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

YVES NGUYEN)	)	
(Yves Nugent),	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 92B00075
ADT ENGINEERING, INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
(February 18, 1993)

MARVIN H. MORSE, Administrative Law Judge

Appearances:

Yves Nugent, Complainant
Dennis J. Levasseur, Esq., for Respondent

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Section 1324b provides that it is an "unfair immigration-related employment practice: to discriminate against any individual other than an unauthorized alien with respect to a discharge from employment because of that individual's national origin or citizenship status. . . ." IRCA covers a "protected individual," defined at Section 1324b(a)(3) as one who is a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee or granted asylum.

Congress established the new cause of action out of concern that the employer sanctions program, codified at 8 U.S.C. §1324a, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in this country. "Joint Explanatory Statement of the

Committee of Conference," Conference Report, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. 87 (1986). Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel or OSC). The OSC is authorized to file complaints before administrative law judges designated by the Attorney General 8 U.S.C. §1324b(e)(2).

IRCA permits private actions in the event that OSC does not file a complaint before an administrative law judge within a 120-day period. The person making the charge may file a complaint directly before an administrative law judge within 90 days of receipt of notice from OSC that it will not prosecute the case. 8 U.S.C. §1324b(d)(2).

II. *Procedural Summary*

Complainant, Yves Nugent (Nugent), filed a citizenship status discrimination charge with the Office of Special Counsel (OSC) on October 4, 1991. In its January 31, 1992 determination letter, OSC advised that it had found "no reasonable cause to believe the charge to be true;" therefore, it would not file a complaint on behalf of Nugent. The letter notified Complainant that he could file a complaint directly with an administrative law judge within 90 days of receipt of the letter. 28 C.F.R. §44.303(c)(2).

Using the Amended Complaint form issued by the Office of the Chief Administrative Hearing Officer (OCAHO), on April 6, 1992 Nugent timely filed a pro se complaint dated March 10, 1992. Complainant requests reemployment, back pay from August 26, 1991 and attorney's fees. Although only citizenship discrimination had been indicated on the OSC charge form, the complaint did not indicate whether Nugent was now alleging citizenship status and/or national origin discrimination.

On May 4, 1992, Respondent timely filed its answer to the complaint. Respondent admitted having employed Nugent, but expressed uncertainty as to whether he was alleging national origin and/or citizenship discrimination. ADT denied that Complainant's discharge was discriminatory. Respondent asserted instead that Complainant was laid off for economic reasons, in particular because Respondent "lacked work in Mr. Nguyen's specialized field of applying finite differences techniques in fluid flow and heat transfer modeling and analysis." Answer at 3. Respondent requested dismissal of the complaint and an award of its costs including attorney's fees.

During three telephonic prehearing conferences on June 2, July 2 and again on October 9, 1992, the nature of Nugent's discrimination allegation clarified. I concluded,

> Mr. Nguyen[1] stated that he understood his claim to be one of citizenship status discrimination exclusively. Accordingly, there is no issue of national origin discrimination in this case.

Second Prehearing Conference Report and Order, July 1, 1992.

Complainant confirmed the accuracy of this conclusion in an August 26, 1992 filing, denominated "Pleadings." Although productive in the sense that they clarified some of the issues, the conferences produced no settlement.

I understand Complainant's "Pleadings" filing to be a sort of motion for summary decision. Complainant claims that he was laid off while H-1 workers who had less education and earned less money were retained. The legal underpinning of Complainant's argument juxtaposes 8 U.S.C. §1324b with 20 C.F.R. Ch. V §§ 656.20(c)(8), 656.21(b)(4), 656.21(b)(6), i.e., the citizenship status discrimination prohibition vis-a-vis the Department of Labor, Labor Certification procedures.

Respondent filed a Motion for Summary Decision on August 3, 1992. Inter alia, it summarizes Complainant's claim.

> The gist of complainant's claim is that he was a permanent resident and that he was fired from his position as an [sic] mechanical engineer with ADT while ADT retained alien employees with H-1 visas. Complainant does not claim that ADT favored United States citizens but that ADT favored others who were non-immigrants and non-citizens.

Respondent's Motion for Summary Decision, August 3, 1992 at 2.

Respondent asserted that Complainant cannot make out a prima facie case that his termination was discriminatory. Even if Nugent were able to make a prima facie case, he would not be able to show that ADT's reasons for laying him off were pretextual. Rather, Respondent laid Complainant off with cause. Furthermore, ADT did not seek people to fill Nugent's position. Respondent also claimed that

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[1] On August 26, 1992, Complainant filed a copy of a July 7, 1992 decree which recited that Complainant's surname had been legally changed from Yves Van Tam Nguyen to Yves Nugent.

retained employees and Complainant were not similarly situated. Respondent argued that IRCA's protection against citizenship discrimination does not extend to discrimination as among non-citizens. On November 2, 1992 subsequent to Respondent's taking of Complainant's deposition, Respondent renewed its motion for summary decision. I denied summary decision because there appeared to be a substantial dispute of material fact and because I was not prepared to adopt Respondent's argument as to the scope of IRCA protections.

