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

APRIL 1, 1996

MARTIN FLORES, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00099
LOGAN FOODS CO., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *Procedural History and the Parties' Arguments*

On June 15, 1995, Martin Flores (Complainant or Flores) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Logan Foods Company (Respondent or Logan Foods) illegally fired him on March 1, 1995 because of his citizenship status and national origin and that Logan Foods refused to accept the documents that he presented to show that he could work in the United States and specifically refused to accept documentation showing Flores has temporary protected status. Complaint ¶16. Complainant also asserts that Respondent asked him to produce a permanent resident card. Complaint ¶17.

Specifically, the complaint alleges that Respondent incorrectly claimed that Flores was not eligible to work legally in the United States. The complaint further alleges that the reason for his firing was that Flores had asked that he be paid for the hours he worked and for overtime pay in accordance with federal and state law. Complaint ¶14.

Complainant states that he filed a charge with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC) on March 1, 1995, and that OSC sent him a letter telling him that he could file his complaint with OCAHO. Complaint ¶19. Complainant seeks back pay from March 1, 1995 and wants to be rehired by the employer. Complaint ¶¶14, 20.

On August 7, 1995 Respondent filed an answer to the complaint in which it admitted, among other things, that Respondent is an alien authorized to be employed in the United States, that Flores was qualified for the job but was fired on March 1, 1995, and that he filed a charge with OSC and was told by OSC that he could file a complaint with OCAHO. Respondent denied the other material allegations of the complaint and specifically averred that Respondent terminated Complainant's employment for insubordination because he refused to follow instructions for work, as requested by supervisors, and for being absent without calling, after previously being warned that if he missed work without calling he would be terminated. Answer ¶6. Respondent requests that the action be dismissed and that Complainant (sic) be awarded attorney's fees pursuant to 28 C.F.R. §68.52 and 5 U.S.C. §504.

On November 20, 1995 Respondent filed a motion to dismiss the complaint. In the motion Respondent asserts, among other things, that since more than 15 employees work for Logan Foods, the Equal Employment Opportunity Commission (EEOC) has exclusive jurisdiction to consider allegations of employment discrimination based on national origin. Further, the motion asserts that Complainant alleges he is a citizen of El Salvador who is authorized to work under Temporary Protected Status (T.P.S.), and that persons with T.P.S. are not protected individuals within the meaning of Section 1324b(3)(B). Respondent further contends that the complaint should be dismissed because the Complaint states that Respondent knew Complainant's status regarding work authorization, that Respondent was sponsoring Complainant for permanent residency, and therefore "there is no rational or logical reason for them to ask him for a green card." Motion to Dismiss ¶¶6–7. Respondent did not file a brief or memorandum in support of its motion to dismiss.

On December 13, 1995 Complainant filed its opposition to the motion to dismiss (Opp.). In the opposition Complainant states that the EEOC has exclusive jurisdiction over claims of national origin discrimination against employers who employ "fifteen or more employ-

ees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *See* 42 U.S.C. §2000e(b). Complainant notes that Respondent has failed to allege or provide evidence that it had fifteen or more employees for each working day in each of twenty or more calendar weeks for 1994 or 1995. Complainant also filed an affidavit in which he swears that during the period of time he was employed by Respondent there were never fewer than 3 employees, and never more than 15. Flores Affidavit ¶5. Complainant also asserts that he has stated a valid claim for document discrimination and that Respondent's assertion that it did not demand to see Complainant's alien registration because to do so would have been unnecessary or illogical is a wholly inappropriate argument for a motion to dismiss. Opp. at 7.

On January 25, 1996, I issued an Order Requiring Further Briefing Regarding Respondent's Motion to Dismiss. That Order instructed Respondent to file a brief, with supporting documents, addressing the question of the number of employees at Logan Foods and the issue of whether Flores can support a claim of document abuse under 8 U.S.C. §1324b(a)(6).

On February 20, 1996, Respondent filed its brief in support of its motion to dismiss, or, in the alternative, request for summary decision (R.Br.). Respondent also filed an affidavit of Clifford Logan, President of Logan Foods, attesting to the number of persons employed by Respondent in each month from July 1994 through December 1994 (Logan Affidavit), a withholding report (R. Exh. 1) and payroll journal reports (R. Exh. 2). Mr. Logan states that the two reports are routinely prepared by Respondent during the regular course of business. Logan Affidavit ¶6.

