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

HOWARD EUGENE MCNIER, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 97B00072
ARTHUR WALLACE in his capacity as Dean, College of Business, San Francisco State Univ.; et al Respondents.	)	**Marvin H. Morse,** **Administrative Law Judge**

FINAL DECISION AND ORDER
(September 17, 2001)

I. PROCEDURAL BACKGROUND

A. OCAHO Proceedings

This case has a long published history in which the legal and procedural underpinnings are set out sufficiently to preclude the need for detailed repetition. *McNier v. San Francisco State Univ*., 7 OCAHO no. 947 (Order Dismissing in Part and Ordering Further Inquiry) (July 3, 1997); *McNier v. San Francisco State Univ*., 7 OCAHO no. 998 (Order Finding San Francisco State an Arm of the State, But Inquiring Further into the Viability of the Ex Parte Young Exception to Sovereign Immunity (May 8, 1998); *McNier v. San Francisco State Univ*., 8 OCAHO no. 1030 (Order Granting Complainant Leave to Amend) (July 14, 1999), and *McNier v. San Francisco State Univ*., 8 OCAHO no. 1034 (Order Granting Complainant's Motion to Recuse Defense Counsel) (December 2, 1999).

Complainant Howard Eugene McNier (McNier or Complainant) was at all times relevant an adjunct faculty member at San Francisco State University, College of Business (SFSU).

On February 27, 1997, McNier, a U.S. citizen, filed a complaint in the Office of the Chief Administrative Hearing Officer (OCAHO),[1] contending that SFSU violated § 274B of the Immigration and Nationality Act, codified as 8 U.S.C. § 1324b.

Initially, McNier alleged that SFSU (1) discriminated against him on the basis of his United States citizenship and national origin by (a) selecting in preference to McNier for a full-time, tenure track hospitality management department appointment, Hailin Qu (Qu), a less qualified candidate who was not work-authorized on the dates he was selected and McNier rejected, and (b) pretextually structuring the requirements for the tenure track hospitality management position to include a Ph.D in Hospitality Management, whereas McNier held J.D. and M.B.A. degrees so as to exclude McNier as a candidate, and (2) retaliated against McNier and attempted to intimidate him for filing a discrimination charge.

On March 27, 1997, SFSU filed its Answer, admitting that McNier applied for the advertised tenure-track faculty position, and that he was not considered for appointment, but denying that it used fraudulent labor certification documents to effect Qu's appointment, and denying that McNier was qualified for the appointment. SFSU contended that under American Assembly of Collegiate Schools of Business (AACSB) requirements, as translated into the position description, an eligible applicant required "an earned doctorate in hospitality management."

The order at 7 OCAHO no. 947 dismissed the national origin claim on jurisdictional grounds, but retained jurisdiction over the pendant citizenship status discrimination claim. I explained that in 8 U.S.C. § 1324b jurisprudence a *prima facie* case of citizenship status discrimination adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

(1) he is a member of a protected class;
(2) the employer had an open position for which he applied;
(3) he was qualified for the position; and
(4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

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[1]Previously, on September 21, 1996, McNier satisfied the procedural condition precedent to filing a complaint by filing a charge of citizenship status discrimination and retaliation with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). 8 U.S.C. §§ 1324b(b)(1), 1324b(d).

7 OCAHO no. 947, 425.

I held that "[o]n the basis of the pleadings to date, McNier tentatively appears to satisfy all four prongs of the test, and directed threshold inquiries to the parties." *Id.* The inquiry as to SFSU's defense of immunity from suit under the Eleventh Amendment to the United States Constitution led to resolution of that issue and also to an unanticipated diversion into the law of professional conflicts of interest.

The order at 7 OCAHO no. 998 (1998), found SFSU to be an arm of the State of California, triggering Eleventh Amendment immunity, and that as California had not explicitly waived its sovereign immunity, SFSU was immune from suit. That Order invited McNier to brief the issue as to whether the narrow judicially created *Ex parte Young*, 209 U.S. 123 (1908), exception to state sovereign immunity permitted him to sue as individuals certain named officials he had been seeking to bring into the case. SFSU was ordered to explain the understanding of those individuals as to Qu's work eligibility as of the date he was selected in order to avoid an inference that he was known to be ineligible for employment in the United States. The individuals were Arthur Wallace (Wallace), Dean, School of Business; Janet Sim (Sim), Chair, Department of Hospitality Management; Kenneth Leong (Leong), Chair, Department of Accounting.

The Order made clear that no monetary relief could be forthcoming but that consistent with Ninth Circuit application of *Ex parte Young*, a request for selection to employment in a position for which an applicant has been rejected can constitute prospective injunctive relief. *Doe v. Lawrence Livermore National Laboratory*, 131 F.3d 836, 840 (9th Cir. 1997). Addressing evidentiary issues and inviting comments by the parties as a predicate for determining whether McNier might maintain an *Ex parte Young* suit, the Order stipulated that McNier would be obliged to demonstrate, *inter alia*, "other than by conclusory allegations, that the officials he seeks to join could not reasonably have believed their conduct was lawful." 7 OCAHO no. 998, 1206-07.

