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

July 21, 1997

HOWARD EUGENE MCNIER, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00072
SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)

ERRATA

The following corrections should be incorporated in the Order Dismissing in Part and Ordering Further Inquiry issued July 3, 1997, restating and ratifying the Errata dated July 9, 1997:

Under Appearances, the name "***Robert S. Jaret, Esq.,* for Complainant**" should be deleted and the name "***Howard Eugene McNier,* pro se**" should be inserted.

Page 4, footnote 1, **add text of footnote 7 from page ll after the last sentence of footnote 1**.

Page 6, paragraph 7, **insert the words "United States Department of Justice" before the word "Office" and insert "(OSC)" after the word "Practices".**

Page 6, first paragraph under II. Procedural History, **insert the word "OSC" after "with" on the first line, and delete "the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)".**

Page 11, **delete footnote 7**.

Page 12, first full paragraph, second line, **after "*12" insert "(O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996)"**.

Page 12, last sentence of first full paragraph **the citation should read "*Westendorf v. Brown & Root*, 3 OCAHO 477, at 6–7 (1992), 1992 WL 535635, at *7 (O.C.A.H.O.)".**

Page 13, footnote 8, **delete the word "a" at the end of the first line, insert a period after the word "actions" and delete the rest of the sentence.**

SO ORDERED.

Dated and entered this 21st day of July, 1997.

MARVIN H. MORSE
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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July 3, 1997

HOWARD EUGENE MCNIER, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00072
SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)

ORDER DISMISSING IN PART AND ORDERING FURTHER INQUIRY

Appearances: *Robert S. Jaret, Esq.,* for Complainant
Patricia Bescoby Bartscher, Esq., University Counsel, for Respondent

I. *Introduction*

Howard Eugene McNier (McNier or Respondent), an adjunct faculty member at San Francisco State University (CFSU or Respondent) College of Business, contends that CFSU discriminated against him on the bases of his status as a U.S. citizen and his national origin by:

1) choosing for a full-time, tenure track, hospitality (hotel) management position Professor Hailin Qu (Qu), a less qualified alien from Hong Kong, allegedly not work-authorized on the date(s) that he was selected and McNier rejected, for whom CFSU, purportedly by fraud, later obtained Labor Certification WAC–97–021–51908,

2) purposely and pretextually structuring the requirements for the tenure track hospitality management position to include a PH.D. in Hospitality Management, a recently developed degree granted by a handful of graduate schools, unavailable at the time McNier earned his J.D. and M.B.A., to exclude McNier as a candidate, although (a) McNier had successfully taught hospitality management for years at CFSU and consistently earned "Outstanding" evaluations, (b) the Department Chair herself lacked this qualification, and (c) the applicant chosen for the position himself lacked this qualification on the date(s) he was chosen and McNier rejected, and

3) retaliating against McNier and attempting to intimidate him for filing a discrimination charge.

McNier requests that three individuals, Janet Sim (Sim), Department Chair, Hospitality Management, College of Business, CFSU; Kenneth Leong (Leong), Department Chair, Accounting Department, College of Business, CFSU, and Arthur Wallace (Wallace), Dean, College of Business, CFSU, be added as individual respondents in this OCAHO action. Complainant's Reply to Affirmative Defenses, at p. 3.

On May 7, 1996, McNier filed Charge No. 37096046 with the San Francisco District Office of the Equal Employment Opportunity Commission (EEOC). Under a formal agreement between EEOC and the California State Department of Fair Employment and Housing (Department), McNier's charge was automatically filed with the Department. On May 13, 1996, the Department issued a letter advising McNier of his right to sue in state court within one year pursuant to CAL. GOV. CODE §12965(b).

By letter dated May 23, 1997, with an appended state court filing, McNier advises that he is represented by Robert Jaret, Esq., and files a copy of the complaint in his state action. I have not lodged this letter and appended document as a filing in the OCAHO case, pending determination as to its relevance. As appears from the state action appended to the letter, McNier filed suit in California Superior Court for the County of San Francisco on May 12, 1997, against the Trustees of the California State University, Sim, Leong, Wallace, and fifty (50) unnamed defendants. The state action charges race, age, and citizenship discrimination under 8 U.S.C. §1324b, 38 U.S.C. §4212, and CAL. GOV. CODE §§12940 (a), (h), and (f),

and retaliation for whistle blowing under CAL. GOV. CODE §§1102.5 and 8547 *et seq*. McNier contends that:

> Defendant WALLACE mandated that a caucasian [sic] candidate would not be considered for the subject position, or any other position in the College of Business, and further stated: "I will hire a white guy over my dead body."

