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

August 1, 1996

Rosa Isela Olivares Aguirre,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00140
KDI American Products, Inc.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *Procedural Background*

On October 6, 1995 Ms. Aguirre (hereinafter Complainant) filed a complaint with the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO) alleging that KDI American Products, Inc. (hereinafter KDI or Respondent) fired her from her position as operator assembler on July 27, 1994 because of her national origin and her citizenship. She also states that she was intimidated, threatened, coerced or retaliated against because she filed or planned to file a complaint or to keep her from assisting someone else to file a complaint. Complaint ¶15. Her explanation of this charge is that she felt intimidated and threatened, not directly, but by other employees, because they were told Complainant was fired since she was a "special case." Complaint ¶15(a). She also alleges that Respondent asked her for more or other documents than those required to show that she is authorized to work in the United States. Complaint ¶17. However, she also states in her complaint that she was fired because her papers were not legal. Complaint ¶14(b). The complaint alleges that she filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (hereinafter OSC) on September 9, 1995, and OSC notified

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her that she could file a complaint with OCAHO. Complaint ¶¶18–19. As relief, she requests that she be awarded back pay from July 27, 1994. Complaint ¶¶20–21.

The September 9, 1995 date on which Complainant stated she filed her OSC charge is incorrect. Ms. Aguirre's OSC charge form, filed with the complaint, was dated December 22, 1994. However, on January 20, 1995 OSC requested further information from the Complainant to complete her charge. On February 21, 1995 OSC received Complainant's response to the request for further information. If a charging party's initial submission to OSC is inadequate and OSC requests additional information to complete the charge, the date of filing a charge with OSC regarding an unfair immigration-related employment practice is deemed to be the date when OSC receives such additional information so as to complete the charge. *See* 28 C.F.R. §44.301(c)(1). However, the filing of the charge will be timely if the original submission is filed within 180 days of the alleged occurrence of the unfair immigration-related employment practice and the additional information requested by OSC is provided in writing within the 180-day period or within 45 days of the date the charging party receives OSC's request for additional information. *See* 28 C.F.R. §44.301(d)(2). Complainant's submission of the requested additional information was within the 45 day regulatory limit, and therefore for purposes of determining the timeliness of her charge the filing date of said charge is the date of the initial submission, or December 22, 1994.

On December 5, 1995 Respondent filed its answer to the complaint in which it admits certain factual allegations in the complaint, including Complainant's national origin, the fact that she was fired and that she received a letter from OSC advising her that she could file a complaint with OCAHO. However, Respondent contends that Complainant was fired because she failed to present valid documents showing her continuing eligibility to work in this country. In fact, Respondent points out that Complainant admitted in her complaint that she was fired because her papers were not legal and that she also admitted that the documents she presented at the time she was hired were false. *See* Complaint ¶14(b); Answer ¶1. Respondent also references the internal inconsistency in the complaint which asserts that Complainant is an alien authorized for employment in the United States but also states that she was naturalized as a U.S. citizen on November 11, 1994. Compare Complaint ¶¶2 and 6.

Respondent also raised several affirmative defenses in its answer, asserting that the complaint was not timely filed in accordance with 28 C.F.R. §68.4(c) (first affirmative defense), that the complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted (second affirmative defense), and that the complaint is barred by the applicable statute of limitations (third affirmative defense).

On January 11, 1996 Respondent filed a motion to dismiss and/or for summary decision, supported by a memorandum, asserting that the complaint is untimely and also fails to state a claim upon which relief may be granted.[1] Citing 8 U.S.C. §1324b(d)(3), Respondent argues that the complaint is not timely because Complainant filed her charge with the OSC more than 180 days after the date of the alleged unfair immigration-related employment practice. Moreover, citing 28 C.F.R. §68.4(c), Respondent contends that the complaint is not timely because Complainant failed to file the complaint directly with OCAHO within 90 days after receipt of the right to sue notice from OSC. In support of its motion Respondent attached a memorandum and several exhibits, including an affidavit by Maria Reyes, Respondent's Human Resources Supervisor, dated January 2, 1996 (hereinafter referred to as Reyes' 1st Affidavit).[2]

Aside from the timeliness issues, Respondent asserts that the complaint should be dismissed because it fails to state a claim upon which relief may be granted. Respondent states that Complainant lacked employment authorization from the start of her employment in 1991, noting that by her own admission she presented false employment authorization documents on two occasions and never presented genuine employment authorization documents, in violation of the Immigration Reform and Control Act of 1986 (IRCA). Respondent states that it terminated Ms. Aguirre's employment for

[1] The following abbreviations will be used throughout the decision:

Motion	—	Respondent's motion to dismiss and/or for summary decision filed on January 11, 1996
R. Memo	—	Respondent's memorandum filed on January 11, 1996 in support of its motion
Supp. Motion	—	Respondent's supplemental motion to dismiss and/or summary decision filed on March 25, 1996
R. Br.	—	Respondent's brief filed on April 18, 1996 in response to the March 29, 1996 Order
R. Supp. Br.	—	Respondent's supplemental brief filed on June 19, 1996 in response to the May 21, 1996 Order

[2] In her affidavit Ms. Reyes states that she is familiar with Complainant's personnel file and employment history with KDI. Reyes' 1st Affidavit ¶2.

this reason, which is entirely non-discriminatory and complies with IRCA. R. Memo. at 7–8.

Because an individual has 90 days after the *receipt* of the determination letter from OSC to file a complaint, on January 18, 1996 I issued an order with respect to the timeliness issue, noting that Respondent would have to support its motion with evidence of when Complainant received OSC's June 16, 1995 notice and directing Respondent to contact OSC to request a copy of the certified return receipt for the notice sent by OSC to Complainant. I then issued a further order on January 31, 1996 directing Respondent to file a status report and Complainant to file an answer to the motion to dismiss not later than February 16, 1996. Finally, on February 1, 1996 I issued an order requiring Complainant, not later than February 16, 1996, to amend her complaint to state when the threatening/intimidating conduct alleged in paragraph 15 of the complaint took place and also to state when KDI refused to accept her documents and requested more or different documents as alleged in paragraphs 16–17 of her complaint.

Respondent filed its status report on February 9, 1996 and attached documents from OSC relating to the service of the OSC determination letter which show that Complainant did not receive the letter until September 7, 1995.[3] Complainant submitted a hand printed letter dated February 14, 1996 which addresses both the issues of when the alleged intimidation/threatening conduct occurred and when her documents were rejected. Although Complainant's letter is not specifically entitled an amended complaint, the letter references the issues raised by, and is clearly responsive to, the Court's February 1 Order. Considering that Complainant is not represented by legal counsel, I interpreted her letter as an amendment to the complaint. *See Monjaras v. Blue Ribbon Cleaners*, 3 OCAHO 496 (1993) (Judge held harmless Complainant's failure to formally amend her complaint to incorporate a particular issue); *Halim v. Accu-Labs Research*, 3 OCAHO 474 (1992) (complaints by *pro se* complainants should be liberally construed and less stringent standards must be applied than when a complainant is represented by counsel). However, Complainant did not file an answer to the motion to dismiss.[4]

[3] The OSC determination letter was dated June 16, 1995, but because it was not mailed to Complainant's current address, it had to be redelivered and was not received by Complainant until September 7, 1995.

[4] Complainant actually submitted two separate hand printed letters dated February 14, 1996. However, the second letter refers to her employment file and does not address Respondent's motion.

