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

June 25, 1993

PRISCILLA C. HENSEL, Complainant, v. OKLAHOMA CITY VETERANS AFFAIRS MEDICAL CENTER, Respondent.	)	8 U.S.C. 1324b Proceeding OCAHO Case No. 92B00021
PRISCILLA C. HENSEL, Complainant, v. UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER, Respondent.	)	8 U.S.C. 1324b Proceeding OCAHO Case No. 92B00022

ORDER GRANTING RESPONDENT OKLAHOMA CITY VETERANS AFFAIRS MEDICAL CENTER'S MOTION FOR SUMMARY DECISION AND ORDER GRANTING RESPONDENT UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER'S MOTION FOR SUMMARY JUDGMENT

On June 27, 1991, Priscilla C. Hensel, M.D. (complainant) initiated these proceedings by filing a charge with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), alleging that the Veterans Affairs Medical Center (the VA) discriminated against complainant, a citizen of the United States, because of her citizenship status and national origin.

In particular, complainant alleged that she had filed a written application for the position of staff anesthesiologist at the VA on July 31, 1989, and that she has applied verbally on several occasions since that time, but that her applications were ignored and the positions for which she applied were filled by individuals who were not citizens.

On January 16, 1992, OSC notified complainant that based on its investigation, it had determined that it would not file a complaint regarding complainant's charge. The letter further informed complainant that she was entitled to file a complaint directly with this Office.

On January 27, 1992, complainant filed two separate Complaints, one against the VA, the other against the University of Oklahoma Health Sciences Center (OUHSC). In both Complaints, it is alleged that on August 28, 1989, and on other occasions thereafter, complainant applied for the position of staff anesthesiologist at the Oklahoma City Veterans Affairs Medical Center, and, although she was qualified, the VA and/or OUHSC refused to hire complainant because of her United States citizenship. Complainant alleged that, although complainant was refused employment, the positions for which she applied remained open and the VA and/or OUHSC continued to seek applications from individuals with complainant's qualifications or similarly situated individuals of a different citizenship status. Complainant requested that the VA and/or OUHSC cease and desist from these allegedly discriminatory practices, and hire complainant for the position of staff anesthesiologist at the Oklahoma City Veterans Affairs Medical Center.

On March 9, 1992, both the VA and OUHSC filed their Answers to the Complaints, in which they denied complainant's allegations of discrimination, and asserted various affirmative defenses to the Complaints.

On April 17, 1992, the undersigned issued an Order of Consolidation, consolidating the two causes of action for purposes of hearing and decision making.

On October 19, 1992, the undersigned issued a Notice of Hearing, setting this matter for hearing to be held on Wednesday, November 18, 1992 in Oklahoma City.

On November 3, 1992, the undersigned granted the parties' joint motion for a continuance of the hearing.

On January 7, 1993, the undersigned issued a second Notice of Hearing, setting this matter for hearing to be held on Wednesday, February 17, 1993 in Oklahoma City.

On January 19, 1993, complainant filed an uncontested Motion for Continuance of Hearing, which was granted.

On March 29, 1993, OUHSC filed a Motion for Summary Judgment, with supporting brief, asserting therein seven propositions in support of its contention that there are no controverted material issues of fact and that it is entitled to judgment as a matter of law.

First, OUHSC contended that under the Eleventh Amendment to the United States Constitution, this Office has no jurisdiction to hear this case. OUHSC next contended that complainant did not apply for a job for which OUHSC was seeking applicants. Thirdly, OUHSC asserted that it had legitimate, nondiscriminatory reasons for not having hired complainant. As a fourth proposition, OUHSC alleged that there is no credible evidence to show that its stated reasons for not hiring complainant are in fact a pretext for not having hired complainant on the basis of her citizenship status. Fifth, OUHSC asserted that the Complaint should be dismissed because the complainant previously filed a charge with the Equal Employment Opportunity Commission that was not dismissed for lack of jurisdiction. As a sixth proposition, OUHSC maintains that much of complainant's claim was not timely filed. Finally, OUHSC contends that the provisions of 8 U.S.C. 1324b do not require it to discriminate in favor of United States citizens.

On April 12, 1993, the VA filed a Motion to Dismiss, or in the Alternative Motion for Summary Judgment, with supporting brief. In its motion, the VA asserts that this Office is without authority to hear this case because IRCA's provisions are not enforceable against the Department of Veterans Affairs. The VA also maintains that complainant has failed to state a claim upon which relief can be granted and that the Complaint was untimely filed. Finally, the VA urges that complainant is unable to establish a prima facie case, and that even if complainant could have done so, the VA has a legitimate nondiscriminatory reason for not having hired complainant. Accordingly, the VA argues that a summary decision in its favor is appropriate as a matter of law.

