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

KRZYSZTOF ZARAZINSKI, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00152
ANGLO FABRICS CO., INC. Respondent.	)	

AMENDED DECISION AND ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, ENTERING PARTIAL SUMMARY DECISION SUA SPONTE IN FAVOR OF RESPONDENT AND DISMISSING IN PART THE COMPLAINT

I. *Introduction & Procedural History*

Complainant, Krzysztof Zarazinski, a naturalized U.S. citizen who was born in Poland, filed the complaint in this case against Anglo-Fabrics Co., Inc. ("Anglo Fabrics" of "Respondent"), alleging that Respondent refused to rehire him as a floorman because of his national origin and citizenship status and that Respondent retaliated against him for filing this complaint, in violation of 8 U.S.C. § 1324b. I have jurisdiction over this matter pursuant to 8 U.S.C. § 1324b and 28 C.F.R. § 68.28.

On December 23, 1991, Complainant initiated the proceedings in this case by filing a written charge with the Office of the Special Counsel for Unfair Immigration-Related Employment Practices ("OSC"), in which he alleges that Anglo Fabrics discriminated against him based on his national origin and citizenship status.[1]

[1] On the charge form for § 1324b charges filed with OSC, paragraph 9 states "Describe the Unfair Employment Practice . . . ." In that space, Complainant wrote "see copy of letter attached, dated October 28, 1991 from Walter R. Snyder, Jr., Esq. as addressed to (continued...)

In a letter dated February 19, 1992, OSC notified Complainant that based on its investigation, it had determined that there was "insufficient evidence of reasonable cause to believe [Zarazinski was] discriminated against as prohibited by 8 U.S.C. § 1324b." OSC thus informed Complainant that it would not file a complaint before an administrative law judge ("ALJ") based on his charge.

Pursuing his right to bring a private action under 8 U.S.C. § 1324b(d)(2), Zarazinski filed a pro se complaint on July 20, 1992, alleging that Respondent knowingly and intentionally failed to rehire him in July 1991 for the job of floorman because of his citizenship status and national origin, in violation of 8 U.S.C. § 1324b(a)(1)(A) and (a)(1)(B) and further alleges that Respondent intimidated, threatened, coerced or retaliated against him by telling him not to file the complaint in this case, in violation of 8 U.S.C. § 1324b(a)(5).

Also, Complainant attached a letter to the complaint, explaining the reasons he believes he was not rehired, in which he states:

> I was employed [by Anglo Fabrics] for four years until I suffered a work-related accident. I then was laid off for "lack of work" and haven't been called back, although others, particularly non-U.S. citizens have been given positions. Others who were also laid off at the same time as I was have been called back and people who have just recently entered the country have been granted positions at Anglo Fabrics while I am still unemployed.

In view of Complainant's pro se status and the indication by Respondent's counsel that he did not intend to file a motion for summary decision, I issued an order on November 6, 1992, informing the parties that an ALJ may enter summary decision sua sponte in favor of a party that has not requested it when the adverse party has been given adequate notice that summary decision may be imposed against it. See infra part III(A)(3)(B). I therefore directed both parties to respond to a number of interrogatories to determine whether the undisputed material facts supported a summary decision.

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[1](...continued)
U.S. Department of Labor. That exhibit, however, inadvertently was not filed with this office until October 27, 1993, when OSC, pursuant to my request, sent a facsimile to this office. In that letter, Snyder, apparently representing Complainant at the time, stated that: ". . . Zarazinski, is personally aware that illegal aliens with questionable Social Security Numbers are being employed as part of [Anglo Fabrics'] work force and represent the actual reason for discriminating against him in the matter of his [failure to be rehired] by Anglo Fabrics." At that time in this proceeding, the basis for Complainant's citizenship status claim was not clear.

The parties filed timely responses. See Complainant's Answers to ALJ's Interrogatories ("Compl.'s Answers to ALJ's Interrogs."); Respondent's Memorandum of Law ("Resp.'s Mem. of Law") and the Affidavit of Respondent's counsel, Perry S. Heidecker ("Heidecker Aff.") with exhibits. In addition, in response to my orders of June 9, 1993 and September 21, 1993, Respondent filed the affidavits of Anglo Fabrics Superintendent, Edwin Bruell, ("Bruell Aff.") and Anglo Fabrics Personnel Manager, Sally Antos ("Antos Aff.") and Complainant filed a response to Respondent's version of the facts ("Compl.'s Version of Facts"). I also issued an order on February 18, 1994, directing the Complainant to respond to interrogatories, to which he timely filed a response.[2] See Complainant's Answers to ALJ's Second Set of Interrogatories ("Compl.'s Answers to ALJ's Interrogs.2").

On April 18, 1994, I issued an Order Directing Complainant to Submit Evidence Regarding His Claim of Threat in Violation of IRCA by April 25, 1994. On April 28, 1994, my office staff telephoned Complainant to find out whether he had mailed a response to that order. On May 2, 1994, Complainant filed a letter in which he apologized for his untimely response, asserting that "English reading comprehension is not one of [his] strong points and legal jargon is beyond [his] ability" and that not until my office staff explained to him in layman's terms the directives of my Order of April 18, 1994 did he understand what he was directed to do ("Compl.'s Letter"). Complainant asserts in this letter that

> Maria Rucinska and Jadwiga Kaminska worked in the same department as I. One of my 'not mentioned' duties was to act in the capacity of an interpreter in that department since I was the only one there who was able to speak both Polish and English. Maria Rucinska and Jadwiga Kaminska both admitted to me that they were illegal (sic) aliens.

Zarazinski also requests in his letter that I issue a court order so that "Boston Immigration Office and their agents can investigate Anglo Fabrics Co. Inc." Attached to the letter as an exhibit is a copy of Maria Rucinska's pay stub.