McNier v. Trustees of California State University et al., Complaint (May 12, 1997), at p. 6. McNier alleges that a PH.D. in Hospitality Management, "a requirement [for the position] that was not imposed upon minority applicants," was imposed upon *his* candidacy as "a pretext for discriminating against . . . [him] on the basis of his race and age." *Id.* According to McNier, such a degree is newly coined, and therefore was unavailable to candidates over 40 years old at the time most such candidates were pursuing graduate education. *Id.* McNier asserts that "he and other non-minority lecturers have been paid at a lower scale than minority lecturers, without any legitimate basis for doing so." *Id.*

On February 25, 1997, McNier filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). His OCAHO case poses at least nine questions:

1) Does 8 U.S.C. §1324**b** contemplate individual liability?[1]

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[1]For an order holding that individual liability is contemplated in 8 U.S.C. §1324**a** proceedings, *see United States v. Wrangler's Country Cafe, Inc. and Henry D. Steiben, Individually*, 1 OCAHO 138, at 935–936 (1990), 1990 WL 512125, AT *5–6 (O.C.A.H.O.) (emphasis added):

> The employer sanctions provisions of IRCA, as noted above, impose civil monetary penalties upon employers ***or their agents*** who hire non-U.S. citizens who are not work-authorized to work in the United States. The discrimination provisions of IRCA require employers ***or their agents*** to pay back pay and attorneys' fees to those employees who have been unlawfully denied employment.

This order relies on the definition of employer found at 8 C.F.R. §274a (Control of Employment of Aliens) (1996) (emphasis added):

> The term "employer" means a person or entity, ***including an agent or anyone acting directly or indirectly in the interest thereof***, who engages the services or labor of an employee to be performed in the United States for wages or other renumeration.

The order, which denied Respondent's request for summary judgment in an 8 U.S.C. §1324**a** proceeding, is not dispositive of the issue as posed in this §1324**b** action.

Title 8 U.S.C. §1324b(a)(1) states that it is "an unfair immigration-related employment practice for a *person or other entity* to discriminate. The applicable regulation, 28 C.F.R. pt. 44, provides no definition of person, entity, or employer. Section 1324b remedies include hiring and restatement of the victim of discrimination, with or without back pay. Suing an individual would not allow this—no individual is empowered

Continued on next page—

2) Is CFSU sheltered from liability by state sovereign immunity?

3) Even if CFSU might otherwise be sheltered by state sovereign immunity, has California consented to suit in 8 U.S.C. §1324b discrimination actions?[2]

Continued—

to offer remedial employment for another person or entity. Furthermore, although an individual could be liable for a civil penalty, this would not benefit the injured party.

The legislative history of §1324b does not address the issue of individual liability. Interestingly enough,

> [t]he issue of whether individual liability attached in a Title VII, ADA, or ADEA claim is [also] a matter of statutory interpretation. The legislative history of these statutes fails to show a clear sign of Congressional intent. Because these statutes use virtually the same definition of employer, courts routinely apply arguments regarding individual liability to all three statutes interchangeably.

Rick A. Howard, *Debating Individual Liability Under Title VII . . .* ,19 AM. J. TRIAL ADVOC. 677, 678 (1996).

As noted above, 8 C.F.R. §274a defines employer as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee . . ." Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. §2000e(b) (1991).

