Savannah, the Eleventh Circuit recognized that "the interests of justice will sometimes require a district court to postpone its ruling on a motion for summary judgment even though the technical requirements of Rule [56(d)] have not been met." 859 F.2d at 871. (citing Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116). The Court emphasized that the party opposing the motion for summary judgment bears the burden of calling to the Court's attention any outstanding discovery. Id. (citing Cowan v. J.C. Penney Company, Inc., 790 F.2d 1529, 1530-32 (11th Cir. 1986).

The Eleventh Circuit has also held that a party propounding a Rule 56(d) motion may not rest their arguments on "'vague assertions that additional discovery will produce needed, but unspecified facts, but rather must specifically demonstrate 'how postponement of a ruling on the motion will enable [them], by discovery or other means, to rebut the movant's showing of the absence of a genuine fact." Florida Power and Lights Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316 (11th Cir. 1990) (citing Wallace v. Brownell Pontiac-GMC Co., Inc., 703 F.2d 525 (11th Cir. 1983)); Burns v. Town of Palm Beach, 999 F.3d 1317, 1334 (11th Cir. 2021) ("general categories of discovery without pointing to specific facts that discovery would reveal and how those facts would create a genuine issue of material fact" are insufficient to establish the Rule 56(d) burden). The ultimate determination rests in the sound discretion of the trial judge. Florida Power and Lights Co., 893 F.2d at 1316; *see also* Burns, 999 F.3d at 1334 ("vagueness [of the Rule 56(d) motion] is a question of law for the judge, and not for the jury, to determine") (citing Konikov v. Orange County, 410 F.3d 1317, 1330 (11th Cir. 2005)).

Complainants' Rule 56(d) application has two significant deficits which prevent the motion from being granted: 1) Complainants fail to provide a timely affidavit or declaration per Rule 56(d), and 2) the request for extension is impermissibly vague with regard to the discovery Complainants seek.

The first issue has been discussed at length earlier in this decision, in the Court's other Orders addressing the untimely filed amended opposition, and so the Court will not repeat the

[3] Rule 56(d) was previously codified as Rule 56(f) of the Federal Rules of Civil Procedure.

circumstances of the untimely filed affidavit. Suffice it to say that no affidavit in support of a 56(d) motion is properly before the Court, and Rule 56(d) requires an affidavit or declaration for the Court to grant the extension. Fed. R. Civ. P. 56(d). Furthermore, the Eleventh Circuit's holding in Snook is a narrow exception to Rule 56(d), which is inapplicable to this case because Complainants have not called to the Court's attention any outstanding discovery requests. *See* Snook, 859 F.2d at 871. This is not a situation where "[f]orm is . . . to be exalted over fair procedures." *See* Littlejohn, 483 F.2d at 1146. Complainants' Rule 56(d) motion is deficient in both substance and form. All else being equal, Complainants would not be entitled to relief under Rule 56(d), even if Complainant Brown's affidavit was properly before the Court.

Additionally, the requests are impermissibly vague. Complainants assert that their primary goal if permitted discovery would be to depose potentially hostile management witnesses presently working at Respondent, subpoena third parties who previously worked at Respondent, and subpoena third-party contractors. Opp'n. 30. However, Complainants fail to identify any of these people by name, title, or basis of knowledge, notwithstanding the fact that many of them are known to Complainants. One of the most significant deficiencies in this regard is in Complainants' failure to identify Ashley Hall as a potential deponent. As described above, Hall provided a declaration in this matter, one which Complainants dispute on the facts presented. There is no element of surprise to be gained in withholding her name — Hall's declaration is part of the record. Complainants' failure to identify her, or for that matter any other manager (past or present), supervisor, co-worker, or contractor who it has referenced in its opposition suggests a lack of clarity in at least the bright contours of its discovery plan.