On April 26, 1993, complainant filed her Combined Response to the Oklahoma City Veterans Affairs Medical Center's Motion to Dismiss or in the Alternative for Summary Decision and Motion to Take Judicial Notice and Response to Respondent University of Oklahoma's

Motion for Summary Decision, in which complainant maintained the following with regard to both Complaints: that this Office has jurisdiction over both of her Complaints; that there are material issues of fact in dispute; that the claimant's claims are not barred by the statute of limitations; that she has stated a claim upon which relief may be granted; and that therefore respondents' motions should be denied. Complainant further asserted that the VA's Motion for Judicial Notice is neither necessary nor appropriate, and that that motion should therefore also be denied.

On May 4, 1993, respondents jointly filed a Motion for Leave to Respond to Complainant's Response to Motions for Summary Judgment, in which they requested leave to file replies to complainant's response to their motions by May 5, 1993. Respondents' motion was granted, and the reply brief of the VA was filed on May 7, 1993, and that of OUHSC on May 10, 1993.

The following material facts are uncontroverted in these proceedings:

The Department of Veterans Affairs is an executive department of the United States of America, and the Veterans Health Administration (VHA) is a component thereof. The VA is a Veterans Affairs field office.

OUHSC houses the University of Oklahoma's medical and health sciences education program. Its main campus is in Oklahoma City, Oklahoma.

The relationship between OUHSC and the VA is governed by an "Agreement of Affiliation" (Agreement), dated October 12, 1977 and effective until June 20, 2000.

Separate from the Agreement is a Scarce Medical Specialist Services Contract (SMSS contract), under which the Department of Anesthesiology at OUHSC assigns staff anesthesiologists to the VA.

On November 23, 1988, complainant and her husband, Joel Kupferberg, M.D., applied for faculty positions in the Department of Anesthesiology at OUHSC. They were interviewed for those positions on January 12, 1989, and on January 24, 1989, Dr. John Plewes, Chairman of the Department of Anesthesiology at OUHSC, unofficially offered Dr. Kupferberg a full-time position as a federal employee at the VA, and unofficially offered complainant a university position at Oklahoma Memorial Hospital (OMH). Those offers were accepted, by letter, on January 31, 1989.

On May 3, 1989, Dr. Clayton Rich, Provost of OUHSC officially offered to complainant the position outlined by Dr. Plewes.

On July 17, 1989, complainant began her duties at OUHSC and spent her first day in the operating room at OMH on July 20, 1989. On the following day, July 21, 1989, complainant gave Dr. Plewes a handwritten note saying that she would like to work at the VA. Complainant followed this up on July 26, 1989, with a letter to Dr. Plewes in which she stated that she wanted to begin formal application for employment at the VA.

On July 28, 1989, Dr. Plewes responded by letter to complainant's request, stating in that correspondence that complainant's request had come as a surprise, and appeared to be a "rather premature and hasty decision", but he expressed his willingness to consider complainant's application and requested that complainant specifically advise him why working at OMH had become so intolerable to complainant after having worked there for only four days. (Letter from Plewes to Hensel of 7/28/89).

On July 31, 1989, complainant submitted her letter of resignation to Dr. Plewes stating therein that she would not have accepted an appointment at OUHSC if she had been "informed of the unfavorable climate for women employees of (OUHSC)', and also that she "would have been happy to continue working (at OUHSC), had (Dr. Plewes) accommodated (her) request for immediate transfer to the (VA)." (Letter from Hensel to Plewes of 8/31/89). Complainant also requested that she be relieved of all clinical duties prior to August 31, 1989, if acceptable. Id. On the following day, August 1, 1989, complainant wrote Plewes saying she wanted to apply for transfer to the VA. (Letter from Hensel to Plewes of 8/1/89).

On August 3, 1989, Dr. Plewes accepted complainant's July 31, 1989, letter of resignation.

In July, 1990, Dr. Kupferberg, complainant's agent and husband, informed Dr. Plewes of complainant's desire to work for the VA. Dr. Plewes responded by stating that complainant would have to apply for a position like anyone else, and cautioned Dr. Kupferberg that OUHSC's past experiences with complainant would have to be considered in any consideration of appointing complainant to a position. See Respondent VA's Exhibit 29.

On September 1, 1990, Dr. Colin Young, a British subject, was assigned to the VA by OUHSC. On December 1, 1990, Dr. Ian Wilson,

who was also a British subject, was assigned to the VA by OUHSC. Dr. Kupferberg knew of these assignments shortly before or immediately following their occurrence.