For the reasons set forth below, partial summary decision will be entered sua sponte in favor of Respondent on the allegations of

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[2] Although I also directed Respondent to respond to one interrogatory, Respondent never received that order because this office inadvertently sent it to the wrong address. As the interrogatory merely requested Respondent's correct name (as variations on the name "Anglo Fabrics" had been used throughout the proceeding), in lieu of reissuing that order, my staff telephonically requested and received that information from Respondent's counsel).

national origin and citizenship status discrimination and those portions of the complaint will be dismissed.

II. *Statement of Facts*

Krzysztof Zarazinski was born in Poland and immigrated to the United States on April 12, 1960. He became a naturalized citizen on December 13, 1972. Compl.'s Ans. to ALJ's Interrogs. at para. 1.

Anglo Fabrics is engaged in the sale and manufacture of fine woolen and worsted fabrics. Heidecker Aff. para. 3. It maintains offices and a manufacturing facility for these purposes in Webster, Massachusetts and has employed approximately 362 employees at all times relevant to the allegations in the complaint.[3] Id.

On April 10, 1988, Respondent hired Zarazinski as a "tacker operator" in the Wet Finish Department. The tacker operator is required to fold fabric with his hands while operating a stitching control device with his foot. Heidecker Aff. para. 4. The job requires physical coordination and dexterity to perform efficiently. Id. It is undisputed that Complainant was unable to operate the machine and was consequently terminated on April 13, 1988. See Heidecker Aff. para. 4; Bruell Aff. para. 4; Antos Aff. para. 3.

On May 31, 1988, Respondent rehired Zarazinski as a "filling carrier" in the weave room. Heidecker Aff. para. 4. A filling carrier is required to select the yarn which is to be spliced onto the end of the yarn bobbin which is already on the weaving loom. Id. After selecting the appropriate yarn, the filling carrier deposits the new bobbin next to the loom for the loom operator's use. Id. This job requires knowledge of the color and texture characteristics of the many different yarns used by Respondent. Id. According to Respondent, "Complainant was unable to make the proper yarn selections without constant assistance from his supervisors. As a result, he did not function effectively in the job, despite an extended learning period." Id. Zarazinski was laid off on September 16, 1988.[4]

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[3] In July 1991, when Complainant was laid-off from his job, Respondent employed approximately 362 employees, many of whom were of Polish descent, permanent resident aliens and naturalized citizens. Heidecker Aff. para. 2. Moreover, Respondent's three highest-ranking executives are naturalized U.S. citizens. Id.

[4] Complainant disputes that he was responsible for choosing the correct yarn. See Complainant's Version of Facts para. 2). He does not allege, however, that he was (continued...)

On September 26, 1988, Respondent rehired Zarazinski as a "material handler" in the Worsted Winding Department. Heidecker Aff. para. 4. The material handler moves yarn bobbins and rolls of finished fabric around the factory. Id. In addition, he does odd jobs, such as sweeping and helping truck drivers load and unload their cargo. Id. Zarazinski performed satisfactorily in this position, except for three disciplinary warnings for wearing sandals on the job instead of safety shoes as required.[5]

Zarazinski was laid off for lack of work on January 26, 1990. Heidecker Aff. para. 4. He was recalled on April 10, 1990 and again laid off for lack of work on July 9, 1990. Id. On August 14, 1990, Respondent recalled Zarazinski as a "material handler" in the Wool Winding Department. The duties of a material handler in the Wool Winding Department are generally similar to those of a material handler in the Worsted Winding Department, however, the Wool Winding Department is larger and has more machines and operators. Id. This has the effect of speeding up the material handler's job. Id. It is undisputed that because Zarazinski did not function effectively in this job, he was laid off on September 28, 1990. Id. [6]

On May 6, 1991, Respondent rehired Zarazinski as a "material handler" in the Worsted Winding Department. Heidecker Aff. para. 4. At about this time, the work mix in this department began to change. Id. Previously, Respondent had been called upon to produce worsted fabrics which contained yarn which had to be twisted. Id. The actual

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[4](...continued)
discharged from this job because of unlawful discrimination.

[5] Complainant does not dispute the fact that he wore improper shoes but contends that others who were not U.S. citizens were allowed to wear improper shoes. Compl.'s Version of Facts para. 3. It is difficult for me to understand why Respondent would want to distinguish between the safety of its citizen and non-citizen employees. As Complainant is still listed on Respondent's employment roster as laid off and subject to recall when an additional material handler is required in the Worsted Winding Department, Antos Aff. para. 10, however, I find this alleged difference in treatment to be irrelevant and immaterial to the charges in this case.

[6] Complainant states that on June 4, 1990, he was injured at work and was unable to work for two weeks. He states that he went back to work before his injury had completely healed but admits that he did not tell his employer about his physical disability because he needed the job. Compl.'s Version of Facts at para. 4. This injury may account for some of Complainant's poor work performance and supports Respondent's statement that Complainant did not satisfactorily perform his job as a material handler in the Wool Winding Department.

twisting of the yarn added an extra step to the production process. Id. This created a lot of additional work for the material handlers, who had to shuttle the material between work stations. Id. Subsequently, Respondent received orders for worsted fabrics which did not require twisted yarn. Id. It is undisputed that this eliminated the need for a material handler and that Zarazinski therefore was laid off on July 8, 1991. To date, Anglo Fabrics has not received significant orders for the variety of worsted fabric which requires twisted yarn. Id.

After Zarazinski was laid off from work in July 1991, he would periodically call or visit Respondent's personnel manager, Sally Antos, to inquire about the availability of employment. Antos Aff. para. 5; Heidecker Aff. para. 5; Bruell Aff. para. 7. Antos told Zarazinski that he did not need to file a formal written application for work but to collect his unemployment benefits and that she would call once a suitable job opened up at the company. Antos Aff. para. 6. On some of these occasions, Edwin Bruell, the Superintendent of Anglo Fabrics, would assist Antos because Bruell spoke Polish, Zarazinski's native language, as well as fluent English. Bruell Aff. para. 7.