By Order Granting Complainant Leave to Amend, 8 OCAHO no. 1030 (1999), I concluded as a matter of law that the Administrative Law Judge (ALJ) has jurisdiction over McNier's suit under the *Ex parte Young* exception to state sovereign immunity against SFSU officials in their official capacities; McNier was granted leave to amend his Complaint to substitute as respondents, in their official capacities, the individuals named by him (now increased to four). The Order repeated that "the state employees to be added as respondents in McNier's 8 U.S.C. § 1324b action are being sued in their official capacities (*not in their individual capacities*) for injunctive relief, (not for *damages)*." *Id*. at 438. (Emphasis supplied).

That Order asked the parties to identify their representatives, if any, to participate in a telephonic prehearing conference. Lacking a response by SFSU, by order dated September 15, 1999, served on counsel of record, I scheduled a conference. Previously, SFSU was represented by

Daniel E. Lungren, Attorney General of California (by Richard G. Tullis, Asst. A.G.), and by Patricia Bartscher, SFSU Counsel. By letter-pleading filed September 22, 1999, Stephanie Leider for herself and Timothy Murphy, on the letterhead of Murphy & Beers, LLP, advised they were retained by SFSU. On September 27, 1999, McNier filed a Motion to Recuse Defense Counsel. McNier contended that because John L. Beers, a partner in Murphy & Beers, served as a "panel mediator" in a mandatory settlement conference ordered by the Superior Court of California in *McNier v. Trustees of the California State University*, "a case akin to the present case," the firm should be disqualified from participating in the case before me.

While that motion was pending, McNier, on October 18, 1999, filed his Amended Complaint alleging citizenship status discrimination and retaliation for having filed his OSC charge on September 21, 1996. The Amended Complaint demanded relief against each individual in his and her official capacity (and not personally) in the College of Business, SFSU, i.e., Wallace, as Dean; Sim, as Chair, Department of Hospitality Management; Leong, as Chair, Department of Accounting, and Mark Blank, as Professor and Chair, Hiring, Retention, Tenure & Promotion Committee.[2]

The December 2, 1999, Order Granting Complainant's Motion to Recuse Defense Counsel, 8 OCAHO no. 1034, concluded that the firm should be disqualified from representing respondents. On December 13, 1999, Kathryn K. Meier filed a notice of entry of appearance for herself and the firm Hoge, Fenton, Jones & Appel, Inc., as substitute counsel. On January 7, 2000, Respondents filed their Answer denying the allegations of the Complaint and asserting thirteen affirmative defenses.

B. California Court Proceedings

On November 7, 2000, on appeal by SFSU, the California Court of Appeal, First Appellate District, Division Two, in *McNier v. Trustees of the California State University*, Cal. Ct. App. (Docket No. AO87663)(November 7, 2000) (unpublished opinion), affirmed the judgment of the Superior Court for the County of San Francisco, in a case filed May 12, 1997 by McNier against SFSU, Wallace, Sim, Leong and fifty unnamed defendants. The decision on appeal recited that "*the issues on appeal pertain only to damages*" in light of which "a brief summary of the facts will suffice." (Emphasis supplied.)

McNier's state court complaint demanded recovery for race and age discrimination and, *inter alia*, for violation of 8 U.S.C. § 1324b. McNier obtained a jury verdict on the claims of race discrimination for failure to have considered him for a tenure track position in the Hospitality Management Department and for retaliation for his having made a good faith complaint of race

[2] As confirmed by the Fifth Prehearing Conference Report and Order, dated September 15, 2000, Blank having reportedly died was deleted from the Amended Complaint.

discrimination. *See McNier v. Trustees*, Opinion and Order on Defendant's Motion for a New Trial, Superior Court, Case No. 986713 (June 1, 1999). The monetary result of the trial court's modification in that order of the jury award is $1,945,116 for economic and non-economic damages, at 10% per annum from March 26, 1999, until paid, coupled with an order dated June 22, 1999 for attorney's fees of $315,000 and $16,503.73 in costs, at 10% per annum from June 22, 1999, until paid yielding a total of $2, 276,619.70, plus 10% interest annually until paid.[3] As reported in the Ninth Prehearing Conference Report and Order (December 22, 2000), counsel for Respondents advised [at the December 20, 2000 conference] that there was no appeal of the "California intermediate court's [Court of Appeal] affirmation of Mr. McNier's judgment in the related state case."

McNier's state court action in his favor having become final, and the parties being unable to reach an agreed disposition of § 1324b claims, it was timely to convene a confrontational evidentiary hearing.

II. DISCUSSION

The hearing was held on McNier's § 1324b claim for two and a half days, February 27-March 1, 2001, in San Francisco, California, compiling a record of 750 pages and 81 exhibits. McNier testified on his own behalf and called Steven Henry McCoy of the SFSU human resources department as an expert witness to testify concerning faculty pay levels in support of the claim that McNier's teaching load and pay levels were reduced in retaliation for his seeking relief for the putative discrimination. In addition to testimony by Wallace, Sim and Leong, Respondents called Patricia Bartscher (Bartscher) to testify concerning immigration processing of foreign faculty generally and the labor certification processing for Qu in particular.