The U.S. Court of Appeals for the Ninth Circuit, the relevant reviewing court in this case, held in *Miller v. Maxwell's Intern., Inc.* that individuals cannot be adjudged personally liable for acts of employment discrimination in Title VII actions. *Miller v. Maxwell's Intern., Inc*., 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 510 U.S. 1109 (1994); *see* Henry P. Ting, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515 (1996) (finding *Miller* representative of both sides of the individual liability issue. While finding the argument for individual liability based on the "any agent" language "not without merit," the *Miller* court relied on *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (holding that Title VII "speaks of unlawful practices by the employer and not . . . by officers or employees of the employer. Back pay awards are paid by the employer. The individual defendants cannot be held liable for back pay"). *See Meritor Sav. Bank v. Vinson*, *FSB,* 477 U.S. 57, 72 (1986) ("Congress' purpose in including 'agent' in the definition of employer was to define the scope of liability of the employer, [but] it said nothing about any liability on the part of the employee/agent"). The Sixth Circuit recently commented on *Miller*, concluding that in Title VII cases "the obvious purpose of this agent provision was to incorporate *respondeat superior* liability into the statute." *Walthen v. General Elec. Co*, 1997 WL 306593, at *3 (6th Cir. 1997). This, of course, is an 8 U.S.C. §1324b case, not a Title VII case. However, the plaintiff, who bears the burden of establishing that 8 U.S.C. §1324b provides for individual liability, should take these analogous holdings into account.

[2]*See* CAL. UN. INS. CODE §9601.7 (1997) (emphasis added), which incorporates by reference the notice requirement and some discrimination prohibitions of The Immigration Reform and Control Act of 1986 (IRCA) enacting *inter alia*, §1324B of the Immigration and Nationality Act (INA), codified as 8 U.S.C. §1324b:

—Continued on next page

4) On which ***exact date***(s) did CFSU:

A) ***reach its decision(s) to hire Qu and reject McNier?***[3]

Continued—

> ***[I]t is a violation of both state and federal law to discriminate against job seekers on the basis of ancestry, race, or national origin.***

See also CAL. CONST. ART. 1 §31 (DISCRIMINATION . . . IN PUBLIC EMPLOYMENT) (added by Prop. 209) (emphasis added):

> ***The state shall not discriminate*** against, ***or grant preferential treatment to***, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> * * * *
>
> "[S]tate" shall include . . . the state itself, any . . . public university system, including the University of California. . . .

See also CAL. GOV. CODE §12940:

> It shall be an unlawful employment practice . . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, marital status, or sex of any person . . . to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions or privileges of employment . . . [or] to print or circulate . . . any publication . . . which expresses, directly or indirectly, an . . . discrimination. . . .
>
> * * *
>
> "[E]mployer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

In construing §12940, California courts look to federal law. *Periera v. Schlage Electronics*, 902 F. Supp. 1095 (N.D. Ca. 1995); Greene *v. Pomona Unified School Dist.*, 32 Cal. App. 4th 1216 (1995), 38 Cal. Rptr. 2d 770 (1995); *Carr. v. Barnabey's Hotel Corp*, 23 Cal. App. 4th 14 (1994), 28 Cal. Rptr.2d 127 (1994); *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467 (1992), 4 Cal. Rptr. 2d 522 (1992). The antidiscrimination provisions of the California Code comprise a floor, not a ceiling. CAL. GOV. CODE §12993 (CONSTRUCTION):

> The provisions [for fair employment] . . . shall be construed liberally for the accomplishment of the purposes thereof.

[3]McNier and CFSU both incorrectly focus on the date(s) on which Qu assumed his duties at CFSU; this focus is beside the point and after the fact. **The date(s) on which the hiring committee reached its decision, and the responsible University official approved, Qu's hiring and McNier's rejection are the critical dates for the purposes of determining whether or not McNier was the victim of discrimination. CFSU shall provide these dates, and shall reveal whether or not Qu was authorized on those dates to work in the United States. Subsequent events, such as Qu's actual entry on the job at CFSU, and Qu's work-authorization after he was elected, are irrelevant to this discrimination inquiry.** For a discussion of the implications of an alien's status at the time of the alleged discrimination for suit *see Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO 590, at 4 (1993), 1993 WL 723364, at *3 (O.C.A.H.O.) (holding that under 8 U.S.C. §1324b(a)(3) "[t]o be entitled to IRCA citizenship discrimination protection, an individual must be either a citizen or national of the United States, or an alien (1) admitted for permanent residence, (2) an IRCA amnesty applicant, (3) a refugee, or (4) an asylee" **at the time of discrimination**, finding that otherwise work-authorized alien lacked standing at time of alleged discrimination to bring Complaint, and dismissing Complaint).

