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

UNITED STATES OF AMERICA, Complainant, v. SOUTHWEST MARINE CORPORATION, a California Corporation, d/b/a SOUTHWEST MARINE CORPORATION SAN PEDRO DIVISION, Terminal Island, California, Respondent.	)))))))))))))	8 U.S.C. §1324b Proceeding OCAHO Case No. 88200036

Appearances: Lawrence J. Siskind, Esq.,
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CA., for Respondent.

DECISION AND ORDER

EARLDEAN V.S. ROBBINS, Administrative Law Judge

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I. *Statement of the Case*

On October 15, 1987, the Mexican American Legal Defense And Education Fund (MALDEF) filed a citizenship discrimination charge with the United States Department of Justice, Office of the Special Counsel for Immigration Related Unfair Employment Practices, hereafter called Special Counsel or OSC, on behalf of Jose S. Miranda, an individual, herein called Miranda or the Charging Party.[1] The charge alleges that Southwest Marine Corporation, d/b/a Southwest Marine Corporation-San Pedro Division, Terminal Island, California, hereafter called Southwest Marine or Respondent, violated section 274B of the Immigration Reform and Control Act of 1986, 8 U.S.C. §1324b, herein called IRCA or the Act, by failing to recall Miranda to work as a "rigger" at its Terminal Island shipyard solely because of his citizenship status.[2]

On April 18, 1988, the Special Counsel filed a Complaint Regarding Unfair Immigration Related Employment Practice with the United States Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer. Said Complaint mirrors the citizenship discrimination allegations raised by the charge. The Special Counsel subsequently amended the Complaint to allege that Southwest Marine violated United States Department of Justice regulations, codified at 28 C.F.R. §44.201, by retaliating against Miranda for filing the charge herein.

With respect to the factual circumstances surrounding the citizenship discrimination charge, the parties have raised few disputes. Indeed, Respondent has admitted that during the relevant period, it

[1] By my Order dated September 9, 1988, MALDEF was granted leave to withdraw as the counsel of record for the charging party.

[2] 8 U.S.C. §1324b was enacted by Congress in response to fears that IRCA's employer sanction provisions may prompt employers and recruiters to practice nationality and/or citizenship-based discrimination in the hiring, firing and recruitment of employees. It is intended to serve as a counterbalance to the sanction provisions by prohibiting such discrimination.

refused to recall Miranda to work at its Terminal Island shipyard because of his citizenship status. However, Respondent argues that this conduct was not unlawful because it was required by government law, regulation and/or contract. Additionally, Respondent contends that it did not retaliate against Miranda and that the Department of Justice regulation prohibiting IRCA-related retaliation is invalid.

Thus, the two basic issues herein are (1) whether Respondent's discrimination against Miranda because he was not a citizen of the United States was unlawful and (2) whether Respondent unlawfully discriminated against Miranda in retaliation for filing the charge herein. The principal subordinate issues are:

(1) whether Respondent's refusal to recall Miranda was required by certain federal regulations and/or contracts;

(2) if not, whether, under the circumstances herein, Respondent should reasonably have known that there was no such requirement;

(3) whether Respondent laid off Miranda and engaged in certain other discriminatory conduct toward him in retaliation for the filing of the charge herein; and

(4) whether the regulation making such retaliation unlawful was promulgated under proper authority.

II. *Respondent's Request For Reconsideration of Earlier Rulings As To The "Intending Citizen" Issue*

At the conclusion of the hearing herein, Respondent moved to dismiss the Complaint on the grounds that (1) the charge was not timely filed and (2) Miranda is neither a citizen nor an "intending citizen" within the meaning of the Act and thus is not entitled to protection under IRCA. I reserved ruling on Respondent's Motion to Dismiss, but agreed to the parties' request to issue a bifurcated decision, the first part of which would address only those issues raised by Respondent in its Motion to Dismiss. The parties stipulated that for the purpose of ruling on the Motion to Dismiss, Miranda's testimony could be fully credited with regard to the intending citizen issue.

My Interim Decision And Order Denying Respondent's Motion To Dismiss is attached hereto and incorporated herein as Appendix A. In that Decision, I found both the Complaint and the underlying charge herein were filed in a timely manner. Specifically, I found that Miranda remained an employee of Southwest Marine after his

discharge in March 1987, albeit one with diminished recall rights. Therefore, Respondent's continuing refusal to recall Miranda may be characterized as continuing conduct which fell within the purview of IRCA's citizenship discrimination prohibition.

The Interim Decision further found Miranda to be a protected "intending citizen" as defined in the Act. Consequently, I concluded that he was shielded by the Act's citizenship discrimination prohibition. As a corollary to the above finding, the Decision also held that the statutory parameters which excluded certain classes of individuals from the definition of a protected intending citizen (codified at 8 U.S.C. §§1324b(a)(3)(B)(i), (ii)) did not apply to Miranda in view of the factual circumstances herein. As a result of these findings, Respondent's Motion to Dismiss was denied.

Subsequent to the issuance of the Interim Decision, Respondent filed a Request for Reconsideration of a Pre-Interim Decision Order Denying Motion for Partial Summary Decision. That Motion was also grounded in the "intending citizen" requirement of Section 1324b. Accordingly, I have treated Respondent's Request as also seeking reconsideration of my Interim Decision and Order Denying Respondent's Motion to Dismiss to the extent that it addresses the "intending citizen" requirement.

Prior to its amendment, 8 U.S.C. §1324b(a)(1)(B) prohibited citizenship discrimination against citizens and "intending citizens," and the definition of an intending citizen was set forth at 8 U.S.C. §1324b(a)(3)(B). However, the intending citizen requirement was retroactively repealed by §533(a) of the Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978. In its Supplementary Brief, Respondent argues that the retroactive application of §533(a) herein would result in a violation of the Constitution's ex post facto clause. Respondent's argument is clearly without merit on substantive grounds. Further, the undersigned lacks the authority to adjudicate this constitutional issue since it is well established that an administrative agency may not declare an act of Congress unconstitutional. Johnson v. Robison, 415 U.S. 361, 368, 94 S.Ct. 1160, 1166, 39 L.Ed.2d 389 (1974); Meridith Corp. v. F.C.C., 809 F.2d 863, 872 (D.C. Cir. 1987). Therefore, in view of the deletion of the "intending citizen" requirement, the parties' dispute on the issue of Miranda's protected

status has been rendered moot.[3] Accordingly, Respondent's Request for Reconsideration is denied.

III. *Respondent's Business*

Respondent Southwest Marine is a California corporation, with a principal place of business located in San Diego, California, engaged in the business of ship maintenance and repair at shipyards in various ports in the State of California. The only shipyard involved herein is the one located at Terminal Island, California which is known as Southwest Marine Corporation-San Pedro Division, and herein called the Terminal Island shipyard or facility.

During the course of its existence, Southwest Marine has repeatedly contracted with the United States Navy to perform maintenance and repair operations on naval vessels. The Navy is Respondent's largest customer, and maintenance and repair work under naval contracts constitute a substantial share of the Terminal Island shipyard's total volume of business.

IV. *The Alleged Discrimination*

A. Facts and Credibility Resolutions

1. Miranda's qualifications and working conditions

Miranda was first hired by Respondent on October 11, 1982 as a journeyman rigger in the rigging and crane department of the Terminal Island facility.[4] During the course of his employment he has worked on both the first and the second shifts. At the time of the

[3] An earlier case has also applied this provision retroactively. See Ryba v. Tempel Steel Co., 1 OCAHO 289 (1/23/91).

[4] Riggers are responsible for the movement of equipment on the pier and between ship and pier. An inexperienced rigger is normally hired into the improver classification and progresses over a period of about 2 1/2 years from improver 1 through improver 5 and on to the journeyman classification. An experienced rigger may be immediately hired as a journeyman.

March 1, 1987 layoff, he worked on the second shift and had done so most of the time since 1984.[5]

From the time of his hire until February 2, 1987, Miranda was laid off for lack of work on at least twelve separate occasions. Subsequent to each of these layoffs, he was invariably recalled to work. Despite such temporary layoffs, the testimony by Rigging Superintendent Raymond Rudolph and the various stipulations entered into by the respective counsels unequivocally demonstrate that Miranda is a rigger with above average qualifications. In fact, Respondent's "Personnel Action Forms" show that, due to the increased workloads at the shipyard, Miranda was temporarily promoted to the supervisory positions of snapper or leadman on two separate occasions.[6] Based on such undisputed evidence, I find Miranda was an above average rigger, well qualified for the position of journeyman rigger during all relevant times.

2. The refusal to recall Miranda

The layoff that eventually engendered the instant citizenship discrimination allegation occurred on March 18, 1987.[7] On that date, a large number of employees on all shifts were laid off by Respondent. Some of those laid off were U.S. citizens while others, such as Miranda, were non-citizens. It is unclear whether riggers with less seniority than Miranda were retained on other shifts.

Thereafter, until December 1, 1987, Miranda was not recalled to work by Respondent. During that same period, however, Respondent recalled several less qualified, or similarly qualified, riggers. Evidence presented during the hearing establish that Ivan Dragin and James

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[5] The rigging department at the Terminal Island shipyard divides its work force into at least two shifts. The first shift begins work at 7:00 a.m. (previously 8:00 a.m.) while the second shift begins at 4:00 p.m. (previously 5:00 a.m.). From 1982 until 1984, Miranda generally worked on the first shift although he was transferred between the shifts from time to time for reasons such as workload requirements. Subsequent to 1984, he worked mainly on the second shift. However, after April 18, 1988, and until the time of the hearing herein, Miranda worked on the first shift exclusively.

[6] At Southwest Marine, a journeyman rigger may be promoted to supervisory positions. He or she is usually first assigned to work as a temporary supervisor, commonly called a "snapper". After a few months of satisfactory performance as a snapper, that individual may then obtain the rank of "leadman" where he or she supervises ten to 12 employees.

[7] All dates hereafter in this section will be in 1987, unless otherwise indicated.

Vaughn, in particular, were recalled to work as riggers at the Terminal Island shipyard prior to December 1, 1987. In fact, Vaughn was recalled, laid off and recalled again during that period. The parties also stipulated that Miranda was more qualified as a rigger than either Vaughn or Dragin. Although on one occasion, Rudolph asserted that Vaughn and Miranda are equally qualified, he also admitted that between March and December 1987 he recalled riggers less qualified than Miranda.[8] Consequently, I find that between March 18 and December 1, 1987, Respondent recalled riggers who were less qualified than Miranda.

The evidence further establishes that on about April 14, Miranda telephoned Raymond Rudolph, the superintendent of the rigging and crane department. Miranda testified, without contradiction, that during this telephone conversation Rudolph said Miranda would not be recalled by Respondent because he was not a citizen of the United States. Later that day, Miranda visited the shipyard's personnel office and spoke to Nancy Yuppa who repeated the gist of Rudolph's earlier statements. He also observed a 3 x 3 foot sign, lettered in red, hanging on the wall of the office which stated that Southwest Marine would only hire United States citizens. According to Miranda, he could not read the sign by himself due to his lack of proficiency in the English language. However, he asked a Mexican-American employee, who was then present in the office, to translate the wording of the sign for him.[9]

Miranda's testimony is corroborated by Art Engel and by Judy Caton who became Director of Personnel in April. Both of them admit that such a sign was posted by Respondent. However, Engel testified that the sign only covered naval work; whereas Caton testified that it was not limited to naval work and remained posted until January 1988. Since the testimony of Miranda and Caton is mutually corroborative

[8] Rudolph admits he would have recalled Miranda before other less qualified riggers between March and December 1987 if Miranda had been a United States citizen.

[9] At this point, I note that disputes regarding Miranda's English proficiency repeatedly arose during the course of the hearing. From the exhibits and testimony as well as my own observations of the witness at the hearing, I find that, during the period relevant to this case, Miranda possessed sufficient knowledge of English to enable him to engage in rudimentary conversations, although he sometimes misunderstood the intended meaning and had problems with word usage. He lacks an extensive English vocabulary, and lacks a reading knowledge of the language even at the very simplest level. In addition, he has almost no written skills in English. The fact that he repeatedly failed the rudimentary English tests given by the Immigration and Naturalization Service to citizen applicants clearly supports this finding. Hence, many of the alleged "inconsistent" statements made by him can be attributed to his lack of English proficiency.

and Engel's testimony is somewhat vague, I credit Miranda and Caton and find that on April 14, and thereafter until January 1988 there was a sign in the personnel office of the Terminal Island shipyard which stated that Respondent had a U.S. citizen-only hiring policy and that the scope of this policy was not limited to naval work. I further find, based on a photocopy, from Respondent's file, of an employment advertisement listing a U.S. citizenship requirement with a handwritten notation of "1/23/87"[10] that Respondent used U.S. citizenship as a hiring criteria for at least certain positions as early as January 23.

At a later time, Respondent discontinued the use of the phrase "U.S. citizenship required" in all its advertisements for employment. Initially, Caton testified that Respondent discontinued the use of the above phrase and removed the aforementioned sign in response to the charge herein. This testimony was consistent with her prior deposition testimony. However, Caton subsequently retracted this testimony claiming that she had been mistaken and that the actions were in fact taken by Respondent because its Access Control Plan had been approved by the Navy. In view of the circumstances under which Caton retracted her former testimony, I do not credit her subsequent assertions. Instead, I find Respondent removed the U.S. citizen-only language from its advertisements and from the sign located in its personnel office either as a response to the filing of the instant charge or in response to a direct request from the Special Counsel.[11]

In an effort to demonstrate lack of discriminatory motivation, Respondent presented evidence during the course of the hearing which shows that it continuously employed non-citizens until March 1987.

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[10] The advertisement was for a Marine Estimator position. Caton testified that the handwritten date notation was placed on the photocopy by someone in the personnel department. Complainant also introduced into evidence copies of a number of other advertisements announcing openings for blue and white collar positions at the Terminal Island facility. All of there advertisements were placed in 1987 after February, and contained a U.S. Citizenship requirement.

[11] Caton initially testified that she replaced the sign because of the filing of the charge herein. She also testified she discontinued running U.S. citizens-only employment advertisements for Respondent because of the filing of the instant charge. Subsequently, she testified that she took those actions only because the U.S. citizen-only requirement became ineffective after the approval of Respondent's ACP by the Navy. However, in Caton's deposition taken prior to the hearing herein, she stated that the sign was removed in response to a request from Isaias Ortiz, counsel for the Special Counsel who conducted an on-site investigation in January 1988. In addition, she also stated in her deposition that the U.S. citizen-only ads were discontinued only because of the instant charge.