An evidentiary hearing was held on November 5 and 6, 1992. Complainant filed his post-hearing brief on December 11, 1992. Respondent filed its post-hearing brief on December 15, 1992.

III. *Statement of Facts*

A. Parties

Nugent holds both a Bachelor's and a Master's degree in mechanical engineering. As a student, he held an F-1 visa. Nugent began his ADT employment August 1, 1988. He worked at ADT under an H-1 visa until March, 1991. Nugent became a permanent resident in March, 1991. He was discharged by ADT on August 26, 1991. Complainant, of French and Vietnamese extraction, is a citizen of France.

ADT is a small engineering consulting firm. It is incorporated in Michigan. General Motors (GM) is ADT's principal client. GM's downturn in business has had a substantial negative impact on ADT. Vito Van (Van), ADT's president, testified that Respondent employed 21 engineers in January, 1990. By December, 1991 the engineering staff had been reduced to 12. At the time of hearing, i.e., November, 1992 only 9 engineers remained on staff (including Van). Mei Tang, one of the four H-1 workers allegedly preferred to Complainant, infra III.B.(2), was reduced to part time status in January, 1992 and discharged on May 15, 1992. Since Nugent's departure from the company, two engineers have been hired. Dr. Wen Tung Su was hired on September 4, 1991, within two weeks after Nugent left. Henry Wong was hired on October 21, 1992.

B. ADT Personnel and Their On-the-Job Performance

(1) Nugent

Although Nugent's visa applications indicate that he was hired to do fluid mechanics among other duties, he was only involved in one such project. His primary occupation at ADT was vehicle systems finite element modeling.

Complainant testified that his tasks were to create "computer simulation models of vehicle systems . . . and [to] conduct. . . nonlinear and dynamic analysis." He admitted that his involvement in the analysis was not "100 percent." Tr. 44. Nugent acknowledged that most of his work had to with "building computer models," adding that he has "done some analysis." Tr. 92, 103.

No written performance evaluations of Nugent were introduced into the record. During his three year tenure, Complainant's annual salary increased from $22,000 to $33,000.

Scott J. Socher (Socher), Nugent's engineering colleague at ADT from mid-1988 to July, 1990, testified on behalf of Complainant. During his ADT tenure, "Mr. Nugent primarily created finite models . . ." but did not do non-linear stress and dynamic analysis of systems. Tr. 127. While Socher was at ADT, Nugent did one flow analysis. In contrast to ADT's witnesses, Socher had had no problems with Nugent's attitude.

Lawrence Bradley Hewitt (Hewitt) also testified for Complainant. Hewitt was an engineer at ADT from June, 1990 to July 1991. He testified that Nugent was a superb modeler, but he could not recall ever seeing Nugent work on an analysis project. Hewitt said that Andrew Lai and Mei Tang did some modeling but that they also performed other tasks such as running computer systems operations and analysis. According to Hewitt, modeling comprised three quarters of the workload during his ADT tenure.

Lonnie Patrick Ward (Ward) has been employed at ADT for more than four years. He has a bachelor's degree in engineering and is a United States citizen. He is a project coordinator at ADT. Ward explained that although ADT does a few finite element modeling-only projects, finite element analysis comprises the bulk of ADT's workload. Finite element modeling is the first step in that analysis. Nugent's models were generally not used for analysis. In recalling Nugent's workload, Ward remembers one flow project, no heat transfer analysis, and no systems support and maintenance projects. Nugent's flow project had been unsatisfactory. On January 21, 1991, after Nugent was already on board, ADT hired Dr. Jyh-Haw Tang. Jyh-Haw Tang holds a Ph.D. in fluid flow mechanics. He took over all of ADT's flow

projects. Ward asserted that Nugent could not be given analysis assignments because he lacked and was unwilling to acquire the background for such assignments. According to Ward, Nugent declined Socher's offer to him to do analysis. Nugent never asked for more or different work. Ward never discussed Complainant's shortcomings with him. Complainant was given a training assignment in July, 1991. According to Ward, Nugent's performance of that assignment was unsatisfactory. At times Ward found Complainant to be uncooperative, uncommunicative and volatile. When Van asked Ward to verbally evaluate Nugent, Ward recited the above details. This verbal evaluation was not shared with Nugent. Ward was asked at hearing, "Who at ADT was doing structural analysis before Mr. Nugent was laid off?" He testified, "Everybody except for Mr. Nugent." Tr. 172. In his opinion, Complainant's lack of professional flexibility was a factor in his lay-off during a slow business time.