On March 1, 1991, complainant wrote to Senator Barbara Mikulski of Maryland to complain about what she saw as discrimination against women by the VA. Complainant noted that she was "outraged that preference is given to white men, even foreigners" at the VA. (Letter from Hensel to Mikulski of 3/1/91). In addition, complainant requested that Senator Mikulski "take the time to investigate and do whatever (she could) to encourage the enforcement of Federal EEO regulations at the (VA) and to ensure that qualified Americans or at least permanent residents are given preference for employment." Id. On April 24, 1991, complainant also wrote to Senator David Boren of Oklahoma to voice similar complaints.

On March 4, 1991, complainant wrote to Dr. Plewes, asking to be considered for a position at the VA. Dr. Plewes replied the next day, informing complainant that the assignment had been filled several weeks earlier. Dr. Plewes informed complainant that if she wished to apply for positions in the future, she should do so in the standard way, by updating her curriculum vitae and list of references. (Letter from Plewes to Hensel of 3/5/91).

On June 27, 1991, as noted earlier, complainant filed her charge with OSC.

On August 1, 1991, complainant again wrote to Dr. Plewes, officially notifying him of her wish to be considered for the position created by Dr. Elwood's resignation from his position with the VA. Complainant submitted with that letter an updated curriculum vitae, but none of the other documentation which Dr. Plewes had requested in his March 5, 1991 letter, contending that Dr. Plewes was "already in possession of all other pertinent materials." (Letter from Hensel to Plewes of 8/1/91). Dr. Plewes forwarded complainant's letter to Dr. Bertram Sears, Chairman of the Faculty Search Committee at OUHSC.

On August 6, 1991, Dr. Sears wrote to complainant requesting references and a list of complainant's anesthesia-related activities since complainant's "original application" (Letter from Sears to Hensel of 8/6/91). Dr. Sears also informed complainant that OU's anti-nepotism policy prevents individuals related by affinity or consanguinity within the third degree from holding positions in which the one is responsible for the other's promotion, salary or tenure. Id. Accordingly, because her husband, Dr. Kupferberg, was on staff there,

complainant would not be eligible for the vacated position of Chief of Anesthesia at the VA.

On August 8, 1991, complainant again wrote to Dr. Plewes, explaining that she wished to be considered for the staff anesthesiologist position vacated by Dr. Juan Correa, not for the position of Chief of Anesthesia. Complainant asserted in her letter that the application materials she submitted for her original position with OUHSC in 1989 were sufficient for the application process. (Letter from Hensel to Plewes of 8/8/91).

On August 19, 1991, Dr. Sears again wrote to complainant, informing her that OUHSC was not recruiting for any faculty position in the adult hospitals other than Chief of Anesthesia at the VA. Dr. Sears also informed complainant that if she did apply in the future for a faculty position, she would be required to document her current or recent anesthesia-related activities. (Letter from Sears to Hensel of 8/19/91).

Since resigning from OMH in July, 1989, complainant has applied for at least 131 anesthesiology positions, she has received no job offers, and she has had no clinical or research experience in anesthesiology in more than three and one-half years.

The OUHSC Department of Anesthesiology has hired 17 staff anesthesiologists since July 1, 1989, of whom nine are United States citizens and three are permanent residents. Two of the three anesthe-siologists given faculty positions by the OUHSC Department of Anesthesiology since that date who have been federally employed or who have been assigned full-time to the VA pursuant to the SMSS contract are United States citizens, and the third is a permanent resident.

Of the 18 staff anesthesiologists who have worked in the OUHSC Department of Anesthesiology since July 1, 1989, but who were hired earlier, 12 are United States citizens, three are permanent residents, one has an H-1 visa, and two had J-1 visas.

Since July 1989, when Dr. Kupferberg was appointed, no anesthe-siologist assigned to the VA pursuant to the SMSS contract has executed an appointment affidavit prior to assuming his or her assigned duties.

It should be noted, as a preliminary matter, that this Office has no jurisdiction over a claim by a United States citizen, pursuant to 38

U.S.C. §7402(c), that he or she should have been preferred for a position in the VA rather than an equally qualified individual of a different citizenship status. The subject matter jurisdiction of this office is limited to and considers only those causes of action arising under sections 274A, 274B and 274C of the Immigration and Nationality Act, codified at 8 U.S.C. §1324a, 1324b and 1324c, respectively.

