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

February 22, 1995

AURELIA FORDEN, Complainant,	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 94B00099
DR. LOTHAR GRIESSBACH, REPRESENTATIVE OF GERMAN INDUSTRY AND TRADE, Respondent.	)	

DECISION AND ORDER

Appearances: Michael Wolf, Esquire, Washington, DC, for complainant; Joel Bennett, Esquire, Washington, DC, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the Complaint of Aurelia Forden, (complainant) against her former employer, Dr. Lothar Griessbach, President of the Representative of German Industry and Trade, (respondent or RGIT), that respondent terminated her employment on November 3, 1993, based solely on complainant's citizenship status, and that respondent had also retaliated against her, in violation of the pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978 (1990).

On November 30, 1993, complainant filed a discrimination charge with this Department's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). Complainant alleged in that charge, which was filed on the standard three (3)-page Form OSC-1, along with a two (2)-page typewritten statement and six (6) documentary exhibits, that respondent had committed an unfair immigration-related employment practice namely, in terminating her employment on November 3, 1993, based solely on her citizenship status.

In that November 30, 1993 charge, complainant asserted that she was a citizen or national of the United States and described the size of respondent's workforce as numbering more than three (3) but less than 15 employees. Complainant also informed OSC that she had filed a similar charge with the United States Information Agency, Exchange Visitors Program Office, located at 301 Fourth St., S.W., Washington, DC 20547.

On the third page of the Form OSC-1, complainant, in response to having been requested to describe the alleged unfair employment practice, responded:

> I was employed as a full-time secretary/executive assistant at RGIT from November 6, 1990 until November 3, 1993. On October 21, 1993, (two weeks after Ms. Caster began working at RGIT) the head of RGIT, Dr. Lothar Griessbach, asked me into his office and told me that he would not need me anymore ("there is no room for you here.") He offered me the choice to resign or to be fired. I liked my job, did it well, and had no warning of his decision to let me go. I chose not to resign. By letter dated November 8, 1993, Dr. Griessbach confirmed that my employment was terminated on November 3, 1993.
>
> For several years now, RGIT has accepted young German professionals, lawyers and other civil servants, who are admitted to the U.S. on three-month tourist visas and who work full-time at RGIT as unsalaried "trainees" (Referendare) while they are here.
>
> RGIT has had no training program or experience, structured or otherwise, for a professional secretary such as Ms. Ursula Caster. In July 1993, however, Dr. Griessbach submitted a "training plan" for Ms. Caster to the sponsor, CDS International Inc., for approval and issuance of the IAP-66. Within a few days of her arrival at the RGIT office, Ms. Caster was assigned my duties. She has displaced me as a full-time salaried employee there.

On April 1, 1994, OSC notified complainant by certified mail that it had completed its investigation of her charge and had determined that there was "insufficient evidence of reasonable cause to believe [that complainant was] discriminated against as prohibited by 8 U.S.C. § 1324b." Accordingly, OSC declined to file a complaint with an administrative law judge assigned to this Office.

OSC also advised complainant in that April 1, 1994 declination correspondence that in the event that she did not agree with its decision not to file a complaint with our office on her behalf, complainant was entitled to file a complaint with our office if she did so within 90 days after receiving that letter.

On May 16, 1994, complainant commenced this private action by timely filing the Complaint at issue with this Office, in which she reasserted that she had been discriminated against by respondent based upon her citizenship status, and also that she had been retaliated against in violation of the provisions of 8 U.S.C. § 1324b.

Complainant advised this Office in that Complaint that she was born in Austria and became a United States citizen on October 9, 1984. She also stated that she began her three (3)-year employment with respondent in November of 1990 as an executive secretary and that she had performed general office duties.

On June 8, 1994, respondent timely filed its Answer, in which it denied that complainant had been discriminated against or that she had been fired based on her citizenship status. Respondent argued that, to the contrary, complainant "was fired because of her increasingly poor job performance and reprehensible personal conduct that resulted in strained relations with the entire staff at RGIT."

In that June 8, 1994, responsive pleading, respondent also denied that complainant had ever held an executive secretary position. Instead, respondent asserted that complainant had been hired "to occupy the reception desk and perform the office duties of answering the telephone, providing information to callers, overseeing the library, and procuring office materials." After performing those duties for some six (6) months, her position was reclassified as that of general office duties/secretary. Respondent argued that "[t]here has never been a job description of 'Executive Secretary' at RGIT. If Ms. Forden means to imply that she was my personal secretary (i.e. secretary to the President of RGIT), I DENY (sic) that allegation as well."