Respondent's brief asserts that the combination of the withholding report, payroll records and the Logan Affidavit shows that Respondent employed greater than 15 persons during the relevant time frame such that Complainant's national origin discrimination claim must be dismissed as exclusive jurisdiction over that claim rests in the EEOC. Respondent further argues that Complainant's citizenship discrimination claim is not viable because Complainant is not a protected individual. Finally, Respondent states Complainant's claim for document abuse must be dismissed because a document abuse claim under 8 U.S.C. §1324b(a)(6) cannot stand alone in the absence of either a national origin or citizenship status discrimination claim. Specifically, Respondent asserts that the plain

language of Section 1324b(a)(6) refers to the general rule regarding national origin and citizenship status discrimination and that this reference demonstrates that a document abuse claim must be coupled with either a national origin discrimination claim or a citizenship status discrimination claim. *See* 8 U.S.C. §1324b(a)(6).

On February 23, 1996, I issued an Order Requiring Further Response from Complainant which noted an inconsistency between the complaint and Complainant's opposition to the motion to dismiss. Specifically, while the complaint alleges citizenship status discrimination, the opposition brief states that Complainant did not make such a claim. Accordingly, I ordered Complainant to clarify this issue. In addition, Complainant was ordered to state whether he disputes the authenticity of the records filed by Respondent regarding its number of employees.

On March 8, 1996, Complainant filed his further response (C.Supp.Br.) which addressed the issues from the February 23, 1996 Order, and the issue of Complainant's standing to raise a claim of document abuse because Respondent's brief raised arguments not contained in the original motion to dismiss. Complainant states that Respondent has failed to prove that the EEOC has exclusive jurisdiction over the national origin discrimination claim because the reports and the Logan Affidavit do not prove that Respondent employed fifteen or more persons for each working day during the months of July to December 1994. Complainant also asserts that the Logan Affidavit and the withholding and payroll records are inadmissable. Complainant also states that the document abuse claim does not have to accompany a national origin or citizenship status discrimination claim.

On March 21, 1996, in response to a March 11, 1996 Court Order, the parties filed a joint stipulation of dismissal of citizenship discrimination claim, and therefore on that date I dismissed the citizenship status discrimination claim. Therefore, the remaining allegations from the complaint include Complainant's national origin discrimination claim and his claim of document abuse.

II. *Standards Governing a Motion for Summary Decision*

OCAHO Rules authorize the Administrative Law Judge (ALJ) to "enter summary decision for either party if the pleadings, affidavits, material gained by discovery or otherwise, or matters officially no-

ticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). Respondent's motion to dismiss, or, in the alternative, for summary decision, shall be treated as one for summary decision because both parties have included affidavits (by Flores and Logan) and Respondent has included the withholding and payroll records as exhibits. If matters outside the pleadings are presented and not excluded by the Court, a motion outside the pleadings shall be treated as on for summary decision. *Ortollano v. Wordperfect Company*, 4 OCAHO 716, at 2 (1994) *quoting* Fed. R. Civ. P. 12(c).[1]

A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof. In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994) *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1985). Failure to meet this burden invites summary decision in the moving party's favor.

III. *ANALYSIS*

A. *National Origin Discrimination Claim*

Complainant, an alien authorized to be employed in the United States and a citizen and national of El Salvador, alleges that he was knowingly and intentionally fired because of his national origin. Complaint ¶14a. Title 8 U.S.C. §1324b(a)(1) provides, in pertinent part, that:

> 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 1324a(h)(3) of this title) with respect to . . . the discharging of such individual from employment—
>
> (A) because of such individual's national origin.

[1] Pursuant to Section 68.1 of the Rules of Practice and Procedure, the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for by the OCAHO rules. 28 C.F.R. §68.1.