Complainants also claim that several potential witnesses are known to Complainant Brown; however, they would suffer retaliation if their names were made public. Opp'n. 30. As the parties are aware, 8 U.S.C. § 1324b prohibits any person from retaliating against a person relating to a charge of discrimination. To the extent Complainants believe the statute's prohibitions against retaliation to be insufficient to protect the witnesses, Complainants could have sought to submit the names for *in camera* review. Moreover, if the 56(d) request were granted, the witnesses' names would be disclosed to Respondent as part of the discovery process. Complainants' failure to disclose the names of persons known to Complainants who they represent that they would depose if provided the opportunity (in any capacity) demonstrates that the request is impermissibly vague.[4]

[4] In support of the request to deny the motion for summary decision, Complainants also argue that they have propounded several discovery requests to Respondent which remain unfulfilled. Opp'n. 17. However, Complainants' obligation is to "show" that they "cannot present facts essential to justify [their] opposition." Fed. R. Civ. P. 56(d). In this context, Complainants' failure to attach the specific discovery requests which they believe are necessary to fully oppose the motion is mystifying. Complainants' failure to do so, or to describe the intended or issued discovery in a manner sufficient for the Court to determine its relevance, prevents the Court from fully considering the request.

Finally, Complainants have apparently issued significant written discovery and received written responses to the discovery requests, but Complainants do not state that these responses are deficient and that they would move to compel if discovery were extended. *See* Respondent's Objections and Responses to Complainants' Statement of Material Facts ¶¶ 17, 30, 39; Complainants' Certificate of Service of Discovery to Respondent Pilgrim's Pride Corporation; Corrected Declaration of Sylvia Bokyung St. Clair. Ultimately, Complainants' statements fail to "point[] to the specific facts that discovery would reveal and how those facts would create a genuine issue of material fact." Burns, 999 F.3d at 1334. Thus, even if the statements in the opposition were considered in spite of the lack of a formal Rule 56(d) motion and accompanying affidavit or declaration, Rule 56(d) relief is not warranted.

Facts Not In Dispute

Respondent Pilgrim's Pride Corporation is a poultry production company. Among other things, it runs an operation that collects chickens from third-party poultry farms and delivers the chickens to its processing plant where the chickens are euthanized, deboned, and processed for consumption. Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. ¶ 1.

All the events relevant to these proceedings occurred in or around Georgia. Respondent's chicken deboning plant is in Athens, Georgia, and the chicken farms are located throughout Georgia. Id.

Complainants were employees of Respondent; they were responsible for gathering chickens from the chicken farms. First Amended Complaint ¶ 7; Answer ¶ 7. They are all United States citizens. First Amended Complaint ¶ 9; Answer ¶ 9. They are called chicken catchers, or more colloquially, catchers. Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. 1. Respondent had six to eight catchers and one supervisor (or "lead") per crew. Id. Respondent had approximately six crews active per day. Respondent provides the catcher crews with a quota of chickens to be caught per day; the quota relates to the plant's production schedule. Id.

Respondent states that, in 2018, it experienced difficulties in meeting its quotas due to absenteeism and high turnover among its catcher crews. Id. During that year, Respondent hired Raul Pizano, a contractor who has worked with other poultry companies, to supplement its catchers. Id. Pizano hired, trained, and supervised his catchers. Id. at 2. As with Respondent's crews, Pizano employed a lead crew worker to supervise the other crewmembers. By the end of 2018, Respondent regularly employed two Pizano catcher crews who worked along with Respondent's employees. Id. at 1-2.

In 2019, Respondent evaluated its chicken catching operations to determine whether they should remain as they presently are, with its employees performing the work, or whether Respondent should outsource its work. Id. at 2. It received proposals from several chicken

catching contractors, including Pizano. Id. Respondent ultimately decided to outsource its operations; it chose Pizano as the sole contractor to carry out its catching activities. Id.

On July 9, 2019, Respondent notified its catchers that their positions would be eliminated due to the operations being outsourced to Pizano. Answer ¶ 8. Respondent offered its catcher employees other positions in the plant in lieu of termination. First Amended Complaint ¶¶ 55-59; Answer ¶¶ 51-59. Complainant Brown accepted a position in the hatchery making $14.50 an hour; he ultimately obtained a position in the live hanger, effective November 18, 2019, earning $15.00 an hour. First Amended Complaint ¶¶ 57, 59; Answer ¶¶ 57, 59. Complainant Pittman obtained a position in the hatchery, effective July 15, 2019, earning $14.50 per hour. Id. Complainant Garcia accepted a position in the live hanger making $13.00 an hour; he appeared for work for one day, but did not subsequently come to work. First Amended Complaint ¶¶ 58, 63; Answer ¶¶ 58, 63. He was terminated on July 25, 2019. Id. Complainants Hernandez and Martinez declined the alternate positions offered to them. First Amended Complaint ¶ 51; Answer ¶ 51.