A. Collateral Estoppel Rejected

The parties filed post-hearing opening and reply briefs. McNier relies almost exclusively on the November 7, 2000, opinion of the California Court of Appeal, content to scold the ALJ for not agreeing that collateral estoppel should have been applied to foreclose further inquiry into the conduct of respondents so as to mandate a finding of liability on his § 1324b claims. Devoting all but a portion of one page of his opening post-hearing brief to quotations from the Court of Appeal opinion, and marshaling collateral estoppel precedents, McNier argues that the ALJ's analysis should be limited to the statement of facts recited by the Court of Appeal on review of the issues of damages awarded by the jury as modified by the trial court.

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[3] *McNier v. Trustees* [Superior Court.] *See* Order on Plaintiff's Motion for Attorneys' Fees and Costs; Plaintiff's Request for Sanctions; and Defendant's Motion to Strike or Tax Costs. Neither order of the Superior Court explained the factual predicate for the jury verdict.

Because with one exception McNier on brief elects totally to ignore the evidentiary record compiled at hearing, and because the result reached here is not in derogation of the California Court of Appeal decision, it serves no purpose to recount the record except to the extent discussed in this Final Decision and Order *seriatim*. The exception to McNier's insistent stand pat reliance on the state court decision is the argument on reply brief that "Respondents never refuted the INS documentary evidence introduced at trial that showed Qu was not properly authorized to work in the United States." Complainant's Reply Br. 3. That argument and the claim that "University Counsel admitted . . . and Respondent's Brief confirms . . . that she [Bartscher] falsified [an immigration document]," *id*., is unsupported by the record as is McNier's assertion that "QU WAS NOT LEGALLY ENTITLED TO WORK IN THE UNITED STATES." *Id.*, at 4. Although my order at 7 OCAHO no. 988, 1208-09, suggested the need to obtain an explanation of Wallace's, Sim's and Leong's understanding of Qu's work eligibility as of the date he was offered the position, the paucity of evidence in support of McNier's § 1324b claims and the undisputed evidence of the regularity of SFSU's H-1B visa processing as to Qu, renders that inquiry immaterial.

Although the Court of Appeal characterized its statement of facts as a "brief summary" where "the issues on appeal pertain only to damages," it set out a remarkably detailed "summary . . . consistent with the well-settled rule that the facts must be viewed in the light most favorable to the judgment." *McNier v. Trustees*, Cal.Ct.App., at 1. To support his claims of citizenship status discrimination and retaliation for having sought relief, McNier contends it is error for the ALJ to consider any evidence which might contradict those findings. At hearing, while agreeing with McNier that the California court's factual recitation was admissible, I rejected his invitation to foreclose conflicting evidence, taking "a decisive straddle" which permitted Respondents the opportunity "to present evidence to rebut or explain any findings – any facts denominated as having been found in the State Court proceeding." Tr. 33.

I have no problem with the argument that collateral estoppel resulting from state court proceedings can apply in federal *forae*, including federal administrative adjudicative agencies, and I so hold.[4] However, on brief, McNier relies on authorities which defeat rather than support his argument.

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[4] OCAHO cases have addressed collateral estoppel. *See, e.g., Iron Workers Local 455 v. Lake Construction & Development Corp.*, 7 OCAHO no. 964, 632, 658 (1997) (doctrine held applicable to administrative adjudications in which "[t]he proponent of collateral estoppel has the burden of showing that the issue in the prior proceeding was identical and decisive"); *Mackentire v. Ricoh Corp*., 5 OCAHO no. 746 (1996) (where federal district court decision on summary judgment that employer articulated a legitimate, nondiscriminatory explanation for discharge in Title VII national origin case decision is affirmed by court of appeals, relitigation of that explanation is foreclosed in citizenship status discrimination case before ALJ); *Walker v. United Air Lines, Inc*., 4 OCAHO no.

(continued...)

For example, quoting the unexceptional statement that "it is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were judicially determined, are conclusively settled by a judgment rendered therein," *Lytle v. Household Mfg., Inc*., 494 U.S. 545 (1990), he overlooks that the outcome conflicted with his argument. Discussing the right to a jury trial, the Supreme Court held that the district court's resolution of issues raised by a former employee's equitable claims did not collaterally estop relitigation of the same issues before a jury in context of the employee's legal claims, where the district court first resolved the equitable claims solely because it had erroneously dismissed the legal claims. *Lytle*, 494 U.S. at 555-56.

McNier relies on *Worton v. Worton*, 234 Cal. App. 3d 1638 (1991). Quoting *Flynn v. Gorton*, 207 Cal. App. 3d 1550, 1554 (1989), *Worton* explains that "res judicata is composed of two parts: claim preclusion and and issue preclusion. Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action; thus, a new lawsuit on the same cause of action is entirely barred [citation omitted]. Issue preclusion, or collateral estoppel applies to a subsequent suit between the parties on a different cause of action . . . prevent(ing) the parties from relitigating any issue which was actually litigated and finally decided in the earlier action. [citation omitted]. The issue in the earlier proceeding must be identical to the one presented in the subsequent action." The *Worton* court quoted *Hulsey v. Koehler*, 218 Cal. App. 3d 1150, 1157 (1990): "the the most important criterion in determining that two suits concern the same controversy is whether they both arose from the same transactional nucleus of facts [Citation]. If so, the judgment in the first action is deemed to adjudicate for purposes of the second action every matter which was urged, and every matter which might have been urged, in support of the cause of action or claim in litigation."[5]

McNier's reliance on the broad language of *Worton* is misplaced. *Worton* reversed the trial court's bar to a plaintiff former wife's suit for fraud and conversion following a dissolution proceeding

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[4](...continued)
686, 791, 841-42 (1994) (facts assumed for purpose of denying motion for summary decision are not subject at trial to bar of collateral estoppel); *United States v. Power Operating Co., Inc*., 3 OCAHO no. 580, 1781, 1811 (1993) (["the ALJ] . . . unconvinced at this stage that respondent in the NLRB proceedings" had been allowed the full scope of discovery available before an OCAHO ALJ, refused to apply collateral estoppel to bar discovery of facts relevant to the inquiry before both agencies).