Both respondents have moved the undersigned to grant summary decision in their favor on the ground that there are no uncontroverted material questions of fact, and that they are entitled to judgment as a matter of law. The rules of practice and procedure for administrative hearings in cases involving allegations of unfair immigration related employment practices provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. For this reason, Federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and requirements needed to decide whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-mov-ing party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Wright v. Southwestern Bell Tel. Co., 925 F.2d 1288 (10th Cir. 1991); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90). The court should not weigh the evidence in considering whether there is a genuine issue of material fact, but instead should inquire whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party. Anderson, 477 U.S. at 242; Clifton v. Craig, 924 F.2d 182, 183 (10th Cir. 1991).

The movant's initial burden under Rule 56(c) is to show the absence of evidence to support the non-moving party's case. Windon Third Oil and Gas v. Federal Deposit Ins., 805 F.2d 342, 345 (10th Cir. 1986),

cert. denied, 480 U.S. 947 (1987). The movant must specify those portions of "'the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any," which demonstrate the absence of a genuine issue of fact. Id. (quoting Fed. R. Civ. P. 56(c)).

Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Gonzales v. Millers Casualty Ins. Co., 923 F.2d 1417, 1419 (10th Cir. 1991); Alvarez, 3 OCAHO 430, at 7; Egal, 3 OCAHO 442, at 9.

As the Supreme Court has noted, the entry of summary judgment is mandated:

> "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation,there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. '[T]he standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...' (emphasis added)

Celotex, 477 U.S. at 322-323, 106 S. Ct. at 2552 (quoting Anderson, 477 U.S. at 242, 106 S. Ct. at 2511). Accord Lujan v. National Wildlife Fed'n, 479 U.S. 871, 110 S.Ct. 3177, 3186 (1990).

Complainant alleges that respondents committed unfair immigration related employment practices under 8 U.S.C. §1324b on October 4, 1989, when they hired Colin Young, a British subject, to perform duties as a staff anesthesiologist at the VA although complainant, a qualified U.S. citizen, had applied for the position; on May 1, 1990, when they hired Ian Wilson, a British subject, to perform duties as a staff anesthesiologist at the VA although complainant, a qualified U.S. citizen, had applied for the position; on March 1, 1991, when they hired Rashid Cajee, a South African subject, to perform duties as a staff anesthesiologist at the VA although complainant, a qualified U.S. citizen had applied for the position; and on August 5, 1991, when they hired Raghuvender Ganta, a British subject, to perform duties as a staff anesthesiologist at the VA although complainant, a qualified U.S. citizen, had applied for such a position. Complainant's Answers to

Respondent Board of Regents of the University of Oklahoma's First Interrogatories, at 20.

An allegation of discrimination may be proven by a showing of deliberate discriminatory intent on the part of an employer, regardless of the employer's motive. Klimas v. Department of Treasury, 3 OCAHO 419, at 15. Discrimination or disparate treatment exists where an employer treats certain individuals less favorably than others because of their race, color, religion, sex, national origin or citizenship status. United States v. Sargetis, 3 OCAHO 407, at 25 (3/25/92).

Decisions from federal courts involving cases brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., provide a proper guide to use in determining the respective burdens of producing evidence in cases brought under the anti-discrimination provisions of IRCA, 8 U.S.C. §1324b. Ortega v. Vermont Bread, 3 OCAHO 475, at 7 (11/18/92); Tovar v. A.P. Esteve Sales, Inc., 3 OCAHO 458, at 5 (9/21/92); Alvarez v. Interstate Highway Constr., 3 OCAHO 430 (6/1/92); Huang v. Queens Motel, 2 OCAHO 364 (8/9/91).

The Supreme Court established the order and allocation of proof to be used in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 192 (1973), holding that the individual alleging discrimination in employment must first establish a prima facie case of discrimination by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Id. at 802. See also Notari v. Denver Water Dep't, 971 F.2d 585, 588 (10th Cir. 1992); Bell v. AT&T, 946 F.2d 1507, 1510 n.1 (10th Cir. 1991); Drake v. City of Fort Collins, 927 F.2d 1156, 1159 (10th Cir. 1159). The burden of production then shifts to the employer to rebut the presumption of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Luna v. Denver, 948 F.2d 1144, 1147 (10th Cir. 1991); Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1236 (10th Cir. 1991); Drake, 927 F.2d at 1160. The employer can meet its burden by disputing the plaintiff's facts or by articulating nondiscriminatory reasons for the disparity of treatment. Id.; McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988). See also Luna, 948 F.2d at 1147; Ortega, 943 F.2d at 1236. Employer's articulation

of those reasons must be "clear and reasonably specific." Id. at 1237 (quoting Drake, 927 F.2d at 1160).