Respondent's Answer further denied complainant's charge that she had been intimidated, threatened, coerced or retaliated against because she had filed or planned to file a complaint.

Following due notice to the parties, an adjudicatory hearing was conducted before the undersigned in Falls Church, Virginia on Wednesday, October 19, 1994.

Summary of Evidence

Complainant's evidence consisted of her testimony, and that of Dr. Lothar Griessbach, who was called as an adverse witness, and the information contained in 24 documents which were marked and entered into evidence as Complainant's Exhibits 1, 3-16, 19-26, and 28.

Respondent's evidence consisted of Dr. Griessbach's testimony, as well as that of Christine Spencer, RGIT's office manager and bookkeeper, and some eight (8) documents which were marked and entered into evidence as Respondent's Exhibits 3-6, 8, 9, 12, and 13.

Aurelia E. Forden testified that she is 47 years of age, having been born on August 17, 1947 in Austria. She is a citizen of the United States and currently resides with her husband in Arlington, Virginia.

She stated that she had been hired by respondent on November 6, 1990 as a receptionist at a starting salary of $21,000 (T. 35, 121; Complainant's Exh. 1). Her duties included answering the telephone, organizing the office library, and ordering office supplies (T. 122). In February 1991 complainant's salary was increased to $23,000 annually (T. 47).

Approximately two months later, in April 1991, complainant began performing secretarial work for two (2) of the RGIT professionals, J. Vaughan and B. Welschke, and ceased performing most of her receptionist duties (T. 122). Her new secretarial duties included taking dictation, typing, arranging appointments, filing, photocopying, working with the RGIT interns, and receiving and sending electronic mail (Complainant's Exh. 10, T. 39, 122).

In June 1991, complainant received her second salary increase, which increased her annual salary to $26,000 (T. 48, 122). In November 1991, complainant was given the additional duties of computer training and performing secretarial work for the German-American Cultural Fund, which promoted the exchange of culture programs between the United States and Germany (T. 42, 124, Complainant's Exh. 11). In December 1991, she received a year-end bonus of $3,000 (T. 50).

In June 1992, her annual salary was increased for the third and final time to $30,000 (T. 49). In September 1992, complainant began working directly for Dr. Griessbach, in addition to working for John Vaughan (T. 45, 126). Complainant then performed general secretarial duties for Dr. Griessbach, in addition to the secretarial duties she

continued to perform, those involving the administration of the German-American Cultural Fund (T. 126). In December 1992, she received a year-end bonus of $1,500 (T. 50).

With the exception of the December 1992 bonus, complainant's salary raises and bonuses were in line with the other RGIT employees performing similar secretarial and general office duties. In December 1992, one employee received a bonus of $2,500, complainant received a bonus of $1,500, and a third employee received a bonus of $500 (T. 60-61). Dr. Griessbach, however, testified that he was dissatisfied with that third employee's performance because "[t]here was a one-time incident where she was absent from the office without an adequate explanation, and we talked about it and attempted to straighten this out, but it did reflect in the December bonus" (T. 71).

Complainant also testified that Dr. Griessbach's primary secretary, Irene Harris, had gone on maternity leave in November of 1992 (T. 127). During the remaining 11 months of complainant's employment at respondent's, she became Dr. Griessbach's primary secretary, performing many of Ms. Harris' prior duties (T. 110, 126).

On October 4, 1993, Ursula Caster, a German national who had been a secretary at BDI's headquarters in Cologne, Germany, began working at RGIT (T. 131) She came to the United States on a J-1 visa as a trainee sponsored by the Carl Duisberg Society, an organization which has offices in Germany and in the United States and sponsors exchange programs (Complainant's Exh. 26, at 20-23).

Complainant also stated that she learned of Ms. Caster's hiring "[o]n July 13, when her resume arrived by fax" (T. 132). Ms. Caster telephoned RGIT on July 15, 1993 attempting to speak with Dr. Griessbach, and was informed by complainant that he was unavailable. During the course of that conversation Ms. Caster stated that she did not know the nature of the work that she would be performing at RGIT, but did mention that "Dr. Griessbach told her that he specifically wanted someone from BDI Cologne to work at his office in Washington" (T. 135).