B) extend an offer of employment to Qu?

C) inform McNier that he had not been chosen?

5) Was Qu work-authorized ***at the time*** CFSU chose Qu and rejected McNier?

6) Did CFSU discriminate against McNier on the basis of citizenship when it chose Qu?

7) Did CFSU retaliate against McNier, or attempt to intimidate him, for filing a charge under §1324b with the Office of Special Counsel for Immigration-Related Unfair Employment Practices?

8) How can a national origin charge survive the mandated limits of 8 U.S.C. §§1324b(a)(2)(B) and 1324b(b)(2), which preclude §1324b actions against employers of fifteen (15) or more employees?

9) Can an OCAHO complainant who failed to allege national origin discrimination in his OSC charge maintain a national origin discrimination claim?[4]

Of these questions, only number eight is readily answered. As discussed at III, *infra*, 8 U.S.C. §1324b effectively prohibits national origin suit where the employer employs fifteen (15) or more individuals. 8 U.S.C. §§1324b(a)(2)(B), 1324b(b)(2).

II. *Procedural History*

On September 21, 1996, McNier filed a *pro se* charge with the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). McNier alleged that CFSU University discriminated against him on the basis of citizenship status and retaliated against him for asserting rights protected by 8 U.S.C. §1324b when:

[4]*See George v. Bridgeport Jai-Alai,* 3 OCAHO 537 at 6, 7 (1993), 1993 WL 403081, at *4 (O.C.A.H.O.). Because I dismiss McNier's OCAHO national origin claim on another basis, I do not here reach this issue.

> On August 26, 1996,[5] Hailen Qu began employment as an associate professor in the College of Business. . . . I wrote to the local INS office on August 28, 1996 that, after meeting Qu on Aug. 26, "to the best of my knowledge Qu is neither a citizen of the U.S. nor has 'green card' working rights. I, an American citizen, was a candidate for the same position, was ranked #1 by the hiring committee, but was denied the appointment in favor of Qu." I have been totally replaced in the position I taught for five years and, after I complained, have been assigned a poor teaching assignment, had a class dropped at the last minute before school started, and had my pay actually reduced (in addition to losing the major pay increase the position which Qu got would have given me).
>
> On Sept. 16, 1996 Mr. Juan Bustos (INS Investigator, (415) 705–3388) phoned me to obtain additional information concerning Qu. He later informed me that Qu was working illegally and would be arrested and detained. He, too, advised me to contact your office.
>
> In my August 28 letter to INS, I also advised them that my superior, Janet Sim, stated in a faculty meeting after I had complained of the hiring process, that the College of Business "has someone who gets these cases through immigration." If this indicates an intentional violation of the law, I would hope that you could stop it.

OSC Charge, at ¶9. McNier acknowledged that he had filed a charge based on the same factual predicate with EEOC, and that CFSU employed fifteen (15) or more employees. OSC Charge, at ¶¶3, 8.

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[5]**This date is not the date of determination of discrimination, nor is Qu's June—August immigration status, here discussed.** According to documents provided by CFSU, it petitioned INS for Qu's admission as a "nonimmigrant worker," Class H1B, in Case No. WAC–96–178–50124, Type I 129, on June 10, 1996, identifying Qu as a citizen of the People's Republic of China, born on November 8, 1951. INS approved San Francisco's petition on June 27, 1996, and authorized Qu for work from June 27, 1996 to June 14, 1999. Qu's Employment Eligibility Form (INS Form I–9), signed by Qu and Helen Fink on July 30, 1996, attests that Qu provided Social Security No. 600–36–2430, that he is "an alien authorized by the Immigration and Naturalization Service to work in the United States upon (. . . Admission Number WAC–96–178–50124)" until June 14, 1999, and that he presented as proof of his work eligibility an unexpired foreign passport, Document No. 422160, with attached employment authorization, expiration date January 30, 1998. On October 30, 1996, CFSU petitioned the INS to adjust Qu's status to that of Outstanding Professor or Researcher, Section 203(b)(1)(B), in Case No. WAC–97–510908, Type I 140. INS granted the petition on November 7, 1996. Answer, Exhibit D. **These documents do not, however, appear to establish that Qu was work-authorized at the time CFSU rejected McNier and chose Qu, presumably as early as February 1996, when McNier, according to his EEOC charge, was told he would not be interviewed for the position. The date(s) on which CFSU reached these decision(s) are the probative dates. CFSU shall provide documentation establishing the exact date on which the hiring committee reached, and the responsible university official approved, its hiring decision, and a description of Qu's status at that critical time.**

By determination letter dated January 30, 1997, OSC advised that it declined to file an OCAHO Complaint "at this time, but that the investigation is not concluded and will continue during the following 90 day period of time." OSC informed McNier of his right to file a private action before OCAHO. 8 U.S.C. 1324b(d)(2).