Should the employer meet this burden of production, the claimant is then to be given the opportunity to prove by the preponderance of the evidence that the reason offered by the employer was a mere pretext for discrimination, i.e., the proffered reasons were not the true reasons for the hiring decision. Burdine, 450 U.S. at 252-253; McDonnell Douglas, 411 U.S. at 802; Notari, 971 F.2d at 588; Luna, 948 F.2d at 1147; Bell, 946 F.2d at 1510; Drake, 927 F.2d at 1160; Carey v. United States Postal Serv.; 812 F.2d 621, 625 (10th Cir. 1987). This burden merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. Burdine, 450 U.S. at 256; Drake, 927 F.2d at 1160; Carey, 812 F.2d at 625-26. As the court noted in Drake:

> Plaintiff may meet this burden directly by a showing that... discrimination actually motivated the defendants, or indirectly by demonstrating that the defendants' reasons are unworthy of belief. In a summary judgment setting, the plaintiff must raise a genuine factual question as to whether defendants' reasons are pretextual. (citations omitted)

Drake, 927 F.2d at 1160.

Where there is direct evidence of employer discrimination, however, a different analysis is used. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1984); Cunico v. Pueblo Sch. Dist. Number 60; 917 F.2d 431, 441 (10th Cir. 1990); Furr v. AT&T Technologies, 824 F.2d 1537, 1549 (10th Cir. 1987).

As the administrative law judge noted in United States v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90):

> In a case where the complainant has presented substantial direct evidence of discrimination the complainant may not be required to show that the employer's reason was pretextual. The direct evidence alone can establish that discrimination was a significant factor in the employment decision.

Marcel Watch, 1 OCAHO 143, at 15. See also United States v. Sargetis, 3 OCAHO 407 (3/5/92). When direct evidence precludes use of the McDonnell Douglas/Burdine framework, Thurston permits the employer to attempt to prove an affirmative defense to its discriminatory practice. Thurston, 469 U.S. at 122. See generally Weld County, 2 OCAHO 326, at 6. See also Tovar v. United States Postal Serv., OCAHO Case No. 90200006 (11/19/90) (Postal Service policy that

excluded all aliens except for permanent residents from employment discriminatory on its face, but within exception to IRCA coverage).

In her response, complainant attempted to both offer direct evidence of discrimination and to establish a prima facie case under the McDonnell Douglas/Burdine framework.

Complainant offered, as direct evidence of discrimination, statements allegedly made by Dr. Robin Elwood, former chief anesthesiologist at the VA, to complainant and to Dr. Kupferberg in August 1989 to the effect that "he would like to fill more anesthesiology positions at OU and the (VA) with rotating anesthesiologists from the UK," (Hensel Affidavit, at 2). In addition, complainant introduced Dr. Elwood's observations that American medical training is "less rigorous" than that received in the UK as direct evidence of discrimination. Elwood Deposition, at 12.

Complainant apparently alleged that this constitutes direct evidence of discrimination because it shows that Dr. Elwood, as the individual responsible for initiating the civil service appointment process, initiated no civil service appointments after complainant applied for a position at the VA, because civil servants must be citizens and Dr. Elwood wanted as many physicians trained in the UK working on the staff at the VA as possible.

Complainant's evidence, however, fails to satisfy the Thurston stand-ard. Dr. Elwood's statements, even as offered by complainant in her response, may constitute direct of evidence of personal bias, but do not constitute direct evidence of discrimination. In order for complainant's argument to be valid, it is necessary that complainant demonstrate that Dr. Elwood acted on his discriminatory beliefs. Ramsey v. Denver, 907 F.2d 1004, 1008 (10th Cir. 1990). However, as complainant has stated in her response, not only did VA not hire a physician trained in the UK rather than hiring complainant, VA did not hire anyone. Furthermore, complainant fails to directly assert, let alone prove by direct evidence, that Dr. Elwood refused to hire a citizen for a civil service position because he preferred to have non-citizen individuals trained in the UK on staff at the VA.

Complainant's evidence is also contradicted by other evidence which she has submitted. In her affidavit, complainant averred that while Dr. Elwood had stated he would like to fill more anesthesiology positions with rotating anesthesiologists from the UK, he was frustrated in his ability to do so. Hensel Affidavit, at 2. In addition, while he did state that American medical training was less rigorous

than that received in the UK, Dr. Elwood asserted in his deposition that he did not think British training would be a preferential factor in hiring. Elwood Deposition, at 16.