On August 15, 2019, Respondent executed a "Catching and Loading Agreement" with Pizano. Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. ¶ 2; Ex. A, Contract. Pizano is responsible for providing its employees' equipment and supplies, the loader drivers and the loaders (the vehicles which transport the live chickens to the processing plant). Id. Pizano is responsible for cleaning up any trash or debris left by its workers. Id. Pizano provides portable toilets for its employees. Id. Pizano is required to provide its employees with personal protective equipment, gloves, masks, dust masks, catch pens, safety cones, and reflective vests. Id. In the instances when a Pizano employee fails to bring their necessary equipment, Respondent will supply them to the employee and charge Pizano. Id.

In a separate paragraph of her declaration, Hall described other aspects of the work relationship between Pizano and Respondent which she did not explicitly tie to the contract, and which cannot be found explicitly within the agreement. She asserts that Pilgrim gives Pizano a weekly schedule[5], identifies farm locations to collect chickens, and establishes chicken catching goals. Respondent's Statement of Undisputed Material Facts Ex. 1, Hall Decl. 3. Hall states that Respondent does not control Pizano's crew assignments, manage productivity, determine their work hours, determine when catchers may take breaks, or schedule catchers for leave/manage absences. Id.

Hall further states that Respondent does not perform any of the typical activities of an employer-employee relationship with regard to Pizano's catchers: Id. Respondent does not hire,

[5] Respondent's contract asserts that Pizano will provide services "according to advanced schedules, furnished by Pilgrim's to [Pizano] in a timely manner." Respondent Stmt. Of Undisputed Material Facts Ex. A, Agreement.

recruit, pay, train, provide benefits for, set work hours, terminate, discipline, or assign work to Pizano's employees. Id.

IV. LEGAL STANDARDS

A. Motion for Summary Decision

OCAHO's Rules of Practice and Procedure provides that 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).[6] Since this rule is analogous to the Federal Rule of Civil Procedure 56(c), OCAHO looks to federal case law interpreting Rule 56(c) for guidance in determining whether summary decision is appropriate. *See* Martinez v. Superior Linen, 10 OCAHO no. 1180, 5 (2013); *see also* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation."). Federal cases decided under the jurisdiction of the Court of Appeals for the Eleventh Circuit are particularly persuasive in this matter because the events in this case occurred in Georgia, which is in the geographical scope of the Eleventh Circuit.

"An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "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. 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 Commerce Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). In the absence of any proof, the Court will not assume that the non-moving party could or would prove the necessary facts. Crespo v. Famsa, Inc., 13 OCAHO no. 1337, 3 (2019).

While the Court views all facts and reasonable inferences in the light most favorable to the non-moving party, "those inferences may not be so tenuous as to amount to speculation."

[6] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2019).

Angulo v. Securitas Sec. Servs. USA, Inc., 11 OCAHO no. 1259, 8 (2015). Furthermore, "[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary [decision] against that party will ensue." Id. at 9 (relying on Catrett, 477 U.S. at 322-23).

B. Discriminatory Discharge Based Upon Citizenship-Status

Complainants each allege that Respondent discharged them from their employment as "chicken catchers" due to their status as United States citizens. Section 1324b of Title 8 of the United States Code prohibits an employer from discriminating against a "protected individual" by discharging that individual from employment based upon his or her citizenship-status. 8 U.S.C. § 1324b(a)(1)(B). A United States citizen is a "protected individual" under section 1324b(a)(3)(A).

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

If a complainant relies on circumstantial evidence, OCAHO applies the familiar burden shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), and its progeny. *See* Reed v. Dupont Pioneer Hi-Bred Int'l, Inc., 13 OCAHO no. 1321A, 3 (2019). First, Complainants must establish a prima facie case of discrimination; second, Respondents must articulate some legitimate, non-discriminatory reason for the challenged employment action; and third, if Respondent does so, the inference of discrimination raised by the prima facie case disappears, and Complainants must then prove by a preponderance of the evidence that Respondent's articulated reason is false and that Respondent intentionally discriminated against Complainants. Crespo, 13 OCAHO no. 1337, at 3; *see generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000); Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