[5] The dichotomy by which collateral estoppel is portrayed as a branch of res judicata was stated in slightly different terms by the Supreme Court in embracing the concept as applicable to administrative adjudication. *See Astoria Fed. Sav. and Loan Ass'n v. Solomino*, 501 U.S. 104, 107, (1991), quoted in *Iron Workers Local 455*, 7 OCAHO at 657 ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality").

where the defendant former husband's "violation of his fiduciary duty to account to his wife for the community property . . . deprived her of an opportunity to fully present her case in the [prior] dissolution proceeding." *Worton,* 234 Cal. App. 3d at 1641. The court denied res judicata because it was unable to find that the wife was at fault for failing to assemble all her evidence at the first trial. The court instructed that "the doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.' (Vella v. Hudgins (1977) 20 Cal.3d 251, 257. . . .)." Moreover, *Worton* rejected res judicata even though, unlike the issue before me, both proceedings involved the identical subject matter (the division of benefits as between the husband and wife).

Applied to a § 1324b case before an ALJ, *Worton* defeats collateral estoppel because, despite McNier's having pleaded § 1324b in his state case, the California courts necessarily only addressed race discrimination, § 1324b issues being exclusively reserved for the federal *forae*. Citizenship status discrimination and any cognate retaliation issues are not matters that *might or could* have been urged in support of the cause of action or claim in litigation in McNier's state case. None of McNier's other authorities (including criminal cases which turn essentially on due process considerations) reach the question, as here, of a totally different statutory cause of action the critical element of proof for which, i.e., citizenship status discrimination in violation of § 1324b, could not as a matter of exclusive federal jurisdiction have been in play in the state action. The remark in the Court of Appeal statement of fact that SFSU "helped Qu immigrate" to the United States refers to a fact not in dispute and cannot, as McNier suggests, bar such inquiry in the § 1324b case as might evidence the *bona fides* of that activity. Indeed, nothing in the Court of Appeal statement of fact implies a value judgment as to SFSU's conduct in respect of the propriety of the immigration processing.

Although the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) abandoned the previous collateral estoppel requirement for identity of parties, due process concepts argue against finding privity between SFSU and Respondents for collateral estoppel purposes. As Respondents quote on reply brief, "'the circumstances must have been such that the party to be estopped **should reasonably have expected to be bound by the prior adjudication.**' (White Motor Corp. v. Teresinski, 214 Cal.App.3d 754, 761 (1989)." Respondents' Reply Br. at 6. Even accepting, *arguendo*, as fact the Court of Appeal statement of fact, I am unable to find privity between the Respondents and SFSU. Respondents argue that "[s]ince the prior litigation concerned allegations of race, and not citizenship, (sic) discrimination, respondents could not reasonably have anticipated that they would somehow be bound by the prior judgment. And McNier has not offered any facts to indicate that respondents exerted any control over the prior state litigation." Respondents' Reply Br. at 6-7. I agree. There is no showing of such control or of a reason to anticipate a detailed statement of

facts in the Court of Appeal decision on the damages issue.[6]

The concept of due process is fundamental in considering whether privity exists sufficient to apply collateral estoppel. In my view, due process considerations trump McNier's claim for collateral estoppel. *See, e.g., Krofcheck v. Ensign Company,* 112 Cal. App. 3d 558 (1980). *See generally, Clemmer v. Hartford Insurance Co*., 22 Cal.3d 865, 875 (1978):

> "Notwithstanding expanded notions of privity, collateral estoppel may be applied only if due process requirements are satisfied. (citations omitted) In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. (citations omitted) Thus, in deciding whether to apply collateral estoppel, **the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, to protect against vexatious litigation."** (Emphasis added.)

Respondents on brief take exception to McNier's reliance on certain other authorities and to his interpretation of others. As already mentioned, Respondents have the better arguments based on the authorities than does Complainant. In that light it would not be instructive or efficient to prolong the discussion of collateral estoppel law. It becomes unnecessary, for example, to resolve whether an appellate court statement of fact qualifies for collateral estoppel where it is provided solely as a bench mark for explaining whether damages awarded by the trial judge and jury were excessive, and no legal issues were before the court. However, I agree with Respondents's reliance, Respondents' Reply Br. at 8, on *Hasson v. Ford Motor Co*., 32 Cal.3d 388, 419 (1982), to the effect that in such a situation, the Court of Appeal does not conduct an independent assessment of credibility, but rather "[i]n assessing a claim that the jury's award of damages is excessive, we do not reassess the credibility of