Analysis of complainant's cause of action should therefore proceed according to the framework set forth in McDonnell Douglas and Burdine. In order to prevail in this action, complainant must show:

1. That she belongs to a protected class;

2. That she applied and was qualified for a job for which either the VA or OUHSC or both were seeking applicants;

3. That, despite her qualifications, she was rejected; and

4. That, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802; Notari v. Denver Water Dept., 971 F.2d at 589.

As to the first element, membership in the protected class, it is undisputed that complainant is a United States citizen, and therefore a protected individual for purposes of citizenship status discrimination under IRCA. 8 U.S.C. §1324b(a)(1)(B); 8 U.S.C. §1324b(a)(3)(A). See also Alvarez, 3 OCAHO 430, at 9. Accordingly, complainant has satisfied her burden of proof as to this element.

Both respondents contend, however, that complainant has failed to carry her burden with respect to the second element, because there is no evidence to support her contention that she applied for any position for which respondents were seeking applicants.

When asked whether she had made a written application to OUHSC since tendering her application in July, 1989, complainant asserted that she had made four such applications:

1. An August 1, 1989 letter to Dr. Plewes, requesting a transfer to the VA as a staff anesthesiologist;

2. A March 4, 1991 letter to Dr. Plewes, regarding a position as a staff anesthesiologist at the VA.

3. An August 1, 1991 letter to Dr. Plewes regarding a position as a staff anesthesiologist at the VA, with enclosed curriculum vitae.

4. An August 8, 1991 letter to Dr. Plewes regarding a position as a staff anesthesiologist at the VA.

Complainant's Answers to Respondent VA's First Interrogatories, at 3-4. In her response to respondent's motions for summary decision, complainant asserted that complainant and Dr. Kupferberg verbally expressed complainant's interest in a position as a staff anesthesiologist at the VA on numerous occasions, and that these inquiries were the equivalent to her having filed a written application for a faculty appointment at OUHSC. Complainant's Response, at 57.

Complainant, in her response, relied on the opinion of the Court of Appeals for the Third Circuit in EEOC v. Metal Service Co., 892 F.2d 341 (3rd Cir. 1990), to support her contention that she need not show that she formally applied for the position of staff anesthesiologist to establish a prima facie claim of discriminatory hiring if she demonstrates that she made every reasonable attempt to convey her interest in the job to respondents.

Metal Service is not factually analogous, however. There, two African-Americans who attempted to apply for positions with defendant employer were required to undergo a burdensome application process while white applicants were being hired for apparently unskilled jobs through word-of-mouth advertising in an all-white work the work-force. Id., at 350. The court held that an informal hiring process in conjunction with an all-white workforce is itself strong circumstantial evidence of discrimination, and that this bolstered plaintiffs' prima facie case. Id. at 350-51.

Complainant has not implicated respondents hiring process in her discrimination claim, and has failed to allege that any of the factors which led the court in Metal Service to relax the application requirement for proving a prima facie case of discriminatory hiring (word-of- mouth hiring to complainant's disadvantage, imbalances in the workforce) are present here.

Furthermore, evidence presented by the parties to this action demon-strates that complainant did not make every reasonable attempt to convey her interest in a staff anesthesiologist position to OUHSC in any of the five instances (complainant's August 1, 1989 letter to Dr. Plewes; complainant's verbal expressions of interest in a staff position at the VA; complainant's March 4, 1991 letter to Dr. Plewes; complainant's August 1, 1991 letter to Dr. Plewes; and complainant's August 8, 1991 letter to Dr. Plewes) that complainant has alleged constitute applications to OUHSC.

In its motion, OUHSC noted that in her August 1, 1989 letter to Dr. Plewes complainant stated that she would like to begin filling out the

paperwork to transfer to the VA. Dr. Plewes had stated in his July 28, 1989 letter to complainant that he would be willing to consider complainant's transfer, but that, as OUHSC noted, complainant had resigned on July 31, 1989, the day before she submitted her written request for transfer. OUHSC contended, and complainant failed to dispute, that a request to change assignments in a job from which one has already resigned does not equate to a job application.

Complainant alleged in her response brief that a written application is not required to begin the OU application process, and asserted that verbal expressions of interest in a staff position at the VA made to Drs. Plewes, Elwood and Roswell by complainant and on her behalf by Dr. Kupferberg were the equivalent of an application for a faculty appointment at OU.

This assertion is directly contradicted by the evidence submitted by complainant to support the assertion namely, the deposition testimony of Dr. Sears. In that deposition, Dr. Sears was asked whether a written application is required before he would consider an applicant. Dr. Sears replied:

> No, but we don't consider the -- no, a written application is not always required, no. I mean, there are people who inquire about the position verbally. From that point on, we consider the application as being processed when we get, for example, a curriculum vitae or we get letters of reference. It doesn't matter whether the process was initiated by a letter or by verbal technologies. (emphasis added)

Complainant's Exhibit 4 (Sears's Deposition), at 46. Therefore, it is clear that while the verbal expressions of interest from complainant and her husband might have commenced the application process, they did not constitute applications per se.