ADT President Van has a bachelor's degree in mechanical engineering. He is a United States citizen of Vietnamese extraction. Van testified that occasionally customers request modeling projects which do not require analysis, but 90 to 96/97 per cent of ADT's business depends on structural analysis. It is preferable for one engineer to do both the modeling and the analysis on any given project. Because of Nugent's limited competence, Complainant was not given analytic work. To remedy Nugent's shortcoming in this area, Van assigned Nugent an analysis training exercise. Van also felt that Nugent's performance of this assignment was unsatisfactory. In addition to his technical weaknesses, Nugent had a poor work attitude. In light of Ward's evaluation, supra, the unsatisfactory assignment, the company's lack of work, the superior professional flexibility of other staff members and Nugent's poor attitude, Van made the decision to lay off Nugent.

Michael Albert Karram (Karram) is a senior project engineer at ADT. Karram has a bachelor's degree in engineering and is a United States citizen. He was a project manager at ADT during Nugent's tenure. Karram assigned Nugent only modeling projects. Karram testified that Nugent had poor communications skills and was temperamental. During idle times, other employees honed their skills; Nugent slept.

(2) ADT's H-1 Engineers

Structural analysis and/or computer maintenance projects were often assigned to and satisfactorily performed by Dayananda Narasimhaih (Narasimhaih), Andrew Lai (Lai), Mei Tang and Magadi Joshi (Joshi). All have master's degrees in mechanical engineering. They worked

under H-1 visas during the relevant time period. As noted earlier after Nugent's discharge, Mei Tang was laid off in May, 1992. In October 1992, Lai left ADT. ADT hired Henry Wong, a mechanical engineer with a Master's degree, to take over Lai's computer maintenance tasks.

IV. *Discussion*

A. Scope of 8 U.S.C. §1324b Explained

Complainant does not clearly articulate a distinction between particularized discrimination and generic unfairness. Sahadi v. Reynolds Chemical, 636 F.2d 1116, 1117 (6th Cir. 1980). Abandoning his initial allegation that, inter alia, he was discriminated against in favor of United States citizens, Complainant based his claim on the exclusive allegation that he was discriminated against in favor of H-1 visa holders. ADT responded that discrimination among aliens inter se is not prohibited by §1324b.

Complainant's initial allegation is the classic discrimination model under 8 U.S.C. §1324b. U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), appeal dismissed, 951 F.2d 1186 (10th Cir. 1991). His allegation, as now understood, appears to be an issue of first impression in this forum. However, I disagree with Respondent's contention that IRCA fails to reach claims of discrimination as between non-citizens. IRCA was enacted to avoid workplace discrimination against people who, although appearing foreign or sounding foreign, are authorized to be employed in this country. Subject to exceptions not pertinent here, for those protected under IRCA, its command is universal.

> (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.
>
> (1) General Rule.-- It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien as defined in section 274A(h)(3)) with respect to the hiring . . . or the discharging of the individual from employment--
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a "protected individual" (as defined in paragraph (3)), because of such individual's citizenship status.

8 U.S.C. §1324b(a)(1).

As a permanent resident, Nugent is a protected individual. §1324b(a)(3)(B). I hold that nothing in IRCA nor its legislative history

suggests that Nugent's rights in a discrimination-free workplace are reduced because that workplace is populated with non-citizens authorized to be employed in the United States.

B. Intent to Violate §1324b Need Not Be Proven

ADT argues in effect that in order to prevail, Complainant must prove that Respondent intended to violate §1324b and that Complainant failed to meet that burden. ADT contends that unlike Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq, Department of Justice regulations describe the prohibited conduct as "knowingly and intentionally" discriminating against a protected individual. Resp. Brief at 2, 3. See 28 C.F.R. §44.200(a).

Respondent's argument cannot be sustained under discrimination law in general, or under OCAHO jurisprudence in particular. As previously held,

> Title VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases. Liability under Section 102 is proven by a showing of deliberate discriminatory intent on the part of an employer. Statement of President Ronald Reagan Upon Signing S.1200, 22 Weekly Comp. Pres. Doc. 1534, 1537 (November 10, 1986). The Complainant must establish intentional discrimination by a preponderance of the evidence, i.e., "knowing and intentional discrimination." . . .

U.S. v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90) at 13, pay award modified, 1 OCAHO 169 (5/10/90). See also Akinwande v. Erol's, Inc., 1 OCAHO 144 (3/23/90); Mesa Airlines, 1 OCAHO 74.

Proof of discrimination does not turn on a complainant's ability to produce "a smoking gun." Resare v. Raytheon Co., 981 F.2d 32 (1st Cir. 1992); Oxman v. WLS-TV, 846 F.2d 448, 455-56 (7th Cir. 1988). See United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 715 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes.") It is rare that the victim can prove that the employer conceded discrimination, e.g., "I do not want any permanent resident aliens working here." But see Mesa Airlines, 1 OCAHO 74.