Michael McKeown, industrial engineering manager and security officer at Respondent's Terminal Island facility, testified that there have been non-citizen employees in the yard since July 1981, when the Terminal Island facility first began hiring employees. In fact, he testified that, despite the institution of a new policy barring non-citizens from navy-related work on February 2, 1987, the shipyard continued to employ non-citizens. From such uncontradicted testimony, which I credit, I find that Respondent has employed non-citizens from the inception of its operations and that it continued to employ non-citizens even after February 2, 1987.

The parties also dispute whether Respondent retained any commercial work during the relevant period. Respondent claims it could not recall Miranda to work because naval regulations prohibited Miranda from working on board naval ships; and, since it had insufficient commercial work, Miranda could not have been recalled to work at the Terminal Island shipyard. In support thereof, Rudolph testified that there was no commercial work in the shipyard during the relevant period. According to him, if there had been commercial work, he would have recalled Miranda to work. McKeown, on the other hand, testified that there was commercial work available at the Terminal Island shipyard between April 14 and December 1, 1987. However, he also testified that he does not know if the yard had commercial work throughout the period from April to November.

In view of this evidence, and taking into consideration Engel's testimony that the U.S. Navy is Respondent's largest customer, I find the evidence insufficient to establish that, between April 14 and December 1, 1987, Respondent had a volume of commercial work at its Terminal Island shipyard sufficient to permit Miranda's recall for commercial work alone.

3. Respondent's Government Law, Regulation and Contract Defense

Respondent admits that it refused to recall Miranda between April 14 and December 1, 1987 because of his lack of United States citizenship. However, Respondent argues that it did not thereby violate IRCA's anti-discrimination provisions because the discrimination falls within the scope of the statutory exclusions which place citizenship discriminations required by government law, regulation or contract outside the purview of prohibited employer conduct under IRCA. See 8 U.S.C. §1324b(a)(2)(C) (1990). Specifically, Respondent argues that former 32 C.F.R. §765.5(c) and NAVSEA INSTRUCTION (NAVSEAINST) 5500.3 prohibited it from employing Miranda for navy-related work during the relevant period because of his non-U.S.

citizen status. Respondent further contends that, due to lack of commercial work during that time, it was effectively precluded from recalling Miranda by operation of the above government regulations.

a. The Relevant Regulations -- 32 C.F.R. §765.5(c) and NAVSEA INSTRUCTION 5500.3

It is undisputed that 32 C.F.R. §765.5(c), upon which Respondent bases its government law and regulation arguments, was promulgated by the Department of Navy in 1966, but never enforced prior to 1985. Further, the provision was removed from the Code of Federal Regulations in 1986, well before the alleged discrimination herein. See 51 F.R. 22804 (June 23, 1986). The provision provides inter alia:

> No person not known to be an American citizen of good standing and repute shall be eligible for access as provided by paragraphs (a) and (b) of this section, except upon a finding by the Commander, Naval Ship Systems Command, that such access should be permitted in the best interest of the United States. Upon reaching such a finding, the conditions and controls imposed by the Commander, Naval Ship Systems Command, shall be complied with, and noncompliance serves to cancel an authorization previously granted.[12]

"Naval Ship Systems Command", as referred to by §765.5(c), is the former appellation for the naval command presently known as "Naval Sea Systems Command", hereafter called NAVSEA. NAVSEA is responsible for the design, construction, repair, overhaul and modernization of naval vessels. Among NAVSEA's many functions is the supervision of construction and repair work by private contractors. Responsibility for overseeing the work of these contractors resides in the Supervisor of Shipbuilding, hereafter called SUPSHIP. SUPSHIP's work is facilitated through a network of field offices headed by naval officers known as "repair officers".

On October 22, 1985, NAVSEAINST 5500.3 was promulgated to interpret and implement 32 C.F.R. §765.5(c).[13] Essentially, it set forth a procedure by which individual contractors can secure approval of the

[12] Subpart (a) of §765.5(c) prohibited boarding privileges on naval vessels undergoing construction, conversion, repair or overhaul except on the authority of the Commander, Naval Ship Systems Command, or his field supervisory representative. Subpart (b) similarly prohibited entry to sites and areas adjacent to naval ships undergoing construction, conversion, repair or overhaul. Subpart (d) set the punishment for violation of the regulation at a maximum of $5,000, or one year imprisonment, or both.

[13] Although 32 C.F.R. §765.5(c) was removed from the Code of Federal Regulations in 1986, it is undisputed that NAVSEA INSTRUCTION 5500.3 remains in effect.

Commander of NAVSEA, hereafter called COMNAVSEA, to use non-U.S. citizen employees for the construction, repair, conversion and overhaul of naval vessels in the contractors' shipyard. Under this procedure, contractors who wish to employ non-U.S. citizen employees for naval repair work are required to submit a proposed "Access Control Plan", hereafter called ACP, for C O MNAVSEA's approval. Under the provisions of NAVSEAINST 5500.3, such approval constitutes a §765.5(c) "finding" by COMNAVSEA that use of non-citizen employees on naval vessels by that contractor is "in the best interest of the United States."[14] Thus, Respondent argues, a contractor obtains authorization to use non-citizen labor on naval ships only after its proposed ACP has been approved by COMNAVSEA.

NAVSEAINST 5500.3(4)(b) also provides that "(t)he requirements of Title 32 CFR 765.5(c) shall be invoked via the clause in enclosure (2) in all Navy contracts, agreements and job orders involving construction, conversion, repair and overhaul of Navy vessels except as exempted in paragraph 5 of this instruction." Thus, contrary to the Special Counsel's contentions, it appears that the ACP requirement has been incorporated into all repair and overhaul contracts between the Navy and private contractors unless a particular contractor can claim an applicable exemption. Therefore, Respondent asserts that it was required by government contract to practice citizenship-based discrimination against Miranda.

Further, paragraph 6 of NAVSEAINST 5500.3 sets forth a time line for compliance therewith. That paragraph reads:

> The provisions of this instruction are applicable to all contracts, job orders and options as described herein for the construction, conversion, repair or overhaul of navy vessels awarded after 30 June 1986. Existing contracts should be modified, using the clause in enclosure (2), to include the provisions of this instruction at an appropriate time in the contract's life but in any event no later than 30 September 1986.

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[14] NAVSEAINST 5500.3(4)(a) states: "Within the current international environment and in accordance with Title 32 CFR 765.5(c), access to naval vessels or sites at which naval vessels are undergoing construction, conversion, repair or overhaul by non-U.S. citizen contractor employees is in the best interest of the United States...if such access is permitted under the following conditions: (1) Contractors employing non-U.S. citizens on Navy ship work contracts will have an approved ACP that meets, as a minimum, the requirements of enclosure (2);" Enclosure (2), referred to in the above paragraph, is an attachment to 5500.3 entitled "Access To Vessels By Non-U.S. Citizens Clause" which sets forth, inter alia, a list of items which must be included in any proposed ACP.

It is undisputed that Respondent's proposed ACP had not been approved by September 30, 1986. However, NAVSEA declined to strictly invoke the September 30th deadline. Testimony by NAVSEA and SUPSHIP officials involved in the implementation of NAVSEAINST 5500.3 clearly establish that NAVSEA did not intend to force contractors to remove non-U.S. citizen employees from naval work after September 30, 1985 where certain conditions exist. Rather, in an admittedly oblique manner, NAVSEA attempted to convey the message that in cases where a proposed ACP had been timely submitted but returned for certain specified modification, the regulation would not be enforced pending resubmission and approval of a modified ACP. This intent was set forth in a December 23, 1986 memorandum signed by James Raymond Salko, NAVSEA's Director of Administration.

b. Salko's December 23, 1986 Memorandum

As Director of Administration, Salko was responsible for providing administrative support within NAVSEA, including the drafting of internal regulations ("directive policy") for the entire NAVSEA organization under the authority of his immediate superiors, the Commander and Vice Commander of NAVSEA.[15] Hence, he was directly involved in the promulgation of NAVSEAINST 5500.3.

According to Salko, during the initial implementation of 5500.3, he became aware of congressional concerns that NAVSEA might be requiring, inappropriately, private contractors to discharge non-U.S. citizens from shipyards engaged in navy-related work. Also, the question was raised as to whether contractors, whose timely submitted proposed ACPs had been rejected, were obligated to discontinue the employment of non-U.S. citizens on naval vessels pending actual approval of the revised ACPs.

In an effort to address both of these issues, and pursuant to the direction of COMNAVSEA, Salko issued a memorandum dated December 23, 1986, hereafter called the "Salko memo".[16] Salko testified that in drafting the memo, it was his intent to convey, without

[15] Salko testified, without contradiction, that Vice COMNAVSEA was authorized to approve and sign, on behalf of COMNAVSEA, all documents relating to internal NAVSEA matters including NAVSEAINST 5500.3 which is an internal NAVSEA policy on the implementation of 32 C.F.R. §765.5(c).

[16] Respondent does not dispute that the Salko memorandum is a validly issued NAVSEA document.

directly saying, that contractors could continue to employ non-U.S. citizens on naval vessels even though their proposed ACPs had not been approved. Accordingly, Paragraph 2(c) of the Salko memo provides:

> Non-U.S. Citizens currently employed by some of the contractors should not automatically draw a conclusion that their job is in jeopardy if the shipyard does not have an approved ACP. Many non-U.S. Citizens are from friendly foreign countries. Continued employment of non-U.S. Citizen individuals from friendly foreign countries is assured provided no criminal or similiar [sic] problems are discovered.

The Salko memo was sent to various NAVSEA field operations within the United States, including SUPSHIP Long Beach.[17]

Captain Martin Hill, Director of the SUPSHIPS Management Group that managed the various SUPSHIP field offices, corroborated much of Salko's testimony regarding the effect and intent of various NAVSEA memorandums. In addition, none of Respondent's witnesses have contradicted any aspect of Salko's testimony. Respondent argues that Salko admitted that the Salko memo applied only to situations where a contractor has an approved ACP. However, the record clearly reveals that Salko did not make such an admission. Rather, he stated that this memo is applicable both to situations where a contractor already has an approved ACP and to situations where that contractor has submitted the ACP but has not yet received approval.

Respondent also argues that Salko's testimony on the meaning of the memorandum is untrustworthy. Specifically, Respondent argues that Salko's testimony cannot be trusted since Leon Olsen, a civilian administrative officer at SUPSHIP Long Beach, directly contradicted Salko's interpretation of NAVSEA memorandums and the Special Counsel may have told Salko what to say. I find Respondent's arguments unpersuasive. Salko's testimony related mainly to NAVSEA procedures and to his elaboration of the intent and meaning of the SALKO memorandum. Such testimony flowed from direct personal knowledge and is particularly convincing since he drafted the document. The gist of Respondent's arguments is that Salko may have been improperly influenced by OSC representatives. However, nothing more than innuendos have been presented to support this claim. Respondent does not directly attack Salko's interpretation of the December 23 memo except to state that Olsen reached a different

[17] SUPSHIP Long Beach has supervisory jurisdiction over naval contracts awarded to Southwest Marine's San Pedro Division.

interpretation. While this may indicate reasonable persons may differ as to the apparent meaning of the memorandum, it does not in any way detract from Salko's testimony as to the memo's intended meaning.

In view of the corroboration of various aspects of his testimony by other witnesses, the lack of contradiction of much of his testimony, and his demeanor on the witness stand, I find Salko to be a credible witness. I also credit Captain Hill that during the relevant period, he received and read the Salko memo and cited it as authority to the Com-mander of SUPSHIP Long Beach when he instructed him not to tell contractors to get rid of non-citizens, that the intent of the Salko memo was to retain non-citizen employers pending ACP approval.

McKeown, testified that he prepared numerous draft ACPs in an ef-fort to comply with NAVSEAINST 5500.3. According to him, he ini-tially submitted two draft versions to Leon Olsen for comment.[18] On May 19, 1986, he attempted to submit for NAVSEA approval a pro-posed ACP covering all of Respondent's various shipyards. However, this attempted submission was rejected by SUPSHIP Long Beach on the ground that Respondent must submit separate ACPs for shipyards located in different geographic regions of the NAVSEA command struc-ture. Thereafter, McKeown submitted to SUPSHIP Long Beach an ACP covering only the Terminal Island facilities. This latter proposed ACP was disapproved by a December 17, 1986 memorandum addressed to SUPSHIP Long Beach and signed by Salko, hereafter called the ACP disapproval memo.[19] The Salko memo was attached thereto. Thereafter, on January 13, 1987, both the Salko memo and the ACP disapproval memo were enclosed with a memo to Respondent from SUPSHIP Long Beach informing Respondent that its ACP has

[18] Leon Olsen, a civilian employed by SUPSHIP Long Beach, had security oversight responsibilities over contractors under the jurisdiction of SUPSHIP Long Beach.

[19] Respondent's proposed ACP was denied on two grounds. First, Respondent failed to detail a badging procedure in its proposed ACP. Second, Respondent included citizens from "communist-controlled countries or countries hostile to the United States", sometimes referred to as "designated countries, in its list of alien-employees who may be admitted on board naval vessels. Specifically, the disapproval memo states that Respondent's ACP included non-U.S. citizens from China, Korea, Laos, Yugoslavia and Vietnam (i.e. "designated countries") who are not to be allowed on board or along-side naval vessels under any circumstances. Further, they must also be excluded from industrial areas where naval work is being done.

been disapproved by NAVSEA.[20] On March 6, 1987, McKeown submitted a revised ACP. This version of the ACP was approved by NAVSEA on November 30, 1987.

c. Respondent Institutes a New Policy Prohibiting the Employ-ment of Non-U.S. Citizen Employees Aboard Naval Vessels

Rudolph testified that the refusal to recall Miranda was in reliance upon a February 2, 1987 memo issued by McKeown and entitled "Use of Non-Citizens Aboard Naval Vessels". This memo, issued pursuant to Engel's instructions and hereafter called the McKeown memo, states in part:

> Effective immediately no non-citizen employee will be allowed to work aboard naval vessels. This a requirement of NAVSEAINST 5500.3 dated 22 October 1985.
>
> It will be the responsibility of all department heads to ensure that no non-citizens are assigned work aboard Naval vessels, or on the Naval base.

Engel testified that about a week after the McKeown memo issued he called a meeting of superintendents to reinforce the message contained in that memo.