Dr. Kupferberg made the verbal inquiries in question prior to complainant's March 4, 1991 letter to Dr. Plewes, which complainant contends was her third application for employment. When Dr. Kupferberg told Dr. Plewes of complainant's interest in a position at the VA, as noted previously, Dr. Plewes told Dr. Kupferberg that complainant could apply for a position like anyone else, and that complainant's previous history with OUHSC would be considered in the application process. Respondent VA's Exhibit 29. In spite of this, complainant failed to submit any updated documentation with her March 4, 1991 letter.

Furthermore, complainant's deposition testimony discloses that she was aware some five or six days prior to having written the March 4,

1991 letter that the position she sought, that which was created by Dr. Correa's departure, had been filled. Hensel Deposition, at 62.

Dr. Plewes responded to complainant's March 4, 1991 letter on the next day, March 5, 1991, and he informed complainant that if she wished to apply for positions in the future, she should do so in the standard way, that is by updating her curriculum vitae and list of references. (Letter from Plewes to Hensel of 3/5/91).

When complainant wrote to Dr. Plewes again on August 1, 1991, in what she asserted was her fourth application for employment, she included an updated curriculum vitae, but refused to submit any additional documentation, asserting that Dr. Plewes was "already in possession of all other pertinent materials." (Letter from Hensel to Plewes of 8/1/91). Dr. Plewes forwarded complainant's letter to Dr. Bertram Sears, chairman of the faculty search committee at OUHSC.

On August 6, 1991, as noted previously, Dr. Sears wrote to complainant to request references and an updated list of complainant's anesthesia-related activities since her 1988 application, and to inform complainant about OU's anti-nepotism policy. (Letter from Sears to Hensel of 8/6/91).

On August 8, 1991, complainant responded by submitting to Dr. Plewes what she contends is her fifth application for employment, a letter explaining that she wished to be considered for the anesthesiologist position vacated by Dr. Correa, and occupied by Dr. Ganta, not for the position of chief of service, as Dr. Sears had assumed in his August 6, 1991 letter. (Letter from Hensel to Plewes of 8/8/91).

In her August 8, 1991, correspondence complainant failed to submit the documentation requested by Dr. Sears in his August 6, 1991 letter, contending that Dr. Plewes already had "all pertinent documents in (his) possession." (Letter from Hensel to Plewes of 8/8/91).

I find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to her August 1, 1989 letter to Dr. Plewes, because her request for transfer, filed after complainant submitted her resignation from OUHSC, did not constitute an application for a position for which OUHSC was then seeking applicants.

Furthermore, I find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to the verbal expres-

sions of interest made by complainant and Dr. Kupferberg to Drs. Plewes, Elwood and Roswell, because complainant has failed to demonstrate that those expressions and/or inquiries are in fact the equivalent of an application for an OUHSC staff position.

I also find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to her March 4, 1991 letter to Dr. Plewes, because OUHSC was not then seeking, and complainant knew that it was not then seeking, applicants for the position complainant sought.

I find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to her August 1, 1991 letter to Dr. Plewes, because complainant failed to submit with that letter an updated list of references, as requested by Dr. Plewes in his March 5, 1991 letter to complainant.

Finally, I find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to her August 8, 1991 letter to Dr. Plewes, because complainant failed to include in that letter the documentation requested by Dr. Sears in his letter of August 6, 1991. In particular, complainant failed to provide letters of support containing information relative to complainant's managerial ability and experience, and failed to update her anesthesia-related activities and professional references since her original application with OUHSC. In addition, I find that complainant has failed to establish a prima facie case of discriminatory hiring with respect to her August 8, 1991 letter to Dr. Plewes, because OUHSC was not then seeking applicants for the position having then been sought by complainant.

Because I find that complainant has failed to offer direct evidence that OUHSC discriminated against her in hiring, and further that she has failed to establish that she applied for a position for which OUHSC was seeking applicants, an element essential to complainant's case and on which she would bear the burden at trial, summary decision is appropriate with regard to complainant's Complaint against OUHSC. Therefore, OUHSC's motion is granted, and the Complaint is hereby ordered to be and is dismissed with prejudice to refiling against OUHSC.

Turning now to the VA's Motion for Summary Decision, it has been shown that when asked whether she had made written application for a position as a federally-employed VA staff anesthesiologist since July 1989, complainant replied that on August 28, 1989, she completed an application for such a position, which she filed with Dr. Roswell, then

the Chief of Staff at the VA. Complainant's Answers to Respondent VA's First Interrogatories, at 4. Complainant included a copy of that application with her brief in opposition to respondents' motion, and averred to filing the application in her affidavit. See Complainant's Exhibit 1 (Hensel Affidavit), at 6.