Both Title VII and IRCA caselaw make clear that circumstantial evidence is sufficient to establish discrimination. The seminal cases, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and their progeny, provide the framework for proof of discrimination by indirect evidence. The discriminatee must only prove that the violative conduct occurred. A complainant does not need to prove that

the conduct was intended to violate the proscription against discrimination.

I disagree with ADT that Complainant is per se out of court because he admits that he did not believe the employer "knowingly and inten-tionally discriminated against him because of his citizenship or immigration status." Resp. Brief at 3. Complainant candidly acknowledges the employer's lack of specific discriminatory intent. This acknowledgment does not estop him from showing, if he can, that the result of the intended conduct, i.e., his discharge from employment, was discriminatory.

> Employment discrimination jurisprudence turns on the basic question whether an employer who intentionally treats persons differently on a prohibited basis violates antidiscrimination laws, regardless of what motivates that intent. Disparate treatment exists when an employer intentionally treats some people less favorably than others because of their group status. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978), International Bhd. of Teamsters, 431 U.S. 324 at 335, n. 15 (1977). Disparate treatment is precisely what the antidiscrimination provisions of IRCA sought to remedy provided that a prima facie case is established on behalf of the aggrieved individual. President's Statement, supra.
>
> See also Note, "Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986." 41 VAND. L.REV. 1323 (1988).

Marcel Watch, 1 OCAHO 143 at 13. See also Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1243 (7th Cir. 1992) ("[Complainants who allege disparate treatment discrimination] may assert that their employer's practice, while not necessarily intended, resulted in a significant disparate impact. . ."); Oxman v. WLS-TV, No. 84 C 4699 (N.D. Ill. Jan. 21, 1993), adopting decision of magistrate, 60 EPD ¶41,946 (Nov. 19, 1992).

Marcel Watch instructs that proof of intentional conduct which has a discriminatory result, but not intent to violate §1324b, is sufficient to establish a prima facie violation. Marcel Watch, 1 OCAHO 143 at 15; Jones v. DeWitt Nursing Home, 1 OCAHO 189 (6/29/90) at 15; U.S. v. Mr. Wash, 1 OCAHO 151 (4/6/90) at 10, 11 (§1324a employer sanctions case). Whether Nugent has satisfied the burden of establishing a violation is a different question.

C. Allocation of Burdens under 8 U.S.C. §1324b

(1) Respondent's Burden of Proof Analysis

ADT's argument on brief that the burden of persuasion remains at all times with the discriminatee is unremarkable. However, ADT's implicit argument that the burden of going forward remains at all times with the complainant, is not accurate. Resp. Brief at 2, 3. ADT's argument fails to acknowledge a respondent's burden in discrimination litigation. In contrast to the burden of persuasion, both parties bear the burden of production with respect to an allegation of knowing and intentional citizenship discrimination. Reciting the McDonnell Douglas/Burdine model, Marcel Watch states,

> To succeed in any Title VII employment action a complainant must (1) establish a prima facie case that a discriminatory act occurred, and (2) meet the evidentiary burden, i.e., burden of persuasion, that allows a court to find the alleged discriminatory act unlawful. The basic allocation of proof in disparate treatment cases is established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The same burden exists for complaints filed under Section 102 of IRCA. See, e.g., Mesa Airlines [1 OCAHO 74].

Marcel Watch, 1 OCAHO 143 at 13; U.S. v. Sargetis, 3 OCAHO 407 (3/5/92) at 26; Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (2/26/92) at 7.

As first applied in Mesa Airlines, 1 OCAHO 74 at 41, the disparate treatment analysis of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5(k)(1964) underpins IRCA §102 discrimination analysis. The McDonnell Douglas Corp./Burdine model instructs as to the proper allocation of the burden of proof between parties in disparate treatment discrimination cases.

The Burdine court summarized the basic allocation of burdens and orders of presentation of proof, as originally set out in McDonnell Douglas.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [McDonnell Douglas Corp. v. Green, 411 U.S.] at 802. . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804.

Burdine, 450 U.S. at 248; Wilson v. Stroh Companies, Inc., 952 F.2d 942, 945 (6th Cir. 1992); Brownlee v. Chrysler Motors Corp., No. 89-CV-72108-DT (E.D. Mich. Mar. 29, 1991). See also Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("the method suggested in McDonnell Douglas . . . is merely a sensible, orderly way to evaluate

the evidence in light of common experience as it bears on the critical question of discrimination."); United States Postal Service Board of Governors v. Aikens, 460 U.S. 709 (1983).