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On March 25, 1996 Respondent filed a supplemental prehearing motion to dismiss and/or for summary decision contending that the complaint was untimely and failed to state a claim upon which relief could be granted. In the supplemental motion Respondent argues that the Court should not consider the events of December 5, 1994 as set forth in the amended complaint because Complainant failed to mention the December 5, 1994 events in her charge filed with OSC and thus these charges should be dismissed as barred by the statute of limitations under 8 U.S.C. §1324b(d)(3). Respondent also asserts that the charges in the amended complaint regarding the refusal to rehire fail to state a claim upon which relief may be granted. Specifically, Respondent avers that it did not rehire Complainant after she presented documents in December 1994 because she had presented false documents in the past. Respondent supports its supplemental motion to dismiss with an affidavit by Maria Reyes dated March 21, 1996 (hereinafter referred to as Reyes' 2nd Affidavit). Complainant has not filed any response to the supplemental motion to dismiss.

On March 29, 1996, after reviewing Complainant's and Respondent's submissions, I noted that although Respondent had filed a supplemental motion to dismiss, it had not filed an answer to the amended complaint. Consequently, I ordered Respondent to file an answer to the amended complaint within twenty days. I also ordered Respondent to file a further brief in this case. Respondent was ordered to address several issues raised by Complainant, including the assertion that Respondent refused to rehire her in December 1994 even though she presented valid work papers.

On April 18, 1996 Respondent filed both an amended answer and also a brief in response to the March 29 Order. In the amended answer Respondent admits that it refused to accept her employment authorization documents on July 27, 1994 because they appeared to be false. Respondent also admits, among other things, that Complainant presented papers on December 5, 1994 which reasonably appeared to establish her employment eligibility, that it made copies of the papers and informed her that it would inform her of their decision after consulting with Respondent's legal department. Respondent specifically denied that it intimidated and threatened Complainant at the beginning of December 1994 by telling her or Respondent's other workers that she was a special case or that Respondent's workers referred to her as a special case. Respondent also raised several affirmative defenses, including untimeliness, failure to state a claim upon which relief may be granted, and failure to

exhaust administrative remedies. Respondent also incorporated by reference its admissions, denials and affirmative defenses set forth in its original answer to Complainant's complaint.

In its brief Respondent contends that the complaint and amended complaint are untimely. Respondent argues that Complainant failed to raise the allegation that Respondent discriminated against her in December 1994 in her charge filed with the OSC on February 21, 1995 and thus she failed to exhaust her administrative remedies. Respondent also argues that the new allegations of discrimination are untimely under 8 U.S.C. §1324b(d)(3) because the alleged discriminatory acts took place 400–450 days before Complainant filed the amended complaint.

Respondent also argues that Complainant has abandoned her complaint by failing to respond to orders issued by the Administrative Law Judge, and therefore the complaint should be dismissed on that basis. Finally, Respondent moves that summary decision should be granted in its favor because its decision not to rehire Complainant was non-discriminatory; namely, she was not rehired because she had engaged in dishonest conduct, and Respondent has a policy of terminating and not rehiring dishonest individuals. Respondent attached multiple exhibits to its brief, including an affidavit by James L. Motush, Respondent's Vice President of Finance, dated April 16, 1996 (hereinafter referred to as Motush 1st Affidavit).

On March 29, 1996 I also invited OSC to file an amicus brief with the Court.[5] OSC agreed to file a brief and that brief was filed on May 2, 1996 (hereinafter OSC Br.). The issues on which the Court invited comment in the amicus brief are as follows:

> 1. Assuming that Complainant was discharged in July 1994 because she failed to present valid employment documents and in fact presented false documentation, does an employer violate 8 U.S.C. §1324b by terminating the employee?
>
> 2. Assuming the same factual scenario, does an employer violate 8 U.S.C. §1324b when the employer refuses to rehire an employee because she has admitted to having presented false documents to that employer in the past?

With respect to the first question, OSC states in its amicus brief that an employer which discharges an employee for presenting false

[5] I invited OSC to file an amicus brief because important issues were raised in the proceeding which could have ramifications for future cases, and, since OSC is the government agency charged with enforcing the provisions of 8 U.S.C. §1324b, it seemed appropriate to solicit their view on these issues. The amicus brief has been very helpful in analyzing the issues and in reaching a decision in this case.

employment verification documents does not violate 8 U.S.C. §1324b. OSC states that although 8 U.S.C. §1324a is satisfied if the employee presents employment eligibility documents that appear on their face to be genuine and valid, if the documents presented by the employee are not valid and the employer knows this fact, it is unlawful to continue to employ the individual. OSC Br. at 3. Further, the prohibitions against discrimination found in Section 1324b exempt acts that are required by federal law. 8 U.S.C. §1324b(a)(2). Since federal law prohibits an employer from employing an individual who has provided false documents, the decision to discharge an employee who has provided false documents is not prohibited discrimination. OSC Br. at 4.

With respect to the second question, OSC states that, to determine whether or not the employer's refusal to rehire a former employee who admits having used false documents in the past constitutes citizenship or national origin discrimination, an analysis under *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973), is appropriate. OSC Br. at 5. Applying that analysis, first a complainant must establish the elements of a prima facie case of refusal to hire. Assuming that a prima facie case is established, the respondent must be prepared to articulate a legitimate non-discriminatory reason for its action, and if it does so, the complainant must establish that the articulated reason was a pretext for prohibited discrimination. In determining whether the refusal to hire was pretextual, the Court should consider whether the employer has a policy and how the policy has been applied in the past. If the employer has rehired citizens who have been discharged for making other misrepresentations, it is more than likely that the act is a pretext for prohibited discrimination. Finally, OSC notes that there is nothing in Section 1324a which prohibits an employer from rehiring a person who has presented false documents in the past but later has obtained valid work authorization and urges the Court not to rule that employers have an absolute right to deny reemployment to persons who presented false work authorization documents in the past. OSC Br. at 8. Rather OSC urges that these cases be determined on the basis of whether an employer has a policy of refusing to rehire persons who have been fired for cause and whether that policy has been applied in a non-discriminatory manner. OSC Br. at 8.

After having received the briefs from OSC and Respondent, on May 3, 1996 I issued an Order permitting Complainant to respond to either or both briefs by May 20, 1996. I also ordered her to file any such brief with Respondent's counsel as well as the Judge. On May 14, 1996 I received a four page hand printed letter signed by

Complainant, with attachment, addressed "To Whom It May Concern." There is no indication that this letter was sent to Respondent's counsel and the letter does not directly respond to the briefs filed by OSC or Respondent. However, in the first page of the letter Complainant states that other employees who were fired (terminated) for the same reason that she was terminated (having false documents) were rehired. The letter names six individuals and questions why they were rehired if they presented false documents.

Following receipt of that letter, on May 21, 1996 I ordered Respondent to file a supplemental brief responding to Complainant's letters by addressing Complainant's assertion that Respondent had rehired employees who previously had been terminated for having presented false employment eligibility documents, and specifically to address the cases of the six individuals listed by Complainant. Respondent requested and obtained an extension of time to file the supplemental brief and filed its supplemental brief on June 19, 1996. The brief was supported by documentary evidence, as well as an affidavit by Mr. Motush dated June 17, 1996 (hereinafter referred to as Motush 2nd Affidavit) and an affidavit by Ms. Reyes dated June 17, 1996 (hereinafter referred to as Reyes' 3rd Affidavit). The brief asserts that Complainant's assertions with regard to the six individuals are completely unsubstantiated and without merit. None of the six individuals named by Complainant was terminated for presenting false documents and consequently were not rehired. Moreover, Respondent states that four of the six individuals—Olivia Hernandez, Carolina Vaires, Francisco Hernandez, and Maria Rodriguez—are not even current or former employees of Respondent, and in fact never even applied for employment with Respondent. R. Supp. Br. at 2; Motush's 2nd affidavit ¶3. As to the other two individuals, both are current employees, and were never terminated or rehired. Further, neither presented obviously false employment eligibility documents nor stated that they had engaged in dishonest acts during their employment with Respondent. R. Supp. Br. at 3; Motush 2nd affidavit ¶¶4–5. Respondent further supported its contention that it has a non-discriminatory policy of firing and refusing to hire individuals who engage in dishonest acts. R. Supp. Br. at 5; Motush 2nd affidavit ¶¶7–8.