According to complainant, RGIT had a policy of advertising openings in daily newspapers and/or enlisting the help of employment agencies. But, RGIT did not advertise the position given to Ms. Caster, nor did it utilize the services of an employment agency (T. 132-133).

As previously noted, Ms. Caster began her employment with RGIT on October 4, 1993, having been assigned the desk next to complainant's, which was located immediately outside Dr. Griessbach's office (T. 134). Complainant testified that Ms. Caster was initially given secretarial work which included many of the same duties that complainant had previously been performing, those of taking dictation from Dr. Griessbach, handling phone calls, working on the computer, coordinating appointments, and sending reports for Mr. Vaughan on E-Mail (T. 134-137).

On October 21, 1993, about three (3) weeks after Ms. Caster started working at RGIT, Dr. Griessbach informed complainant that she was being terminated (T. 133). She was given the option of resigning voluntarily or being fired if she chose not to resign (Complainant's Exh. 18, at 4). Complainant testified that she refused to resign and was subsequently fired on November 3, 1993 (T. 133, Complainant's Exh. 18, at 4).

Complainant further testified that prior to Ms. Caster's arrival Dr. Griessbach had never criticized her work nor did he notify her, either verbally or in writing, of any problems with her work, (T. 131), as he did with the employee involved in the unexcused absence which resulted in that employee having received a lower year-end bonus (T. 71). Complainant testified that, to the contrary, Dr. Griessbach praised the work that she did for an arts exhibit presented by the German-American Cultural Fund (T. 125). And he had placed this written notation in a catalog which was distributed at the arts exhibit, "Aurelia Forden, my assistant, contributed oversight and professional support to this endeavor, for which I am grateful" (T. 125-126, Complainant's Exh. 19).

Following her November 3, 1993, firing, she undertook a search for employment, and filed her initial job application some two (2) weeks later. Complainant testified that she applied for approximately 250 positions and spent some three (3) months attending "classes in commercial photography, just to expand the range of possibilities in the job field" (T. 137-139).

Respondent's evidence concerning these disputed facts varied considerably, and not unexpectedly, from that of complainant.

Dr. Lothar Griessbach testified that since 1988 he has served as the President of Representative of German Industry and Trade (RGIT), which represents the interests of the Federation of German Industries

(BDI), and the Association of German Chambers of Industry and Commerce (DIHT), primarily regarding matters of trade policy.

He also advised that complainant had been hired as a receptionist and was given a raise when she subsequently assumed more duties and then was reclassified as a secretary, and that the raise "was justified to bring her up to one of these positions, which in the Washington market ranged somewhere between $25,000 and $30,000" (T. 99).

He stated that complainant was given salary increases and bonuses in 1991 and in 1992 in order "to encourage her to perform up to her potential" in anticipation of taking over some of the duties previously performed by respondent's personal secretary, Irene Harris, while the latter was on maternity leave (T. 99-100, 181-182).

At the time Ms. Harris began her maternity leave he fully expected her to return to work, "and that is why I did not fill the position with a full-time, (sic) or did not actively look for a full-scale personal secretary. I thought I could get by with Aurelia Forden and then the part-time people that we employed until she would return, which was expected within the year after the birth" (T. 180-181). Dr. Griessbach also stated that it was never his intention to have complainant fully replace Ms. Harris because he did not believe "that she could perform to the full potential that I need as a personal secretary" (T. 100).

Concerning Ursula Caster, he testified that she had been hired as a trainee and had not been hired to replace complainant, and emphasized that fact by stating, "[n]o, that was out of the question, because first of all she was not experienced in the United States, and her stay was only for 1 year, and she came in as a trainee only" (T. 105).

He also stated that complainant's citizenship had played no part in his decision to terminate her (T. 199) and that she had been fired for several reasons. Dr. Griessbach claimed that "[i]t just became unbearable to have her in the office," that she failed to report when she was leaving or returned to the office, that she passed on to coworkers assignments specifically given to her, and that she attempted to manage the office even though that was not her job (T. 186-187).

Dr. Griessbach also testified that he fired complainant because he lost trust in her (T. 189). He stated that his deputy reported that complainant had approached him and "offered to serve as an informant, that she had offered to show him documents which were on my desk and tell him about my whereabouts and what I was doing" (T. 189-190). His deputy recommended that complainant be fired (T. 194).