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[6] Respondents aptly quote *Miller v. The Superior Court of Los Angeles County*, 168 Cal. App. 3d 376, 383 (1985): "In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." Respondents are correct that "[I]t would be fundamentally unfair, and inappropriate, to bind respondents to a recitation of facts in an unpublished state appellate court opinion to which they were not a party, in which the issues were different, and respondents were not represented. McNier has not provided any authority to indicate otherwise." Respondents' Reply Br. 7.

witnesses or reweigh the evidence. To the contrary, we consider the evidence in the light most favorable to the judgement, accepting every reasonable inference and resolving all conflicts in its favor." *Id.*

I am unable to discern an identity of issues as between the two lawsuits, state and federal, and disagree with Complainant that the facts recited by the Court of Appeal are dispositive of the § 1324b suit. Therefore, I reject the collateral estoppel claim, remitting McNier to his proof. Proof, however, was not forthcoming, his evidence consisting almost entirely of the unsuccessful effort to obtain testimonial concessions by Respondents that their conduct towards him was characterized correctly in the Court of Appeal statement of facts. He abandons even that effort on post-hearing briefs, foregoing review of the record except for isolated argumentation.

For economy of judicial resources and because it does not prejudice Respondents as the parties against whom the doctrine is urged, this Final Decision and Order takes Complainant's reliance on the Court of Appeal decision at face value and takes the Court of Appeal statement of fact into account to the extent of its reach. I do not find its content inconsistent with the result here. I accept it because it is the virtual entirety of McNier's case. His evidence on the witness stand in no way informs as to citizenship status discrimination and he has made no reasoned argument that it does.

Complainant's theory of this § 1324b case, that it was unnecessary to take evidence on the issue of citizenship status discrimination is not viable where such evidence was not implicated in the race issue before the California courts. Because the issues before me were not and could not properly have been before the state courts, McNier saves me from the need to evaluate evidence taken here which may have conflicted with facts recited in the Court of Appeal opinion. Accordingly, I do not address the weight to be assigned those facts although clearly the court did not evaluate the evidence. Stated another way, no facts recited by the California courts --the only facts embraced by the collateral estoppel claim--conflict with testimony and exhibits relevant and material to defense of the § 1324b claims. Rather, each Respondent testified without contradiction to lack of awareness of Qu's citizenship status, and to lack of participation in Qu's immigration processing.

B. Lack Of Evidence Of Improper Labor Certification Processing

Despite McNier's shrill rhetoric that Qu's hiring and immigration processing is infected with intent to evade the Nationality and Immigration Act, none of the Respondents individually or in concert with SFSU is proven or even suspected on this record to have been in breach of lawful and routine processing of Qu's H-1B visa. McNier seizes upon a refiling of the H-1B labor certification application to obtain a visa for Qu to claim fraud evidencing a conspiracy to prefer a non-U.S. professor. I accept the simple explanation, unrebutted and unimpeached, that what was involved was SFSU's innocent response to a change in Department of Labor requirements for labor certification

processing. An inquiry by SFSU selection officials into Qu's citizenship status before making the job offer would have violated 8 U.S.C. § 1324b. Consistent with H-1B procedures, it is after selection that the successful candidate demonstrates authorization to be employed in the United States. Respondents quite properly point out that "if the offeree does not have appropriate work authorization, then the university does the application for the H-1B visa, which is employer specific." Respondents' Br. 10. *See* 20 C.F.R. Pt. 656 (regulations implementing the labor certification procedures for effecting hire of foreign skilled and unskilled workers).

C. No Evidence of Citizenship Status Discrimination

Embracing the law of torts, McNier argues that the doctrine of *res ipsa loquitor* fills the evidentiary gap, i.e., that two non-U.S. selectees for the tenure-track professorship for which he was never considered proves he was the victim of citizenship status discrimination. First, they were not the only finalists; at least one, Robert A. Walther (although not selected) was a U.S. citizen. Second, although McNier cites no case precedent he might have pointed, *e.g.*, to *United States v. Mesa Airlines*, 1 OCAHO 74 (1989), *appeal dismissed*, *Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991) for the proposition that systematic exclusion of non-citizens to the advantage of *all* U.S. citizen applicants constitutes citizenship status discrimination. The obvious distinction is that in *Mesa* there was an evidentiary predicate for the trier of fact to infer that the employer's decision makers consciously selected between citizenship categories. In contrast, where, as here, McNier relies on the California courts for their findings that SFSU decision makers made a conscious race-driven employment selection, there is no basis, without more, for finding that they, the decision makers, were at the same time consciously preferring non-U.S. citizens in their zeal to exclude him.

On SFSU's tendering the appointment to a prior selectee to Qu, Dr. Connie Mok (who rejected the appointment), Sim--the only Respondent who McNier cross-examined about Mok-- was unaware of her citizenship status. That among other finalists in the initial competition for the appointment who were rejected as failing the terminal degree requirement (i.e., Ph.D., an earned doctorate) there were United States citizens, is no proof that the requirement was pretextual. There is simply no evidence that McNier was passed over because he was a citizen of the United States and one or another selectee was not, or that the requirements were skewed to deny selection to citizens of the United States.

Reflecting the absence in the state court adjudications of any announced points of law, Complainant has not argued that the Court of Appeal decision enunciated a principle of law binding on the § 1324b case. Indeed, both the Court of Appeal decision of November 7, 2000, and the Superior Court orders of June 1, and June 22, 1999, are devoid of any discussion of legal principles. The court rulings do not analyze the legalities of SFSU conduct, much less that of Respondents.