Despite Respondent's reliance on 32 C.F.R. §765.5(c) and NAVSEAINST 5500.3 as its defense herein and despite the reference to these regulations in the McKeown memo, Respondent does not claim that the McKeown memo was issued as a direct result of either the ACP disapproval letter or the Salko memo. In fact, McKeown freely admits that even though he was aware of the contents of NAVSEAINST 5500.3 and 32 C.F.R. §765.5(c) prior to January 1987, and even though he understood those regulations to require Southwest Marine not to use non-U.S. citizen employees on board naval vessels, he never sought to enforce those provisions at the Terminal Island facility either on his own initiative or at the urgings of other Southwest Marine personnel. Rather, according to him, the McKeown memorandum was the direct result of an alleged telephone conversa-tion between Lieutenant Commander Timothy Gann, the naval "repair officer" at SUPSHIP Long Beach, and Ardie Beck, a program manager

[20] McKeown admits that he received the January 13 letter and Engel admits that he read both the January 13 letter from SUPSHIP and the ACP disapproval letter. However, Engel does not specifically recall reading the Salko memo.

at the Terminal Island facility.[21] The call from Gann was allegedly precipitated by a January access-denial incident aboard the U.S.S. Wabash involving certain of Respondent's non-citizen employees.

1. The alleged Beck-Gann and Olsen-McKeown Conversations

Beck testified that on the afternoon of Friday, January 30, 1987, Gann telephoned and asked to speak with either McKeown or Engel. After being informed that both McKeown and Engel had left the ship-yard, Gann asked Beck if Respondent was using non-citizens on navy ships. Beck said they were. Gann then said that since Respondent had no approved ACP, it could not employ non-citizens to perform work on naval vessels. Gann also said Respondent must cease employing non- U.S. citizens for naval repair contracts and that SUPSHIP would make spotchecks to ensure compliance with this policy. Beck further testified that on Monday, February 2, 1987, he related to McKeown the gist of Gann's statements. Thereafter, McKeown and Beck met with Engel at which time they related the Gann-Beck conversation to Engel. During this meeting, Engel instructed McKeown to issue the February 2 memo.

McKeown and Engel corroborate this sequence of events. However, they contradict Beck as to what Beck told them was said by Gann. Beck testified that Gann did not refer to any incidents involving the denial of access to Respondent's non-citizen employees. McKeown and Engel testified that Beck told them Gann had spoken to him regarding an incident on the U.S.S. Wabash when an employee of Respondent was denied access because of his non-citizen status. McKeown and Engel both testified that this was their first knowledge of such an incident. McKeown testified that Beck telephoned him and said he had received a telephone call from Gann in which Gann said the Captain or the quarterdeck officer had called SUPSHIP to report that they had denied access to some non-citizens. McKeown said they were really not supposed to use non-citizens and that he and Beck should talk about it. Shortly thereafter McKeown and Beck related the Gann-Beck conversation to Engel. Engel asked if Respondent was in compliance. McKeown said, not really. Whereupon Engel instructed McKeown to issue the February 2 McKeown memo.

[21] As repair officer, Gann serves as his commanding officer's representative to the contractors, reviews progress reports for ships undergoing repair and overhaul at the various contractors' yards and heads a staff of ship superintendents who handle day-to-day matters only if problems arise which cannot be handled on the staff level.

McKeown admits he is not sure whether the incident occurred on board the U.S.S. Wabash or on some other vessel. However, since he is unaware of any other incidents of that nature occurring on naval ships during that time, it is his belief that it did occur on the Wabash. The Special Counsel argues that the Gann-Beck conversation was fabricated. This argument is based on a pretrial affidavit and deposition by McKeown in both of which he states that it was he, and not Beck, who spoke to Lt. Commander Gann. McKeown's only explanation for this inconsistency is that he had simply misremembered the facts. According to him, during a post-deposition conversation with Beck, he was reminded by Beck that it was Beck who had in fact spoken to Gann. However, Beck testified that McKeown reminded him of his conversation with Gann both before and after the opening of the hearing herein. According to Engel, Beck said the Wabash incident involved non-citizens and could be a potential problem; but he did not mention any specific details relating to the incident.

Beck testified that it was Captain Powers, then the Commander of U.S.S. Wabash, who informed him of the access denial incident. Accor-ding to him, Captain Powers expressed general concerns regarding possible terrorist threats posed by non-U.S. citizens in relation to an incident during January 1987 in which a non-citizen employee from Southwest Marine was denied access to the Wabash. Beck further testified that since he was aware of only one non-citizen who worked on board the Wabash at that time--Gordon Wright, the Ship Superintendent--he instructed Wright not to work aboard the Wabash until further notice. However, Beck later admitted that he is unsure whether Wright was ordered off the Wabash due to his status as a non-citizen or because his name was not on the Wabash's access list.[22] It is clear from the evidence that if Wright's name was not on the access list, he would have been denied access to the ship regardless of his citizenship status.

[22] Respondent is required to submit "Access Lists" before it can begin work on board a naval vessel. An "access list" constitutes a request by the contractor for named workers to be allowed on board a particular naval vessel. Prior to 1987, McKeown sent a transmittal letter, along with badge numbers and a list of names to SUPSHIP Long Beach. The list of names constitutes the actual "Access List". It could either be printed on 8 1/2 by 11 white paper or on computer printout. The access lists also include a contract number as well as the agreed period of time to complete the contracted work. At SUPSHIP Long Beach, Olsen was responsible for approving access lists received from Respondent. However, between January and December 1987, Access Lists to naval ships located at Respondent's shipyard were not forwarded to SUPSHIP. Instead, they were hand carried to the particular ship's designated security and quarterdeck officer.

Further complicating these tangled accounts as to the conversations which led to the McKeown memo is the testimony of Lt. Commander Christopher Martin, the executive officer on the U.S.S. Wabash from August 29, 1986 until March 22, 1988. As executive officer, Martin was responsible for carrying out the policies of the ship's commanding officer, Captain Powers. He was also the designated security officer on board during the relevant period. As the ship's security officer, Martin was responsible for reviewing the access lists received by the quarterdeck.

According to Martin's recollection, the Wabash was berthed at Pier Echo, Long Beach Naval Station, in January 1987. Martin categorically stated that no security incidents involving non-citizens occurred on board the Wabash during that period. He further testified that non-citizens access to the ship was never an issue under Captain Powers' command. Rather, the only instance in which Powers ejected an individual from the ship during the relevant period was when a worker was caught smoking marijuana on board. According to Martin, access to the Wabash by contractors' employees was based solely on whether the workers' names appeared on the access list. Such access was not dependent on the individual's citizenship status. Additionally, Martin testified that, as the ship's security officer, it was not possible for any crew members of the Wabash to deny access to workers without his knowledge. In view of the positions he occupied on the Wabash, I fully credit Martin's testimony that no citizenship-based access denial incident occurred on board the U.S.S. Wabash in January 1987.

As to the alleged Gann-Beck conversation, Gann testified that in January and February of 1987, he was familiar with neither the contents of NAVSEAINST 5500.3 nor with the nature of an ACP. According to him, he also did not possess any knowledge that Southwest Marine's first ACP was denied by NAVSEA in 1987. Further, although Gann admits that he frequently spoke with both Engel and McKeown in his capacity as a "Repair Officer" at SUPSHIP Long Beach, he testified that he does not recall ever engaging in a conversation with Beck during January or February 1987 regarding non-U.S. citizen workers. In fact, Gann testified that he has no recollection of ever having spoken with anyone at Southwest Marine in regard to security-related matters during 1986 and 1987. According to him, he is not normally involved in security-related matters, and would only speak to Respondent regarding security matters if he became aware that classified materials were being compromised. He is unaware of any such incidents during 1986 and 1987. Gann further testified that he would normally follow up a telephone conversation with a written

communication reflecting the topics covered, where the conversation involved a substantial alteration in the way a contractor complies with its contract. Here, there is no evidence of any such written documentations.

However, Gann does not categorically deny that he made the alleged phone call. He admits that it is possible, under certain conditions, that he may have called Respondent. According to him, it is theoretically possible for him to have telephoned Southwest Marine on the alleged subject in order to "help someone out" and then to have promptly for-gotten about it. There is no evidence that anyone requested that he make such a call.

In view of the inconsistencies in the testimony of McKeown and Beck as to this conversation and other matters,[23] I conclude that the evidence is insufficient to establish that Gann telephoned Beck on or about January 30, 1987. However, there is undisputed evidence that, on various occasions, Leonard Olsen, a civilian administrative officer at SUPSHIP Long Beach with contract oversight responsibilities, spoke with McKeown concerning employment of non-citizens. Olsen testified that he verbally instructed McKeown not to employ non-citizens on naval vessels on a number of occasions but never issued any written instructions to him on that subject. Olsen specifically recalls telling McKeown in 1987 not to use non-citizens for navy-related work until Respondent obtained approval of its ACP from NAVSEA. He also admits that he may have made similar comments to McKeown in 1986 as well as during telephone conversations he had with McKeown in January 1987.

According to Olsen, he told McKeown that use of non-U.S. citizens on naval ships without an approved ACP might result in loss of Respondent's certification with the Navy.[24] He further testified that he warned McKeown regarding the possibility that he would check to see

[23] For example, the non-occurrence of the alleged U.S.S. Wabash citizenship incident, the testimony of Captain Martin Hill, Director of SUPSHIP Management Group, that he told the commander of SUPSHIP Long Beach that the intent of the Salko memo was to indicate that non-citizen workers did not have to be removed and that he specifically instructed him not to require contractors to remove non-U.S. citizen workers, Gann's testimony that he has no recollection of ever telephoning the Respondent on the subjects on non-citizen access and employment on board naval vessels, the absence of any written confirmation of such a call, and Gann's unfamiliarity with the nature of an ACP and the related naval regulations.

[24] A contractor is permitted to perform work for the U.S. Navy only if it has been certified and has received a contract number.

if Respondent was employing non-citizens on any ships. However, Olsen did not actually make any such checks. In fact, he stated that he was not aware that Respondent employed non-citizens on naval ships in 1986 and during the first eleven months of 1987. McKeown corroborates that Olsen made such statements to him. Olsen admits he was not authorized to set naval policy in regard to non-citizen employees. According to him, during all relevant times, he was aware of the exis-tence of 32 C.F.R. §765.5(c) and the contents of NAVSEAINST 5500.3. However, he admits that he was unsure of the precise requirements of those regulations even though he made several inquiries to NAVSEA on that subject.

In view of the undisputed testimony of Olsen and McKeown in this regard, I find that on several occasions during 1987 and perhaps 1986, Olsen orally instructed McKeown that Respondent must not employ non-U.S. citizens on naval vessels until it received NAVSEA approval of its proposed ACP and that doing so would risk losing its naval contracts.

As to the alleged Gann-Beck telephone call, in view of my finding above regarding the inconsistencies in the testimony of McKeown and Beck as to this conversation and other matters, I find that neither McKeown nor Beck has any specific recollection that such a call was received from Gann. However, I also find that McKeown or Beck had a conversation with someone from SUPSHIP, whether Gann or Olsen, the contents of which made McKeown feel it would be prudent to advise Engel that there had been comments and/or occurrences which might make questionable the continued practice of employing non-citizens in the repair and overhaul of naval vessels. In reaching this latter conclusion, I am mindful of the extensive use that Respondent made of non-citizen employees and of the complete absence in the record of any other explanation for Respondent taking a step which would adversely impact upon its work force. I further find that on February 2 Beck and McKeown related to Engel their various conversations with naval personnel regarding ACPs and the requirement that non-citizens not be employed on naval vessels in the absence of an approved ACP.

d. Respondent's Non-Citizen Employment Practices Following the McKeown Memo

Respondent asserts that, in compliance with the McKeown memo, it required non-U.S. citizen employees to cease working on navy ships through the issuance of the McKeown memorandum. However, despite the McKeown memo, there exists ample evidence indicating

that, after its issuance, non U.S. citizen employees continued to work on naval vessels undergoing repair and maintenance in Respondent's shipyard. Thus Miranda testified that he continued to work on navy ships between February 2, 1987 and March 18, 1987, the day of his layoff, even though he was not an U.S. citizen. On January 16, Miranda was temporarily laid off by Respondent. On January 29, he was recalled to commence work on February 2, the date of issuance of the McKeown non-citizen memo. According to him, on February 2, and throughout the month of February 1987, he worked on both commercial and naval ships. He also testified that on one occasion during February, he worked on navy ships for five consecutive days. No contradictory testimony was adduced.

There is also other evidence indicating that, for some period of time after February 2, 1987, Respondent continued to employ non-citizens to work on navy ships. Thus, McKeown testified that he was told by others that several departments at Southwest Marine continued to hire and recall non-U.S. citizens for jobs covered by NAVSEAINST 5500.3. Also, Engel testified that some departmental superintendents at Southwest Marine "dragged their feet" in implementing the McKeown non-citizen memo and, during a meeting with the superintendents shortly after the issuance of the memo, many of them voiced displeasure regarding the new non-citizen policy.[25] I therefore find Respondent continued to employ non-U.S. citizens on U.S. Navy vessels for some period of time after February 2, 1987.

B. Conclusions

1. The statutory scheme and applicable case law

On November 6, 1986, Congress enacted the Immigration Reform and Control Act of 1986. Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified as amended at 8 U.S.C. §§1324a, 1324b, 1324c (1991)), which amended the Immigration and Nationality Act of 1952. Its primary goal was to stem illegal immigration into the United States by establishing a national employment verification system. A novel feature of this system is the requirement that employers verify

[25] A Summary of Alien Actions" prepared by Respondent in compliance with discovery requests shows that between February and December, Respondent hired and/or recalled or laid off a number of non-citizen employees. However, this summary does not indicate whether these employees worked in classifications or departments engaged in ship maintenance operations. Thus the summary does not tend to establish either that non-citizens worked on naval vessels or that commercial work was available.

employment eligibility. To ensure proper discharge of this newly acquired verification duty, the Act also imposed civil and criminal penalties upon those employers who were found to have failed to comply with their statutory duty. Generally 8 U.S.C. §1324a.

The Act's requirement that employers must verify potential workers' employment eligibility was a controversial measure. In particular, it was widely feared that this requirement might encourage employers to discriminate against Hispanic-Americans and other minorities on the basis of their "foreign" linguistic and physical characteristics. See H.R. Rep. No. 682, 99th Cong., 2d. Sess., pt. 1, at 68. In order to prevent any such potential discrimination, Congress included an anti-discrimination provision to bridge a perceived gap in other discrimination legislation. See U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89). Title VII of the Civil Rights Act of 1964 outlaws, inter alia, race and national origin discriminations against both U.S. citizens and non-U.S. citizens. However, its national origin discrimination prohibition does not apply to employers with fewer than fifteen employees, nor does that Act prohibit discriminations on the basis of an individual's citizenship status. U.S. v. Lasa Marketing Firms, et. al., 1 OCAHO 106 at 4 (1/27/89) (citing Espinosa v. Faran Mfg., 414 U.S. 86, 95 (1973)).