Dr. Griessbach further testified that he continuously, and almost on a daily basis, received complaints about complainant from her fellow workers (T. 193). The employees with whom she shared the office complained that she gave orders and was very moody (T. 194). He also stated that several of complainant's coworkers complained that she would place telephone calls to their homes after working hours, and Dr. Griessbach stated that he had also received two such calls at his residence (T. 204-206).

He also stated that after his former personal secretary had indicated that she would not be returning from maternity leave, "I had to think about how to reorganize the office for the future and came to the conclusion that in the process I would have to replace Ms. Forden, and I was a little hesitant - that is not something I like to do" (T. 195). He called complainant into his office on October 21, 1993, and told her that she was going to be terminated and offered her the option of resigning and invited her to consider resigning during her then upcoming one (1) week vacation (T. 195).

Dr. Griessbach stated that he had been informed by his superiors in Germany that complainant had written letters to them, in which she had requested their assistance. Upon complainant's return from vacation, he confronted her with those letters she had unauthorizedly sent to Germany and again extended an offer allowing her to resign but complainant refused to do so and was fired (T. 195-196).

He also testified that in 1990, when complainant had interviewed for the job at RGIT, she failed to inform him that she had been recently fired from her previous job for having committed a crime for which she was subsequently convicted and he stated that he probably would not have hired her had he known of that criminal prosecution (T. 180).

Christine B. Spencer testified that she has worked at RGIT for over three (3) years, since June 1991, as its office manager and bookkeeper (T. 158). She worked with complainant for well over two (2) years, and interacted with her at the office on a regular basis in the course of taking inventory, ordering office supplies, "and just by regular day-to-day contact in the office itself" (T. 161).

She also stated that she had gotten along well with everyone at RGIT except the complainant, with whom she did not have a good relationship (T. 162). Complainant had made disparaging remarks to her and had also spread unfounded rumors about her (T. 161-162). Ms. Spencer also testified that on many occasions complainant had telephoned her home late at night and made upsetting comments about

her personal life, including accusations that she was not a good mother (T. 163-164). She complained about those telephone calls to Dr. Griessbach and also to his personal secretary, Ms. Harris (T. 164).

She further testified that her duties changed in November of 1993 after complainant had been fired (T. 158-159, Complainant's Exhs. 12, 13). Several of the duties previously assigned to complainant were reassigned to her. Specifically, she took on the added duties of administering the intern program, sending and receiving electronic mail, and filing and typing (T. 158-161, Complainant's Exhs. 12, 13).

Ms. Spencer also stated that complainant's duties had been divided among the remaining workers in the office. "I got some of them, Monika got some, and we had a trainee who got some" (T. 165). When questioned about whether the trainee, Ursula Caster, was hired to replace complainant, she testified "[n]o, absolutely not" (T. 165). Ms. Caster was taught and exposed to many jobs within the office, including bookkeeping, because "[t]hat was the whole point of coming to see our office, and how an American office functions, and also seeing how we do bookkeeping in an American office" (T. 165, 176).

She testified that following complainant's firing on November 3, 1993, Dr. Griessbach advertised for a personal secretary (T. 167). She also stated that while being able to write and speak German fluently was a prerequisite for the personal secretary position, one's citizenship was not a requirement nor "has citizenship ever been a factor in any employment decision" (T. 166-167).

Issues

These disputed facts present two (2) issues for adjudication. Initially, it must be ascertained whether, as complainant has alleged, respondent violated the unfair immigration-related employment practices provisions of IRCA, 8 U.S.C. § 1324b(a)(1)(B), by having terminated her employment on November 3, 1993, based solely on her citizenship status. And secondly, it must be determined whether respondent retaliated against complainant for her having asserted those rights protected under IRCA, 8 U.S.C. § 1324b(a)(5).

Discussion, Findings, and Conclusions

The complainant, Aurelia Forden, has filed two (2) unfair immigration-related employment practices charges against respondent, Dr. Lothar Griessbach, President of RGIT, based upon citizenship status discrimination and retaliation for having asserted rights

protected under IRCA. In filing these charges, complainant relies upon the pertinent provisions of 8 U.S.C. § 1324b, which provide:

> UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES
>
> 8 U.S.C. 1324b(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 recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual(as defined in paragraph (3)), because of such individual's citizenship status.
>
> * * * *
>
> (5) Prohibition of Intimidation or Retaliation.-It is also 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), to have been discriminated against.