II. *Standards Governing Adjudication of Motions to Dismiss and for Summary Decision*

Respondent's motion is styled a motion to dismiss and/or for summary decision. As previously noted, Respondent attached several

documents in support of the motion, including Reyes' Affidavit. If a motion to dismiss is supported by documents outside the pleadings, it should be treated as a motion for summary decision. *Rosales v. United States,* 824 F.2d 799, 802 (9th Cir. 1987); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Garcia v. McCarron Electric Company*, 5 OCAHO 747, at 3 (1995).

A motion for summary decision may be granted if there is no genuine issue of material fact, and the moving party is entitled to decision as a matter of law. *Curuta v. U.S. Water Conservation Lab.*, 19 F.3d 26 (9th Cir. 1994); *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474, 1477 (7th Cir. 1990). In determining whether a fact is material, any uncertainty must be considered in the light most favorable to the non-moving party. *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party but once the movant meets its initial burden, the non-moving party must show that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of material fact is genuine only if it has a real basis in the record and is material only if it might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

III. *Findings and Conclusions*

A. *The Abandonment Issue*

In its brief filed on April 18, 1996, Respondent argues that Complainant has abandoned her complaint by failing to respond to orders issued by the Administrative Law Judge and therefore the complaint should be dismissed pursuant to 28 C.F.R. §68.37(b). Respondent refers specifically to the January 31, 1996 Order requiring Complainant to file an answer to the motion to dismiss. R. Br. at 3–4.

Actually I issued two orders on January 31, 1996, one ordering the filing of an answer to the motion to dismiss and one requiring Complainant to make certain necessary amendments to the complaint. Both orders required compliance by February 16, 1996. In response to the orders, Complainant submitted two letters dated February 14, 1996, which I construed as amendments to the complaint. However, Complainant did not file a brief or memorandum responding to the motion.

The Rules of Practice provide that a complaint or request for hearing may be dismissed upon its abandonment by the party who filed it, and a party shall be deemed to have abandoned the complaint if the party fails to respond to orders issued by the Administrative Law Judge. 28 C.F.R. §68.37(b)(1). Respondent is correct that OCAHO case law demonstrates that it is well established that Judges have dismissed complaints for failure to respond to orders. *See, e.g. Palma v. Farley Foods*, 5 OCAHO 757 (1995); *Medina v. Bend-Pack, Inc.*, 5 OCAHO 791, at 3 (1995); *Robinson v. New York State Family Court*, 5 OCAHO 814 (1995). However, a finding of abandonment depends on the circumstances of each case, and there is a great deal of discretion given the judge in this respect.[6]

In this case I conclude that Complainant has not abandoned her complaint. She is *pro se* and appears to have a limited understanding of the English language. Moreover, she did respond to the January order by submitting two letters, although she did not comply with my order to answer Respondent's motion. However, given the fact that two orders were issued at the same time, she may have intended these letters to be responsive to both orders; i.e. both as an amendment to the complaint and a response to the motion to dismiss. Complainant also responded to the May 3, 1996 order, although her submission was in the form of a letter rather than a memorandum.

Further, Section 68.37(b) of the Rules of Practice should not be read broadly or expansively to default a party, particularly when the party is *pro se*. When a party is unrepresented, a Court should make some allowances for the failure literally to abide by the strict terms of an order.[7] For all the above reasons, I conclude that although Complainant has not complied with my order to respond to the Respondent's motion, she has not abandoned her complaint.

B. *Exhaustion of Administrative Remedies*

In its brief filed on April 18, 1996, Respondent contends that Complainant's assertion, raised for the first time in her amended

[6] In fact, the regulation provides that a complaint "may" be dismissed upon its abandonment, thus employing discretionary rather than mandatory language. 28 C.F.R. §68.37(b).

[7] If this part of the Rules of Practice were read broadly, it could be used to default parties in a broad range of circumstances. Yet to my knowledge this rule never has been applied to default a federal government entity, even though at times government counsel has failed to respond to orders issued by Administrative Law Judges. Therefore, in my view the Rule should be applied only in limited circumstances.

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complaint of February 14, 1996, concerning Respondent's review of her employment authorization documents in December 1994 and its failure to hire her in January 1995, should not be considered because Complainant failed to exhaust her administrative remedies. Respondent cites 8 U.S.C. §1324b(b)(1) and 8 U.S.C. §§1324b(d)(2) and (3).[8] Specifically, Respondent asserts that Complainant "plainly failed to raise these allegations regarding Respondent's decision not to rehire her in her charge filed with the OSC on February 21, 1995." R. Br. at 2.

Respondent is in error. Complainant's charge was initially submitted to OSC on December 22, 1994 and was completed on February 21, 1995. The charge specifically alleged that Respondent promised Ms. Aguirre that she would get her job back as soon as her "legal documents were valid," that Respondent did not rehire her even though she had "everything in order," and that Respondent kept people working like her who did not have valid papers. The charge was attached to her original complaint, and the amended complaint reasserted this charge.

Moreover, the issue of whether a complaint properly can assert allegations that were not raised explicitly in the charge to OSC has been considered previously. In *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477 (1992), the respondent argued that the complainant's failure to allege national origin discrimination in the charge filed with the OSC amounted to a failure to properly invoke OCAHO jurisdiction and therefore the portion of the complaint alleging national origin discrimination should be dismissed. After examining Title VII employment discrimination law, the Administrative Law Judge disagreed, noting that under Title VII incidents of discrimination not included in an administrative charge filed with the EEOC may be considered in a subsequent complaint if the new claims are like or reasonably related to the allegations contained in the charge. *Id.* at 5; *see also Green v. Los Angeles County Superintendent of Schools*, 883

[8] Section 1324b(b)(1) provides in pertinent part that any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice may file a charge respecting such practice or violation with the Special Counsel. Section 1324b(d)(2) provides in pertinent part that the Special Counsel shall investigate the charge and, if the Special Counsel has not filed a complaint with respect to the charge within 120 days of the receipt of the charge, shall notify the person making the charge of its determination not to file a complaint and that the charging party may file a complaint directly with the Judge within 90 days after the date of the receipt of the notice.

F.2d 1472, 1475–76 (9th Cir. 1989). Thus, the Judge in *Westendorf* held that the complainant's allegation that the company refused to hire him because of his national origin fell within the scope of the OSC's investigation reasonably expected to grow out of the respondent's alleged citizenship discrimination. Similarly, in *Ekunsumi v. Hyatt Regency Hotel of Cincinnati*, 1 OCAHO 866 (Ref. No. 128) (1990), the Judge held that Complainant's failure to check the citizenship discrimination allegation in the OSC charge form was not sufficient grounds to dismiss the citizenship discrimination allegation in the complaint because the allegation fell within the scope of the OSC's investigation reasonably expected to grow out of a charge of discriminatory discharge because of national origin. *Id.* at 871.

In this case Complainant did raise the issue of Respondent's failure to rehire in the charge filed with OSC. Considering the holdings in *Westendorf* and *Ekunsumi,* it would be unreasonable to dismiss Complainant's complaint allegations regarding Respondent's rejections of Complainant's documents in December 1994 and Respondent's failure to rehire Complainant on the ground of failure to exhaust administrative remedies because those allegations fell within the scope of OSC's investigation reasonably expected to grow out of the allegations in the charge. Therefore, Respondent's contention that Complainant failed to exhaust her administrative remedies in connection with the review of Complainant's documents and the rehire issue is rejected.