On one occasion, Complainant complained to Bruell that someone else had been hired to fill a material handler position in another department while Zarazinski remained laid off. Bruell Aff. para. 8. Bruell reminded Complainant that "he had once attempted to perform [that] job without success but that if a material handler position opened up in the Worsted Winding Department, he would be recalled." Id. Bruell also states that on another occasion, Zarazinski told him that he did not want to sue the company but "wanted to settle his complaint then and there." Bruell Aff. para. 9. Bruell states that at that time, Bruell was aware that some legal action had been initiated and told Zarazinski that he did not "feel comfortable" discussing the matter with him because "it is in the hands of the lawyers." Bruell Aff. para. 10. Bruellfurther states that he told Zarazinski that "if and when a suitable position became available he was still on the list for recall." Bruell Aff. para. 10.

Complainant states that he was not given any reason why Respondent did not or could not hire him. According to Complainant, at some point after he was laid off from work, he spoke to Antos and Bruell about his knowledge of individuals who neither had work permits authorizing them to work in the U.S. nor Social Security numbers, but were "working and being hired to work" at Anglo Fabrics. Compl.'s Ans. to ALJ's Interrogs. at para. 5. Complainant contends that when he questioned the ethics of this type of hiring, Bruell told

him that he did not care. Id. Complainant states that he later had a telephone conversation with Bruell, which Zarazinski contends was in both English and Polish (see Compl.'s Ans. to ALJ's Interrogs.2, at para. 1(d)) and that Zarazinski told Bruell that he was going to file a complaint in Washington against Respondent.[7] According to Complainant, Bruell responded by saying "I'm going to wipe your nose."[8] Compl.'s Ans. to ALJ's Interrogs. at para. 6. Complainant asserts that he next stated that there was no sense in talking to Bruell anymore and hung up the phone. Compl.'s Ans. to ALJ's Interrogs. at para. 6. Bruell denies that he ever told Complainant that he would "wipe [Complainant's] nose" if he filed a complaint against the company." Bruell Aff. paras. 3, 12.

As of December 9, 1993, Respondent had not received any significant orders for the variety of worsted fabrics that requires twisted yarn. Zarazinski is still listed on Respondent's employment roster as laid off and subject to recall when an additional material handler is required in the Worsted Winding Department. Antos Aff. para. 10. Respondent states that Zarazinski has not been rehired or recalled because the company has not had any need for an additional material handler in

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[7] Complainant states that "[he] cannot recall or approximate the date when [he] phoned Mr. Bruell." Compl.'s Answers to ALJ's Interrogs.2, para. 1(a).

[8] In his complaint, Complainant, in explaining how someone had "intimidated, threatened, coerced or retaliated against" him because he planned to file a complaint, stated "Anglo told me not to file this complaint." Compl. para. 14(a). Complainant asserts that even though there was room on the form in which to elaborate, he did not feel that he needed to do so. Compl.'s Answers to ALJ's Interrogs.2, para. 1(e). In a subsequent response to interrogatories which I issued, Complainant states that "[he] thought that Mr. Bruell's statement of 'wiping my nose' meant don't do anything against us or I'll get even with you." Compl.'s Answers to ALJ's Interrogs.2, para. 1(b). Zarazinski further asserts that after Bruell made the alleged statement to him, "[Zarazinski] felt upset, and intimidated." Id. at para. 1(c).

Complainant has submitted a letter dated June 9, 1992 that he received from the Volunteer Lawyers Service of Legal Assistance Corporation of Central Massachusetts, which indicates that Complainant contacted an attorney of that office regarding the pending case and that the office was not able to provide him with pro bono representation. See Compl.'s Answers to ALJ's Interrogs.2, Ex. 1. Complainant submitted that letter in response to my interrogatory asking him if prior to November 30, 1992 (when Complainant for the first time filed a written statement asserting specific facts indicating that Respondent may have threatened Complainant in violation of 8 U.S.C. § 1324b(a)(5)), Complainant had made such specific allegations to any other person or entity. Complainant thus contends that this letter supports his contention that he made such assertions.

the Worsted Winding Department.[9] Heidecker Aff. paras. 6, 12; Antos Aff. para. 4.

Respondent asserts that it is an equal opportunity employer and has a company policy which states that "[c]onsideration of age, gender, race, creed, color, national origin, religion, sexual preference or orientation, handicap or military or marital status is not tolerated in employment-related decisions at any level." Heidecker Aff. para. 2. Respondent further asserts that its actions in not rehiring or recalling Complainant have been "motivated by bona fide and nondiscriminatory business concerns: ability to perform and the availability of work." Heidecker Aff. para. 6.

III. *Discussion*

A. Respondent's Motion to Dismiss Complainant's Claim of Citizenship Status Discrimination for Failure to State a Claim is Denied

1. Respondent's Arguments

Respondent argues that "discrimination on account of status as a naturalized citizen does not amount to unlawful discrimination because of either citizenship status or national origin . . . ." Resp.'s Mem. of Law at 3. More specifically, Respondent argues that:

> [t]he "citizenship status" prohibitions of IRCA concern only the distinction between U.S. citizens and aliens. . . . [A]ll available evidence suggests that Congress, while contemplating the passage of IRCA into law, feared widespread discrimination on account of alienage and attempted to deal with that specific problem and that problem only.

Resp.'s Mem. of Law at 4.

Respondent further asserts that:

> [t]he argument concerning "national origin" discrimination is more subtle. It can be argued that all naturalized U.S. citizens were born outside of the United States. Therefore, according to this logic, discrimination because of status as a naturalized citizen equates to discrimination because of national origin. However, this is the very same argument which was considered, and rejected, by the Supreme Court in Espinoza. Therefore, it has been held that discrimination because of status as a naturalized citizen does not amount to discrimination because of "national origin."