8 U.S.C. §§ 1324b(a)(1)(A)(B) and 1324b(a)(5) (emphasis added).

In order to assert a cause of action based upon a claim of citizenship status discrimination, the unfair immigration-related employment practice must have occurred in one (1) of three (3) workplace settings: (1) in the hiring of an individual; (2) in the recruitment or referral for a fee of an individual; or (3) in the discharging of an individual from employment. 8 U.S.C. § 1324b(a)(1). Complainant has based her citizenship status claim on the latter scenario.

Before complainant can proceed in her claim of unlawful employment-related discrimination practice based upon citizenship status, she must also demonstrate that she has met the precondition of being a "protected individual," as that term is defined in the pertinent provision of IRCA:

> Definition of Protected Individual.-As used in paragraph (1), the term "protected individual" means 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, is granted the status of an alien lawfully admitted for temporary residence under section 210(a), 210A(a), or 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

8 U.S.C. § 1324b(a)(3).

Since complainant has established that she was granted United States citizenship status on October 9, 1984, she is a protected individual for the purposes of IRCA. See 8 U.S.C. § 1324b(a)(3)(A). Accordingly, complainant has shown that she is entitled to assert these claims of citizenship status discrimination and retaliation.

Complainant's evidentiary burden of proof in pursuing her charge of an unfair immigration-related employment practice based upon citizenship discrimination is that of establishing by a preponderance of the evidence that respondent knowingly and intentionally engaged in the discriminatory activity alleged. See 8 U.S.C. §§ 1324b(d)(2) and 1324b(g)(2)(A). Hence, in order to prevail on this charge, complainant must show by a preponderance of the evidence that respondent knowingly and intentionally terminated her employment based solely upon her citizenship status.

The burden of proof that complainant must satisfy in order to prevail equates to that which is required in a claim of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (Title VII). Yefremov v. NYC Dep't of Transp., 3 OCAHO 562 (1993); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532 (1993); Alvarez v. Interstate Highway Constr., 3 OCAHO 430 (1992); Huang v. Queens Motel, 2 OCAHO 364 (1991); Williams v. Lucas & Assoc., 2 OCAHO 357 (1991).

Pursuant to Title VII guidelines, a complainant may establish liability for an alleged discriminatory practice in one (1) of two (2) ways. First, under a disparate treatment theory, complainant must show that she was knowingly and intentionally treated less favorably than other employees similarly situated and she must also prove that the

employer had a discriminatory intent or motive. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986 (1988). The second method for establishing Title VII liability involves the disparate impact theory, which requires the complainant to show that discrimination resulted from an employer's practices, that although being facially neutral, nevertheless created significant adverse effects on a protected group. Under this theory a complainant need not prove intentional discrimination on the part of the employer. Watson, 487 U.S. at 986-87.

All claims brought under IRCA, 8 U.S.C. § 1324b, must be proven according to a disparate treatment theory of discrimination, which requires evidence of knowing and intentional discrimination. See, e.g., Yefremov v. NYC Dep't of Transp., 3 OCAHO 562, at 21-23 (1993). Accordingly, in order for complainant to prevail she must prove her allegation by a preponderance of the evidence that respondent knowingly and intentionally treated her differently than other employees similarly situated in the course of terminating her employment on November 3, 1993.

Because complainant has alleged disparate treatment namely, that she was knowingly and intentionally treated less favorably than other employees similarly situated at RGIT based solely upon her citizenship status, it is appropriate to examine the applicable case law as expressed in the seminal United States Supreme Court decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In that ruling, the Supreme Court defined the order and allocation of proof required in Title VII cases dealing with disparate treatment. The Court announced that the plaintiff therein was required to establish a prima facie case of discrimination and was further required to prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (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 employer continued to seek applicants from persons of complainant's qualification.

McDonnell Douglas, 411 U.S. at 802.

Although the facts in McDonnell Douglas involved an illegal refusal to hire setting, the Court subsequently announced that order and allocation of proof were also applicable in those cases which, as here, involve alleged illegal firings. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In Burdine, the Court held that upon a showing of a prima facie case of discrimination by a preponderance of the evidence, an inference of discrimination arises and imposes upon the defendant a burden of rebuttal which respondent successfully assumes by articulating with specificity a legitimate, non-discriminatory reason for not having hired or fired plaintiff. Given that showing, the plaintiff then has the opportunity to prove, once more by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired or fired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. Burdine, 450 U.S. at 249.