OCAHO jurisdiction over a claim of national origin discrimination is limited to those employers who employ between three and fourteen employees. *Valencio v. VASP Brazilian Airlines*, 5 OCAHO 740, at 2 (1995); *Yohan v. Central State Hospital*, 4 OCAHO 593, at 5 (1994). Specifically, Sections 1324b(a)(2)(A) and (B) provide that the general prohibition against national origin discrimination shall not apply to an employer with three or fewer employees, or where the EEOC has jurisdiction under Section 2000e–2 of Title 42. *See* 8 U.S.C. §§1324b(a)(2)(A) and (B). For purposes of determining EEOC jurisdiction over a claim of national origin discrimination against a particular employer under 42 U.S.C. §2000e–2, the term "employer" is defined as, "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . " 42 U.S.C. §2000e(b).

Respondent asserts that OCAHO lacks jurisdiction over Complainant's national origin discrimination claim because it employs greater than fourteen individuals. Motion to Dismiss ¶2; R.Br. at 1–2. As previously stated, Respondent, as the moving party, has the initial burden to demonstrate that there is no genuine issue as to any material fact before summary decision may be granted. To show that it employs greater than fourteen employees, Respondent submitted the Logan Affidavit, the withholding report and the payroll report with its brief. Complainant asserts that the affidavit and reports are inadmissable.

Complainant states that the Logan Affidavit is inadmissable because it does not comply with Section 68.38(b) of the OCAHO Rules of Practice, 28 C.F.R. §68.38(b), which requires that all affidavits show affirmatively that the affiant is competent to testify to the matters stated therein. Complainant asserts that the Court cannot presume Logan's competence to provide testimony regarding the precise number of employees at Logan Foods based on his position as company president. I disagree. Initially I note that we are dealing with a small (less than twenty five employees), apparently family owned and operated company. It is reasonable to expect that the President of such a small company would be familiar with the number of employees and the payroll records. I find that the combination of Mr. Logan's position as president, and his sworn statement that he has personal knowledge of the facts as stated, is sufficient indicia of his competence to testify to the issues discussed in the affidavit. Accordingly, I find that the Logan Affidavit is admissible.

Complainant also asserts that the withholding and payroll records are inadmissable as hearsay. Respondent states in the Logan Affidavit that these records were routinely prepared during the regular course of business. Complainant asserts that hearsay evidence like the affidavit and the reports is "uniquely unsuited for use in summary decision." C.Supp.Br. at 12. Under the pertinent provision of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), hearsay evidence is admissible if factors exist which assure the underlying reliability and probative value of the evidence. *See, e.g., United States v. Jenkins*, 5 OCAHO 743, at 7 (1995); *United States v. China Wok*, 4 OCAHO 608, at 11 (1994). The Logan Affidavit states that the reports were routinely prepared by Respondent during the regular course of business. The reports themselves indicate the specific date they were prepared and show withholding information for July 1994 through November 1994, and payroll information for December 1994, with the withholding information redacted. In examining the documents I find sufficient indications of underlying reliability to admit them into evidence.

In addition to disputing the admissibility of the Logan Affidavit and the reports, Complainant also asserts that they are insufficient to show that Respondent employed greater than fourteen employees during the relevant time period. EEOC jurisdiction over national origin discrimination claims exists where an employer has fifteen or more employees work each working day in each of the twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e(b). In determining the number of employees for each working day, Courts generally do not count part-time employees who did not work each day of the working week. *EEOC v. Garden & Associates*, 956 F.2d 842, 843 (8th Cir. 1992); *Zimmerman v. North American Signal Company,* 704 F.2d 347, 354 (7th Cir. 1983). Courts also generally do not count independent contractors as employees for jurisdictional purposes. *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 982 (4th Cir. 1983); *United States v. Robles*, 2 OCAHO 309, at 8 (1991). In addition, Title VII case law differentiates between "employers" and "employees" for jurisdictional purposes. A company president and supervisory personnel are not considered employees for jurisdictional purposes. *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989).

Complainant contends that Respondent's records include several individuals who are owners or supervisors (Clifford Logan, Clifford R. Logan III, Bonnie Logan, and Juver Quintanilla) and that several

employees who work for relatively low pay are part-time employees who do not work every day (e.g. Becky Wymer, David Patrick Wagner, Osbelio Ralsda, and Leopoldo Soto). C.Supp.Br. at 13–14. Complainant also contends that employee Robert Avila had no withholdings listed for state and federal taxes from July 1994 to December 1994, and that David Patrick Wagner had no withholdings reported for November 1994. Complainant reasons that these employees may have been on unpaid leave, part-time status or independent contractors. C.Supp.Br. at 15. While that supposition is speculative, Complainant is correct that Respondent has failed to show that these two employees were full time, non-supervisory employees for the applicable period of time.