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[9] According to Respondent, this was the only position which Zarazinski was able to perform satisfactorily. Heidecker Aff. paras. 6, 11; Antos Aff. para. 3.

Id. (citation omitted).[10]

2. Legal Standard

I construe Respondent's arguments as a motion to dismiss Complainants' citizenship status discrimination claim for failure to state a claim upon which relief can be granted. The rules of practice and procedure governing these proceedings provide that:

> [t]he respondent, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the [ALJ] determines that the complainant has failed to state such a claim, the [ALJ] may dismiss the complaint.

28 C.F.R. § 68.10.

A motion to dismiss for failure to state a claim is akin to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The issue is not whether the plaintiff will ultimately prevail, but whether it is entitled to offer evidence to support its claims. Id. It is well established in the federal courts that a complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Thus, a court will not dismiss the complaint merely because the plaintiff's allegations do not support the particular legal theory it advances, as the court is under a duty to examine the complaint to determine if the allegations provide a basis for relief under any possible theory. Scheuer, 416 U.S. at 236.

3. Analysis

Respondent asserts that Congress "feared widespread discrimination on account of alienage" in response to the passage of section 101 of IRCA, the statute's employer sanctions provisions, and argues that section 102 of IRCA, 8 U.S.C. § 1324b is an "attempt[] to deal with that

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[10] Respondent misconstrues Espinoza, in which the Supreme Court held that the plaintiff had failed to state a Title VII claim where most of the employer's workforce was Mexican-born U.S. citizens and the employer rejected the plaintiff, a Mexican-born non-U.S. citizen as this did not constitute national origin discrimination, but discrimination based on alienage or citizenship status, which is not covered by Title VII.

specific problem and that problem only." Resp.'s Mem. of Law at 4. Thus, Respondent argues that Complainant, as a naturalized citizen, is not protected under IRCA against citizenship status discrimination and therefore his claim of citizenship status discrimination must be dismissed.

In resolving this issue, my objective is "to ascertain the congressional intent and to give effect to the legislative will." Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975). To determine the congressional intent behind a statutory section, one first looks to the statutory language itself. Blum v. Stenson, 465 U.S. 886, 898, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984).

a. The Plain Meaning of the Statute

Section 102 of IRCA provides in pertinent part that

> [i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring . . . of the individual for employment . . . 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 amended by Immigration Act of 1990, Pub. L. No. 101-649, section 533(a).[11]

The statute defines "protected individual" as an individual who--(A) is a citizen or national of the United States, or (B) is an alien who is lawfully admitted for permanent residence, . . . temporary residence[,] . . . refugee . . ., or is granted asylum . . . ." subject to certain exclusions. 8 U.S.C. § 1324b(a)(3). As a naturalized citizen clearly is a citizen of the United States, 8 U.S.C. §§ 1324b(a)(1)(B) and (a)(3) establish that it is an unfair immigration-related employment practice to discriminate based on citizenship status against a naturalized citizen.

b. The Legislative History

Although IRCA's purpose was to combat discrimination based on a person's "immigration (non-citizen) status," H.R. Rep. No. 682, Part 2, 99th Cong., 2d Sess., 13 (1986), "[t]he bill also makes clear that U.S. citizens can challenge discriminatory hiring practices based on citizen

[11] The amendments to IRCA which were enacted in 1990, among other things, substituted the phrase "protected individual" for citizen or intending citizen.

or non-citizen status." H.R. Rep. No. 682, Part 1 at 70.[12] See also Roginsky v. Department of Defense, 3 OCAHO 415, at 1 (March 8, 1991) (Second Prehearing Conference Report and Order) (holding that the "alleged discrimination is based on and implicates Complainant's citizenship status not his Soviet national origin" where a U.S. citizen who was born in the then-Soviet Union, filed a complaint against the Department of Defense, alleging, among other things, that Respondent had discriminated against him in violation of 8 U.S.C. § 1324b by applying a regulation to him which selectively denied security clearances to naturalized citizens from "designated" countries based on duration of U.S. citizenship or residence in the United States.

As the plain meaning of the statute and IRCA's legislative history both indicate that it is an unfair immigration-related employment practice for an employer to discriminate against a naturalized citizen based on that individual's citizenship status, I conclude that Complainant, by alleging citizenship status discrimination by Anglo Fabrics has stated a cause of action under 8 U.S.C. § 1324b. Respondent's motion to dismiss that allegation for failure to state a claim is therefore denied.

B. Summary Decision for Respondent on Allegations of National Origin & Citizenship Status Discrimination

1. Legal Standards

[12] Furthermore, OCAHO case law has recognized that both native-born and naturalized citizens have standing to file citizenship status discrimination complaints under IRCA. See, e.g., General Dynamics, 3 OCAHO 517, at 20 (May 6, 1993) (asserting that the individuals against whom the respondent allegedly discriminated, as U.S. citizens, were protected against citizenship status discrimination); United States v. McDonnell Douglas Corp., 2 OCAHO 351, at 9 (July 2, 1991) (stating that section 102 of IRCA protects native-born American citizens despite the fact that they were not the Act's primary target for protection); Jones v. DeWitt Nursing Home, 1 OCAHO 189 (June 29, 1990) (granting relief to a United States citizen who was neither foreign-looking nor foreign-sounding); United States v. Marcel Watch Corp., 1 OCAHO 143 (March 22, 1990) (granting relief to a Puerto Rican born citizen of the United States), amended by 1 OCAHO 169 (May 10, 1990); Roginsky v. Department of Defense, 3 OCAHO 426 (May 5, 1992) (U.S. citizen born in the Soviet Union had standing to file a citizenship status discrimination complaint); Trivedi v. Northrop Corp. & Department of Defense, 4 OCAHO 600 (Jan. 25, 1994) (naturalized citizen had standing to file citizenship status discrimination complaint); Rusk v. Northrop Corp. & Department of Defense, 4 OCAHO 607 (Feb. 4, 1994).