In order for complainant to prevail under IRCA, she must produce evidence of a prima facie case of citizenship status discrimination concerning her termination by RGIT. The elements of that prima facie case require complainant to demonstrate: (1) that she belonged to a class of persons protected by the provisions of IRCA; (2) that she satisfied the normal job requirements for the job which she had performed; (3) that she was discharged; and (4) that following her discharge, RGIT continued to employ or seek to employ persons with her qualifications. See Tal v. Energia, Inc., 4 OCAHO 705 (1994).

Under Title VII guidelines, complainant may, in either of two (2) ways, establish RGIT's alleged discriminatory practice, that of knowingly and intentionally having treated her differently than other employees similarly situated in the course of terminating her employment on November 3, 1993 based solely upon her citizenship status.

Complainant can offer indirect, or circumstantial, proof of such discrimination, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), or she may provide direct evidence of such proscribed conduct. Price Waterhouse v. Hopkins, 490 U.S. 228 (1986); Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

Should complainant's evidence disclose indirect evidence of discrimination, and thus establishes a prima facie case, the burden of production then shifts to RGIT to articulate a legitimate reason for her discharge. Should RGIT carry that burden, complainant will then have the opportunity to prove that the reasons articulated by RGIT are a mere pretext for discrimination. See McDonnell Douglas, 411 U.S. at 807; Burdine, 450 U.S. at 248. Moreover, "[t]he ultimate burden of persuading the trier of the fact that the defendant intentionally

discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253.

In the event that complainant's evidence demonstrates direct evidence of discrimination, as opposed to indirect evidence of the same nature, the McDonnell Douglas test is not applicable since that evidentiary test is intended to be utilized in order to assist in discovering discrimination where only circumstantial evidence is available. Trans World Airlines, 469 U.S. at 121-22. Direct evidence will not only constitute a prima facie case of defendant's discriminatory conduct, it also serves as plaintiff's entire case and imposes upon the defendant the burden of proving, by a preponderance of the evidence, that defendant would have discharged plaintiff even in the absence of the discrimination element.

A recent ruling of the U.S. Supreme Court has modified the McDonnell Douglas framework. In St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), a case involving alleged indirect, or circumstantial, evidence of discriminatory intent, the Court held that a discharged plaintiff alleging racial discrimination is not entitled to judgment as a matter of law after proving that all of the defendant's reasons were merely pretextural. Id. at 2749-51. To the contrary, in order to prevail the plaintiff therein was further required to bear the ultimate burden of persuasion of showing additionally that the employer had intentionally discriminated against him based upon his race. Id. at 2756.

By utilizing those accepted evidentiary parameters, we will now analyze and assess complainant's charge that she was knowingly and intentionally terminated by RGIT on November 3, 1993 solely because of her citizenship status. The analysis will begin with an examination of the elements necessary to establish a prima facie case.

Regarding the first element, that complainant was a member of a class of persons protected under IRCA, it is undisputed that complainant became a United States citizen on October 9, 1984, thus making her a protected individual for purposes of a citizenship status discrimination cause of action under IRCA. See 8 U.S.C. §§ 1324b(a)(1)(B); 1324b(a)(3)(A); see also Hensel v. Oklahoma City Veterans Affairs Medical Center, 3 OCAHO 532, at 12 (1993). Accordingly, complainant has satisfied her burden of proof on that element.

The second element requires that complainant demonstrate that she satisfied the normal job requirements for the job which she performed. After carefully and thoroughly reviewing the relevant and credible evidence concerning that disputed fact, I find that complainant did not satisfy the normal job requirements for that position. Before proceeding, we must determine complainant's position at the time of her dismissal. It is found that complainant held the position of personal secretary to Dr. Lothar Griessbach, albeit on a temporary basis, pending Ms. Irene Harris' return from maternity leave.

In support of her contention that she had satisfactorily fulfilled the job requirements for the position of respondent's secretary, complainant relies primarily upon her salary increases and bonuses, as well as her record of advancement. Complainant was hired on November 6, 1990 for the position of receptionist (T. 32, 121) and received raises of $2,000 on February 1, 1991, $3,000 on June 1, 1991 and $4,000 on June 1, 1992, along with bonuses of $3,000 in December 1991 and $1,500 in December 1992 (T. 48-50). During that period, complainant's position was reclassified to that of general office duties/secretary in April of 1991, and then to temporarily becoming Dr. Griessbach's primary secretary in December of 1992, after his regular secretary went on maternity leave (T. 38-39, 110).