A prima facie discharge case under the traditional formulation requires a showing that the complainant is: 1) a member of a protected class, 2) was qualified for the position held, 3) was discharged, and 4) was replaced by a person not in the complainant's protected class. *See, e.g.*, Santiglia v. Sun Microsystems, Inc., 9 OCAHO no. 1110, 7 (2004); Mitchell v. Worldwide Underwriters Ins. Co., 967 F.2d 565, 567 (11th Cir. 1992). Although the prima facie criteria of

the traditional formulation are not intended to be rigidly required, "[a] prima facie case may be established only when there is a basis for inferring that discrimination is the reason for the employment decision . . . ." Mitchell, 967 F.2d at 567 (citing Pace v. Southern Ry. System, 701 F.2d 1383, 1390 (11th Cir.), cert. denied, 464 U.S. 1018 (1983)).

V. DISCUSSION

A. Motion for Partial Summary Decision

Respondent seeks partial summary decision on the basis that Complainants were replaced by a third-party contractor, rather than a co-worker or other person who is similarly situated to Complainants.

Respondent did not specifically challenge the first three elements of Complainants' prima facie case. The dispute in this matter centers on whether Complainants' can establish the fourth element of the prima facie case of discrimination. The court in Brown, 14 OCAHO no. 1379, at 5, described the fourth element as requiring complainants to show that they "were replaced by a person not in the complainant's protected class." (citing Martinez, 10 OCAHO no. 1180, at 5). In that case, the court recognized that "an employer who terminates an employee and contracts out that employee's duties to another company has not replaced that worker within the meaning of McDonnell Douglas." Id. (citing Humphries v. Palm, Inc., 9 OCAHO no. 1112, 8 (2004) and Mitchell, 967 F.2d at 566 (internal quotations omitted).

Scope of Hall's Testimony Concerning Business Relationship Between Pizano and Respondent

While the Court accepts Hall's declaration concerning the relationship between Respondent and Pizano's crews, this analysis is incomplete without describing when, or during what interval, her description applies.

To briefly recap — Respondent hired Raul Pizano's crews at an unspecified time in 2018 to supplement its employee catcher crews. By late 2018, Pizano's crews were a regular part of Respondent's poultry catching operations. On July 9, 2019, Respondent informed Complainants that their positions would be terminated because their jobs would be outsourced to Pizano. On August 15, 2019, Respondent executed an agreement with Pizano. Hall outlines the "arms length" relationship between Pizano and Respondent in paragraph ten of her declaration, explicitly linking her description of the relationship to terms which appear in the contract. She continues to describe the relationship between the parties in paragraphs 11-13 of the declaration, however, the statements in the succeeding paragraphs are not explicitly tied to the contract, and indeed the contract does not contain terms as she describes in her declaration.

The first question is then: when Hall testified about nature of the relationship between the employers as evidenced by the contract, did her description include the period of time prior to the contract's execution — specifically, the time around the abolition of Complainants' jobs, roughly one month earlier? Complainants argue that it does not; they contend that the Court should accept by negative implication that if there was a contract between the parties outlining their responsibilities in August 2019, and no contract reflecting the prior period was presented to the Court, that the Court should infer that none existed for that prior time period. Opp'n. 29. Respondent counters that this is speculation, and that conjecture is insufficient to create a triable question of fact. Reply 6.

However, both Hall's description in paragraph ten and (perhaps more critically) the terms of the agreement she describes in paragraph ten are not retrospective. There is no indication from the plain language of paragraph ten that Hall intended to describe the nature of the parties' relationship before the contract was signed. Presuming so would be an inference, and it is a bedrock principle of dispositive motions practice that the court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." Stewart v. Booker T. Washington Ins., 232 F.3d 844, 848 (11th Cir. 2000) (internal citations omitted). Accordingly, for the purposes of the motion, the Court disregards Hall's statements concerning the contract as descriptive of Respondent's relationship with Pizano in 2018 and 2019 before the contract was executed.