McNier does not describe how his case fits into the established *McDonnell Douglas Corp. v. Greene* framework for resolving federal claims of workplace discrimination, discussed in the July 3, 1997 Order, 7 OCAHO no. 947, 425. Applying the *McDonnell Douglas* framework, on the basis of the record developed *at hearing*, I find that (1) he is a member of a protected class; (2) the employer had an open position for which he applied; (3) he failed to prove that the earned doctorate prerequisite was pretextual and, therefore, failed to prove he was qualified for the position, and (4) he failed also to prove he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship, because the fact that the candidate selected was not a citizen of the United States and was not authorized to work in this country on the date selected for the position is not *per se* evidence of discrimination against the citizen candidate.

McNier's focus on the Court of Appeal statement of facts to the exclusion of virtually the entire § 1324b evidentiary record works to his disadvantage. It is the measure of that case that the court omits any legal underpinning on the race discrimination jury verdict. Precisely for that reason, however, the state case provides no aid to fitting McNier's claims into the *McDonnell Douglas* § 1324b paradigm; his reliance on the Court of Appeal decision, without more, is fatal to his case here.

The failure of proof is spectacularly evident in context of the admonition to Complainant more than three years ago, as already noted, that to invoke *Ex parte Young* his evidence "must demonstrate, other than by conclusory allegations, that [Respondents] could not reasonably have believed their conduct was lawful." 7 OCAHO no. 998, 1206-07. Having tentatively persuaded me of the sufficiency of his case to withstand dispositive motion practice, McNier overlooks that he bore the greater burden of persuasion by a preponderance of evidence at hearing. In the event, he has failed to "provide some **proof** of discriminatory conduct beyond mere accusation." *Id.* at 1207. This record is devoid of evidence that conduct of any Respondent was animated by bigotry or prejudice implicating Complainant's status as a United States citizen.

D. No *Ex parte Young* Relief Can Be Forthcoming

SFSU, and not the three Respondents today, was the respondent in 1997. Even assuming Complainant were perceived to have prevailed on the merits as to citizenship status discrimination and retaliation, he would obtain no relief. Although *Ex parte Young* and the Amended Complaint make clear that Respondents are implicated in any § 1324b relief *only* in their official capacities, McNier, on brief, derides the suggestion that they are powerless to assist him, implying that retirement from SFSU by Wallace and resignation by Leong is no bar.[7] He is wrong.

[7] As I several times advised McNier, the relief available in this forum would be limited to an order to place him in the employment he seeks, the remedy available under *Ex parte Young*. He (continued...)

A mandatory injunction to instate McNier to the tenure track position he seeks is a result I am empowered to adjudge, assuming a finding of liability. 8 U.S.C. § 1324b(g)(2). But an injunction is futile when it is addressed to one who is powerless to effect it. To ignore the reality that these individuals lack power, if any they ever had, to be obliged as a matter of federal law to place him in the job ignores almost a hundred years of constitutional legal development and the concession he made when he denominated these individuals in the Amended Complaint in their official capacities.

Wallace retired from SFSU in 1998 and Leong resigned in 2001. They are not in an employer posture and are, therefore, beyond the reach of an *Ex parte Young* remedy. Even were they still SFSU employees, it is uncontradicted that while the authority as Dean of the College of Business entitled him to veto appointments, Wallace could not effect selections; his role was limited to recommending appointments to the SFSU Vice President of Academic Affairs. Similarly, there is no evidence that Leong, as Chair of the Accounting Department, could have played an official role in selection of a tenure track appointee in the Hospitality Management Department, or that he had authority to effect any tenure track appointments. Sim, the only Respondent remaining in active SFSU service did not develop the criteria for the hospitality management professorship, but most significantly for *Ex parte Young* purposes, it is uncontroverted that as Chair of the Hospitality Management Department she had no authority to grant tenure track status; she lacked authority to effect an appointment on behalf of the State of California.

The purpose of the *Ex parte Young* doctrine, ensuring that "state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law," *Puerto Rico Aqueduct and Sewer Authority v. Mercalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), is satisfied in this docket by the extensive inquiry reflected by prior orders and by the evidentiary hearing.[8] Finding no proof of a continuing (or any) violation of federal law, the *Ex parte Young* inquiry is at an end.

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[7](...continued)
already has the California judgment in his favor as to compensation, and the ALJ lacks power to adjudge damages. Accordingly, I disregard so much of the requests in the Amended Complaint as reach beyond prospective injunctive relief.

[8] In addition to the *Ex parte Young* discussion in prior orders in this docket, 7 OCAHO no. 998, and 8 OCAHO 1030, *see also Wong-Opasi v. State of Tennessee, et al*, 8 OCAHO no. 1042, 643 (2000), and *Wong-Opasi v. Sundquist*, 8 OCAHO no. 1054, 830 (2000). My order at 8 OCAHO 130, discussing Ninth Circuit precedents made unmistakably clear that McNier's recourse against the individual respondents could only be in their official capacities.