Respondent's evidence, however, has amply demonstrated that complainant did not satisfy the normal requirements of that position, prior to having been fired on November 3, 1993, approximately 11 months after she temporarily assumed that position (T. 110). All of the raises and bonuses which complainant received were given before she became Dr. Griessbach's primary secretary, a position she held from December 1992 through November 3, 1993. Furthermore, complainant's raises and bonuses were in line with those which were routinely given to other RGIT employees performing similar duties.

Contrary to complainant's assertion that she was fired based solely because of her citizenship status, respondent has clearly established that she was discharged because of her inability to satisfactorily perform her assigned job duties and also because of her inability to get along with her coworkers. The evidence discloses that complainant created an unbearable office atmosphere by passing off her assignments to other employees, by overstepping her authority in attempting to manage the office, by issuing orders to her coworkers, by not reporting when she was leaving or returning to the office, by making personal and upsetting remarks about a coworker, and by making unsolicited and unwelcome late evening/night telephone calls

to the residences of her coworkers, as well as to Dr. Griessbach (T. 150-151, 161-164, 186-194).

The record contains further evidence supporting respondent's contention that complainant was unable to satisfactorily perform the normal requirements of her job. In addition, Dr. Griessbach testified that he lost trust in complainant when she offered to serve as an informant against him and also offered to remove documents from his desk (T. 189-190). Complainant offered no evidence to refute this damaging testimony. Dr. Griessbach has shown that he was forced to give the complicated and technical assignments to other workers because of complainant's inability to meet his expectations (T. 182-183).

For those reasons, it is found that complainant has clearly failed to show that she was satisfactorily fulfilling the requirements of her job. Therefore, complainant has failed to establish a prima facie case in support of her allegations of employment-related discrimination based upon her citizenship status. Accordingly, complainant's claim of citizenship status discrimination must be dismissed.

We now examine complainant's second charge that respondent retaliated against her for asserting rights protected under IRCA. As noted earlier, the pertinent IRCA wording provides that:

> It is also 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, . . . to have been discriminated against.

8 U.S.C. § 1324b(a)(5).

This Office has subject matter jurisdiction over a claim of retaliation only when that particular claim implicates a right or privilege secured under Section 1324b, or involves a proceeding under that section. 8 U.S.C. § 1324b(a)(5). Complainant has not alleged, nor has she offered any supporting evidence, that respondent interfered with a right or privilege secured under Section 1324b, nor has she alleged that she was retaliated against for filing a complaint with OSC initially and eventually with this Office, or for having participated in an investigation, proceeding, or hearing under this section.

For these reasons, complainant's charge that respondent retaliated against her for asserting rights protected under IRCA must also be dismissed.

With regard to the admissibility of after-acquired evidence presented by respondent, it is unnecessary to rule upon that point since this ruling is not based upon that information, nor has it even been considered. Under these facts, complainant has simply failed to adduce evidence in support of the necessary elements required to establish a prima facie case for citizenship status discrimination.

It should be noted that very recently, on January 23, 1995, during the pendency of this matter, the U.S. Supreme Court ruled in deciding McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995) (No. 93-1543), that such evidence is not a complete bar to recovery in age discrimination cases, but that such evidence must be taken into account in fashioning a remedy on a case-by-case basis.

In summary, complainant has failed to show, by the required proof, that respondent terminated her employment on November 3, 1993, based solely on her citizenship status, in violation of the provisions of 8 U.S.C. § 1324b(a)(1)(B), and has also failed to demonstrate that respondent violated the provisions of 8 U.S.C. § 1324b(a)(5) by having retaliated against her for asserting rights protected under IRCA.

In view of the foregoing, complainant's requests for administrative relief must be denied.

Order

Complainant's May 16, 1994 Complaint alleging unfair immigration-related employment practices consisting of citizenship status discrimination as well as retaliation, allegedly in violation of the provisions of 8 U.S.C. §§ 1324b(a)(1)(B) and 1324b(a)(5), respectively, is hereby ordered to be and is dismissed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

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