Complainants argue that Hall's use of the present tense in paragraphs 11 through 13 (e.g., "Pilgrim provides weekly schedules …", "Pilgrim does not recruit …", and "Pilgrim's interactions with Pizano's workers are limited … ") indicates that Hall was similarly describing the nature of the relationship between Respondent and Pizano as of the date she signed the declaration, on February 3, 2021, and not before. The Court disagrees. The present tense can, and often does, indicate habitual activities, or events which began in the past and which continue to the present. Michael Swan, *Practical English Usage*, §463 (3d Ed.) ("We often use the simple present [tense] to talk about . . . things that happen regularly, repeatedly or all the time."). Unlike paragraph 10, Hall provides no words of limitation by linking the condition she describes to a legal document executed on a particular day, or to a set of circumstances that arose at a particular time. The Court therefore finds that the statements in paragraphs 11 through 13 of Hall's declaration apply to the whole of Respondent's work experiences with Pizano's catchers. While all reasonable inferences are construed in the light most favorable to the nonmoving party, "[t]he Court is not required, or even permitted, to deny a summary judgment motion based on unreasonable inferences that amount to nothing more than speculation or conjecture." Miles v. Jones, 2010 U.S. Dist. WL 5574324, at *7 (S.D. Fla. Nov. 22, 2010) (citing Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1181 (11th Cir. 2005)).

Joint Employer Theory

Before evaluating the fourth element of the prima facie case, the Court needs address the joint employer argument Complainants advance. Complainants argue that from the time that Pizano's employees began working alongside Respondent's employees until the point of Complainants' termination, Pizano's employees were jointly employed by Respondent and Pizano.

In Virgo v. Riviera Beach Associates, the court approvingly looked to NLRB v. Browning-Ferris Industries to announce the standard for the joint employer theory:

> The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.

Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1359-60 (11th Cir. 1994) (quoting NLRB v. Browning-Ferris Indus., 691 F.2d 1117 (3d Cir. 1982). As the court described the joint employer theory in Llampallas v. Mini-Circuits, Lab, "[b]oth [the joint and single employer][7] theories concentrate on the degree of control an entity has over the adverse employment decision on which the … suit is based." Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998) (internal citations omitted); *see also* Lyles v. City of Riviera Beach, Fla., 166 F.3d 1332, 1341 (11th Cir. 1999) ("[W]here two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees, we may treat the entities as 'joint employers' and aggregate them.").

The court most recently addressed the joint employer theory in Garcia-Celestio v. Ruiz Harvesting, Inc., 898 F.3d 1110 (11th Cir. 2018), a case addressing the application of a different section of the IRCA, the governing statute at issue in this case. The court identified several considerations in determining whether two employers functioned as a joint employer. They are: 1) the skills required for the work, 2) the source of the instrumentalities and tools, 3) the location of the work, 4) the duration of the relationship between the parties, 5) whether the hiring party

[7] The analysis of the joint employer theory often occurs in tandem with the "single employer" theory of liability. *See, e.g*., Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998); Lyles v. City of Riviera Beach, Fla., 166 F.3d 1332, 1341 (11th Cir. 1999); Swallows v. Barnes and Noble Book Stores, Inc., 128 F.3d 990 n.4 (6th Cir. 1997). Complainants do not raise the single employer theory in their opposition; accordingly, the Court does not address it.

has the right to assign additional projects to the hired party, 6) the extent of the hired party's discretion over when and how long to work, 7) the method of payment, 8) the hired party's role in hiring and paying assistants, 9) whether the work is part of the regular business of the hired party, 10) whether the hiring party is in business, 11) the provision of employee benefits, and 12) the tax treatment of the hired party. Id. at 1119 (quoting Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 324 (1992) (often described as the "Darden factors"). In Garcia-Celestio, the court directed that no one factor is dispositive, and not all factors are relevant to each case. Garcia-Celestio, 898 F.3d at 1119. Following traditional agency principals, the overarching consideration in a joint employer analysis is the level of control which each putative employer has over the worker. Id. at 1120 ("As in Darden and Clackamas, first and foremost, we consider control, which we have emphasized is 'the proper focus' of our inquiry.") (internal citations omitted).

The Garcia-Celestino court found these Darden factors to be particularly relevant: 1) the source of the instrumentalities and tools, 2) the location of the work, 3) the provision of employee benefits, 4) whether the putative employer has the right to directly assign the worker's work, 5) to what extent the putative employer has discretion over when and how long the workers work, and 6) whether the work the workers performed is part of the putative employer's regular business. Id. at. 1120-21. The court also identifies "control" as a consideration; however, the court notes that the Darden court considers control to be the "first and foremost" consideration. Id. at 1120. The court's jurisprudence on this issue, and the citations to the common law agency rules, support this analytical framework. Accordingly, the Court will separately consider the overall control which Respondent exercises over Pizano's employees.