The regulations governing these proceedings provide that either party can file a motion for summary decision, 28 C.F.R. § 68.38(a), and that an ALJ can enter a summary decision for either party "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters official noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).

It is well established that a district court may enter summary decision sua sponte upon proper notice to the adverse party. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); Stella v. Town of Tewksbury, Mass., 4 F.3d 53, 55 (1st Cir. 1993); NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957, 965 (5th Cir. 1991); see generally 10A C. Wright & A. Miller, Federal Practice and Procedure § 2720 at 27-28 and n.16 (1983). Proper notice affords the party opposing summary judgment the opportunity "to bring forth all of its evidence on the essential elements of the critical claim or defense," Jardines Bacata Ltd. v. Diaz-Marquez, 878 F.2d 1555, 1561 (1st Cir. 1989), and the opportunity to inform the court precisely what it intends to prove and how, before the court can say there are no "genuine" and "material" issues of fact. Bonilla v. Nazario, 843 F.2d 34, 37 (1st Cir. 1988)).

Similar in this sense to district courts, administrative law judges have power to grant summary decision in favor of a party that did not request it so long as adequate notice has been given to the party against whom summary decision will be imposed. See Martinez v. United States Department of Justice, No. 91-4792 (5th Cir. March 30, 1992) (vacating ALJ's entry of summary decision sua sponte in a case alleging violations of IRCA's employer sanctions provisions, 8 U.S.C. § 1324a, where ALJ had not afforded adequate notice to the adverse party that ALJ might assess civil penalties without conducting an evidentiary hearing). In addition, "the discovery phase must be sufficiently advanced so that the court can make an accurate determination of 'whether a genuine issue of material fact does or does not exist.'" Stella, 4 F.3d at 55 (quoting Jardines Bacata Ltd. v. Diaz-Marquez, 878 F.2d 1555, 1560-61 (1st Cir. 1989)).

a. National Origin Claim Dismissed For Lack of Jurisdiction

One of Complainant's allegations is that Respondent unlawfully discriminated against him by refusing to rehire him on the basis of his Polish national origin. The jurisdiction of administrative law judges over claims of national origin discrimination in violation of 8 U.S.C. § 1324b(a)(1)(A) is limited to claims against employers employing

between four and fourteen employees, 8 U.S.C. § 1324b(a)(2)(A) and (B), thus supplementing Title VII's coverage of national origin discrimination by employers of fifteen or more employees. See Trivedi v. Northrop Corp. and Department of Defense, 4 OCAHO 600, at 13 (Jan. 25, 1994); Rusk v. Northrop Corp. and Department of Defense, 4 OCAHO 607, at 15-16 (February 4, 1994); Dhillon v. Regents of the University of California, 3 OCAHO 497, at 11 n.8 (March 10, 1993); Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 8 (Dec. 2, 1992).

As it is undisputed from the record in this case that Anglo Fabrics employed more than fourteen employees at all times relevant to the alleged acts of discrimination, I do not have jurisdiction to determine Complainant's allegations of national origin discrimination.[13] Complainant's allegation of national origin discrimination is therefore dismissed.

b. Citizenship Status Claim Dismissed for Failure to Establish a Prima Facie Case

Complainant argues that Respondent's alleged decision to hire aliens who are not authorized to work in the United States instead of hiring Complainant, a naturalized citizen, constitutes citizenship status discrimination in violation of IRCA.

i. Threshold Issues

A. Complainant Has Standing to Bring a Citizenship Claim

In order to have standing to bring a claim of citizenship status discrimination in violation of IRCA, the claimant must be a "protected individual," 8 U.S.C. § 1324b(a)(B), statutorily defined as a United States citizen or national, an alien who is lawfully admitted for permanent or temporary residence, a refugee, or an individual granted asylum. 8 U.S.C. § 1324b(a)(3). Complainant, as a naturalized citizen is a "protected individual," and therefore has standing to file the complaint in this case.

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[13] Complainant argues that Respondent's statement that it employed "approximately 362" employees on or about July 1, 1991, suggests that Respondent was "unaware of how many people [it] employed at that time." Compl.'s Version of the Facts para. 1. Complainant, however, does not dispute that Respondent employed over 14 employees at all times relevant to the allegations of the complaint. I therefore find that at the time of the alleged acts of discrimination, Respondent employed in excess of fourteen employees.

B. Respondent is Subject to IRCA's Prohibition against Citizenship Status Discrimination

Section 102 of IRCA provides for causes of action based on citizenship status discrimination against employers of more than three employees. See 8 U.S.C. § 1324b(a)(1)(B), (a)(2)(A); see also Westendorf v. Brown & Root, 3 OCAHO 477, at 12 (Dec. 2, 1992). As Respondent employed "approximately 362" employees on the date of the alleged discriminatory act, Respondent is subject to IRCA's prohibition against this type of discrimination.

ii. The Alleged Unfair Immigration-Related Employment Practices

A. Disparate Treatment Theory

IRCA prohibits as an unfair immigration-related employment practice, knowing and intentional discrimination with respect to the hiring of a protected individual for employment, because of such individual's citizenship status. 8 U.S.C. § 1324b(a)(1), (3); 28 C.F.R. § 44.200(a)(2). Claims of unfair immigration-related practices brought under IRCA must be proven by a "disparate treatment" theory of discrimination.[14] See Statement of President Reagan upon signing S.1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1537 (Nov. 10, 1986) (construing IRCA's antidiscrimination provisions to require a showing of deliberate discriminatory intent); Supplementary Information to 28 C.F.R. § 44, 52 Fed. Reg. 37403 (October 6, 1987) (statement by the Attorney General that the intent to discriminate under this provision is an essential element of the charge). In view of the common language and common purpose of Title VII and IRCA, the analysis developed under Title VII for proving intentional discrimination has been applied to cases arising under IRCA. See, e.g., Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, 20-21 (October 19, 1993), appeal docketed,

[14] In contrast, an individual bringing a claim under Title VII may proceed under either the "disparate treatment" or "disparate impact" standard of proof. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Title VII proscribes "not only overt discrimina tion but also practices that are fair in form but discriminatory in practice."). "'Disparate impact' . . . results from the use of 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on [a protected group] and cannot be justified by business necessity.'" Geller v. Markham, 635 F.2d 1027, 1031 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)). Under the disparate impact theory, actual intent to discriminate is not necessary for a finding of illegal discrimination. See, e.g., Griggs, 401 U.S. at 431.