The VA, however, contested complainant's assertion that complainant filed this application with the VA, and alleged that complainant was neither qualified nor had she applied for a position for which the VA was then seeking applicants.

The VA also alleged that there is little evidence supporting complainant's contention that she submitted an application for federal employment in August, 1989, asserting that the application produced by complainant and dated August 28, 1989 could just as easily have been drafted in 1992. In support of this assertion, the VA offered the affidavits of Drs. Roswell and Elwood, that of Richard Campbell, former chief of Human Resources and Development, as well as that of Danni Ponton, an employee in Human Resources and Development, to the affect that none were able to recall a federal application submitted by complainant.

Construing these conflicting allegations in the light most favorable to complainant, I accept complainant's contention that she filed the application in question on August 28, 1989.

In its motion, the VA contended that complainant was not qualified for a staff anesthesiologist position and noted that its bylaws, as well as the Agreement of Affiliation with OUHSC, mandate that all federal physician employees must have secured an OUHSC faculty appointment as a precondition to employment. Because complainant's resignation had been submitted and accepted by OUHSC before complainant submitted her application, VA contends that complainant would no longer have had faculty status for the potential October, 1989 position for which she applied. The VA admitted that this defect could be cured, but contended that the facts indicated that complainant did not obtain a faculty appointment or a waiver in anticipation of the potential federal position, and for that reason complainant was not qualified.

Complainant countered this contention, asserting that the Agreement of Affiliation does not make faculty appointment an absolute prerequisite to being given a position as a staff anesthesiologist at the VA.

In response, the VA asserts that this requirement is contained within the VA Medical Staff Bylaws. The pertinent provision provides:

> 1. The medical staff shall be divided into active and consulting categories.
> a. Active Medical Staff:
>
> * * * *
>
> (2) Shall hold faculty appointments in the College of Medicine or Dentistry, unless this requirement is specifically waived by the Professional Standards Board, and approved by the Dean's Committee.

Bylaws of the Medical Staff of the VA, art. IV §A. The VA contends that this requirement is only waived when the position has no clinical or teaching responsibilities, which would not be true of the VA staff anesthesiologist position at issue.

The VA also noted that Dr. Roswell informed complainant of the faculty appointment requirement in the VA's bylaws when complainant approached him about employment opportunities at the VA. (Roswell Aff. ¶ 10.). In addition, the VA noted that complainant admitted that she was knowledgeable regarding the distinction between a federal position as a staff physician at the VA and a state position as a staff position at OUHSC with assignment to the VA, and also admitted that her agent/husband, Dr. Kupferberg, was aware of the federal employment application process as a staff anesthesiologist at the VA. Complainant's Response to Respondent VA's First Request for Admission, at 2.

At the time complainant contended that she filed her application with VA on August 28, 1989, she held faculty status at OUHSC, and continued to hold faculty status until the effective date of her resignation, August 31, 1989. In the cover letter which complainant sent with her application, complainant noted that the position "was to be a regular VA position, pending congressional approval of fiscal year 1989-1990. Approval by the Congress should normally occur in October 1989." (Letter from Hensel to Roswell of 8/28/89).

The bylaws of the VA clearly mandate that to be a member of the active medical staff at the VA one must hold a faculty appointment at OU in the College of Medicine and Dentistry, or have a waiver of this requirement. Because complainant has failed to establish that she had an OU faculty appointment at any point after the effective date of her resignation, or that she had obtained, or was even capable of obtaining, a waiver thereof for purposes of joining the active medical staff at the VA, complainant has failed to demonstrate that she was qualified

for the position she sought, a position as a staff anesthesiologist set to commence at some point after October, 1989.

Accordingly, because I find that complainant has failed to establish that she was qualified for the position for which she applied, that of staff anesthesiologist at the VA, an element essential to complainant's case and on which she would bear the burden at hearing, summary decision is appropriate with regard to complainant's Complaint against the VA. Therefore, the VA's motion is granted, and the Complaint is hereby ordered to be and is dismissed with prejudice to refiling against the VA, also.

In view of the foregoing, it is unnecessary to rule upon whether the VA, a field facility of a component of the federal government, is protected against liability under IRCA by virtue of the doctrine of sovereign immunity nor is it necessary to decide whether the Complaint against OUHSC, an agency of the State of Oklahoma, is barred by the Eleventh Amendment to the United States Constitution.

JOSEPH E. McGUIRE
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.