IRCA bridges this gap by outlawing citizenship based employment discrimination as well as national origin discrimination where the employer has between three and fifteen employees. 8 U.S.C. §1324b. The Act also designates the Special Counsel to investigate and prose-cute charges brought under this provision. Further, the statute pro-vides certain exceptions to its discrimination prohibition. One such provision exempts an employer engaged in otherwise unlawful discri-minations, from IRCA liability if its actions were required by government law, regulations or contracts. 8 U.S.C. §1324b(2).

To prove unlawful citizenship discrimination the Special Counsel must demonstrate by a preponderance of the evidence that covered employer, on the basis of citizenship status, discriminated against a protected individual, with regard to hiring or discharge. 8 U.S.C. §1324b(1)(B). The Special Counsel need not produce all its evidence during the initial presentation of its case. Rather, the Title VII scheme for allocating the burden of evidence production has been adopted for IRCA citizenship discrimination cases. 28 C.F.R. Part 44,

U.S. v. Mesa Airlines, supra, citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973).[26]

However, where direct evidence of discrimination exists, the McDonnell Douglas test for a prima facie case is not applicable. U.S. v. San Diego Semiconductors, Inc., 1 OCAHO 314 at 7-8 (4/4/91) (citing TWA v. Thurston, 469 U.S. 111, 121 (1985)). Direct evidence is sufficient to prove the existence of the discrimination. In such cases, Respondents may escape liability only if it can show that it actually relied upon a legitimate, non-discriminatory motive and that it would have made the same decision even absent the discriminatory motive. These are the so called "mixed-motive" cases. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

2. Discussion

Respondent argues that the Act only prohibits citizenship discrimination motivated by fear of employer sanctions, which clearly is not the situation here. However, this argument was rejected in early decisions involving Section 1324b. U.S. v. Mesa Airlines, supra. Respondent also argues that in failing to recall Miranda it did not have the intent necessary to support a finding of unlawful discrimination. Specifically Respondent argues that its sole intent was to comply with Navy regulations, not to discriminate against its non-citizen employees because of their citizenship status. This is sophistry. There is no contention or evidence that Respondent harbored any animus toward Miranda. Nor can I find anything in the statutory language, legislative history or case law that appears to suggest animus as a required element of a violation. Although evidence of animus is often important in determining concealed motivation, it is irrelevant here.

Respondent's conduct was quite straightforward. Its motivation was neither concealed nor mixed. Quite simply, Respondent refused to recall Miranda solely because he was not a U.S. citizen. If such conduct is not unlawful, it is not because the discrimination against Miranda was not based on citizenship status; but rather, because the discrimination is not proscribed since it falls into one of the three exceptions of Section 1324b(a)(2). Since I have found above that Miranda is a protected individual under Section 1324b(a)(1)(B) of the Act, this refusal to recall Miranda clearly violates that Section unless, as urged by Respondent, it falls within the purview of the Section

[26] See also, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

1324b(a)(2)(C) exception. That subsection excludes from its prohibitions "discrimination because of citizenship status which is otherwise required in order to comply with law, regulation or executive order or required by Federal, State, or local government contract...."

Respondent performs commercial as well as naval work at the Term-inal Island Shipyard. However, the majority of the work performed is on naval vessels, and the evidence is insufficient to refute Respondent's claim that the volume of its commercial work did not justify recalling Miranda for commercial work alone. Thus the threshold question is whether Naval regulations prohibited Respondent from employing non-U.S. citizens to work on, or alongside, naval vessels.

32 C.F.R. Section 765.5(c) provides that non-citizens shall not have access to naval vessels except upon a finding by COMNAVSEA that such access should be permitted "in the best interest of the United States." Although promulgated by the Department of Navy in 1966, the Regulation was not enforced, and n-on-citizens from friendly countries were used extensively by private contractors for the repair and overhaul of naval vessels. Then, in 1985, NAVSEAINST 5500.3 was promulgated to interpret and implement 32 C.F.R. Section 765.5(c). This instruction established a procedure for securing the approval of C O MNAVSEA to employ non-citizens in the construction, repair, conversion and overhaul of naval vessels. Essentially the procedure involves submitting an Access Control Plan (ACP) for COMNAVSEA's approval. Such approval constitutes a Section 765.5(c) "finding" by COMNAVSEA that use of non-citizen employees on naval vessels by that contractor is "in the best interest of the United States." NAVSEAINST 5500.3 further provides that the Instruction applies to all contracts awarded after June 30, 1986 and that existing contracts be modified at an appropriate time but no later than September 30, 1986.

It is clear from the testimony that NAVSEAINST 55003.3 caused a certain amount of consternation among contractors, employees and congress-persons, apparently because non-citizens are a substantial part of the work force in the ship building and repair industry. Another expressed concern was whether a contractor whose timely-submitted proposed ACP has been rejected and returned for modification is required to discontinue employment of non-citizens on naval vessels pending approval of the revised ACP.

It is also clear from the record that a decision was made by NAVSEA that in cases where a proposed ACP has been timely submitted but returned for certain specified modifications, NAVSEAINST 5500.3 will

not be enforced pending resubmission and approval. However the manner of communicating this decision was deliberately oblique. Thus the Salko memo enclosed with the memo notifying Respondent of the disapproval of its ACP, sought to communicate this position by the following statement:

> c. Non-U.S. Citizens currently employed by some of the contractors should not automatically draw a conclusion that their job is in jeopardy if the shipyard does not have an approved ACP. Many non-U.S. Citizens are from friendly foreign countries. Continued employment of non-U.S. Citizen individuals from friendly foreign countries is assured provided no criminal or similiar [sic] problems are discovered. [Emphasis added]

The record also establishes that notwithstanding the clear language of 32 C.F.R. Section 765.5(c), the prohibition of non-citizen workers, except upon the required finding by COMNAVSEA, was never enforced. Similarly NAVSEAINST 5500.3 was not enforced while an ACP was pending approval or modification for resubmission following disapproval. Thus, there existed a situation where the language of the government regulation required discrimination against n on-citizens but the actual practice under the regulation did not require such discrimination. In view of the intent of IRCA to protect against citizenship discrimination and given a history of more than 20 years of the naval contractual relations involved herein being governed by practice rather than the language of the regulation, I find that for purposes of the Section 1324b(2)(C) exception, it is the actual practice that is controlling. Accordingly, I find that Government regulations did not actually require Respondent to discriminate against Miranda.

I further find that Respondent's reliance upon the language of the regulation does not bring it within the purview of the Section 1324b(2)(C) exception. In this regard, I conclude that Respondent's reliance upon the language of the this section was unreasonable. As noted above, for almost 20 years 32 C.F.R. 765.5(c) was never enforced. Similarly, it was quite clear that the implementing N A VSEAINST 5500.3 was not to be immediately enforced. That Respondent was aware of this lack of enforcement is evident by its complete disregard of the requirement prior to February 2, 1988, even after NAVSEAINT 5500.3 was promulgated. Thus, Respondent submitted a proposed ACP which had not been approved by the deadline date of September 30, 1986. Despite this lack of approval, Respondent made no changes in its use of non-citizen employees for naval work on October 1, 1986, or at any time prior to February 2, 1987. Nor did Respondent cease such use of non-citizen employees in December when it learned that its ACP had been disapproved nor in mid-January when it received official notification of such disapproval.

Basically, Respondent argues that it was forced to comply with the language of the regulation because of a January threat by SUPSHIP personnel of loss of its naval certification if it did not do so. I find this argument unpersuasive. The wording of the Salko memo clearly sug-gests that there were circumstances which would not require discontinuance of the employment of non-citizens. Faced with these conflicting requirements, a reasonably prudent business person would have made an inquiry as to exactly how NAVSEAINST 5500.3 was being imple-mented. This Respondent failed to do. It is apparent from the record that if appropriate inquiries had been made, Respondent would have learned that NAVSEAINST 5500.3 was not being enforced while an ACP was pending approval or modification for resubmission following disapproval.

In these circumstances, I find that Respondent's failure to recall Miranda was not protected by Section 1324b(2)(C) of the Act. I there-fore find that by its refusal until December 1, 1987 to recall Miranda from his March 18, 1987 layoff, because of his citizenship status, Respondent has violated Section 1324b(a((1)(B) of the Act.

V. *The Validity of 28 C.F.R. §44.201 -- The Regulation Prohibiting Retaliatory Conduct*

Miranda was recalled by Respondent shortly after its revised ACP was approved by COMNAVSEA on about November 30, 1987. Com-plainant contends that thereafter Respondent gave Miranda undesirable and/or unsafe work assignments and subsequently laid him off in retaliation for filing the charge herein. Although, at the time IRCA has no specific provision prohibiting such retaliation,[27] the regulations implementing IRCA do prohibit such conduct. 28 C.F.R. §44.201 provides:

> No person or other entity subject to [the anti-discrimination provision of IRCA] shall intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured by this part or because he or she 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 part.

Respondent contends that this regulation is void because it is totally inconsistent with the language of the Statute in that the Statute is silent in this regard and there is no mention in the legislative history of any congressional concern in this regard. Rather, Respondent

[27] Section 534 of the Immigration Act of 1990, Public Law No. 101-649, 104 Stat. 4978, does prohibit such retaliation.

argues, it is a blatant attempt on the part of the Department of Justice to "legislate" a substantive, punitive law Congress did not intend to make and did not enact.

It is undisputed that the Attorney General is charged with the administration and enforcement of the Act with authority to issue implementing regulations, 8 U.S.C. §1103. The question here is whether the regulation was a reasonable exercise of the authority to administer and enforce the Statute. Specifically, did the Attorney General exceed that authority by the issuance of a regulation which prohibits conduct not specifically prohibited by the Statute, even though nothing in the Statute specifically withholds such authority.

Administrative regulations are valid if they are not in conflict with or do not change the Statute conferring the rule-making power. Further, a regulation which fulfills the purpose of the law cannot be said to be an addition to the law. U.S. v. Antikamnia Chemical Co., 231 U.S. 654. Thus, where a regulation is reasonably related to the purpose of the statute, its validity should be sustained. Mourning v. Family Publications Services, Inc., 411 U.S. 356, 369 (1973).

The language of IRCA and the legislative history makes clear that the purpose of Section 1324b(a) is to guard against discrimination based on national origin or citizenship status. Here the regulation seems clearly and reasonably related to that purpose. As alleged in the Amended Complaint, this purpose would be eviscerated if employers are permitted, through retaliatory conduct, to discourage employees and individuals from assisting with, or from asserting their own, charges of immigration-related unfair employment practice.

The reasonableness of that relationship is underscored by the statutory scheme of other statutes concerned with protecting the rights of employees, such as the National Labor Relations Act, as amended,[28] and Title VII of the Civil Rights Act of 1964, as amended.[29] These statutes have a provision prohibiting retaliation against employees for utilizing, or assisting in the utilization of, the protection of the statute. Thus, it appears that such a prohibition has been generally considered a necessary concomitant to protecting employees against discrimination. There is nothing in the legislative history which affords any insight as to why such a provision was not included in IRCA. However, it is clear that Congress view 28 C.F.R. §44.201 as

[28] 29 U.S.C. §§151-169.

[29] 42 U.S.C. §§ 2000e-3(a).

crucial to the regulatory scheme, for an almost identical provision was included in the Immigration Act of 1990. Further, the Conference Report specifically refers to the provision as "Codification of Regulation" H.R. Conf. Rep. No. 955 at 82. In these circumstances, 28 C.F.R. 44.201 should be accorded the force of law. Accordingly, I find that 28 C.F.R. 44.201 is a valid regulation which does not exceed the authority of the statute.

VI. *The Alleged Unlawful Retaliation Against Miranda For Filing the Charge Herein*

A. Knowledge as to Filing of the Charge

On January 28, 1988[30] Isaias Ortiz, an attorney from the Office of Special Counsel, conducted an investigation of the instant charge at Respondent's Terminal Island shipyard. Rudolph admits that he learned of Miranda's charge a few days before January 28. However, he testi-fied that he told no one about the charge until May 1988, at which time a San Pedro newspaper had already printed a story on the subject. According to Rudolph, before May 10, the day on which the newspaper article first appeared, the only persons at Southwest Marine who were aware of the charge were himself, Michael Adams and certain individuals working in the personnel office. Sometime during May 10, a clipping of the newspaper article on Miranda's allegations was posted on Respondent's bulletin board. Rudolph testified that he ordered the clipping to be removed from the Board.

Jerry Allen, Miranda's supervisor during early 1988, testified that Rudolph did not inform him regarding Miranda's charge. He further testified that he was unaware of any rumors about the on-site investigation and that he first became aware of Miranda's charge against Southwest Marine only in May when he "skimmed over" a newspaper article then circulating in the Terminal Island shipyard.

The above testimony clearly establishes that Miranda's discrimination charge became common knowledge at Southwest Marine after May 10. It is also clear that, at the very least, Rudolph, Adams and some personnel office employees possessed knowledge of the charge prior to May. However, there exists some dispute as to whether any of Miranda's "leadmen" (supervisors) knew of his charge prior to May. In accordance with Rudolph and Allen's testimony, Respondent argues that Miranda's direct supervisors had no knowledge of Miranda's

[30] All dates in this section will be in 1988 unless otherwise indicated.

charge prior to May. Complainant adduced no direct evidence to the contrary. Nix, the other person alleged to have engaged in discriminatory conduct, did not testify.

I have found in several instances above that Rudolph is not a reliable witness. Also, it appears from Chance's testimony that she had some knowledge of the charge at the time she made the April recall telephone calls for Rudolph. Since she worked directly for Rudolph, it seems likely that she obtained the information from him. Further, as set forth below, the record establishes no other reason for the discriminatory treatment accorded Miranda. In these circumstances and in view of the timing of the commencement of the discriminatory conduct directed toward Miranda within a few days after the on-site investigation, I do not credit Rudolph that he told no one about the charge prior to May, nor do I credit Allen that he had no knowledge of the charge prior to May. In the circumstances, I find that at the times relevant herein Rudolph, Allen and Nix had knowledge of the filing of the charge herein.