E. No Evidence Of Retaliation In Context of 8 U.S.C. § 1324b

OCAHO case law makes clear that retaliation may survive a failure to prove an underlying violation of law, i.e., citizenship status or national origin discrimination. *Cruz v. Able Service Contractors, Inc*., 6 OCAHO no. 837, 144,150 (1996); *Adame v. Dunkin Donuts*, 4 OCAHO no. 691, 904, 908 (1994); *Zarazinski v. Anglo Fabrics Co., Inc*., 4 OCAHO no. 638, 428, 445-50 (1994); *Yefremov v. NYC D epartment of Transportation*, 3 OCAHO no. 562, 1556, 1603 (1993). Such result assumes the victim has made a good faith allegation of underlying discrimination in response to which he was retaliated against.[9] *Adame*, 4 OCAHO at 909; *Palacio v. Seaside Custom Harvesting and Zinn Packing Co.*, 4 OCAHO no. 675, 744, 756 (1994); *Zarazinski*, 4 OCAHO at 448-49. Here, the California courts found retaliation for McNier's having made a good faith complaint of race discrimination. However, I have been pointed to no law or facts to support a conclusion that iteration of claims of national origin and citizenship status discrimination, without more, entitles the race discriminatee to a finding that the conduct which warranted the race-driven retaliation award, without more, constitutes retaliation within the scope of 8 U.S.C. § 1324b(a)(5). There is nothing on this record to sustain a finding of retaliation by Respondents, or any of them, for McNier's having sought remedies authorized by § 1324b.

McNier is grasping at straws. For example, he contends that reduction in his teaching load and in time base calculations effecting pay reductions were retaliation for filing his OSC charge. But the claim that retaliation is proven by the scheduling for the Fall 1996 semester lacks credibility considering that he did not file his OSC charge until September 21, 1996, after the semester schedule had been set; there is no evidence he had broadcast that he was going to make the OSC filing. Similarly as to pay. A McNier memorandum to Leong dated September 16, 1996, shows McNier was aware at least by September 14, 1996, a week before filing his OSC charge, of a pay adjustment (which Leong reputedly effected to eliminate a prior preferential treatment which had improperly benefitted McNier). Ex. MM. Significantly, the September 16, 1996 memorandum protesting reduction in McNier's time base pay formula, silent as to OSC, specifies that the pay reduction "is further evidence of *retaliation* against me *for the filing* of charges of discrimination and retaliation against SFSU *with the United States Equal Employment Opportunity Commission.*" (Emphasis supplied).

I reject the notion of pyramiding the California findings of retaliation for asserting race discrimination into a finding of retaliation in violation of § 1324b(a)(5) where there is no evidence to support a finding of retaliation for § 1324b protected activity. Having kept McNier's cause of action

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[9] *See also United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216 (1996) *(Martha Washington II)*, and *United States v. Hotel Martha Washington Corp.*, 5 OCAHO no.786, 533 (1995) *(Martha Washington I)* (retaliation found even absent an underlying discrimination charge).

alive through numerous procedural hurdles, this tribunal now finds a total lack of evidence bearing on retaliation in context of § 1324b allegations, much less any evidence of discrimination based on alienage.

I understand McNier's hypothesis to be that an employee who successfully prosecutes a race discrimination-related retaliation claim is *ipso facto* entitled to a retaliation finding related to another discrimination cause of action (i.e., citizenship status) whether or not the underlying citizenship cause of action is viable. Absent authority which compels that result, I am not prepared to follow his reasoning. Acceding to race considerations as found by the California courts, for all that appears on this record it is mere happenstance that Qu, the individual selected in his stead, was not a United States citizen. Lacking any evidentiary predicate for a finding of citizenship status discrimination, it is consistent with the record to suspect that McNier seized on every available cause of action, including 8 U.S.C. § 1324b.

Inability to find retaliation for assertion of § 1324 rights where the employer conduct at issue has already occasioned a finding of retaliation arising out of the employee's efforts to combat the race discrimination proved in the California courts, is not inconsistent with OCAHO precedent that retaliation *may* survive rejection of the underlying discrimination claim. The McNier claim fails because proof of retaliation requires evidence which demonstrates a causal connection between the protected activity and the adverse action, *Yefremov,* 3 OCAHO at 1603; here there is none.

F. Presence Of Prospective Witness Was Inadvertent And Not Prejudicial; Failure Of Complainant To Call Potential Rebuttal Witness Was His Decision

I reject McNier's claim that he was prejudiced by Bartscher's presence in the hearing room during testimony by Respondents. McNier, Respondents'counsel and the bench had agreed that potential non-party witnesses would not be permitted to attend the hearing prior to the testimony of each. The record makes clear that Bartscher was called to the stand by Respondents solely to testify about SFSU's management of Qu's immigration processing. Wallace, Sim and Leong, without contradiction, all testified that they were not involved in Qu's immigration status and that his immigration processing was a subject about which they had no knowledge.