C. *The Timeliness Issue*

1. *Timeliness of the Complaint*

In its motion Respondent contends that this case was not timely filed pursuant to the applicable statute, 8 U.S.C. §1324b(d)(2), and the Rules of Practice, 28 C.F.R. §68.4(c), because the complaint was not filed within ninety days after the receipt of the right to sue notice from OSC. Noting that it received its copy of OSC's right to sue notice on June 19, 1995, and that the complaint was not filed until October 6, 1995, Respondent argues that Complainant filed her complaint with OCAHO approximately 110 days after OSC provided the notice to Respondent required by Section 1324b(d)(2).

However, the time limitation in Section 1324b(d)(2) refers to the date of receipt of OSC's right to sue letter by the charging party, not the Respondent. Section 1324b(d)(2) specifically provides that the

charging party may file a complaint with an Administrative Law Judge "within 90 days after the date of receipt of the notice." In a letter dated February 2, 1996 addressed to Respondent's counsel, with a copy to the Court and Complainant, OSC stated that the initial determination letter was sent on June 16, 1995 to Complainant at an incorrect address. OSC then sent a copy of the right to sue letter to the correct address on September 1, 1995, and the signed return receipt card indicates that Complainant received this letter on September 7, 1995. Therefore, the credible evidence indicates that Complainant did not receive OSC's right to sue letter until September 7, 1995, and thus her October 6, 1995 complaint was filed well within the 90 days required by 8 U.S.C. §1324b(d)(2) and 28 C.F.R. §68.4(c). Given this recent evidence, in its February 9, 1996 status report Respondent withdrew the argument that Complainant failed to timely file her complaint under 28 C.F.R. §68.4(c).

2. *Timeliness of the Charge Filed with OSC*

Although it withdrew its argument that the complaint was untimely because it was not filed within 90 days of the receipt of the right to sue letter, Respondent continues to assert that Complainant did not file her charge with OSC within the 180 day period required by 8 U.S.C. §1324b(d)(3), and therefore the charge and the complaint are untimely. Section 1324b(d)(3) provides in pertinent part that no complaint shall be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. The filing of a timely charge with OSC is a prerequisite for filing a private action with OCAHO. *Udala v. New York State Dept. of Education*, 4 OCAHO 633, at 6 (1994), *appeal dismissed,* no. 94–4077 (2d Cir. 1994).

Statutes of limitations generally are applied strictly. Courts will neither strain the facts or the law in favor of a statute of limitations nor should such a statute be extended by the courts or be applied to cases not clearly within the statutory provision. *United States v. Workrite Uniform Company*, 5 OCAHO 736, at 7 (1995); 51 Am. Jur. 2d Limita tion of Actions §50 (1970). Because statutes of limitations are among the most universally familiar aspects of litigation considered indispensable to any scheme of justice, it is reasonable to assume that Congress did not intend to create a right enforceable in perpetuity. *See Felder v. Casey*, 487 U.S. 131, 140 (1988); *Bozoghlanian v. Lockheed-Advanced Development Co.*, 4 OCAHO 711, at 9 (1994). This principle is applicable to the statutory require-

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ment that an individual file her charge with the OSC not later than 180 after the unfair immigration-related employment practice has occurred. *See United States v. Hyatt Regency Lake Tahoe,* Final Decision and Order Granting Summary Decision for Respondent, OCAHO Case No. 95B00118 (July 23, 1996); *Bozoghlanian v. Lockheed-Advanced Development Co., supra.*

Complainant has alleged four unlawful acts: (1) that she was fired based on her national origin and citizenship; (2) that the employer requested more or different documents; (3) that KDI retaliated against her; and (4) that KDI failed to rehire her when she presented valid documents in December 1994. Section 1324b(d)(3) only permits the filing of a complaint if a discrimination charge is filed within 180 days of the occurrence of the alleged unfair employment practice. Therefore, I must determine whether each alleged violation occurred within 180 days of the date the charge was filed with OSC.

The complaint states that the charge was filed with OSC on September 9, 1995. Complaint ¶18. However, as acknowledged by Respondent, the September 9 date appears to be in error and the true date actually is more favorable to Complainant. A February 28, 1995 letter from OSC to Jack Rivers, Counsel to the Chief Administrative Hearing Officer, states that Complainant's charge was received by OSC on February 21, 1995, and Respondent has agreed with this date. *See* R. Memo. at 5 and R. Memo Ex. 1. However, as previously discussed, Complainant initially submitted an inadequate charge form to OSC on December 22, 1994. The applicable regulations state that for purposes of determining the timeliness of a charge, when an inadequate charge is filed and OSC requests additional information to complete the charge, the charge is timely if the date of the initial submission is within 180 days of the alleged unfair immigration-related employment practice and the additional information requested is received within that 180-day period or within 45 days of the OSC request. *See* discussion of the regulation at 28 C.F.R. §§44.301(c) and (d) *supra* at 2. As the additional informa tion requested by OSC was received within the allowable 45 days, for purposes of determining the timeliness of the charge, I will consider December 22, 1994 as the date of filing the charge with OSC.

I must next determine when each of the alleged discriminatory acts occurred. The limitation period for filing a charge of discrimination begins to run on the date that the charging party is notified of

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an adverse employment decision. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United States v. Mesa Airlines, supra.*

a. *Termination of Employment Based on Citizenship/National Origin*

When a company allegedly discriminates by discharging an employee, the alleged discriminatory act takes place when the employee is fired, and the statute of limitations starts running from that date. The parties agree, and I so find, that Complainant was discharged on July 27, 1994. Complaint ¶14(c); Answer ¶1; R. Memo. at 3. Thus, the 180 day limitation period commenced on July 27, 1994. In order for the charge regarding the allegations of national origin and citizenship status discrimination to be timely, the charge must have been filed within 180 days of that July 27, 1994 date, or on or before January 23, 1995. As the charge was filed on December 22, 1994, Respondent has failed to show that the allegations of national origin and citizenship status discrimination were untimely.

b. *Request for More or Different Documents*

Complainant also has alleged that Respondent discriminated against her by requesting more or different documents than required to comply with the employment eligibility verification requirements of Section 1324a. Complaint ¶¶16–17.[9] It is unlawful for an employer to request more or different documents when an employee presents an accepted form of documentation showing the employee's identity and work authorization, *see* 8 U.S.C. §1324b(a)(6), although a recent decision suggests that it is not unlawful for an employer to request a specific document in certain circumstances. *See United States v. Zabala Vineyards,* 6 OCAHO 830 (1995). However, the complaint does not specify when the alleged request for more or different documents was made. Therefore, the February 1, 1996 Order directed Complainant to amend her complaint to state the date this alleged unlawful conduct occurred. As noted previously, Complainant complied with that order by amending the complaint

[9] The complaint actually alleges that KDI requested "too many or wrong documents," whereas Section 1324b(a)(6) renders it unlawful for an employer to request "more or different documents." Although the language of the complaint does not track the language of the statute, keeping in mind that the complaint is a form document, and that Complainant is *pro se*, I will liberally construe the allegation as meaning that KDI requested "more or different documents."

in her hand printed letter of February 14, 1996, in which she states that her documents were proffered to Respondent on both June 26, 1994 and December 5, 1994.

Respondent does not directly address the question of when the request for documents occurred but it suggests, supported by the documents accompanying the motion, that all requests for documentation were made prior to July 27, 1994, the date Complainant was terminated. *See* R. Memo at 3, 6 and Reyes' 1st Affidavit. Indeed Respondent admits that Complainant's documents presented in December 1994 reasonably appeared to establish Complainant's eligibility to work in the United States. Amended Answer ¶4; R. Br. at 4. Therefore, Respondent denies that it requested more or different documents in December 1994, although it does admit that it refused to rehire Complainant. Even accepting Respondent's assertion that the request for additional documents occurred on June 26, 1994, the charge filed with OSC was timely because it occurred 179 days prior to the filing of the charge with OSC on December 22, 1994. Moreover, the December 5, 1994 incident is well within the 180 day period prior to the filing of the charge with OSC.