B. The Alleged February 12, 1988 Retaliatory Layoff

On February 12, 1988, Miranda and one other employee were laid off from the night shift. Special Counsel contends that the circumstances surrounding this layoff indicate it was motivated by a retaliatory intent on the part of the Respondent. Specifically, the Special Counsel argues that Miranda was laid off before other less experienced and less qualified riggers and that the manner in which the layoff notice was distributed to Miranda by Jerry Allen evidences an unlawful realiatory motive. In this matter regard, Miranda testified that Allen distributed the layoff notices earlier than usual and smiled when he gave one to Miranda.

Allen does not dispute the contention that he distributed the layoff notices earlier than is the practice of some other supervisors. However, he testified that it was his normal practice to distribute layoff notices shortly after lunch rather than later during the shift. Further, Rudolph testified that, at times, he also distributed layoff slips at an earlier than usual hour. It is undisputed that Allen distributed all of the layoff slips on his shift at the same time. It is also undisputed that rigger Ivan Dragin was less senior than Miranda and that he was not laid off on February 12. Further, Randall Kenny, another rigger who is less senior than Miranda, was also retained by Southwest Marine after February 12. In the case of Kenny, however, Respondent claims that he was only temporarily working on the night shift and thus was not subject to the night shift layoffs. Kenny testified that immediately prior to the February layoffs, he worked on

the night shift for two weeks in order to move his boat during the day.[31]

Respondent contends that its layoff decisions were based on two criteria: 1) the experience and qualifications of the rigger; and 2) the needs of the particular shift. Respondent further claims that it does not have a practice of laying off less qualified workers from one shift in order to retain workers with more experience from another shift. Rather, qualifications and experience affect a worker's job security only within his or her normal shift. Thus, Respondent argues, Kenny's retention does not demonstrate any retaliatory intent since his assignment to the night shift was only temporary and he returned to the day shift on February 15.

During the hearing, the Special Counsel elicited testimony which de-monstrates that Respondent had a history of transferring employees between shifts under certain circumstances. The Special Counsel ar-gues that such evidence implies Respondent did not observe a strict demarcation between the shifts. However, even assuming arguendo that this is true for certain purposes, there is no record evidence to establish a practice of transferring between shifts in order to protect more senior or more qualified riggers from layoffs. In fact, the evidence indicates that the transfers normally occur pursuant to an employee's request or when there exists a temporary need for additional employees on another shift due to the workload. Further, despite his qualification and seniority, Miranda has been laid off on at least 12 previous occasions. In these circumstances, I find the evidence insufficient to establish that Miranda's layoff on February 12, 1988 was unlawfully motivated.

C. The Alleged Retaliatory Refusal to Recall Miranda Subsequent to His February 12, 1988 Layoff

On April 1, 1988, the ship U.S.S. Anchorage, entered Respondent's Terminal Island shipyard for maintenance and repairs. As a result of the increased workload, Respondent recalled a number of laid-off rig-gers. However, Miranda was not immediately recalled to work and other, less qualified, riggers were recalled. Specifically, James Vaughn was recalled on April 5. Miranda was not recalled until April 18. Spe-

[31] Randall Kenny's "Personnel Action Forms" indicate that he worked on the night shift from February 1, 1988 until February 15, 1988, at which time he was transferred back to the day shift.

cial Counsel claims that this failure to recall Miranda was motivated by the filing of the charge herein.

Respondent, on the other hand, argues that the delay in the recall of Miranda was not retaliatory. Rather, it asserts that it attempted to recall Miranda prior to the recall of less experienced riggers, but no one answered his telephone. According to Respondent, this was the reason it proceeded to recall other less experienced riggers. This contention is supported by the testimony of Rudolph and Pearl "Dollie" Chance, a journeyman rigger who performs clerical work for Rudolph.

Chance testified that she was given a recall list of four to six names from which to recall persons to fill two or three openings. She followed the normal practice of calling persons in the order in which their names appeared on the list until all openings were filled. She does not recall all the names on the list. However, she does recall the names of Miranda and Vaughn and that Miranda's name appeared above Vaughn's. She has no recollection as to whether Jerry Spurwell was on the list. According to her, she called Vaughn only after receiving no answer when she attempted to call Miranda. She admits that over the years she has made hundreds of such recall telephone calls with no specific recollection as to most of them. According to her, she recollects the calls to Miranda and Vaughn because both of them have worked for Respondent for a long period of time and also because of the charges filed in this instant matter. However, she vacillated as to whether she called Miranda later in April and finally testified that she did not.[32]

Chance's account is corroborated by Rudolph. According to him, he gave Chance a recall list in early April 1988. Although he cannot recall all the names on the list, he does recall the names of Jerry Spurwell and James Vaughn. He also stated that he observed Chance once or twice attempting to telephone Miranda to recall him back to work[33]; however, there was no answer. Consequently, Chance proceeded to recall Spurwell and Vaughn. Rudolph further testified that two or three days prior to April 18, 1988, he spoke with Miranda

[32] In a pretrial deposition she could not recall this. She testified that she could recall this telephone call at the time of the hearing because she had more time to consider the question.

[33] At times, Rudolph testified that Chance telephoned Miranda twice in early April 1988. At other times, he testified that Chance called Miranda once during that period for recall purposes.

over the telephone. During that conversation, Miranda asked why he had not been recalled. Rudolph said there were only day shift openings. Miranda said he was willing to work on any shift. Subsequently, on April 18, 1988, Rudolph recalled Miranda.

However, some doubt regarding Rudolph's testimony is raised by the testimony of Michael Adams, Director of Human Resources at Respondent's corporate headquarters located in San Diego, California. Adams testified that during early April 1988, after receiving certain inquiries, he asked Judy Caton, director of the personnel office at the San Pedro shipyard, if other employees were recalled before Miranda in early April 1988. Caton said she would have to speak to Rudolph. Subsequently, Caton informed Adams that Rudolph had recalled one employee before Miranda because the other employee was a better performer than Miranda.

Finally, the testimony of Miranda and his wife, Rosario Miranda, contradict Respondent's version of the failure to recall Miranda. According to Miranda, from February 12 until April 18, there was always someone at his house. He testified that neither he nor his wife were simultaneously absent from home during this period except when they went to church together or when his wife was picking up their children from school. Rosario Miranda testified that she made a specific effort to remain at home to receive any recall telephone calls. She also testified that between March 31 and April 6, 1988, she never left her house because her son, Louie Miranda, was ill. On April 6 or 7 she did leave home to take Louie to the doctor.

I credit Rosario Miranda's testimony that she was home during the first week of April because of her son's illness and that she did not receive any telephone calls from Southwest Marine during that time. She impressed me as an honest witness who was endeavoring to testify truthfully. On the other hand, I do not credit Rudolph and Chance. In this regard, I note the vagueness of Chance's recollection and the conflict between the testimony of Chance and Rudolph and the reason given Michael Adams for the failure to recall Miranda. Also, Chance testified she did not learn about the charge until about July or August of 1988 when Rudolph mentioned it when he asked her for some papers. However, as indicated above, she also testified that she re-membered the attempt to recall Miranda in April partially because of the charge herein. Further, Rudolph testified it was general knowledge at the shipyard after the appearance of the May 10 newspaper article. Finally, I note my findings above as to Rudolph's lack of credibility in certain other regards. In these circumstances, I find that no attempt was made to recall Miranda prior to recalling other less

qualified riggers. In the absence of any credible explanation for this deviation from Respondent's normal practice, I find that Miranda's recall was delayed because of the filing of the instant charge. Accordingly, I find that Respondent thereby violated 28 C.F.R. §44.201.

D. The July 1988 Crane Incident and the Related Counseling Session

Both Miranda and Rudolph gave undenied testimony regarding an incident on about July 11. Although the testimony is somewhat dif-ferent, it is not contradictory. I therefore find that a composite of their testimony more accurately reflects what occurred. According to their testimony, Miranda was on the deck of a ship serving as a hook-tender while Greg Nix was in the ship's hold and leadman, Greg Spurbeck, was on the pier serving as a "track-walker". As Miranda was guiding a crane, Nix indicated that the crane was moving too slowly and screamed that he had "babysat" Miranda "long enough." Miranda then "yelled" or "screamed" at Nix, saying "I can't see the fucking crane operator." Miranda complained to foreman Roger Ward, general fore-man Dave Claude, and Rudolph, about Nix's behavior. Rudolph said he would speak to Nix. On the following day, July 11, Rudolph called Miranda into his office. During this meeting, Miranda admitted that he yelled at Nix because Nix said something to him which he could not hear. Miranda also explained that he thought something was wrong with the load on the crane, he could not see the crane itself, and he believed that for safety reasons there should be another hook-tender to relay signals to the crane operator.

According to Rudolph, a foreman and two leadmen told him Miranda has "cussed" and "screamed" at Nix.[34] Rudolph admits he made no further investigation of the incident. Rather, he assumed that Miranda must have used cusswords because Nix and Spurbeck said he did. Rudolph testified that he felt Miranda's behavior was inappropriate. According to him, since Nix was only about three decks (25 to 30 feet) below Miranda at the time, Miranda should not have screamed at him. He admits that the shipyard can be a noisy place and that it may be legitimate for a rigger in Miranda's position to "yell" down to a leadman or foreman, but not to "scream" down. He does not explain the difference between the two nor why "yelling" is appropriate and "screaming" is not. Rudolph further testified that he felt Miranda's

[34] Rudolph agrees that the information given him was that Miranda screamed something to the effect of "I can't see the fucking crane operator."

behavior should have resulted in his termination. However, he felt he could not handle the matter on his own because of the pending litigation and the possibility that termination might cause greater friction. He therefore decided to refer the matter to Bob Michell, the Assistant Production Manager at the San Pedro shipyard.

Special Counsel contends that the circumstances under which the meeting took place reveal Miranda was treated differently than other similarly situated workers. Respondent, on the other hand, argues that such circumstances in fact indicate Respondent was making additional efforts to treat Miranda in a fair manner.

Michell testified that he normally does not deal with personnel mat-ters involving non-supervisory employees but that in this instance, Rudolph requested that he deal with Miranda because Miranda had filed the charge herein.[35] According to Michell, Rudolph explained what had occurred during the crane incident and also stated that Miranda had some difficulties in working with others and that the crane incident was only the most recent manifestation of this problem. Rudolph corroborates this and further testified that he also told Michell that Miranda was argumentative and difficult to work with. As a result of these representations, Michell decided to have a counseling session with Miranda.

From Michell's testimony, it is clear that the counseling session cen-tered not on the crane incident but rather on investigating Miranda's alleged inability to work with others. Thus, Michell testified that, during the session, he sought to give Miranda the "benefit of the doubt" when Miranda claimed the crane incident was the result of Miranda's concern for safety. He also testified that he did not seek to terminate Miranda for the incident because it was not his practice to terminate anyone due to employee conflicts. However, in order to avoid any possible prejudicial treatment of Miranda by Nix or by others on his shift, Michell asked Rudolph to transfer Miranda to another shift.[36]

At the end of this meeting, Michell prepared a written summary, dated July 13, of the session which was witnessed by Rudolph and

[35] Rudolph at first testified that he did not tell Michell about Miranda's suit against Southwest Marine; subsequently, he reversed himself and testified that he had indeed told Michell about the lawsuit.

[36] Michell testified that since Miranda's transfer, he had not received any complaints concerning Miranda.

signed by Miranda.[37] The summary states that Michell believes Rudolph treated Miranda fairly; but to give Miranda the benefit of the doubt, he was instructing Rudolph to transfer Miranda to a different leadman. The summary went on to state that "...if [Miranda is] contri-buting to the problems that some of the Journeymen are complaining about, [Miranda] must re-evaluate [his] attitude." The summary fur-ther relates Miranda's statement that he felt he had no friends at Southwest Marine. This summary was placed in Miranda's personnel file.

Respondent does not deny that Miranda was treated differently dur-ing the counseling procedure as a result of his lawsuit against Southwest Marine. However, it contends that Miranda had in fact been treated more favorable than if he had not filed the charge herein. This contention is based on Rudolph's testimony that he would have terminated Miranda for the crane incident if the charge herein had not been pending. I do not credit Rudolph in this regard. Rudolph testified that cursing at a leadman is a serious offense which normally warrants termination. Specifically he testified that if a person only "screamed" and "yelled" at a leadman without using cusswords, that would not be ground for discharge, however, where screaming and yelling is accompanied with swear-words, this would warrant termination.

Initially, Rudolph testified that journeymen never use swearwords when addressing leadmen. Subsequently, however, he admitted that riggers are known to have yelled at leadmen in order to get their attention and that everyone at the shipyard has used the word "fucking". Further, an incident which involved two craft superintendents (Nix and Duvesic) grabbing and pushing each other only warranted verbal counseling.[38] In these circumstances, the assertion that Miranda normally would have been terminated for using an unspecified "cussword" strains credulity. This conclusion is further reenforced by Michell's testimony that he did not believe Miranda should have been terminated for the crane incident. I therefore find that the crane incident would not normally have been considered as warranting termination or requiring a counseling session.

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[37] Miranda testified that because of language difficulties, he signed the statement without understanding what it said.

[38] Michell also testified that "there may have been a punch thrown" during this incident.

Finally, Respondent contends that the alleged incidents of retaliation in fact originated from Miranda's inability to work with others. In an effort to substantiate this assertion, Respondent points to the statement admittedly made by Miranda during the counseling session that he felt he had no friends at work. Miranda explained that he uttered those words only to convey the sense that he no longer enjoyed going to work after the on-site investigation of the charge herein. Actually, according to Miranda, he gets along with almost everyone except when an individual uses unsafe work procedures in which case he may have a "run-in" with that individual.

Further, Rudolph's testimony in this regard is unreliable. I note that Rudolph gave inconsistent testimony in regard to questions concerning his perception of Miranda before and after he learned of Miranda's charge against the Respondent. Initially he testified that his opinion of Miranda did not change after the on-site investigation of this matter. After he was confronted with his prior deposition testimony to the contrary, he admitted that he believed Miranda's status as an above-average" rigger "had to change" after the on-site investigation because no one wanted to work with Miranda anymore. According to him, the general foreman, foremen, leadmen and some journeymen all told him that no one wanted to work with Miranda. Later he reversed himself again and testified that he in fact had not felt differently towards Miranda after the investigation and that his deposition testimony to the contrary was correct. He then stated that in his opinion, Miranda is an "above-average" rigger.