McNier recalls that when his potential witness George Frankel (Frankel) entered the room he, McNier, so informed the bench and upon Respondents' counsel asking that he leave, Frankel did so. McNier implies on brief that because Frankel was not permitted to remain at the hearing, his inability to return prejudiced Complainant whose offer of proof as to what Frankel would have testified to was improperly rejected. McNier's recitation, factually incorrect, is impeached by the record. McNier informed the bench that he would contact Frankel in order for him to be available as a rebuttal witness after Leong's testimony. He made no offer of proof but instead volunteered that he would not call the

witness despite the invitation from the bench to schedule him:

> JUDGE MORSE: Now you had anticipated calling Dr. Frankel if he were available, but I take it that it's not critical from your viewpoint?
> MR. MCNIER: Well, I would like to have to rebut, Your Honor, but obeying the rules of the Court, and I have lost him, obviously, he must not be able to get here, so I can't produce him. I would like to.
> JUDGE MORSE: Well, you made a diligent effort and you weren't able to show that he would be here.
> Is there an offer of proof you can make as to what it is that he would testify? Is there any exhibits that he would have sponsored?
> MR. MCNIER: No, he just would have testified. I can get you the complaint in the California Superior Court and those kinds of things that encompass it.
> JUDGE MORSE: Well, no, I don't think that we need that in any event.

Tr. 745.

Bartscher's testimony about H-1B visa processing addressed a sufficiently isolated subject as not to be affected by what else she may have heard in the hearing room. Her presence could not have impaired McNier's case. I reject the suggestion that Frankel's testimony or availability was affected by Bartscher's presence. Frankel's unavailability when it would have been timely for him to take the stand and Complainant's rejection of the opportunity to proffer an offer of proof were not impacted by Bartscher's presence while one or another of the Respondents was on the stand, and there is no reason to suspect that her presence affected their testimony. The outcome of this case is unaffected by Bartscher's presence while others were on the witness stand. The omission of testimony by Frankel was McNier's call.

III. CONCLUSION

Alienage is what citizenship status is all about. From enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e *et seq.*, until the Supreme Court instructed otherwise, *Espinoza v. Farah Mfg Co., Inc.*, 414 U.S. 86 (1973) it was commonly understood that the prohibition against national origin discrimination implicated discrimination based on citizenship status. From *Farah Mfg Co*., until enactment of § 1324b in 1986 there was no federal cause of action for alienage, as distinct from national origin, discrimination. As a *percentage* of the number of cases alleging citizenship status discrimination, other than those arising in context of overdocumentation incidental to the employment verification regimen pursuant to 8 U.S.C. § 1324a, decisions finding alienage discrimination are puny in number. The reason is obvious. While prejudice and emotion regrettably play into the national origin

scenario in our broadly diverse national community, most of whose population readily identify with their immigrant ancestors, it is the rare individual or institution who cares, much less asks, what is a person's citizenship. Certain it is that McNier suffered race discrimination, proof of which is immaterial to the case at hand.

Having heard and observed the witnesses, including Complainant, I conclude that it was mere coincidence that his nonselection worked to the advantage of a citizen of Taiwan (or of any country other than the United States) and led to the claims before me. The testimony of the three Respondents coupled with that of SFSU counsel makes clear that they participated not at all in Qu's immigration processing and that SFSU's satisfaction of the niceties of the H-1B visa process fails to reflect the cynical depravity alleged by McNier. Even assuming collateral estoppel, the result is the same. Not a word in California's judicial affirmance of his race claim is inconsistent with the conclusion that he has failed by any evidentiary standard, much less a preponderance, to prove a § 1324b case.

IV. ULTIMATE FINDINGS AND CONCLUSIONS

I have considered the pleadings, testimony, documentary evidence, memoranda, briefs and arguments submitted by the parties. All motions and requests not previously disposed of are denied. Accordingly, and in addition to findings and conclusions already stated, I find and conclude that:

1. Complainant has failed to prove by a preponderance of the evidence that Respondents, or any one of them, discriminated against him based on his citizenship status in violation of 8 U.S.C. § 1324b(a); and

2. Complainant has failed to prove by a preponderance of the evidence that Respondents, or any one of them, discriminated against him by retaliation, threat or coercion for the purpose of interfering with any right or privilege secured under 8 U.S.C. § 1324b or because he intended to file or did file a charge or complaint or took any other action protected by 8 U.S.C. § 1324b(a)(5).

3. Upon the basis of the whole record, consisting of the evidentiary record, pleadings and arguments of the parties, I am unable to conclude that a state of facts has been demonstrated sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. § 1324b(g)(2)(A). I find and conclude that no one or all of Respondents has engaged or is engaging with respect to Complainant in the unfair immigration-related employment practices alleged and within the jurisdiction of the administrative law judge, i.e., citizenship status discrimination, and retaliatory conduct. Accordingly, the Amended Complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

4. Respondents' request for award of attorney's fees (frequently asserted in their pleadings), as authorized at 8 U.S.C. § 1324b(h), where the administrative law judge determines in favor of the prevailing party that "the losing party's argument is without reasonable foundation in law and fact," will be considered if an application to that effect is filed in the OCAHO within 60 days of entry of this Final Decision and Order. Any such application "shall be accompanied by an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. § 68.52(d)(6).

Pursuant to 8 U.S.C. § 1324b(g)(1) this Final Decision and Order is the final administrative adjudicative order in this proceeding, and "shall become final unless appealed" within 60 days of entry to the United States Court of Appeals for the Ninth Circuit in accordance with 8 U.S.C. § 1324b(i).

SO ORDERED.

Dated and entered this 17th day of September, 2001.

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Marvin H. Morse
Administrative Law Judge