As noted previously, the proponent of a motion for summary decision has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. All reasonable inferences must be accorded the non-moving party. Thus, considering the allegations of the complaint, as amended, and based on the current factual record, Respondent has failed to show that the allegations in paragraphs 16–17 of the complaint concerning Respondent's alleged unlawful request for more or different documents are untimely.

c. *Retaliation Claim*

Complainant also asserts that she was intimidated, threatened, coerced or retaliated against because she filed or planned to file a complaint or to keep her from assisting someone else to file a complaint. Complaint ¶15. She further explains that she felt intimidated and threatened not directly but by other employees because Maria Sanchez (presumably KDI's representative) told many employees that Complainant was fired because she was a special case. Complaint ¶15(a). In her February 14, 1996 letter Complainant asserts that the intimidation took place in December 1994, after she was terminated as an employee. Thus, assuming that the intimida-

tion took place in December 1994, her charge was filed with OSC within 180 days of the alleged unfair immigration-related employment practice, as required by 8 U.S.C. §1324b(d)(3) and thus Respondent has failed to show that the allegation concerning the alleged retaliation in December 1994 is untimely.

d. *Refusal to Rehire*

Complainant finally alleges that Respondent discriminated against her when it failed to rehire her in December 1994, despite allegedly promising to do so if she provided valid work authorization documents. Complaint ¶16. Thus, assuming that the failure to rehire took place in December 1994, her charge was filed with OSC within 180 days of the alleged unfair immigration-related employment practice, as required by 8 U.S.C. §1324b(d)(3) and thus Respondent has failed to show that the allegation concerning the alleged failure to rehire in December 1994 is untimely.

D. *Failure to State a Claim*

In addition to moving to dismiss the complaint because it is untimely, Respondent also has moved for summary decision because the complaint fails to state a claim upon which relief may be granted.

In the memorandum supporting its motion for summary decision, Respondent notes that IRCA provides that an employee has an affirmative duty to attest to the employer that she has employment authorization. *See* R. Memo. at 6; 8 U.S.C. §1324a(b)(2). Respondent states that Complainant presented fraudulent documents both at the time she was hired in March 1991 and in July 1994 when she was asked for documentation by KDI. Indeed Respondent notes that Complainant has admitted that the documents she presented on March 27, 1991 with her employment eligibility verification form (I–9 form) were false, and the INS document which Complainant presented on July 27, 1994 also was false. Complaint ¶14(b); Reyes' 1st Affidavit, ¶7. Respondent further states that it was required to terminate Complainant's employment because knowing employment of a person who is an unauthorized alien subjects the employer to penalties under IRCA. See 8 U.S.C. §1324a(a)(2). Thus, Respondent contends that the complaint should be dismissed because the undisputed facts show that Complainant admitted presenting false employment eligibility documents on two occasions,

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and she never presented genuine employment eligibility documents to KDI. R. Memo. at 7.

Finally, Respondent contends that terminating Complainant was required by IRCA and was non–discriminatory as a matter of law. Respondent references federal regulations promulgated pursuant to IRCA which provide that an employer who continues the employment of an employee knowing that the employee is or has become an unauthorized alien with respect to that employment violates Section 274A(a)(2) of the Immigration and Nationality Act. Knowing is defined by the federal regulations as including not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person through the exercise of reasonable care to know about a certain condition. R. Memo. at 7; *see* 8 C.F.R. §274a.1(l)(1).

As noted previously, Complainant has alleged four instances of discrimination; termination because of her citizenship status and national origin, requesting more or different documents, retaliation, and failing to rehire her. This decision will discuss each of these alleged instances as to whether the complaint states a claim upon which relief may be granted.[10]

1. *Termination of Employment Based on Citizenship/National Origin*

Complainant alleges that she was terminated on July 27, 1994 because of her national origin and citizenship status. Complaint ¶¶8–9. Respondent disputes that allegation, asserting that Complainant was terminated because she presented false documentation at the time of her initial hire in March 1991 and also in July 1994 when she was asked to update her records. R. Memo. at 6–7;

[10] Respondent has not argued or addressed the question of whether claims of document abuse or retaliation can stand alone if a complaint does not state a viable claim of national origin or citizenship discrimination. With respect to the latter, I have ruled recently that I have jurisdiction to hear a retaliation claim even in the absence of a viable national origin or citizenship discrimination claim. *Cruz v. Able Service Contractors, Inc.,* 6 OCAHO 837 (1996). With respect to the question of a free standing document abuse complaint, there is case law holding that a document abuse claim brought pursuant to 8 U.S.C. §1324b is a separate and distinct claim. *United States v. Guardsmark,* 3 OCAHO 572, at 10 (1993). However, since the issue has not been raised or briefed in this case and since my decision is based on other grounds, I do not intend to address that issue here.

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Reyes' 1st Affidavit ¶¶7–8; Reyes' 2nd Affidavit ¶¶8–10; Motush 1st Affidavit ¶¶4–5.

Complainant has not filed any counter affidavit. It is well established that when a party moves for summary decision and supports that motion with an affidavit and other supporting documentation, the adverse party may not rest upon mere allegations or denials in its pleadings. *White v. Roper*, 901 F.2d 1501, 1503 (9th Cir. 1990). Rather the adverse party must set forth specific facts, supported by an affidavit or other similar documentation, showing that there is a genuine issue as to the facts asserted in the motion. *See* 28 C.F.R. §68.38(b); Fed. R. Civ. P. 56; *United States v. Flores-Martinez*, 5 OCAHO 733, at 4–5 (1995). If the adverse party fails to do so, then the facts set forth in the uncontradicted affidavit will be considered as true. *See King v. Idaho Funeral Service Association*, 862 F.2d 744, 746 (9th Cir. 1988); *Mosher v. Saalfeld,* 589 F.2d 438, 442 (9th Cir. 1978); *Jones v. Halekulani Hotel, Inc.,* 557 F.2d 1308, 1310 (9th Cir. 1977). On January 31, 1996 I ordered Complainant to file a response to the motion to dismiss not later than February 16, 1996. She did not do so. Consequently, the assertions in the Motush and Reyes affidavits are uncontradicted and therefore I accept the assertions as true. I further note that Complainant admits in her complaint that she was fired because her papers were not legal. Complaint ¶14(b).

It is an unfair immigration-related employment practice for an employer to discriminate with respect to the hiring or firing of an individual based on national origin, or based on citizenship status if the person is a protected individual within the meaning of the statute. 8 U.S.C.§§1324b(a)(1), (3). *See Kamal-Griffin v. Curtis, Mallet-Provost, Colt & Mosle*, 3 OCAHO 550, at 12 (1993).

The sworn assertions in the Motush and Reyes affidavits refute Complainant's contention that she was fired because of her citizenship or national origin and demonstrate that she was fired because she failed to present valid documentation and in fact admitted supplying false documents. Further, the other documents submitted by Respondent which relate to Complainant's employment show that Complainant misrepresented key facts with respect to her employment eligibility. In her March 1991 application for employment she checked the box indicating that she had a legal right to live and work in the United States, and she presented an alien registration card and social security card in support of her application for employment. She later acknowledged that these documents were false.

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Reyes' 1st Affidavit ¶7, Attachment A. She also presented a fraudulent INS document on July 27, 1994 in an effort to continue her employment. Reyes' 1st Affidavit ¶7.