Respondent's submissions regarding its number of employees are insufficient to meet its burden to show that there is no genuine issue of material fact regarding the number of employees for each day of the twenty weeks preceding the alleged discriminatory act. The Logan Affidavit refers only to the number of employees per *month* from July 1994 through December 1994. The withholding records list withholding amounts for specific weeks from July 1994 through November 1994. The payroll records list account information and show that certain redacted amounts were paid and withheld for listed individuals each week for the month of December 1994. The affidavit does not specifically state that Respondent employed fifteen or more non-supervisory full time employees for each of the days within the six month period from July 1994 to December 1994.

Moreover, Respondent has failed to show why it failed to provide the state withholding records for December 1994, and the payroll journal for December 1994 that was provided in lieu of the withholding records is insufficient to demonstrate that there fifteen or more employees for each day in the month. Complainant correctly notes that December 1994 was the month with the fewest employees during the applicable period. C.Supp.Br. at 13. Further, the copy of the December payroll journal has been redacted to exclude the federal or state withholding information for the employees. Thus, Respondent has not shown that it employed fifteen or more full time, non-supervisory employees during the month of December 1994. Since Respondent has the burden of showing that it is entitled to judgment on the motion, its failure on this point is fatal to its motion.

Further, Respondent's payroll records do not show that it had greater than fourteen full time non-supervisory employees for *each*

day for twenty consecutive weeks.References are made to the numbers of employees per month, and arguably, to the number per week. However, it is fatal to Respondent's motion that it failed to show the number of employees for each working day. In addition, Respondent fails to provide information regarding the status of the individuals listed on these records. Specifically, Complainant asserts that certain individuals are not "employees" for jurisdictional purposes because they are "employers." Complainant refers to the inclusion of the company president on the withholding and payroll lists, and states that at least two other individuals are known to be managers at Logan Foods and should therefore be considered "employers" for jurisdictional purposes in resolving the summary decision.[2]

As Respondent has the burden of proof and all facts must be examined in the light most favorable to Complainant, the non-moving party, I find that there is a genuine issue of material fact as to the number of employees working for Respondent during the twenty weeks prior to the alleged discriminatory conduct. Therefore, Respondent's motion for summary decision as to the national origin discrimination claim is denied.

B. *Document Abuse Claim*

Respondent's sole argument in favor of summary decision on Complainant's document abuse claim is that document abuse cannot stand as an independent cause of action in the absence of either a national origin or citizenship status discrimination claim. As Respondent's motion for summary decision regarding the national origin discrimination claim has been denied, it is unnecessary for me to address the issue of whether a document abuse claim can be asserted independently of a national origin or citizenship status discrimination claim. Therefore, Respondent's motion for summary decision as to the claim of document abuse is also denied.

VI. *Conclusion*

Since the motion for summary decision has been denied, the parties are ordered to file a status report. The Second Prehearing Order

[2] Complainant notes that Logan family member Bonnie Logan is listed in the withholding records and should be presumed to be a part owner and not an employee. C.Supp.Br. at 14, n. 3. There is no record evidence to support Complainant's assertion that Bonnie Logan is a part owner, and I have given no credence to it in deciding this motion.

issued September 8, 1995 established dates for the completion of prehearing procedures in this case. Pursuant to that order the parties submitted their exhibit and witness lists and all discovery was to be completed by November 10, 1995. Therefore, it would appear that this case should be ready for trial. Within twenty days of the date of this Order, the parties shall consult with each other and file with the Court a status report which shall discuss any remaining matters which need to be resolved prior to trial and shall state the number of days needed for trial. The parties also shall state any days during May or June when they are unavailable for a final pretrial conference or trial. The final pretrial conference will be held approximately two weeks before trial. The trial will be held in the Hearing Room of the Executive Office for Immigration Review, 2400 Skyline Tower, 24th Floor, 5107 Leesburg Pike, Falls Church, Virginia 22041.

ROBERT L. BARTON, JR.
Administrative Law Judge