No. 93-4239 (2d Cir. Nov. 10, 1993); Kamal-Griffin v. Curtis, Mallet-Prevost, Colt and Mosle, 3 OCAHO 550, at 3 (August 16, 1993), appeal docketed, No. 93-4239 (2nd Cir. Jan. 3, 1994); General Dynamics, 3 OCAHO 517; Dhillon v. Regents of the University of California, 3 OCAHO 497 (March 10, 1993); Alvarez v. Interstate Highway Construction, 3 OCAHO 430 (June 1, 1992); Huang v. Queens Motel, 2 OCAHO 364 (Aug. 9, 1991); United States v. Harris Ranch Beef Co., 2 OCAHO 335 (May 31, 1991); United States v. Lasa Marketing Firms, 1 OCAHO 106 (Nov. 27, 1989); Mesa Airlines, 1 OCAHO 74.

Under Title VII case law, "disparate treatment" or discrimina- tion is when an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." Teamsters, 431 U.S. at 334 n.15. Accord, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). IRCA added to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1).

In a disparate treatment case, where an employer treats an employee less favorably than other employees because of citizenship status, the employee must establish discriminatory intent on the part of the employer. As I have stated previously:

> At issue is whether the discriminatory act is deliberate, not whether the violation of the law is deliberate or the result of an employer's invidious purpose or hostile motive. See, e.g., Nguyen v. ADT Engineering, 3 OCAHO 489, at 8 (Feb. 18, 1993) ("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"); United States v. Buckingham Ltd. Partnership, 1 OCAHO 151, at 10 (April 6, 1990) (In cases arising under IRCA's employer sanctions provisions, ALJ stated that "it is not intent to violate the law that is at issue but intent to perform an action for which law has prescribed consequences."). (Footnote omitted). A complaining party, however, will not prevail on a disparate treatment claim where the evidence shows the employer was aware that a given policy would lead to adverse consequences for a given group, if there is insufficient evidence of discriminatory intent. AFSCME v. State of Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).

General Dynamics, 3 OCAHO 517, at 39-40.

An employee may prove discriminatory intent either by establishing that unlawful discrimination was a motivating factor in the adverse employment decision (a "mixed-motives" case) or by establishing that the employer' stated reason for the adverse decision is pretextual (a "pretext" case). Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12, 109 S.Ct. 1775, 1789 n.12 (1989) (Brennan, J.; plr. opn.). In a pretext

case, a three-part procedure for the allocation of the burden of production and an order for presentation of proof has been established: (1) the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence; (2) the employer must offer a legitimate nondiscriminatory reason for its actions; and (3) the plaintiff must prove that this reason was a pretext to mask an illegal motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).

In order to establish a prima facie case of discriminatory failure to hire, the plaintiff must show (1) that he is a member of a protected class; (2) that he applied and was qualified for the job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. Id. at 802.

Establishment of a prima facie case by a preponderance of the evidence creates a rebuttable presumption of unlawful discrimina- tion. St. Mary's Honor Center v. Hicks, --- U.S. ---, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). This rebuttable presumption places on the employer the burden of producing evidence of a legitimate nondiscriminatory reason for the adverse employment action. Id.; see Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990) (This showing shifts the burden of production requiring the employer to articulate (but not necessarily prove) some legitimate, nondiscriminatory reason justifying the adverse employment action.). The employer, however, bears only a burden of production, not of persuasion. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 1094-95. If the employer fails to introduce evidence of legitimate nondiscriminatory reasons, the trial court must award judgment to the employee as a matter of law. St. Mary's Honor Center, 113 S.Ct. at 2748. If the employer produces evidence of legitimate nondiscriminatory reasons, the presumption of discrimination created by the establishment of the prima facie case is rebutted and disappears. 113 S.Ct. at 2747; see Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993) ("Satisfying this burden of production effectively dissolves the inference of discrimination arising from the plaintiff's prima facie case."). The plaintiff then has the burden of persuading the trier of fact that the reason proffered by the employer was a mere pretext for illegal discrimination, and that the prohibited basis was the true reason for the adverse employment action. St. Mary's Honor Center, 113 S.Ct. at 2748. The burden of persuasion as to intentional discrimination remains at all times with the plaintiff. Id.

The plaintiff may prove that the proffered reason is a pretext, for intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095. Evidence that the proffered reason is incredible, particularly where incredulity is accompanied by a suspicion of mendacity, may, together with the elements of the prima facie case, be sufficient to support a finding of intentional discrimination. St. Mary's Honor Center, 113 S.Ct. at 2749. The trier of fact may find intentional discrimination where it determines on the basis of substantial evidence that the employee's proffered reasons are pretextual, but it is not required to do so. Id. at 2749-50. Thus, a finding of pretext does not compel the trier of fact to find in favor of the employee. Id. Rather, the employee must persuade the trier of fact the employer's proffered reasons were not only pretextual but, in fact, were a pretext for discrimination. Id.