Addressing the first factor, the source of the instrumentalities and tools, paragraph 10 of Hall's declaration describes these as coming from Pizano directly. However, as discussed earlier for the purposes of the motion, the Court disregards this statement as it applies to events after the abolition of Complainants' catcher positions. Respondent, therefore, offers no admissible evidence related to the source of instrumentalities or tools. Complainants similarly offer no admissible evidence suggesting that Respondent provides the instrumentality or tools for Pizano's workers; accordingly, the Court determines that this factor is neutral.

The second factor — the location of the work — is largely neutral as well. The catchers, both under Pizano and Respondent, travel to third-party chicken farms, collect the chickens, and deliver them to Respondent's factory.

The third, fourth, and fifth factors all redound to Respondent not being a joint employer. As Hall attests in her declaration, Respondent does not provide employee benefits to Pizano's employees, nor directly assigns Pizano's employees' work, nor determines when and for how long Pizano's employees may work.

The sixth factor — the nature of the business — militates toward Respondent being a joint employer. Until 2019, Respondent directly employed individuals to catch chickens. While one might reasonably argue that Respondent's "core business" is poultry processing and distribution, rather than the act of specifically transporting live chickens to its factories, Respondent conceived of chicken catching as part of its business and incorporated this act into its business practices until very recently.

The final and overarching consideration, the level of control which Respondent exercises over Pizano's employees, firmly resolves in Respondent's favor. The arrangement Hall describes in her declaration reflects a typical independent contractor relationship, one in which Respondent set production targets and directed Pizano to act in accordance with state and federal regulations, but where the terms and conditions of the Pizano's employee's employment was controlled by Pizano, not Respondent. Respondent did not control when Pizano's employees took leave, what days counted as holidays, what shifts they worked on, or how long they worked. Respondent did not recruit, hire, or fire Pizano's employees. Respondent was not involved in Pizano employee discipline. Respondent did not pay Pizano's employees.

As the balance of factors weigh against Respondent being a joint employer, and the overarching factor of control also weighs against that determination, the Court therefore finds that Respondent and Pizano have not created a joint employment relationship with Pizano's employees.

Prima Facie Claims of Citizenship Discrimination

The parties' briefings on the prima facie case differs widely in terms of the arguments and case law supporting them. Respondent asserts that Complainants were replaced by independent contractors, and that, consequently, Complainants cannot meet the fourth element of the prima facie case under the traditional McDonnell Douglas indirect proof scheme, as Complainants cannot show that they were replaced by persons outside their protected category. Implicit in this claim is the argument that the independent contractor is not "similarly situated" to Complainants, and so any comparison between Pizano and Complainants is inapt.

Complainants' opposition makes several contrary arguments: 1) that as a joint employer, Respondent's termination of Complainants and not Pizano's crews establish the fourth element of the prima facie case, 2) the joint employer theory requires additional discovery to address, and 3) that Respondent has not claimed that there are no material questions of fact. Opp'n. 12.[8]

[8] Complainants' opposition identifies four arguments for denial of Respondent's motion. Argument "A) Pilgrim hasn't argued that Pizano's catchers who were working before and at the time that Complainants were discharged weren't jointly employed by Pilgrim and weren't treated more favorably" and argument "D) Pilgrim hasn't presented any evidence that Pizano's Catchers who replaced Complainants on or about July 11, 2019 weren't jointly employed by Pilgrim" are sufficiently similar to be discussed together. Opp'n. 12.

Addressing the first issue, as discussed above, the Court has determined that Respondent and Pizano were not joint employers during the timeframe that Complainants direct the Court to — from their initial appearance at the worksite until Complainants' positions were abolished in mid-2019. Consequently, Respondent's abolition of the employee catcher positions while retaining the contractor catcher positions does not in and of itself create an inference of discrimination. Moving to the second argument, the Court has addressed the Rule 56(d) argument previously — in short, Complainants' request failed to comport with Rule 56(d)'s requirements for specificity concerning the needed discovery and for an affidavit accompanying it. Addressing the third issue, the Court notes that Respondent has styled its submission as a "motion for partial summary decision;" accordingly, at least to Respondent's thinking some aspect of this case would be preserved if the motion were granted in full.