In view of Miranda's prior good work record, Rudolph's lack of credi-bility as to the importance of the crane incident and Miranda's alleged inability to work well with others, and Michell's testimony that he has received no complaints regarding Miranda since his transfer to a dif-ferent leadman, I find there was no reason for Rudolph to conclude that Miranda was having difficulty working with others. Accordingly, in the absence of any credible justification for the counseling session, I find that Miranda was counseled in retaliation for filing the charge herein in violation of 28 C.F.R. §44.201.

E. The Alleged Retaliatory Work Assignments

1. The "CHT Room" incidents

Special Counsel also alleges that Respondent twice assigned Miranda to work under unsafe and unpleasant conditions in "CHT" rooms in re-taliation for his assertion of his IRCA rights. The "CHT" room contains equipment which chemically treats the refuse and waste

originating from a ship's latrine and mess hall. The waste and refuse are electrically pumped through pipes into the CHT tanks located in the CHT room where it is processed through mechanical grinders and mixed with chemicals prior to being dumped overboard. When a ship comes into Respondent's shipyard, its CHT tanks are sandblasted, painted and inspected as a normal part of the maintenance procedures. A rigger's duties in the CHT room usually consists of removing valves, the electric motor and the tank level indicator in order to facilitate the cleaning of the equipment.[39] According to Miranda, riggers are normally assigned to the CHT rooms only after the supervisor has first inspected it and found it to be clean and safe. Further, less experienced riggers are usually assigned to this task, if possible.

Miranda testified that he was first assigned to the CHT room by Jerry Allen approximately one to two weeks after Ortiz's investigatory visit in January 1988. He deems this particular episode to have been an undesirable and retaliatory assignment. Miranda testified that, unless the CHT room has been previously cleaned, the assignment is unpleasant and undesirable because of the odor. However, Special Counsel introduced little evidence on whether the room had been cleaned prior to this particular assignment.[40] I therefore find that the evidence as to this assignment is insufficient standing alone to establish that it was either undesirable or retaliatory.

However, a second CHT room assignment clearly appears undesirable. This incident occurred in April, after Miranda was assigned to the the day shift under the supervision of Greg Nix.[41] On this occasion, according to Miranda, chemicals and waste overflows were still in the CHT room. Further, two riggers with less experience, Vaughn and Kenny, were available at the time to work in the CHT room. According to Miranda, as a result of the unclean work conditions, he and another rigger, Salas, were contaminated by chemicals and treated in sickbay before being sent home for the day.

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[39] Riggers are not responsible for taking the equipment apart. Rather, they wait in the CHT room for the equipment to be taken apart by machinists so that they can remove the equipment from the room.

[40] Miranda described the CHT room as smelling bad unless it has been cleaned. However, it is unclear whether he was describing the condition of the CHT room during his assignment or whether he was describing the general condition of the room.

[41] the February layoff, Miranda was recalled on April 18 to the day shift.

Rudolph corroborates that this contamination did occur. However, Respondent contends that the assignment was not retaliatory. Accor-ding to Rudolph, CHT room assignments are a normal part of a rigger's duties and are not particularly unpleasant. In fact, Miranda admits that the assignment is not intrinsically undesirable if the CHT room has been cleaned out prior to the commencement of work. Allen testified that it is not uncommon for riggers to work in the presence of leakages and that all riggers, including himself, have worked in the CHT room during minor leakages. Rudolph also testified that worker contaminations due to overflows in CHT rooms are probably not uncommon. However, he admits that in the two-year period prior to the incident, he was unaware of the occurrence of any incidents during which employees have been sent home as a result of chemical overflows in CHT rooms.

Allen also testified that Respondent has a written rule requiring a supervising employee to inspect the CHT room before allowing the commencement of work at that site. According to him, his practice was to make a visual inspection and, where an overflow is not sufficiently severe in his estimation, he would allow riggers to work in the room prior to a cleanup. Neither Allen nor Rudolph testified as to the experience level of riggers usually assigned to this type of duty. Nix did not testify.

Based upon the evidence, including the need for medical treatment and being sent home before the end of the workday, I find that the leakages in the CHT room on this occasion were not minor. I also find, in view of Allen's testimony as to the inspection requirement, that Miranda's supervisor was aware of the condition of the room. I further find that this second CHT room assignment was an undesirable task due to presence of the leakages. Finally, in light of Miranda's undisputed testimony, which I credit, I find there were other less experienced riggers who were available for that assignment and that they normally would have been assigned to that task before Miranda.

2. The Anchor-Chain Incident

Miranda testified that within a week of Ortiz's visit to Southwest Marine, Jerry Allen assigned him to hook up an "anchor chain" without any assistance. Miranda contends this was an unsafe practice since normally at least three riggers are required for such tasks. It is Miranda's belief that Allen took this action in retaliation for his charge against Respondent.

An "anchor-chain" is a chain which attaches a ship's anchor to its bulkhead. The chain is stored in a room, called the chain locker, located near the ship's bow. When a ship enters Southwest Marine's shipyard for maintenance, the anchor chain is usually removed for sandblasting and painting. Afterwards, the chain must be reattached to the ship by fastening the last link, commonly referred to as a "weak link", to the ship's bulkhead. For the types of ships served by Respondent, these weak links can range in weight from 50 to 175 pounds. When attaching the smaller chains, a rigger can pick up the weak link and slip a bolt through both the anchor chain and the bulkhead. For heavier chains, riggers use a "chain fall" to position the chain next to the bulkhead. The chain is supported in midair by a crane located on the pier while the weak link is hooked to the bulkhead. Then the rest of the chain is "stuffed" into the chain locker.

Rudolph testified in agreement with Miranda that three or four individuals are usually required for this job--two persons on the deck to handle the chain as it is lowered into the chain locker and one or two additional persons in the chain locker to hook up the anchor chain. Immediately after the chain is hooked up, the individuals in the locker must exit the room in order to allow the chain to be "stuffed" into the chain locker. Allen testified that although one person is usually suf-ficient for the task located in the chain locker, "a couple" of persons are required for the job when there is a "large chain." Also, he admits that additional workers are present on the deck of the ship during this operation.

Miranda testified that, based upon his experience as a rigger, at least three persons were necessary for the task in this particular instance. Neither Rudolph nor Allen expressed any opinion with respect to the number of riggers required for the specific incident involved here. Thus, Miranda's testimony is uncontroverted. Since Miranda is an ex-perienced journeyman rigger whose testimony as to both the general nature and the staffing requirements of an anchor chain operation is corroborated by Rudolph and Allen, I credit Miranda's testimony that normally three or four riggers are required for the task of hooking up the anchor chain. I also credit his uncontradicted testimony that he was the only rigger assigned to the particular anchor chain task alleged here and that this differed from Respondent's normal practice.

3. The "Hook-Tending" Assignment

"Hook-tending" is a task performed by riggers. It involves hooking equipment onto cranes to be transported between the ship and the pier. It is the duty of a "hook-tender" to ensure that appropriate

moving and safety procedures are followed before and during the crane operations. He or she may also be required to give signals to the crane operator as to how to maneuver a particular load.

Shortly after Ortiz's January 28 on-site visit, and before Miranda's February 12 layoff, Allen assigned Miranda to work for three or four days continuously as a hook-tender across from, and in full view of, an area where management personnel gather for breaks. Miranda con-tends that this assignment was calculated to embarrass him in front of management, to show that he is "no good." Thus, he was observed by Rudolph, who laughed at him. The Special Counsel alleges that Miranda was given this assignment in retaliation for filing the charge herein. In support thereof, Miranda testified that because it is an "easy task" normally assigned to less experienced riggers, hook-tending is considered a somewhat demeaning job by experienced riggers such as himself, who like to keep busy with challenging work.

Jerry Allen testified in agreement with Miranda that the "normal" rigger at Southwest Marine likes to "keep busy" from one project to another and dislikes tasks which carry little responsibilities. Allen also testified that hook-tending is considered to be one of the easiest jobs at the shipyard, and that up to 90 percent of a hook-tender's time consists of idle periods during which he or she does nothing in particular.

It is undisputed that all riggers are required to serve as hook-tenders from time to time. However, according to Miranda, while all riggers may be called upon to temporarily relieve a hook-tender, that job is normally assigned to "improvers". Rudolph lent credence to this claim when he testified that an "improver three" can serve as a hook-tender and that a rigger received greater responsibility as he or she gains greater experience. Further, Miranda testified that it is unusual for an experienced rigger to work as a hook-tender continuously for three or four days. Rudolph also testified that when he was still a rigger, he never was assigned to tasks with little or no activities for an entire day.

In consideration of all the evidence, I find Miranda was assigned to work as a hook-tender for a three to four day period between January 28 and February 12, 1988, and that the length of this assignment was unusually long for this shipyard. I also find that a hook-tending assignment of such duration is generally considered demeaning by riggers with Miranda's experience.

With respect to Miranda's allegation that Rudolph laughed at him when Rudolph saw him working as a hook-tender, there exists a factual dispute. Rudolph denies he laughed at Miranda. Miranda claims that Rudolph laughed at him from the management break room and also from a vehicle on the pier. However, while Miranda clearly perceived the alleged laughter to be derisive in nature, there is little in the way of surrounding circumstances to support his claim. In these circumstances, I find the evidence is insufficient to establish that Rudolph laughed at Miranda in a derisive manner while he worked as a hook-tender during the period between January 28 and February 12.

4. Conclusions as to the Work Assignment Allegations

As noted above, an OSC representative conducted an on-site investi-gation of the charge herein on January 28. On January 29, Jerry Allen was assigned as the new rigging foreman for Miranda's shift.[42] Shortly thereafter, Complainant asserts, Respondent's treatment of Miranda markedly deteriorated.[43] Respondent argues, however, that retaliation against Miranda was unlikely because Ortiz specifically warned that any retaliation against Miranda would constitute a violation of the law. Rather, Respondent contends, the alleged episodes of retaliation are the product of Miranda's paranoia and inability to work with others subsequent to the investigation.

From the outset, I reject the argument that paranoia accounts for Miranda's perception that he was accorded retaliatory treatment on a number of occasions. Despite my finding above that the evidence is insufficient to establish certain conduct as retaliatory, there are certain definite instances of retaliatory discrimination. Thus, Miranda's perception of retaliation on a broader scope that I find herein is not unreasonable, and I conclude that it does not affect his credibility nor does it tend to support any contention of his inability to work with others. In this latter regard I note the absence of any contention that Miranda had difficulty working with others prior to the on-site investigation and the admission that there were no difficulties after he was transferred from Nix' shift.

[42] At the time of the hearing herein, Allen was Night Superintendent.

[43] Allen testified that prior to beginning his new assignment as the rigging foreman on Miranda's shift in January 1988, he met with Rudolph. According to Allen, he asked Rudolph if he could change the "status quo" on the shift as he thought necessary. Rudolph said yes and further stated that he would support any changes made by Allen.

In the circumstances set forth above, including my finding of other retaliatory conduct, the timing shortly after the on-site investigation, and the absence of any valid reason for the deviations from normal practice, I find that Respondent retaliated against Miranda for filing the charge herein by (1) failing to give him appropriate assistance in hooking up an anchor-chain in February; (2) assigning him to a hook-tending job for a three to four day period between January 28 and February 12; and (3) assigning him to work in a CHT room in April. Accordingly, I find that Respondent thereby violated 28 C.F.R. 44.201.

I further find that the record fails to establish that Rudolph behaved toward Miranda in a derisive or otherwise inappropriate manner while Miranda was engaged in the hook-tending assignment discussed above or that he was given the February CHT room assignment in retaliation for the filing of the charge herein. Accordingly, I find that Respondent did not thereby violate 28 C.F.R. 44.201.

F. The Alleged Retaliatory Conduct by Greg Nix

Upon Miranda's April 18, 1988 recall, he was assigned to the day shift supervised by Greg Nix. From the beginning, according to Miranda Nix was hostile toward him. Specifically, Miranda's undenied testimony was that Nix often screamed at him and attempted to embarrass him in front of other employees. However, except for the crane and the second CHT room incidents, discussed above, he did not testify in any detail regarding these alleged incidents. He did testify that about a week after his recall, Nix referred to him as "a dirty Mexican". However, there is no evidence that Nix's manner toward Miranda was different from that shown other employees under his supervision. Miranda admits he never complained about this behavior. According to him he did not want to create further conflict and hoped that Nix would alter his behavior. In all the circumstances, I find that the Special Counsel has failed to establish Nix's general conduct toward Miranda with the specificity necessary to establish that Miranda was treated differently from other employees and that such difference in treatment was motivated by the filing of the charge herein.

VII. *Conclusions of Law*

1. Jose S. Miranda timely filed a charge with the Special Counsel against Respondent Southern Marine Corporation-San Pedro Division, a California Corporation employing more than three employees at all time material herein.

2. Miranda is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(1)(B).

3. Respondent denied employment to Miranda because of his citizen-ship status by the failure on April 14, 1987 and thereafter until December 1, 1987 to recall Miranda from layoff.

4. The discrimination described above in paragraph 3 is not excused or permitted by 8 U.S.C. 1324b(a)(2)(C) as being required in order to comply with law, regulation or executive order, or required by Federal, State or local government contract, nor has it been determined by the Attorney General to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

5. By engaging in the conduct described in paragraph 3 above, in the circumstances set forth in paragraph 4 above, Respondent has discri-minated against Miranda with respect to hiring and has thereby engaged in an unfair immigration-related employment practice in violation of 8 U.S.C. § 1 3 24B(a)(1)(B).

6. 28 C.F.R. Part 44, Subpart B §44.201 is a valid regulation which does not exceed the authority of the Act by prohibiting retaliation against individuals because they file charges or otherwise assist or participate in the enforcement of the Act.

7. Respondent retaliated against Miranda for filing a charge of immigra-tion-related employment discrimination with the Special Counsel by

(a) the failure on April 5, and thereafter until April 18, 1988 to recall him from layoff;

(b) calling him into a counseling session and placing a written summary of said counseling in his personnel file on July 13, 1988;

(c) giving him an undesirable and unsafe assignment in a CHT room in April 1988;

(d) assigning him a hook-tending job for a three to four day period between January 28 and February 12, 1988;

(e) failing to give him appropriate assistance in hooking up an anchor-chain in February 1988.

8. Respondent's conduct described above in paragraph 7 has the effect of eviscerating the enforcement abilities of the Special Counsel as set out in 8 U.S.C. §1324b(2) by discouraging other employees and individuals from assisting with, or from asserting their own, charges of immigration-related unfair employment practices.