B. Complainant Has Failed to Establish a Prima Facie Case

Complainant has failed to establish a prima facie of citizenship status discrimination. As a member of the protected class, Zarazinski has satisfied the first prong of the McDonnell Douglas paradigm. He has failed to satisfy the other three prongs, however, by failing to show that he applied and was qualified for a job for which Anglo Fabrics was seeking applicants, that he was rejected despite his qualifications, and that after his rejection, the position remained open and Anglo Fabrics continued to seek applicants from persons of Zarazinski's qualifications.[15] See Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st Cir. 1988) (discharged employee failed to make prima facie case of race discrimination where he conceded that he was unable to perform the job as assigned to him); compare Cuello-Suarez v. Puerto Rico Elec. Power Authority (PREPA), 988 F.2d 275, 278 (1st Cir. 1993) (plaintiff

[15] Even if Complainant had been able to establish a prima facie case, he has failed to submit any probative or reliable evidence of Anglo Fabrics' discriminatory animus based on citizenship status. In fact, the record shows that Respondent hired Complainant on several occasions for various jobs, indicating that Respondent did not adversely consider his citizenship status. Furthermore, the record indicates that in July 1991, when Complainant was laid-off from his job, Anglo Fabrics employed approximately 362 employees, many of whom were of Polish descent, permanent resident aliens and naturalized citizens. Heidecker Aff. para. 2. Moreover, Respondent's three highest-ranking executives are naturalized U.S. citizens. Id. Finally, Complainant has submitted no reliable evidence to show that a non-U.S. citizen or illegal alien was hired for any position for which Complainant had applied and was qualified.

established a prima facie case of employment discrimination based on national origin where (1) she was from the Dominican Republic, (2) she was qualified, and (3) she was repeatedly rejected in favor of those of U.S. origin, as evidenced by employee's 77 rejections, evidence of the status of other similarly-qualified individuals, and employee's final rejection for position as supervisor of consumer affairs in favor of someone with less job experience and education).

As Complainant has failed to establish a prima facie case of citizenship status discrimination, that portion of his complaint is dismissed.

C. Claim of a Threat in Violation of 8 U.S.C. § 1324b(a)(5) Will Be Resolved at a Hearing

Complainant has alleged that Respondent violated IRCA's antidiscrimination provisions by threatening him because he intended to file a charge of discrimination against Respondent. The record shows that after Complainant was laid off from his job in July of 1991, he would appear periodically at Respondent's personnel office to inquire about work. Each time he was informed by Antos, the Personnel Manager, that she would call when something suitable opened up. Often, Bruell assisted Antos. During one of these encounters, Complainant alleges that Bruell told him that he would "wipe [Zarazinski's] nose" if Complainant were to file a charge. Bruell emphatically denies that he made this statement to Complainant. See Bruell Aff. paras. 3, 12; Respondent's Memorandum, dated July 26, 1993 ("Resp.'s July 26 Mem.").

IRCA provides in pertinent part that:

> It is . . . an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

8 U.S.C. § 1324b(a)(5).[16]

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[16] IRCA was amended by the Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 104 Stat. 4978. Section 534 of the 1990 Act bars retaliation against those seeking to enforce their rights under section 102 of IRCA. Pub. L. No. 101-649, 104 Stat. 4978, 5055, (continued...)

Respondent asserts that it did not intimidate Zarazinski "in any way, either as a matter of fact or law." Resp.'s July 26 Mem. at 1. Respondent argues, however, that "even assuming arguendo that the remark was made, any charge of retaliation would still fail." Id. Respondent then mistakenly argues that "[c]harges of retaliation and/or intimidation under [IRCA] are treated in the same way as similar charges lodged under Title VII." Citing Ninth Circuit cases, Respondent states that:

> The order and allocation of proof governing retaliatory action is similar to that utilized in Title VII disparate treatment cases (citation omitted). First, the employee must make a prima facie case by showing: (1) that he/she engaged in an activity protected under Title VII; (2) that his/her employer subjected him/her to an adverse employment action; and (3) that there is a causal like between the employer's action and the protected activity . . . .

Resp.'s Mem. of July 26, 1993, at 3 (citations omitted).[17]

As Respondent notes, if a prima facie case of retaliation is established in a Title VII case, the burden of production shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse action. Id. If evidence of a legitimate reason is produced, the plaintiff may still prevail if he demonstrates that the articulated reason was a pretext for discrimination. Id. (citing Cohen v. Fred Meyer, Inc., 686 F.2d 793 (9th Cir. 1988)).

Respondent asserts that Complainant has failed to make a prima facie case of retaliation because at the time of the alleged encounter between Complainant and Mr. Bruell, Complainant "was on lay-off

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[16](...continued)
codified at 8 U.S.C. § 1324b(a)(5). This amendment applies to actions occurring on or after November 29, 1990.

OSC's regulations, codified at 28 C.F.R. § 44.201, already included an anti-retaliation provision which covered all actions occurring after the regulation's publication on October 6, 1987. The legislative history of section 534 of the 1990 Act makes clear that Congress intended to codify this anti-retaliation regulation which implements OSC's interpretation of section 102 of IRCA. See H.R. Rep. No. 955, 101st Cong. 2d Sess. 82-83 1990. OSC amended its existing regulation by recodifying section 44.201 as paragraph (a)(3) of section 44.200, and by correcting minor differences between section 44.201 and section 534 of the 1990 Act. See 56 Fed. Reg. 157, at 40247 and 40248 (August 14, 1991).

[17] Under both Title VII and the ADEA, the complaining party's initial burden is to "establish a prima facie case sufficient to permit an inference of retaliatory motive." Hazel v. U.S. Postmaster General, 7 F.3d 1, 3 (1st Cir. 1993) (citing 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d)).

with rights of recall" the same status he has today. Resp.'s Mem. of July 26, 1993, at 2.[18] Thus, Respondent asserts that "[n]o adverse employment action was taken against [Zarazinski]. No identifiable threat of adverse employment action was ever made against him. Therefore, the charge of retaliation . . . must be dismissed." Id.