Notwithstanding that description, the Court disagrees with Complainants' argument that Respondent's motion fails to argue that there is no circumstantial evidence which would lead to a triable question of fact. Respondent does so by arguing that Complainants cannot establish the fourth element of the McDonnell Douglas proof scheme. The McDonnell Douglas proof scheme is reliant on circumstantial evidence in the absence of direct evidence of discrimination. In the presence of direct evidence of discrimination, the McDonnell Douglas proof scheme is unnecessary because a fact-finder would not need to infer a connection between the adverse employment action and the discriminatory motive.[9]

Respondent relies upon a prima facie formulation derived from McDonnell Douglas, in which the movant may establish the fourth element of the prima facie case by showing that the employee or applicant "was replaced by a person outside [their] protected class or was treated less favorably than a similarly-situated individual outside [their] protected class." *See* Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003) (citing McDonnell Douglas, 220 F.3d at 802). However, this is one iteration of the fourth element of the prima facie case, which generally may be fulfilled by offering some evidence which creates a causal nexus between the protected basis and the adverse employment action. The Court in McDonnell Douglas recognized that the "articulation of the plaintiff's prima facie test might vary somewhat depending on the context of the claim and the nature of the adverse employment action alleged."[10] *See* Kendrick v. Penske Transp. Servs. Inc., 220 F.3d 1220, 1227 (10th Cir. 2000)

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[9] Complainants have also argued that the motion should be denied because Respondents have not claimed that there is no statistical evidence to support a claim of discrimination. Opp'n. 12, 13. Statistical evidence is simply a form of evidence used to demonstrate discrimination, similar in that respect to testimonial evidence or documentary evidence. A party need not delineate each and every form of conceivable evidence which might be brought against it in order to assert that there is none.

[10] While Complainants do not make this argument in their opposition, Complainants argue in their untimely filed amended opposition that the Court should consider this case as a "reduction in force," and apply the modified prima

(citing McDonnell Douglas, 220 F.3d at 802). In all cases, the critical inquiry is "whether the plaintiff has demonstrated that the adverse employment action occurred 'under circumstances which give rise to an inference of discrimination.'" Id. (citing Burdine, 450 U.S. at 253-55). In order to satisfy this requirement, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312 (1996) (quoting Burdine, 450 U.S. at 253-55). Accordingly, although Complainants need not show that they were "replaced" by individuals outside of their protected class, they must at the very least provide circumstantial evidence that permits a logical inference of discrimination.

Respondent argues that Complainants cannot meet this element because Complainants were not replaced by similarly situated persons outside Complainants protected class. They argue that Pizano's contractors are not similarly situated to Complainants as employees, and that there is no other evidence which might link Complainants' terminations to their citizenship status. Complainants, in response, offer no admissible evidence to suggest that there is a material question of fact on this issue. In short, there is no genuine question of material fact on the final element of the prima facie case. Insofar as Complainants cannot establish this element, and they offer no concrete plan for the discovery they would engage in if permitted to do so, the Respondent's motion must be granted.

VI. CONCLUSION AND ORDER

For the reasons articulated in this Order, the Court GRANTS Respondent's Motion for Partial Summary Decision.

IT IS FURTHER ORDERED that the parties shall advise the Court, no later than 21 days from the date of this Order, whether there are any remaining issues for the Court to consider in this matter.

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facie standard announced in Verbraeken v. Westinghouse Electrical Corp., 881 F.2d 1041, 1045-46 (11th Cir. 1989). The Court does not consider the untimely filed amended opposition; however, the Court notes that the Verbraeken court's formulation of the final element of the prima facie case is an example of principle articulated above. Verbraken, 881 F.2d at 1045 (A plaintiff may establish a prima facie case "(3) by producing circumstantial or direct evidence by which a factfinder might reasonably conclude that the employer intended to discriminate on the basis of [the protected basis] in reaching the decision at issue.").

ENTERED:

_____

Honorable John A. Henderson
Administrative Law Judge

DATE: March 11, 2022