Respondent fails to acknowledge the teaching of Burdine. In contrast to the burden of persuasion, both parties bear the burden of production vis a vis an allegation of knowing and intentional citizenship discrimination.

(2) Complainant's Traditional Prima Facie Burden

The McDonnell Douglas Court enumerated the elements of Complainant's prima facie hurdle.

To meet the initial burden of establishing a prima facie case, a complainant must show:

> (i) that he belongs to a protected class, (ii) that he applied and was qualified for a job for 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 em-ployer continued to seek applicants from persons of complainant's qualifications. . . .

McDonnell Douglas Corp., 411 U.S. at 802; Brownlee, Civil Action No. 89-CV-72108-DT.

The Court later explained the rationale behind its prima facie methodology.

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Furnco Const. Corp., 438 U.S. at 577.

(3) A Complainant's Prima Facie Burden in the Context of Discharge and Reduction in Force

Courts have adapted the seminal McDonnell Douglas formulation to discriminatory discharge allegations and reduction in force (RIF) defenses.

(a) Discharge

The Sixth Circuit has adopted the following modifications in applying the Supreme Court standards to discharges under Title VII.

> A plaintiff must show "[1] that he is a member of a class entitled to the protection of the Civil Rights Act, [2] that he was discharged without valid cause, and [3] that the employer continued to solicit application for the vacant position." [Potter v. Goodwill Industries, 518 F.2d 864], 865 [(6th Cir. 1975)].

Shah v. General Electric Co., 816 F.2d 264, 268 (6th Cir. 1987); Brownlee, Civil Action No. 89-CV-72108-DT.

Explaining discharge discrimination standards, the Shah court continued that the

> essence of a disparate treatment case is that "the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters, 431 U.S. at 335 n. 15 . . . Accordingly, "individual disparate treatment . . . cases generally require comparative evidence demonstrating that the treatment of the plaintiff differs from that accorded to otherwise 'similarly situated' individuals who are not within the plaintiff's protected group." B. Schlei & P. Grossman, supra, at 1291 (2d ed. 1983).

Shah, 816 F.2d at 268. (emphasis added).

In analyzing an Age Discrimination in Employment Act (ADEA) discharge complaint, the Seventh Circuit has developed an instructive second branch of the prima facie formulation. Its version of a discriminatory discharge formulation is, in effect, that "they were doing their jobs well enough to meet their employer's legitimate expectations." Fisher, 979 F.2d at 1243; Oxman, 846 F.2d at 453-5.

An employer has broad discretion in defining expectations of employ-ees' performance. Absent an illegality, an employee must acquiesce in those expectations, rather than misperceive them as discriminatory.

> The employee doesn't get to write his own job description. An employer can set whatever performance standards he wants, provided they are not a mask for discrimination on forbidden grounds such as race or age.

Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989).

Furthermore, it is not the judge's role to second guess employer decisions. As well stated by the Seventh Circuit,

> The business of business, and the sole concern of business is profit. And the law does not judge the wisdom of a company's business decision, unless a forbidden motive is present . . . [C]ourts do not sit as a super-personnel department that re-examines [employer] decisions. [Cite omitted.] No matter how medieval an employer's practices, no matter how highhanded its decisional process, no matter how mistaken its managers. . . .

Oxman, 60 EPD ¶41,946.

(b) Reductions in Force

• RIF Complainant Carries Greater Burden

Modifying the McDonnell Douglas prima facie model in a RIF, the Sixth Circuit held,

> When work force reductions by the employer are a factor in the decision, "the most common legitimate reasons" for the discharge are the work force reductions. By showing the other elements of a McDonnell Douglas case, a plaintiff has not presented any evidence indicating that the work force reductions are not the reasons for the discharge and therefore does not make out a prima facie case absent additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons. La Grant v. Gulf and Western Mfg. Co., 748 F.2d 1087, 1090 (6th Cir. 1984) ("[t]he mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case of age discrimination"); McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073 (6th Cir. 1989); Sahadi v. Reynolds Chemical, 636 F.2d 1116, 1118 (6th Cir. 1980).

Barnes v. Gencorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). See also Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 517 (6th Cir. 1991) ("a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons."); Ridenour v. Lawson Co., 791 F.2d 52, 57 (6th Cir. 1986); (under ADEA, a "plaintiff who has been terminated amidst a corporate reorganization carries a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons"); Brownlee, Civil Action No. 89-CV-72108-DT at 11 ("cases involving work force reductions impose a higher evidentiary burden upon the plaintiff.").

• RIF Complainant Must Show Replacement

In the RIF context the Sixth Circuit, among others, requires that a prevailing putative discriminatee show that he has been either actually or constructively replaced by an individual not in the protected class at issue.[2] In an ADEA case, the Sixth Circuit held that,

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[2] Some circuits do not require that a complainant show replacement by an unprotected individual. See e.g. McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980).