Respondent's arguments are not persuasive, however, as Title VII case law addressing retaliation is not controlling as to IRCA cases alleging a threat in violation of 8 U.S.C. § 1324b(a)(5). Only where the statutory language is similar do OCAHO ALJs look for guidance to Title VII and ADEA case law. See, e.g., Lardy v. United Airlines, Inc., 4 OCAHO 595, at 41 n.28 (Jan. 11, 1994)). Title VII and the ADEA clearly prohibit retaliation in the form of an adverse employment action.[19] IRCA, in contrast, is drawn more broadly and includes in its definition of unlawful discrimination not only retaliation, like Title VII and the ADEA, but also intimidation, threats and coercion. As there

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[18] Complainant's status with the company has remained the same since July, 1991, at which time Complainant was listed by Respondent as an applicant for a job as a material handler in the Worsted Winding Department. It is undisputed that he has remained on Respondent's active list for recall but Respondent has not hired him because there has not been any need for someone with his job qualifications.

[19] Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3.

The ADEA provides in pertinent part:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

are significant differences between IRCA's prohibition of retaliation, intimidation, threat and coercion and the retaliation provisions of Title VII and the ADEA, I conclude that it is inappropriate to follow Title VII or ADEA case law here.

This is the first OCAHO case to address an allegation of a threat in violation of 8 U.S.C. § 1324b(a)(5). The relevant part of that subsection makes it an unfair immigration-related employment practice to threaten an individual because that individual intends to file a charge under § 1324b. Whereas Title VII case law limits retaliation to adverse employment actions, there is no basis for doing so under IRCA. The express terms of the statute, however, provide no clarification as to what constitutes a threat. Nor is there any relevant legislative history clarifying this part of IRCA or OSC's regulation addressing the same subject matter.[20]

Although I have determined that Title VII case law on retaliation is not controlling as to the proper interpretation of 8 U.S.C. § 1324b(a)(5), a certain aspect of Title VII is only logical to follow. In a Title VII retaliation case, the plaintiff does not have to prove that the conduct opposed was in fact a violation of Title VII. Instead, the rule is that opposition activity is protected if it is based on a "good faith, reasonable belief that the challenged practice violates Title VII." Goos, 715 F.Supp. at 3 (D.C. Cir. 1989) (quoting Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012, 1020 (D.C. Cir. 1981)); see Love v. Re/Max

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[20] The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 1210 et seq., with language similar to IRCA provides that:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

42 U.S.C. § 12203(b) (West Supp. 1992). Research, however, has revealed no case law interpreting "threat" under the ADA.

The District of Columbia Human Rights Act provides that "It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected under this chapter." D.C. Code Ann. § 1-2525 (1992). Because that Act was modeled after Title VII, courts have applied the Title VII prima facie case analysis established in McDonnell Douglas to suits brought under it. Goos v. National Association of Realtors, 715 F.Supp. 2, 3 (D.C. Cir. 1989) (citing Thompson v. International Association of Machinists, 614 F.Supp. 1002, 1011 (D.D.C. 1985)). Those courts therefore require the employer or potential employer to have taken an adverse personnel action against the complaining party. See, e.g., Goos, 715 F.Supp. at 3. I do not feel compelled to apply that analysis to IRCA.

of American, Inc., 738 F.2d 383, 385 (10th Cir. 1984) ("the opposition activity is protected [even] when it is based on a mistaken good faith belief that Title VII has been violated"). The rationale for this rule is that "making the protected nature of an employee's opposition to alleged discrimination depend on the ultimate resolution of his claim would be inconsistent with the remedial purposes of Title VII." Parker, 652 F.2d at 1019.

I conclude that the same rule applies to § 1324b(a)(5) cases under IRCA. Thus, the fact that Zarazinski has not prevailed on his national origin and citizenship status discrimination claim therefore is not fatal to his prima facie case of a threat in violation of 8 U.S.C. § 1324b(a)(5). See Mesnick v. General Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991).

In order to make a prima facie case of a § 1324b(a)(5) violation, Complainant needs to establish that he filed his OSC charge based on a reasonable, good faith belief that Anglo Fabrics' reasons for not rehiring him were discriminatory. As Complainant has asserted that two individuals, Maria Rucinska and Jadwiga Kaminska, with whom he worked, both admitted to him that they were illegal aliens (see Compl.'s Letter), I conclude that his OSC charge was based on a reasonable, good faith belief that Respondent's decision not to rehire Zarazinski was based on its preference to hire undocumented aliens, in violation of IRCA.[21]

Complainant may only prevail on his retaliation claim, however, if (1) he had a reasonable, good-faith belief that an IRCA violation occurred; (2) he intended to act or acted on it; (3) Respondent knew of Complainant's intent or act and (4) Respondent lashed out in consequence of it. See id. (setting forth a similar rule under Title VII) (citing Petiti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990); Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988)).

Accordingly, because there is a dispute as to the facts regarding each of these elements, a hearing on the issue of Complainant's allegation that Respondent threatened him in violation of 8 U.S.C. § 1324b(a)(5) was held on Friday, May 13, 1994 at the United States Department of Labor, J.W. McCormack Post Office & Courthouse, Office of the

[21] Although Complainant's response to my order of April 18, 1994 was seven days late, in view of his pro se status and his difficulty with English comprehension, I accepted his filing as timely.

Administrative Law Judge, Room 505, Boston, Massachusetts 02109, to begin at 8:30 a.m.

This decision amends my Decision and Order of May 3, 1994 in conformity with my Errata dated May 18, 1994.

SO ORDERED on this 18th day of May, 1994.[22]

ROBERT B. SCHNEIDER
Administrative Law Judge

[22] This is not the final decision and order for this case. A final decision and order will be issued following the hearing. Within "60 days after the entry of such final order, any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. § 1324b(i)(1).