It is clear that Complainant obtained her employment in 1991 under false pretenses, continued working for over three years based on the fraudulent papers she submitted, and then attempted to continue working by presenting additional false papers. Thus, I accept Respondent's assertion that it terminated Complainant's employment because she admitted using false documents on March 27, 1991 to obtain employment and on July 27, 1994 to attempt to continue working and because at no time during her employment did she produce genuine documents as proof of employment eligibility. *See* Reyes' 1st Affidavit ¶8. Based on the pleadings, the affidavits and the other documents submitted by both parties, it appears that there are no disputed issues of fact regarding the firing in this case. Complainant's allegation that she was discriminated against on the basis of national origin and citizenship fail to state a claim upon which relief may be granted. Therefore, I grant Respondent's motion for summary decision as to paragraphs 8–9 of the complaint.

2. *Request for More or Additional Documents*

Complainant states that the employer refused to accept her employment authorization, social security card, and California identification card. *See* Complaint ¶16(a). However, in a written statement attached to the complaint, Complainant states that she was fired on July 27, 1994 because she did not have legal documents. Further, in another written statement attached to the complaint, Complainant states that she was terminated because her papers had expired.

Respondent agrees that Complainant was terminated because she did not have legal documents and has attached documents in support of its motion, including affidavits by Ms. Reyes and Mr. Motush. *See* R. Memo Attachment 3. In her affidavit Ms. Reyes states that when Complainant commenced employment with KDI on March 27, 1991 she referred in her I–9 form to an alien registration card which expired on September 21, 1992. Reyes' 1st Affidavit ¶2. In early 1993 KDI advised Complainant that, based on her personnel records, the employment eligibility document had expired, and it would be necessary for her to provide current documentation supporting her eligibility for employment. Reyes' 1st Affidavit ¶3. However, no further documentation was provided by Complainant, and on July 19, 1994

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Respondent contacted Complainant to request an updated, unexpired employment authorization document. Reyes' 1st Affidavit ¶6. On July 27, 1994 Complainant presented an INS document which appeared to be fraudulent because the information appeared to have been hand-typed rather than laser printed. Reyes' Affidavit ¶7. Complainant then admitted the document was false and also admitted that the documents she presented to KDI for I–9 verification at the commencement of her employment on March 27, 1991 also were false. *Id.; see also* Reyes' 2nd and 3rd Affidavits; Motush 1st Affidavit.

Respondent has not filed any counter affidavit or any other papers to refute the statements in Ms. Reyes' sworn statements. In fact, she has not directly responded to the assertions in the Respondent's motion for summary decision.[11] As previously discussed, when a party fails to respond to a motion supported by an affidavit, the Judge may find that the facts set forth in the uncontradicted affidavit will be considered as true. *See Jones v. Halekulani Hotel, Inc., supra.*

Moreover, as noted previously in this decision, the Rules of Practice permit a Judge to make adverse findings when a party, as here, fails to comply with a Judge's order. 28 C.F.R. §68.23(c). Consequently, the assertions in the Motush and Reyes affidavits are uncontradicted, and therefore I accept the assertions as true. These refute Complainant's claim that the employer demanded more or different documents or that she was fired because she failed to produce the same. The affidavits also show that the employer rejected her proffered document in July 1994 because it was admittedly invalid and did not request any specific document, merely a document that was legitimate and established her eligibility to work.[12] It is not a violation of Section 1324b for an employer to refuse to accept an admittedly false document or to require the employee to submit a valid document showing her authorization to work. Indeed, if KDI had allowed her to continue to work under such circumstances, KDI could very well subject itself to civil penalties pursuant to 8 U.S.C.

[11] While I have not construed Complainant's failure to respond to the motion as an abandonment of her complaint, *see* discussion *supra* at 8–9, nevertheless she has neither responded nor provided counter affidavits and consequently Respondent's assertions are unrefuted.

[12] Even if the employer had requested a specific document, such a request may not violate Section 1324b(a)(6). *See United States v. Zabala Vineyards*, 6 OCAHO 830 (1995).

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§1324a(a)(2) for knowingly continuing to employ an alien unauthorized to work, after learning that the alien is or has become unauthorized. *See United States v. American Terrazzo Corp.,* Final Decision and Order, OCAHO Case No. 95A00097 (July 18, 1996); *United States v. Mester Manufacturing Co.*, 1 OCAHO 53 (Ref. No. 18) (1988), *aff'd,* 879 F.2d 561 (9th Cir. 1990).

Finally, in her February 14, 1996 letter (which has been construed as an amendment to her complaint), Complainant states that she presented legal papers to Respondent on December 5, 1994. The letter further states that the employer made copies and sent them to Cincinnati to be checked and told her she would be contacted.

It is difficult to understand what type of illegal conduct Complainant is alleging occurred in December 1994 when she presented these further, unspecified papers. Complainant does not allege in the letter that Respondent rejected her documents in December 1994, or that Respondent asked for more or different documents. Consequently, even liberally construing her complaint, as amended, she has failed to state a claim with respect to her allegation that Respondent illegally requested more or different documents. Consequently, I grant Respondent's motion with respect to paragraphs 16 and 17 of the complaint.

3. *Retaliation Claim*

Complainant also alleges that she was intimidated, threatened, coerced or retaliated against because she filed or planned to file a complaint, or to keep her from assisting someone else to file a complaint. Complaint ¶15. In explanation, she states that she "felt intimidated *and threatened, not directly*, but by other employees because Maria Sanchez told many employees that I was fired because I was a special case." Complaint ¶15(a). In her amendment to the complaint Complainant asserts that this conduct took place in December 1994, and therefore I ruled that the allegation is timely. *See* discussion *supra* at 14.

Section 1324b(a)(5) provides in pertinent part that it is an unfair immigration-related employment practice 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. Intimidation is a separate charge which stands on its own and does not require an allegation of national origin or citizenship discrimination. Thus, an alleged violation of Section 1324b(a)(5) may proceed to hearing even if there are no viable charges of national origin or citizenship discrimination. *See Cruz v. Able Service Contractors, Inc.*, 6 OCAHO 837 (1996); *Palacio v. Seaside Custom Harvesting*, 4 OCAHO 675, at 2 (1994).

Complainant was fired on July 27, 1994. There is no statement or suggestion in the complaint that the alleged retaliatory conduct occurred prior to her dismissal. Moreover, there is no suggestion that she intended to file a charge until she was dismissed or that she testified, assisted, or participated in any manner in an investigation. Further, in her February 14, 1996 letter she states that the conduct occurred in December 1994, which is conduct that occurred post-employment.

The issue of whether post-employment retaliation is covered by IRCA has not been decided. Moreover, in actions brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e–3(a), federal circuit courts have not agreed on whether a former employee may assert a retaliation claim for conduct occurring after the termination of employment. In *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), the Court held that such an action is not viable under Title VII. However, the Ninth Circuit Court of Appeals has allowed former employees to assert retaliation claims for post-employment conduct in a Title VII case. *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982). While this issue has not been adjudicated with respect to Section 1324b, the logic of the *O'Brien* decision would suggest that the Ninth Circuit Court would allow such claims under Section 1324b. Moreover, the language of the retaliation provision at 8 U.S.C. §1324b(a)(5) is broader then Title VII because it protects "any individual," while Title VII protects only "employees."[13] The language of the statute indicates that Section 1324b(a)(5) was intended to protect any individual, including former employees, if they were intimated, threatened, coerced or retaliated for the purpose of inter-

[13] Title VII's anti-retaliation provision at Section 704(a) of Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have either availed themselves of Title VII's protections or assisted others in so doing. 42 U.S.C. §2000e–3(a). The term "employee" is defined as "an individual employed by an employer." 42 U.S.C. §2000e(f).

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fering with a right or privilege secured under Section 1324b, or for intending to file or filing a charge or complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Section 1324b.