[w]hen there is a corporate reorganization or reduction in forces, a prima facie case is not established when plaintiff does not show that he was replaced by a younger person.

La Grant v. Gulf & Western Mfg. Co., Inc., 748 F.2d 1087, 1090 (6th Cir. 1984).

The Sixth Circuit has reasoned that replacement undermines an employer's RIF defense, i.e., that there was no genuine RIF. Barnes, 896 F.2d at 1465; Sahadi, 636 F.2d at 1116; Kesselring v. United Technologies Corp., 753 F. Supp. 1359, 1364 (S.D. Ohio 1991).

A complainant can supply evidence of discrimination in a RIF context by showing that non-protected employees with comparable records, i.e., similarly situated employees, were not terminated and therefore essentially replaced the putative discriminatee. Hughes v. Chesapeake & Potomac Telephone Co., 583 F. Supp. 66, 69 (D.DC 1983). Such evidence must include a showing that these non-protected employees were "performing [complainant's] specific job." Kesselring, 753 F. Supp. at 1367. However, in a situation where a job within a department was initially consolidated and the department was subsequently eliminated altogether, it has been held that no replacement and therefore no discrimination took place. Tye v. Bd. of Education of the Polaris Joint Vocational School Dist., 811 F.2d 315 (6th Cir. 1987).

In the Sixth Circuit a showing that complainant was replaced by an unprotected individual is simply a prerequisite for making out a prima facie case. Such a showing alone does not make out a prima facie case. In a RIF context, the plaintiff must not only prove that he fell within the protected class, that he was terminated and that he was replaced by an individual [not within the protected class] but he must also come forward with additional direct, circumstantial, or statistical evidence. La Grant, 748 F.2d at 1090, 91. See also Barnes, 896 F.2d at 1471; Sahadi, 636 F.2d at 1117, 18; Kesselring, 753 F. Supp. at 1364; Oxman, 846 F.2d at 454.

D. Nugent's Prima Facie Case

(1) The Standards for a Discharge Case Applied

• Complainant's Protected Class Status

As a permanent resident alien, Nugent is a member of the class protected under IRCA.

• Validity of Discharge

The parties informally stipulated as to Complainant's academic and professional background. In contrast, their perceptions of the employer's legitimate expectations and Nugent's performance of those expectations differ. Respondent entertained at least two discreet employment expectations for Complainant.

Respondent discharged Complainant because, inter alia, he failed to live up to its fluid flow work performance expectations, as expressed in Nugent's visa paperwork. Due to Nugent's unsatisfactory execution of a fluid flow assignment early in his tenure, Respondent refrained from making similar subsequent assignments. Instead Respondent directed fluid flow work to Jyh-Haw Tang, who was hired after Nugent. Respondent's dissatisfaction with Complainant's fluid flow skills did not alone motivate a discharge. However, this early disappointment formed part of Respondent's cumulative negative perception of Nugent's professional performance.

Respondent also asserts that it discharged Complainant because he lacked engineering flexibility, particularly in light of its downturn in business. Due to Respondent's small staff, Respondent expects engineers to fulfill a variety of functions. They must be able to model, analyze and perform corollary duties, such as computer maintenance. As several witnesses testified, Complainant's sole professional proficiency was modeling and he was unable and/or unwilling to take on any other duties.

Because of Nugent's professional and attitudinal limitations and a decline in business, Complainant was substantially idle during the months of July and August, 1991. The four individuals allegedly unlawfully preferred by Respondent were professionally superior to Complainant.

I hold that Respondent was well within its legitimate business discretion to expect analytic skills and professional flexibility from its engineering staff. Palucki, 879 F.2d at 1571. For the reasons discussed in III.B. and IV.D.(1), supra, I conclude that Complainant did not meet his employer's standard.

I apply the Sixth Circuit's comparative prima facie analysis to the case at bar. Shah, 816 F.2d at 268; Brownlee, Civil Action No. 89-CV-72108-DT. This case turns on whether Nugent was treated differently from individuals he claims were similarly situated for purposes of work assignment, but who were not within Nugent's

protected class. Complainant argues that the appropriate comparison is between himself and the four H-1 workers who were not discharged. I grant Complainant's assertion that the H-1 employees were not members of Complainant's protected class. 8 U.S.C. §1324b(a)(3). However, I hold that Complainant and the H-1 employees were not similarly situated for purposes of work assignment. Academic credentials do not establish parity. Despite the fact that all five had substantially identical academic credentials, Complainant's professional skills and work habits were inferior to those of the H-1 employees.[3] Nugent and the H-1 workers were not similarly situated. Accordingly, I cannot infer that Respondent's reason for treating Complainant differently, i.e., discharging him, was discriminatorily motivated. La Grant, 748 F.2d at 1091.