On February 21, 1997, McNier did so *pro se*, reciting that on October 10, 1995, he applied for a position teaching courses in hospitality (hotel) management at CFSU; that he was knowingly and intentionally not hired because of citizenship status and national origin discrimination; that the Chair, Sim, herself of Asian descent, flew in an Asian alien applicant from Hong Kong and "used [a] fraudulent labor certification to hire him." OCAHO Complaint, at ¶¶8, 9, 10, 11, 12, 13. McNier alleges that after August 26, 1996, "I was replaced in ALL courses I had previously taught in [sic] hospitality dept., including courses the Chinese had no qualifications to teach." OCAHO Complaint, at ¶14(b). McNier contends that he was the victim of retaliation:

> [A]fter I filed federal charges, my pay was reduced per course taught, my number of courses was reduced, I have been threatened by Dept. Chair Leong, and posters put up by my supporters were torn down by administration w/threats to have supporters arrested (this also caused a witness for me to back out).

OCAHO Complaint, at ¶15(a). McNier requests that he be hired for a tenure track, full-time position, and that he receive back pay from January 1, 1992.[6]

On March 27, 1997, CFSU filed its Answer, admitting that McNier applied for the advertised tenure-track faculty position "on or about November 10, 1995," and that he was not hired, but denying that it used fraudulent labor certification documents and that McNier was qualified for the position. Answer, at ¶¶4, 5, 8, 9.

San Francisco's denial that McNier was qualified, however, is presumptively inconsistent with the information provided in the Appendices to its own Answer. These Appendices include February 7, 1996, September 6, 1995, February 7, 1995, September 14, 1994, March 23, 1994, and February 14, 1994, letters of appointment to an

[6]McNier does not give the rationale for such an award in his OCAHO Complaint. In his state action, however, he contends that CFSU routinely pays minority faculty members more than white faculty members.

adjunct faculty position teaching Hospitality Management, and Spring 1993, 1994, and 1995 evaluations of McNier's performance as a teacher of this subject, by the Chair of the Department of Hospitality Management, endorsed by the Dean. After rating the student evaluations of McNier, classroom observation, and course materials as "Excellent," the Chair provided these written performance evaluations:

> **He may be the best teacher in the School of Business. He works well with all students.**

Answer, Appendix: Exhibit A: Spring 1994 Department of Hospitality Faculty Evaluation, signed by Chair and Dean Wallace (emphasis added).

> Howard McNier is a lecturer in the Hospitality Management Program and he is outstanding. His student evaluations as well as student comments attest to his dedication to the academic process and the affection of his students. He is without a doubt the best person who could have been chosen to teach in this new program. He fills voids in the fields of law and accounting . . . Howard is involved in all areas in the School of Business and his background in Hospitality Management, [and] the Internal Revenue [Code] coupled with his MBA in Accounting lends itself to many of the Business School areas. He is involved in many of Hospitality Management Program Activities more so than other tenure track faculty members and is always available to support students. In the classroom Mr. McNier excels. He has good rapport with the students.

Answer, Appendix: Exhibit A: Spring 1994 Department of Hospitality Faculty Evaluation, signed by Chair and Dean Wallace.

> On Monday April 2 I visited Howard McNier's class: HM590—Int. Seminar in Hospitality Management. . . . [McNier lectured] on the impact of Civil Rights law upon the hospitality management field. The lecture was well prepared, organized, and prompted ongoing participation by students with questions and comments.
>
> It was a [sic] active and enjoyable class session presented in a very professional, yet informal, way.

Answer, Appendix: Exhibit A: Spring 1995 Department of Hospitality Faculty Evaluation, signed by Chair and Dean Wallace.