However, Complainant's assertion that she was intimidated/threatened because the employer told other employees that she had been fired because she presented illegal documents does not state a viable cause of action under Section 1324b. First, the statement is true, as shown by Reyes' affidavits and as admitted by Complainant. As to her assertion that the employer and/or its employees informed other employees that she was a "special case," the employer has demonstrated through uncontradicted affidavits that it has a non-discriminatory policy of terminating and refusing to rehire dishonest employees. *See* Motush 1st Affidavit; Reyes' 2nd Affidavit.

Moreover, even if the statements about her dishonest conduct were not true, such statements, while perhaps actionable in a different forum for a different cause of action (e.g. defamation) are not the type of conduct prohibited by Section 1324b. In *Yohan v. Central State Hospital,* 4 OCAHO 593, at 9 (1994), the complainant asserted, among other things, that the respondent intimidated him by repeatedly warning him not to argue about the unfair treatment to which he was subjected, that he did not have any rights or privileges because he is not a citizen, and that he could be deported. The Judge held that OCAHO did not have jurisdiction over that claim. *Id.* at 10. Similarly, I conclude in this case that Complainant's assertion that she was intimidated/threatened because Respondent allegedly told other employees that Complainant was fired because she presented illegal papers and was a special case fails to state a viable claim. Therefore, I grant Respondent's motion for summary decision as to paragraph 15 of the complaint because it fails to state a claim upon which relief may be granted.

4. *Refusal to Rehire*

As noted in the March 29, 1996 Order, both the original complaint and the amended complaint filed on February 14, 1996 alleged that Respondent violated Section 1324b by refusing to rehire Complainant in December 1994. Complainant alleges that she was promised she could return to work if she had valid work authorization documents and on December 5, 1994 she brought valid work authorization documents (social security and legal identification card),

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but Respondent refused to accept these documents. On January 19, 1995 Respondent notified Complainant that it would not rehire her because she admitted having presented false documents to Respondent in conjunction with her prior employment. Reyes' 2nd Affidavit ¶10; Motush 1st Affidavit ¶7.

Construing her *pro se* complaint broadly, Complainant's allegation could be construed as a type of document abuse. An employer commits document abuse in violation of 8 U.S.C. §1324b(a)(6) if it refuses to honor employment eligibility documents that on their face reasonably appear to be valid and to establish the applicant's employment eligibility. *United States v. Strano Farms*, 5 OCAHO 748, at 17 (1995), *petition for review filed*, No. 95–4654 (11th Cir. May 25, 1995).

Respondent admits that Complainant presented identity and employment authorization documents (INS Employment Authorization Card and Social Security Card) in December 1994 which reasonably appeared to establish Complainant's employment eligibility. Amended Answer ¶4; Motush 1st Affidavit ¶6. Respondent further admits that it refused to rehire Complainant despite the fact that the documents appeared to be valid. However, Respondent asserts that it did not refuse to honor Complainant's documents. Rather it accepted the validity of the documents tendered in December 1994 but refused to rehire Complainant for a legitimate and non-discriminatory reason; namely, that she was dishonest because she presented false employment eligibility documents when she originally applied for employment with KDI in March 1991 and also in July 1994 when she was asked for an updated employment eligibility document. Respondent contends that although the December 1994 documents reasonably appeared to establish Complainant's work eligibility, Respondent already had decided not to rehire her due to her previous dishonesty. Motush 1st Affidavit ¶6. Respondent asserts that its decision was not related to Complainant's immigration status, and that Respondent has terminated the employment of other persons who have presented false documents. R. Br. at 7; Motush 1st Affidavit ¶8. Respondent also has terminated the employment of another employee who falsified time cards. *Id*. Respondent also notes that Complainant was alerted to this policy because on the application form above her signature was language which specifically stated that any misleading or incorrect statements may render her application void or become cause for discharge if she were employed. R. Br. at 5.

Respondent has supported its brief with affidavits and documentary evidence. In particular, Respondent has submitted three affidavits by Maria Reyes and two affidavits by James L. Motush. Mr. Motush states that he is personally familiar with Complainant's personnel file. Motush 1st Affidavit ¶2. Mr. Motush states that Complainant admitted that she presented work authorization documents which were fraudulent. Motush 1st Affidavit ¶4. Further, Mr. Motush states that Respondent terminated Complainant on July 27, 1994 because she admitted to providing false employment authorization documents both at the time of her employment application on March 27, 1991 and again on July 27, 1994 when she was asked to provide proof of employment eligibility. He notes that she also provided false information on the application and on the I–9 form, and that Respondent would have declined to hire her on March 27, 1991 if it had known that the employment authorization documents she presented were false. Motush 1st Affidavit ¶5.

Complainant has responded to the Respondent's supplemental brief and Motush's affidavit by asserting in her May 8, 1996 letter that other employees who were fired because they had false documents were rehired. She names six individuals; namely, Olivia Hernandez, Carolina Vaires, Francisco Hernandez, Patricia Baldwin, Maria Rodriguez, and Magdalena Saldana. Consequently, Complainant's assertions suggest that Respondent's reasons for her termination and its refusal to rehire her were a pretext.[14]

Respondent has thoroughly refuted Complainant's assertions in its June 19, 1996 Supplemental Brief, which is supported by affidavits from Mr. Motush and Ms. Reyes as well as other documents. Respondent notes that none of the six individuals listed by Complainant were terminated for presenting false documents or were rehired. Indeed four of the six individuals—Olivia Hernandez, Carolina Vaires, Francisco Hernandez, and Maria Rodriguez—are not current or former employees of Respondent. R. Supp. Br. at 2; Motush 2nd Affidavit ¶3. Indeed since none of the four individuals even applied for employment with Respondent, KDI never had even a prospective employer-employee relationship with these four, and certainly did not terminate or rehire them as Complainant alleges. R. Supp. Br. at 2; Motush 2nd Affidavit ¶3.

[14] However, Complainant has failed to support this allegation by an affidavit, and thus the sworn statements by Ms. Reyes and Mr. Motush's affidavit are unrefuted.

As to the remaining two individuals, both are current employees. Magdalena Saldana has been continuously employed by Respondent since January 18, 1989. Respondent avers that she never presented obviously false employment eligibility documents nor ever stated or admitted that she had engaged in dishonest acts as part of her employment with Respondent. R. Supp. Br. at 3; Motush 1st Affidavit ¶4. Contrary to Complainant's assertion, Respondent has never terminated or rehired Ms. Saldana. R. Supp. Br. at 3.

As to the remaining individual named by Complainant, Respondent states that Patricia Valdivia presented what appeared to be genuine employment eligibility documents to Respondent on April 30, 1991 and has never been terminated by Respondent for presenting false employment eligibility documents or been rehired. R. Supp. Br. at 3; Motush 2nd Affidavit ¶5; Reyes' 3rd Affidavit ¶4. Valdivia did show Respondent a series of notices from INS regarding her application for employment authorization based on an asylum application and an economic hardship classification. *Id.* Respondent accepted these notices and believed that Ms. Valdivia was legally protected from adverse employment consequences since she was engaged in the process of providing legal documentation regarding employment authorization. Motush 2nd Affidavit ¶6; Reyes' 3rd Affidavit ¶5. While Respondent acknowledges that this was an error, it asserts that Ms. Reyes' misunderstanding of the law served as a non-discriminatory basis for its decision not to terminate Ms. Valdivia. R. Supp. Br. at 5.

I find that the situations of Complainant Aguirre and Ms. Valdivia are not comparable. Complainant admitted that she had presented false employment eligibility documents to Respondent on two occasions, whereas Ms. Valdivia never made such an admission nor gave Respondent any reasonable suspicion to believe that she was acting dishonestly. Thus, Respondent had very clear grounds on which to terminate and refuse to rehire Complainant; namely, that she admitted that she knowingly presented a false employment eligibility document.