9. Respondent's retaliatory conduct set forth above in paragraph 7 is not excused or permitted by any provision of 8 U.S.C. §1334b.

10. The Special Counsel has failed to establish by a preponderance of the evidence that Respondent has committed unfair immigration- related employment practices except as found above.

VIII. *Remedy*

Since I have found that Respondent has violated the Act, a cease and desist order is required by 8 U.S.C. §1324b(g). That Section also gives me discretionary authority to require Respondent to

(1) Pay backpay;

(2) Pay a civil penalty of $1,000 for each individual discriminated against;

(3) Comply with the requirements of Section 1324(a)(b) with respect to individuals hired during a period of up to three years;

(4) Retain for said period the names and addresses of each applicant for employment.

A. Backpay

Although the Act makes a backpay order discretionary, it is well established in Title VII and NLRB cases that backpay is the fundamental remedy for job bias which should only be denied in exceptional circumstances. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989); Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496 (2nd Cir. 1980. Complainant bears the burden of establishing that Miranda in fact suffered economic loss as a result of the discrimination. Taylor v. Phillips Industries, Inc., 593 F.2d 783, 787 (7th Cir. 1979). Respondent has the burden of establishing the appropriateness of any offsets against such economic loss such as interim earnings and lack of diligence by Miranda in mitigating damages. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 937 (10th Cir. 1979);

Rasimos v. Michigan Dept. of Mental Health, 714 F.2d 614 (6th Cir. 1983), cert. denied 466 U.S. 950 (1983).

8 U.S.C. §1324b(g)(C) provides that backpay liability shall be reduced by interim earnings or "amounts earnable with reasonable diligence" by the discriminatee. Thus, only reasonable diligence is required and an employee need not ". . . seek employment which is not consonant with his particular skills, background, and experience. . ." Ford Motor Co. v. E.E.O.C., 458 U.S. 219, 231 fn. 16 (1982). Further, backpay is not offset by collateral benefits such as unemployment compensation. N.L.R.B. V. Gullet Gin Co., 340 U.S. 361 (1951); Albermarle Paper Company, supra at 419; Kauffman v. Sidereal Corp., 695 F.2d 343, 346-47 (9th Cir. 1982); Craig v. Y and Y Snacks, Inc., 721 F.2d 77, 82-85 (3rd Cir. 1983); United States v. Mesa Airlines, 1 OCAHO 74 (7/24/89).

Here, I have found that but for the discrimination Miranda would have worked during both backpay periods. His uncontroverted testi-mony, which I credit, is that he attempted to find interim employment but was unable to do so. Thus, he had no interim earning. His finan-cial support during this period came from unemployment compensation and the refinancing of his home. In these circumstances, I find that Miranda suffered economic loss as a direct result of the discrimination against him. Further, the record reveals no circumstance which would support a denial of the fundamental remedy of backpay. Therefore, any such denial would be an abuse of my discretion.

Accordingly, I find that Miranda is entitled to backpay from April 14, 1987, the date Miranda was told he would not be recalled because of his citizenship status, until December 1, 1987, the date he was recalled.[44] He is also entitled to backpay from April 5, 1988, the date he should have been recalled until April 18, 1988, the date he was in fact recalled. Additionally, it was stipulated that his medical, vacation and holiday benefits terminated one month after each layoff. Because of the termination of these benefits, he incurred medical expenses in the amount of $121 on April 6 and 7, 1988. I find that he is entitled to reimbursement for these medical expenses. Culp v. General American Transportation Corp., 8 F.E.P. 460 (N.D. Ohio 1974), aff'd mem., 517 F.2d 1404 (6th Cir. 1975).

I further find that the payment of interest on backpay amounts is necessary not only to fully to compensate Miranda for his economic

[44] Miranda testified that he was called one to three days before December 4.

loss, but also to discourage the commission of unfair immigration-related employment practices and encourage timely compliance with the backpay order. Prejudgment interest has often been allowed as part of backpay awards in Title VII cases. Harmon v. San Diego County, 477 F. Sup. (S.D. Cal 1979). The general rule is that interest is awarded as a matter of right when damages are "ascertainable with mathematical precision." Eazor Express, Inc. v. Int'l Brotherhood of Teamsters, 520 F.2d 951 (3rd. Cir. 1975); Miller v. Robertson, 266 U.S. 243, 258 (1924). The Ninth Circuit allows prejudgment interest when the amount of backpay is readily determinable. Elte, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127, 1133.

In determining the rate of interest, the Ninth Circuit has followed the lead of the National Labor Relations Board (NLRB) in applying to backpay awards the interest rate charged by the Internal Revenue Service (IRS) on the underpayment or overpayment of Federal taxes. EEOC v. Pacific Press Pub. Assn., 482 F. Supp. 1291, 1319 (N.D. Cal. 1979), aff'd 676 F.2d 1271 (9th Cir. 1982). Under the Tax Reform Act of 1986, the IRS calculates the interest rate on underpayment of taxes differently from the rate on overpayment of taxes.[45] The NLRB utilizes the underpayment formula, which is the short-term Federal rate plus three percent. In explication of its rationale for adopting the new method used by IRS, the Board (NLRB) stated: "The short-time Federal rate has many of the characteristics that prompted the Board in Florida Steel[[46]] to adopt the adjusted prime rate as used by the IRS pursuant to 26 U.S.C. §6621. Thus, while it is not directly linked to interest rates in the private money market, the short-term Federal rate is based on average market yields on marketable Federal obligations and is influenced by private economic forces. Further, it is subject to periodic adjustment and is relatively easy to administer." New Horizon for the Retarded, Inc., 283 NLRB 1173. Since Title VII cases have employed the IRS method for computation of interest and since other cases under IRCA[47] have employed the current method used by IRS in computing interest on underpayment of taxes, and for the reasons set forth in New Horizon, I find it appropriate to use the interest computation method presently used by IRS.

Miranda normally worked an eight-hour day, 40-hour week. Further, he testified, without contradiction, that he averaged five

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[45] Pub. L. 99-514 §1511, 100 Stat. 2744 (1986).

[46] Florida Steel Corp., 231 NLRB 651 (1977).

[47] United States v. Marcel Watch Corporation, 1 OCAHO 143 (March 22, 1990).

hours of overtime per week.[48] There is no evidence in the record that he would have been laid off or, for any other reason, would have worked less than 45 hours a week throughout the backpay periods. The parties stipulated that his regular hourly wage rate throughout both backpay periods would have been $13.55 an hour plus a 75 cents night shift differential. His overtime rate would have been $27.10 an hour.

For the reasons set forth above, I find that Respondent owes backpay to Miranda in the amounts set forth below, plus interest to be computed at the rate used by the Internal Revenue Service for underpayment of taxes[49] Interest will accrue commencing with the last day of each calendar quarter of the backpay period for the amount due and owing for each quarterly period and continuing until compliance is achieved.

Quarterly Backpay Owed

Quarter	Hours Worked		Hourly Wage Rate	Med.Exp.	Backpay Amount	Total Backpay For Qtr.
2nd Qtr. 87	Regular	448	$14.30		$6406.40	$8028.00
(4/14-6/30	Overtime	56	26.10		1517.60	
3rd Qtr.	Regular	528	14.30		7550.40	9339.00
1987	Overtime	66	27.10		1788.60	
4th Qtr. 1987	Regular	352	14.30		5005.00	6197.40
(10/1-12/1	Overtime	44	27.10		1192.40	
2nd Qtr. 1987	Regular	72	14.30	$121.00	1029.61	1273.51
4/5-4/18	Overtime	9	27.10		243.90	
			Total backpay, not including interest			$25,736.91

B. Other Discretionary Remedies

[48] Miranda first testified that he averaged five to ten hours overtime each week, however, he immediately changed that testimony to five hours a week.

[49] The interest rate on underpayment of taxes as determined by the Secretary of the Treasury for the periods relevant herein are:

	Percentage Rate
January 1, 1987, through September 30, 1987	9
October 1, 1987, through December 31, 1987	10
January 1, 1988, through March 31, 1988	11
April 1, 1988, through September 30, 1988	10
October 1, 1988, through March 31, 1989	11
April 1, 1989, through September 30, 1989	12
October 1, 1989, through March 31, 1991	11
April 1, 1991, through December 30, 1991	10
January 1, 1992, through March 31, 1992	9
April 1, 1992, through June 30, 1992	8

B. Other Discretionary Remedies

Upon a consideration of the entire record herein, recognizing particularly that the violation herein did not arise out of any effort to circumvent the requirements of Section 1324a(b) and considering that by the time of the trial herein, Respondent had ceased its unlawful conduct, I will not issue a Section 1324a(b) compliance order; nor will I require Respondent to retain names and addresses of employment applicants. I shall require, however, that Respondent post a notice to employees regarding their rights under 8 U.S.C. 1324b and Respondent's obligations under 8 U.S.C. §1324a. I shall also require that Respondent pay a civil penalty of $1,000.

IX. *Order*

Upon a consideration of the foregoing findings of fact and conclusions of law, I issue the following:

1. Respondent, Southwest Marine Corporation, a California Corporation, d/b/a Southwest Marine Corporation San Pedro Division, shall:

(a) Cease and desist from the unfair immigration-related employment practices found herein.

(b) Pay to the United States a civil money penalty in the sum of $1,000.

(c) Pay to Jose S. Miranda backpay in the amount of $25,736.91 plus interest to be computed as set forth in the "Remedy Section" herein.

(d) Expunge from its records, including Miranda's personnel file, all references to the counseling session found unlawful herein or to any alleged conduct by Miranda leading to said counseling session

(e) Post, in a conspicuous place at Respondent's Terminal Island facility, notices to employees about their rights under 8 U.S.C. §1324b, and employer's obligations under 8 U.S.C. §1324a.

2. All outstanding motions not ruled upon herein are denied.

3. Pursuant to 8 U.S.C. §1324b(g)(1) this final Decision and Order is the final administrative order in this proceeding.

This Decision and Order may be appealed within sixty (60) days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i).

SO ORDERED.

Dated this 15th day of May, 1992.

EARLDEAN V.S. ROBBINS
Administrative Law Judge

APPENDIX A

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

UNITED STATES OF AMERICA, Complainant, v. SOUTHWEST MARINE CORPORATION, A California Corporation, d/b/a SOUTHWEST MARINE CORPORATION- SAN PEDRO DIVISION, TERMINAL ISLAND, CALIFORNIA, Respondent.	)	8 U.S.C. SECTION 1324b PROCEEDING CASE NO. 88200036

Appearances:

Lawrence J. Siskind, Esq.
Isaias Ortiz, Esq., and
Chris D. Thomas, Esq., of
Washington, D.C., for the
Complainant.
William C. Wright, Esq.
of Littler, Mendelson, Fastiff
& Tichy, San Diego, Calif., for
the Respondent.

INTERIM DECISION AND ORDER DENYING RESPONDENT'S MOTION TO DISMISS

EARLDEAN V.S. ROBBINS
Administrative Law Judge

Statement of the Case

This case was heard before me on various dates in October 1988. The charge was filed by Jose S. Miranda, herein called Miranda, on October 15, 1987 against the Southwest Marine Corporation, a

California corportation d/b/a Southwest Marine Corporation-San Pedro Division, Terminal Island, California, herein called Respondent. On April 18, 1988, a Complaint Regarding Unfair Immigration Related Employment Practice issued alleging that Respondent has committed unfair immigration related employment practices in violation of Section 274B(a)(1)(B) of the Immigration Reform and Control Act of 1986 (IRCA)[1] by knowingly and intentionally discriminating against Miranda by refusing to recall him to his job as a rigger because he was not a U.S. citizen. Thereafter, an amended complaint issued alleging that Respondent (1) in violation of 8 U.S.C. Section 274B(a)(1)(B)[2] refused to recall Miranda until on or about December 18, 1987, and (2) in violation of 28 C.F.R. Part 44 Subpart B, Section 44.201, retaliated against Miranda for filing the charge herein by laying him off as a rig-ger on February 12, 1988, and failing to recall him until April 15, 1988.

On May 24, 1988, Respondent filed its Answer to the Amended Complaint in which it alleged inter alia as affirmative defenses that (1) Miranda was not a citizen of the United States or an intending citizen within the meaning of Section 274B(a)(1)(B) and 274B(a)(3)(B);[3] (2) any alleged discrimination was permissible under Section 274B(a)(2)(c) and/or Section 274B(a)(4);[4] and (3) the charge was filed more than 180 days after the occurrence of matters alleged as unfair immigration-related employment practices.[5]

At the conclusion of the hearing, counsel for the Respondent moved to dismiss the Complaint on the grounds that the charge was not timely filed and that Miranda was not an intending citizen. I reserved ruling on the Motion but agreed, at the urging of the parties, to issue a bifurcated decision herein with an interim decision covering only the two affirmative defenses raised in the Motion to Dismiss. The parties stipulated that for purposes of resolving the intending citizen issue, Miranda's testimony may be credited.

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[1] 8 U.S.C. Section 1324b(a)(1)(B).

[2] 8 U.S.C. Section 1324(b)(a)(1)(B).

[3] 8 U.S.C. Section 1324(b)(a)(1)(B) and 1324(b)(3)(B).

[4] 8 U.S.C. Section 1324b(a)(2)(C) and/or Section 1324b(a)(4)

[5] See 8 U.S.C. Section 1324b(d)(3).

Upon the record, including my observation of the demeanor of the witnesses, and after due consideration of the post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. *The Timeliness of the Filing of The Charge*

Section 274B(a)(1) of IRCA provides:

> "(1) General Rule.--It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> "(A) because of such individual's national origin, or
>
> "(B) in the case of a citizen or intending citizen (as defined in paragraph (3), because of such individual's citizenship status.

However, Section 274B(d)(3) provides:

> "(3) TIME LIMITATIONS ON COMPLAINTS.-No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1).

The facts relevant to the timeliness of the filing of the charge are undisputed The charge was filed on October 15, 1987.[6] On April 14, Miranda, who was then on layoff, telephoned his superintendent, Raymond Rudolph, and inquired as to when he would be recalled from layoff. Rudolph said he could not recall Miranda because he was not a citizen. About a week later, thinking that Rudolph may have been confused, Miranda went to the personnel office and spoke to Nancy Yuppa. When he asked her when he would be recalled she also told him he could not be recalled because he was not a citizen.

At that time, Miranda observed a sign posted in the personnel office which stated that U.S. citizenship was a requirement for employment at Respondent's facility. This sign, or a similar one, remained posted in the personnel office until after the charge herein was filed. Further, from at least April 1987 until after the charge was filed, Respondent

[6] All dates herein will be in 1987 unless otherwise indicated.

placed job advertisements in newspapers which included a citizenship requirement for both blue collar and white collar jobs.