Despite Respondent's failure to present contemporaneous personnel evaluations indicating that Respondent had given notice of or memorialized its dissatisfaction in writing, it is clear that ADT's dissatisfaction with Complainant was pervasive. Complainant's pretrial reliance on ADT's labor certification filings, provides him no support. The putative failure of an employer to comply with the undertakings in its labor certification filings is not determinative of a discrimination complaint.

I hold that Respondent had legitimate nondiscriminatory reasons for discharging Complainant and that Complainant's discharge was valid. Although Complainant is a protected individual under §1324b, there is no semblance of citizenship discrimination in this record. Even if this record supported a conclusion that Nugent was treated unfairly by ADT, there is no evidence to establish that he was discriminated against on the basis of citizenship. The evidence fails to support a reasonable inference that he was discharged because of his citizenship status. Sahadi, 636 F.2d at 1116. The evidence "must be sufficiently probative to allow a fact finder to believe that the employer intentionally discriminated" against the complainant for for the reason alleged. Barnes, 896 F.2d at 1466. Complainant failed to sustain that burden. Therefore, I find for the Respondent.

(2) Remaining Prima Facie Issues

[3] As previously discussed, supra, §III. B. (2), in addition to modeling, Narasimhaih, Lai, Mei Tang and Joshi also performed structural analysis and computer maintenance duties.

I have found that Complainant's prima facie case failed. Therefore it is unnecessary to resolve remaining issues, e.g. whether the employer continued solicitation for Complainant's position and whether Nugent's discharge was effectuated during a general reduction in force.

I do not make a finding regarding Respondent's claim that Complainant's discharge was part of a RIF. Despite Respondent's evidence that its professional staff shrank from 21 in January 1990 to 9 in November 1991, it could be argued that Respondent replaced Complainant. ADT hired an engineer within less than two weeks after Nugent's discharge. There is also evidence that when Lai left in October, 1992, he was replaced by Wong. ADT could argue, however, that even if it was not engaged in a literal reduction in force, it laid off a number of its employees without replacing them. Therefore, its circumstances were comparable to a reduction in force. Oxman v. WLS-TV, 641 F. Supp. 652, 653 (N.D. Ill. 1986).

If I were to make a finding that ADT was in a RIF modality at the time of Nugent's discharge, his case certainly would fail. Complainant's failure to prevail under the relatively lenient evidentiary standards of the discharge model, bars him from prevailing under the more stringent RIF standards.

E. The Other Prongs of the McDonnell Douglas/Burdine Test Applied to Nugent

Because Complainant did not establish a prima facie case, the burden of production never shifted to Respondent under the second prong of McDonnell Douglas/Burdine. In any event, Respondent has met its burden of production. Respondent has amply demonstrated that its discharge decision was based on legitimate, non-discriminatory reasons.

Complainant's claim never matures to consideration under the third prong of the McDonnell Douglas/Burdine model. Complainant failed to show that Respondent's proffered reasons for termination were pretextual.

Complainant has clearly failed to sustain his burden of proof at each analytic level. He has not shown by a preponderance of the evidence that he was the victim of citizenship status discrimination by ADT.

G. Attorney's Fees

Respondent has requested recovery of attorney's fees against Complainant. 8 U.S.C. §1324b(h) authorizes fee shifting within the discretion of the administrative law judge. As applied in this case, fee shifting pursuant to subsection (h) requires findings in favor of Respondent on both of the following factors:

(1) that ADT is the "prevailing party" in this litigation and
(2) that the "losing party's [Nugent's] argument is without reasonable foundation in law and fact."

8 U.S.C. 1324b(h).

A finding in favor of Respondent on both of those factors would necessitate inquiry into attorney's time expended and related fee and expense data. 28 C.F.R. §68.52 (c)(2)(v). However, no further inquiry is required because only one of the two factors is found in Respondent's favor.

(1) ADT is the Prevailing Party

ADT is a prevailing party within the meaning of subsection (h). In a seminal case applying an analogous prevailing party factor under the Voting Rights Act, the Court of Appeals for the D.C. Circuit has ruled that a party prevails if it has:

[1] substantially received the relief it sought and . . .

[2] the law suit itself . . . [is] a catalytic, necessary or substantial factor in attaining the relief.

Commissioner Court of Medina Cnty. Tex. v. United States, 683 F.2d 435, 440 (D.C. Cir. 1982).

The courts have applied the Medina standards to cases arising under both the Voting Rights Act and the Equal Access to Justice Act (EAJA). Andrew v. Bowen, 837 F.2d 875, 877 (9th Cir. 1988) (". . . the party seeking to establish 'prevailing party' status must demonstrate that: (1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiff's claim."); Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986); Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (a prevailing party must prevail on the central issue). ADT is the prevailing party because it has received all the relief it sought, thereby satisfying the first strand of Medina.