Further, I find that Respondent has shown that it has a uniform and non-discriminatory policy of terminating and refusing to rehire individuals who engage in dishonest acts, including presenting false employment eligibility documents. Respondent has shown that following a company wide employment eligibility audit in September 1994, Respondent terminated eight non-U.S. citizen employees, who

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were unable to produce legitimate employment eligibility documents after a request for the same was made. R. Supp. Br. at 5; Motush 2nd Affidavit ¶7.

Moreover, Respondent's policy is not limited to non-citizens or to those who present false employment eligibility documents. Respondent has shown that it terminated, and has not rehired, at least one other individual who committed an act of dishonesty. Respondent terminated Doug Joslin, a U.S. citizen, who falsified time cards, and it has not rehired him. Motush 2nd Affidavit ¶8. Thus, I find that Respondent's termination of and refusal to rehire Complainant was consistent with Respondent's non-discriminatory and uniform policy and practice of terminating and refusing to rehire employees who present false employment eligibility documents and who engage in dishonest acts about which Respondent becomes aware.

I conclude that Respondent did not violate Section 1324b in refusing to rehire Complainant. In deciding this question I am cognizant of the fact that the matter is being adjudicated in the context of a motion for summary decision and therefore every reasonable factual inference must be accorded the opposing party. However, Respondent has supported its motion by affidavits and other documentation. When a motion for summary decision is supported by affidavits or other documentation, the adverse party may not rest upon the mere allegations of the complaint but must set forth specific facts, supported by an affidavit or affidavits, showing that there is a genuine dispute as to the facts asserted in the motion. *See* Fed. R. Civ. P. 56 (e); *Jones v. Halekulani Hotel, Inc., supra; Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 (7th Cir. 1976); *see also Brooks v. Watts Window World*, 3 OCAHO 570 (1993). If the adverse party fails to do so, the Administrative Law Judge may enter a summary decision for the moving party if the pleadings, affidavits, and other material show that there is no genuine issue as to any material fact, and that the party is entitled to summary decision. 28 C.F.R. §68.38(c). Here, despite the fact that she was given ample opportunity to respond to Respondent's motion, Complainant has failed to respond and has failed to set forth facts showing that there is a genuine dispute of material fact. Therefore, the facts asserted in the Reyes and Motush affidavits are uncontradicted.

Even assuming that Complainant has established a prima facie case of discrimination with respect to Respondent's refusal to rehire

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her, once an individual alleging discrimination establishes a prima facie case, the burden of production shifts to the employer to assert legitimate nondiscriminatory reasons for its employment decision. *United States v. McDonnell Douglas*, 4 OCAHO 676 (1994); *Kamal Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO 550 (1993). Here Respondent has met that burden. Respondent has shown that it did not refuse to rehire Complainant because of her citizenship or national origin nor did it retaliate against her or request more or different documents. Indeed Respondent acknowledges that the documents presented in December 1994 reasonably appear to be valid and to establish Complainant's eligibility to work. Motush 1st Affidavit ¶6. However, Respondent has shown that it declined to rehire Complainant due to her previous dishonesty in presenting fraudulent work documents. *Id.* Furthermore, Respondent has shown that on or about January 19, 1995 it informed Complainant that she would not be eligible for rehire because she admitted to having presented false documents to Respondent in conjunction with her prior employment with KDI; namely, that she had been dishonest by presenting false documents and by providing false information on the application form and I–9 form. Motush 1st Affidavit ¶7.

Further, Respondent has shown that it has established a general practice that it does not tolerate dishonest behavior by its employees, including providing false documents and falsified information on its employment application and I–9 form. Motush 1st Affidavit ¶8. Complainant attested in her I–9 form, which was completed and signed by Complainant on January 28, 1991, that the documents which she presented as evidence of employment eligibility were genuine and that she was aware that federal law provided for imprisonment and/or a fine for any false statements or use of false documents. Motush 1st Affidavit Attachment B. Yet it is clear that Complainant knowingly and deliberately presented both false documents in January 1991 to enable her to secure employment with KDI and later in July 1994 in an effort to continue her employment.

The issue presented here is whether or not Respondent's refusal to rehire a former employee who admits to having used false documents to secure employment in the past, and uses false documents in an attempt to continue such employment, violates 8 U.S.C.

§1324b.[15] The Complainant must establish the elements of a prima facie case of discriminatory refusal to hire. To establish a prima facie case of refusal to hire under 8 U.S.C. §1324b, Complainant must establish that (1) she is a member of a protected class; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified she was rejected; and (4) after she was rejected, the position remained open, and the employer continued to seek applications from persons of plaintiff's qualifications. *See, e.g., Chu v. Fujitsu Network Transmission System, Inc.,* 5 OCAHO 778, at 3–4 (1995). Assuming that a complainant establishes a prima facie case, then the respondent must be prepared to articulate a legitimate non-discriminatory reason for the alleged discriminatory act. Once the employer articulates a legitimate non-discriminatory reason, the complainant must establish that the articulated reason was in fact a pretext for prohibited discrimination. *Id.*

Here Complainant clearly has alleged the first three elements. While it is not clear whether the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications, I will assume for the purpose of Respondent's motion that she has so alleged. Certainly Respondent does not assert that no positions were open at the time Complainant applied. However, Respondent has articulated a non-discriminatory basis for both its termination and refusal to rehire Complainant; namely that it terminates and refuses to reemploy individuals who are dishonest, including but not limited to those who submit false employment eligibility documents. In support of that assertion, it has attached the Reyes and Motush affidavits. Complainant has not even attempted to refute the statements in these affidavits. Therefore, I find that Respondent has established that it has a policy of terminating and refusing to rehire individuals who have been fired for dishonest acts and that it has applied that policy in a non-discriminatory manner.

I hold that an employer which has a policy of terminating and refusing to rehire employees who engage in dishonest actions, including presenting false employment eligibility documents or making a false statement on the application and I–9 form, does not violate Section 1324b by refusing to rehire an employee who admittedly en-

[15] Thus, the issue is not whether Respondent refused to honor documents tendered by Complainant which reasonably appeared to be genuine.

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gaged in such dishonest conduct. Therefore, I reject Complainant's assertion that Respondent unlawfully discriminated against her in refusing to accept her employment authorization documents and refusing to rehire her.[16]

IV. *Ultimate Findings and Conclusions of Law*

For all the reasons stated in the above decision, I reject Respondent's contention that the complaint should be dismissed on the ground that Complainant's charge filed with OSC was untimely. However, I hold that Complainant's assertions that KDI unlawfully requested more or different documentation, and that Respondent intimidated, threatened, coerced or retaliated against her because she filed or planned to file a complaint or to keep her from assisting someone else to file a complaint, as well as the claims alleging national origin and citizenship status discrimination, fail to state a claim upon which relief may be granted. I also conclude that her claim that Respondent unlawfully discriminated against her by refusing to rehire her after she presented valid work authorization documents in December 1994 also should be dismissed because the employer has articulated a non-discriminatory reason for its refusal to rehire, and Complainant has failed to refute that reason. Therefore, I grant Respondent's motion for summary decision.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Concerning Appeal

As provided by statute, not later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the 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. *See* 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[16] OSC in its amicus brief requests that the Court not rule that an employer has an absolute right to deny reemployment to persons who have presented false work authorization documents in the past but rather should analyze these cases by determining if the employer has a policy of refusing to rehire employees who have been fired for cause and whether that policy has been applied in a non-discriminatory manner. OSC Br. at 8. In view of my finding that KDI does have such a policy and has applied it in a non-discriminatory manner, I do not reach the question of whether an employer may refuse to rehire an individual who has presented false work authorization papers in the past.