Respondent argues that if there was any unfair immigration-related employment practice, it occurred on April 14 when Rudolph told Miranda he could not be recalled because he was not a U.S. citizen. Therefore, according to Respondent, the charge was untimely filed 184 days after the alleged unfair immigration-related employment practice occurred.

Complainant argues that Respondent's conduct constitutes continuing violations which occurred within the 274B(d)(3) 180-day period. Re-spondent refutes this position by relying upon Delaware State College v. Ricks, 449 U.S. 250 (1980) and its progeny. In Ricks, a state college librarian was denied tenure. Subsequently, as a result of the lack of tenure, the librarian was discharged. He filed suit alleging that the denial of tenure deprived him of his rights under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. Section 1981, 101 S.Ct. 498; but argued that the limitations period began to run from the date of his discharge.

The Court found that the allegedly illegal denial of tenure was the discriminatory act and the subsequent discharge was only the consequence of such discriminatory act. In holding that the limitations period commenced with the discriminatory act--the denial of tenure--and not the consequence of such act--the discharge--the Court stated:

> [T]he only discrimination alleged occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to Ricks.... That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the discriminatory acts not upon the time at which the consequences of the acts became most painful."... It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." ... The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists." (Emphasis in original) (footnotes omitted)

The Court further explicated this principle in Chardon v. Fernandez, 454 U.S. 6, 102 S.Ct. 28 (1981) where the alleged illegal acts were employee terminations. The Court rejected the First Circuit's attempt to distinguish Ricks on the ground that there the alleged illegal act was denial of tenure whereas in Chardon the terminations were the alleged illegal act. In holding that, for limitation purposes, the crucial factor is the time of the alleged discriminatory act rather than the

effective date, the Court noted that in both Ricks and Chardon, "the operative decision was made--and notice given--in advance of a designated date on which employment terminated." The Court further noted, "In Ricks, we held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. . . . The fact of termination is not itself an illegal act."

However, nothing in these decisions diminishes the principle of con-tinuing violations as explicated in United Air Lines, Inc. v. Evans, 431 U.S. 553 (1976). In that case, Evans had been forced to resign in 1968 pursuant to a United policy, later declared violative of Title VII, of refusing to allow its female flight attendants to be married. Several years later, she was hired as a new employee and unsuccessfully sought seniority credit for her years away from work. She contended that the denial of seniority credit for those years during which she was unlawfully deprived of employment were a continuing violation of her rights under Title VII. In rejecting Evan's contention of a continuing violation, the Court distinguished between continuing impact and continuing violations. Specifically, the Court stated: "United's seniority sys-tem does indeed have a continuing impact on her pay and fringe bene-fits. But the emphasis should not be placed on mere continuity, the critical question is whether any present violation exists.

This distinction continues to be recognized by the courts. Reed v. Lockheed Aircraft Corporation, 613 F.2d 757, 761 (9th Cir. 1980); Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984); Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982). In the latter case the court stated:

The doctrine of continuing violations, as one court observed, is "actually a conglomeration of several different ideas." Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 585 (D.Minn.1978). For present purposes, however, the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Id. at 585-86. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed. With regard

to such discrimination in promotion, this court has accepted the following formulation:

> [A] challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future. [citations omitted]

The situation may be different, however, with regard to complainants who have ceased to be employees or never were employees. A refusal to hire or a decision to fire an employee may place the victim out of reach of any further effect of company policy, so that such a complainant must file a charge within the requisite time period after the refusal to hire or termination, or be time-barred. If in those cases the victims can show no way in which the company policy has an impact on them within the limitations period, the continuing violation doctrine is of no assistance or applicability, because mere "continuing impact from past violations is not actionable. Continuing violations are." Reed v. Lockheed Aircraft Corp., 613 F.2d at 760; see United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

We agree with the trial court that in this case Owens-Illinois' refusals to hire and terminations did not give occasion to apply the continuing violations doctrine....

The trial court erred, however, in concluding that the continuing vio-lations doctrine did not apply to discriminatory placements or denials of promotions. It should not have barred consideration of such events that may have occurred prior to the limitations period. The reason is that appellants were entitled to base claims on such discriminatory acts if they could show that these acts continued as violations because the supporting discriminatory policy carried forward into the limitations period and had its effect on employees....

In Roberts v. North American Rockwell Corp., 650 F.2d 823 (6th Cir. 1981) the employer refused to give an applicant an application for em-ployment and over a period of several months, repeatedly told her she would not be hired because she was a woman. The company asserted that a hiring should be treated the same as a discharge, and therefore the limitations period commenced when she was first told the company did not hire women. In rejecting this argument, the court stated:

> If a company discriminates by firing an employee because of his/her race or sex, the discriminatory act takes place when the employee is fired. The statute of limitations ordinarily starts running from this date. [citations omitted]...

> The issue becomes more difficult when a company fails to hire or promote someone because of their race or sex. In many such situations, the refusal to hire or promote results from an ongoing discriminatory policy which seeks to keep blacks or women in low-level positions or out of the company altogether. In such cases, courts do not hesitate to apply what has been termed the continuing violation doctrine. [citations omitted]
>
> ...Neither logic nor precedent supports Rockwell's position. First, by definition, if there is a continuing violation, the company is continually violating Title VII so long as its discriminatory policy remains in effect. An applicant for employment or promotion will, in many circumstances, be interested in any suitable position which opens up. As job openings become available, the applicant will automatically be rejected because of his/her race, sex or national origin. We see no reason to formalistically require an applicant to continuously apply, only to be continuously rejected. We do not think that Title VII requires that suit be filed when the applicant is initially discriminated against. If an ongoing discriminatory policy is in effect, the violation of Title VII is ongoing as well....
>
> Rockwell relies heavily on United Airlines v. Evans, supra. This reliance is misplaced....Evans cannot apply in a case such as this, involving discrimination in hiring, since each time the company hires, it violates Title VII so long as its discriminatory policy is in effect.
>
> Rockwell's alleged policy of not considering women for employment in its Winchester axle plant is a patent violation of Title VII. The seniority system used in Evans may have perpetuated past discrimination, but the seniority system did not itself violate Title VII....

Application of these cases to the circumstances herein clearly show a continuing violation since Respondent refused to recall Miranda pursuant to its ongoing policy of requiring employees to be U.S. citizens. Further, the principle of continuing violation has previously been applied, or noted with favor, in cases involving discriminatory failure to recall or rehire. Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 987-988 (D.C. Cir. 1973); Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1354 (9th Cir. 1981.) Jurinko v. Wiegand Company, 477 F.2d 1038 (3rd Cir. 1973) vacated and remanded on other grounds, 414 U.S. 970 (1973).

However, Respondent asserts that Section 274B(a) clearly encompasses only discriminatory discharges and refusals to hire and that bypassing a temporarily laid-off employee cannot be equated with the refusal to hire situation proscribed by the Act. Rather, Respondent argues, whatever rights or expectations Miranda had were extinguished when Rudolph notified him he would not be recalled because of his non-citizenship status. Therefore, according to Respondent, Rudolph's statement was a de facto act of discharge and the limita-

tions period began to run when the termination decision was communicated to Miranda.

I find this argument somewhat disingenuous. A discharge involves the separation of the employment relationship. That is not what oc-curred here. Rudolph admits that if non-naval work had become avail-able, Miranda would have been recalled. Thus Miranda remained an employee albeit with diminished recall rights. Employment on naval vessels--the only employment available during the critical period there-in--was denied him because of his citizenship status. Specifically, he was denied work pursuant to Respondent's ongoing policy of requiring employees to be U.S. citizens.

Further, I reject Respondent's interpretation of the scope of Section 2 7 4B(a)(1)(B) as too narrow. Although it might be arguable that discri-mination as to some types of working conditions are outside the pur-view of the Section, a recall from a "temporary" layoff is by its nature similar in effect to a "hiring." In both instances the employee assumes a working status where none had existed immediately prior thereto and in both instances a discriminatory refusal to "employ" results in a total lack of work for the employee.

In these circumstances, and upon a consideration of the cases cited above, I find that the charge and the complaint herein allege continuing conduct within the purview of Section 274B(a)(1) and that the charge was timely filed.

II. *Miranda's Status As An Intending Citizen*

IRCA protects only "citizens" and "intending citizens" against citizen-ship status discrimination. Both categories are defined in the Act and Respondent contends that Miranda does not fall within either category.

Section 274B(a) provides:

"SEC. 274B. (a) PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.--

"(1) GENERAL RULE.--It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharge of the individual from employment--

"(A) because of such individual's national origin, or

"(B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

"(2) EXCEPTIONS.--Paragraph (1) shall not apply to--

* * *

"(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, state, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

"(3) DEFINITION OF CITIZEN OR INTENDING CITIZEN.--as used in paragraph (1), the term 'citizen or intending citizen' means an individual who--

"(A) is a citizen or national of the United States, or

"(B) is an alien who--

"(i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208, and

"(ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen; but does not include (I) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (II) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward to 2-year period.

The facts pertinent to this issue are undisputed. Miranda became a permanent resident of the United States in 1970 but took no steps to become a citizen until 1985. On March 25, 1985, he filed a petition for naturalization and took, but failed, the requisite tests. On that same day he requested a retest as soon as possible. Subsequently, he was retested three times, the last of which was August 11, 1986. A major factor contributing to his lack of success on the tests was his inability to write in English. During an August 13, 1986 preliminary interview, an officer of the Immigration and Naturalization Service (I.N.S.) advised Miranda to withdraw his petition for naturalization and stated that, if he did not do so, he would have to wait four years before he could refile. Miranda requested to see a supervisor for further expla-nation of the reason for this advice. The supervisor verified the accur-acy of the information the INS officer had given. Whereupon, on

August 13, 1986, Miranda filed a Request For Withdrawal of Petition For Naturalization. Attached to the request is a notation by the INS officer, "Subject is unable to satisfy the requirement of writing English and is not exempt by Section 312." Immediately thereafter Miranda embarked upon a program of regularly working with his son several times a week to achieve fluency in reading and writing English. The first alleged discriminatory act occurred on April 14, 1987. On November 30, 1987 he filed a Declaration of Intending Citizen. At the time of the hearing herein he had obtained the necessary application for reapplying for naturalization. However, he had not filed the application.

Thus Miranda meets the threshold requirement for protection under Section 274B(a)(1). He is lawfully admitted for permanent residence and he has completed a declaration of intention to become a citizen. However, Section 274B(a)(3)(B) further narrows the class of protected aliens by certain exclusions from the definition of "intending citizen." Respondent relies upon these exclusions which sets forth a six-month time frame for applying for naturalization and a two-year period for completing the timely initiated naturalization process. Specifically, Respondent argues that Miranda first became eligible to apply for naturalization in 1975 after five years of permanent residency and thus is not an "intending citizen" since he did not apply within six months after he became eligible. At the latest, Respondent urges, Miranda was required to have applied for naturalization within six months of November 6, 1986, the date of enactment of IRCA, in order to be an "intending citizen" within the meaning of Section 274(B). Thus, Respondent concludes, Congress clearly intended to establish a cutoff date of May 6, 1987, and to accord Miranda the status of "intending citizen" would indefinitely extend the cutoff period beyond that deliberately selected by Congress.

That argument is not persuasive. Although Miranda failed to apply for naturalization when he first became eligible in 1975 or 1976, the statute provides for filing later than six months after initial eligibility provided that such later filing is before May 6, 1987, six months after the enactment of IRCA. I reject Respondent's argument that a "later" filing can be timely only if it occurred prior to the enactment of IRCA. It is clear, from legislative history, that congressional intent in enacting this provision was to guard against the possibility that employers, in an excess of caution, would seek to avoid the possibility of sanctions by refusing to hire persons based on national origin or

citizenship status.[7] Considering this intent and the clear language of the statute encompassing filing at a time later than that related to first eligibility, I cannot conclude that Congress intended to exclude from the protection of Section 274B(a)(1) aliens otherwise encompassed within the definition of "intending citizen" who applied for naturalization prior to the enactment of the statute. Rather, I would read part (I) of the 274B(a)(1)(3)B) exclusions to require application for naturalization within six months after the date the alien first becomes eligible to apply or within six months after the date of enactment of IRCA, whichever is later.

Additional questions which will be considered together are whether, despite the above, withdrawal of his petition for naturalization places Miranda within the ambit of exclusion (I) and whether he falls within exclusion (II). Respondent correctly asserts that Miranda has not been naturalized as a citizen within two years after the date of his application and that as of May 6, 1987 (six months after the enactment of IRCA) he did not have on file a petition for naturalization. However, Respondent does not consider, within this context, the effect of the qualifier set forth in the second exclusion. That exclusion provides that "intending citizen" does not include otherwise eligible aliens who have not been naturalized as a citizen within two years after the date of the application, unless the alien can establish that he or she is actively pursuing naturalization. Thus, the second exclusion only creates a presumption that an alien who does not acquire citizenship status within two years is not an "intending citizen." This presumption can be rebutted by showing that the alien is actively pursuing naturalization.

Here, the facts establish that Miranda has met this burden. Clearly the very act of withdrawal of his petition for naturalization was taken in order to protect his pursuit of citizenship status. He withdrew not because of lack of interest or change of intent, but because he was advised by the INS that failure to withdraw would delay his pursuit of citizenship status. He took steps to increase his ability to read and write English and at the time of the hearing herein had obtained the necessary papers to reapply for naturalization. In these circumstances, I find that Miranda has shown that he is actively pursuing naturalization and thus does not come within exclusion (II). I further find, in view of Congressional intent to protect aliens who are actively

[7] Joint Explanation Statement of The Committee of Conference, H.R.Rep. No. 99-1000, pp. 85, 87-88.

pursuing naturalization and my finding above that his petition for naturalization was withdrawn in furtherance of his pursuit of citizenship, that said withdrawal does not place Miranda within exclusion (I). Accordingly, I find that Miranda is an "intending citizen" within the meaning of Section 274B(a)(1)(3).

Conclusions of Law

1. The charge herein was timely filed.

2. Miranda is an "intending citizen" entitled to the protection of Section 274B(a)(1).

Accordingly, **IT IS HEREBY ORDERED:**

1. Respondent's Motion to Dismiss is denied.

2. This Interim Decision is not a final Decision and Order

EARLDEAN V. S. ROBBINS
Administrative Law Judge

Dated: June 9, 1989