The second strand of Medina requires a strong causal link between a party's receipt of relief and the role of that litigation victory in attaining the relief. ADT's successful defense relieves it from any legal obligation toward the Complainant, thus fulfilling the causal link requirement.

ADT has met the prevailing party standard. Accordingly, I hold that Respondent is properly characterized as the prevailing party for the purpose of determining the collateral issue of attorney's fees.

(2) Complainant's Arguments Were Not Without Reasonable Foundation in Law and Fact

(a) Relevant EAJA and Title VII Jurisprudence

The finding that a party has prevailed does not necessarily entitle that party to an award. For example, under EAJA, the Court of Appeals for the First Circuit has held that the losing party "is not liable merely because it lost." United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985).

Under 8 U.S.C. §1324b(h) the prevailing party obtains the benefit of fee shifting only upon a finding that the arguments of the opposing party were without reasonable foundation in law and fact. 8 U.S.C. §1324b(h); Jones, 1 OCAHO 189 at 25-29. An objective standard is used to determine the legitimacy of the arguments made by the losing party.

Parameters for IRCA's reasonable foundation standard are informed by EAJA case law, even though the IRCA terminology "without reasonable foundation" does not appear in EAJA. The EAJA formulation of the parallel test is "substantial justification"; at least twelve circuits have construed that formulation to be a reasonableness test. Yoffe, 775 F.2d at 449. The EAJA standard, as applied by the courts, approximates IRCA's subsection 1324(h) reasonableness standard.

EAJA jurisprudence has developed a middle of the road framework for assessing attorney's fees. Fees are neither awarded automatically to every prevailing party, nor are they awarded only when the losing party's position is frivolous. Yoffe, 775 F.2d at 450. Fee shifting was granted against the party deemed to have prosecuted a case "wholly without merit." Andrew, 837 F.2d at 875. Fee shifting was denied where a party failed to anticipate the weakness of its case, because inter alia it misjudged the credibility of a key witness. Temp. Tech. Industries, Inc. v. N.L.R.B., 756 F.2d 586 (7th Cir. 1985).

Title VII of the Civil Rights Act also illuminates the reasonableness test for fee shifting. Under Title VII, the Supreme Court has held that

> . . . a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). See also Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989); Marshall v. Nelson Electric, A Unit of General Signal, 766 F. Supp. 1018, 1042 (N.D. Okla. 1991) (attorney's fees not shifted where the action was not frivolous, unreasonable or without foundation.)

Title VII case law is instructive,

> [a] finding that an action is frivolous, unreasonable, or without foundation cannot result solely because the plaintiff did not prevail on the action. [Cite omitted.] Since the results of many lawsuits are not predictable, plaintiffs are not to be discouraged from bringing an action just because it is less than airtight.

E.E.O.C. v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1385 (W.D.N.C. 1991).

(b) Complaint Was Not Unreasonable

In the case at bar, Respondent does not allege that Nugent acted in bad faith. It fails to show that the case was frivolous or unreasonable. Cf. Jones, 1 OCAHO 189 at 28 (awarding attorney's fees where the party requesting them had prevailed and because the party opposing them had made arguments held to be "without foundation in law and fact.") Even though Nugent did not make out a prima facie case and, therefore, has not prevailed in any portion of this case, legitimate issues were ventilated throughout the pleading stage and during the evidentiary hearing. Applying the relevant IRCA, and cognate EAJA and Title VII case law, I am unable to conclude that Complainant's arguments lacked a reasonable foundation in fact and law. Accordingly, I deny Respondent's motion for attorney's fees. Accord Salazar-Castro, 3 OCAHO 406 at 11-14; Salerno v. ICL Retail Systems, Inc., 4 OCAHO 481 at 12.

V. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings, testimony, evidence, memoranda, briefs and arguments submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in

addition to the findings and conclusions already stated, I find and conclude that Complainant has failed to prove discrimination based on his citizenship status. However, I reiterate the finding that a protected individual is no less covered by §1324b when the individuals allegedly preferred are non-citizens than when they are citizens. Upon the basis of the whole record, consisting of the evidentiary record and the pleadings of the parties, I am unable to conclude that a state of facts has been demonstrated by Complainant sufficient to satisfy the preponderance of the evidence standard of 8 U.S.C. §1324b(g)(2)(A). I find and conclude that Respondent has not engaged and is not engaging in the unfair immigration-related employment practice alleged and within the jurisdiction of this Office, i.e, citizenship based discrimination. Accordingly, the complaint is dismissed. 8 U.S.C. §1324b(g)(3).

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative order in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. §-1324b(i).

SO ORDERED.

Dated and entered this 18th day of February, 1993.

MARVIN H. MORSE
Administrative Law Judge