CFSU admits that it did not assign McNier to teach Hospitality Management during the 1996–97 academic year, but contends that this was because McNier was unavailable for such assignments. CFSU admits that the Dean removed fliers that stated "Hang in

there Howard," from the College of Business but denies that it retaliated against McNier.

CFSU files McNier's resume to the effect that he holds a J.D. from Washington University School of Law (St. Louis, Missouri), an M.B.A. from the University of San Francisco and the University of Guam in Taxation/Accounting (Thesis title: "Taxation of 'S' and Foreign Sales Corporations), and a B.A. *summa cum laude* in Accounting from Illinois Wesleyan; has taught courses in Hospitality Human Resource Management, Selected Topics in Hotel Administration, Hotel Operations, Property Management in Hotel Operations; developed course materials for an Integrated Seminar in Hotel Management, presented a workshop on "Curriculum for Hospitality Accounting and Law in Four-Year Hospitality Management Universities" (1993 Pacific Region Conference, Council of Hotel and Restaurant Industry Educators), and served on the planning committee of the 1994 National Conference of the Council of Hotel and Restaurant Industry Educators.

Nevertheless, CFSU contends as an Affirmative Defense that McNier, having taught as an adjunct faculty member at CFSU since 1992, was unqualified for a full-time tenure-track faculty appointment in Hospitality Management because:

> The American Assembly of Collegiate Schools of Business, the accrediting body for the College of Business, only recognizes the J.D. as an appropriate terminal degree for faculty who teach courses in business law, international business law, and taxation.

Answer, at p. 3. CFSU contends that because McNier's qualifications did not match the position description it developed, McNier was unqualified. It appends the position description, which states as a requirement an "earned doctorate in hospitality/hotel management." Answer, Appendix: Exhibit C. Because a position description may be written so as to exclude all but a preselected candidate, this defense may not be persuasive.

CFSU contends that "[a]t the time of his hire, Dr. Qu was legally authorized to work in the United States," appending as Exhibit D post-selection work certifications. These representations, however, are not dispositive. The critical inquiry is: ***What was Qu's work-authorization status on the date(s) when McNier was rejected and Qu selected?***

On March 28, 1997, McNier filed a *pro se* reply to Respondent's Affirmative Defenses. McNier asserts that the Chair of the Hospitality Management Department lacks a PH.D. in this new and rare academic discipline; that the current President of CHRIE, the international association of Hospitality Management professors has a J.D., not a PH.D.; requiring a PH.D. in Hospitality Management, "a recently developed degree available only in a few universities . . . is a pretext for race and age discrimination and immigration fraud;" Qu himself was not qualified for the position at the time of his selection; and Labor Certification WAC–97–021–51908 was fraudulently obtained. McNier requests that Sim, Wallace, and Leong be added as respondents.

III. *McNier's National Origin Claim Is Dismissed, But His Citizenship Status Complaint Survives That Dismissal*

McNier's OSC Charge alleged only citizenship status discrimination and not national origin discrimination. His OCAHO Complaint alleges both.

A national origin claim cognizable under Title VII cannot also be the subject of an IRCA national origin discrimination claim. Jurisdiction of administrative law judges (ALJs) over claims of national origin discrimination in violation of 8 U.S.C. §1324b(a)(1)(A) is necessarily limited to claims against employers who employ between four and fourteen individuals. Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three and fewer than fifteen individuals. 8 U.S.C. §1324b(a)(2)(B); *Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO 590, at 2–3 (1993), 1993 WL 7233364, at *2 (O.C.A.H.O.); *Huang v. United States Postal Service*, 2 OCAHO 313, at *4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd, Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990),[7] 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL

[7]Citations to OCAHO precedents in bound Volume I, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

409425, at *20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990). McNier acknowledges in his OSC Charge that CFSU employs fifteen (15) or more employees. His OCAHO Complaint of national origin discrimination must, therefore, be dismissed.

McNier's national origin discrimination OCAHO Complaint is also dismissed on the grounds that it overlaps his EEOC charge. Title 8 U.S.C. §1324b(b)(2) states that:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e *et seq.*], unless the charge is dismissed as being outside the scope of such title.

Where EEOC exercises jurisdiction, an ALJ is not authorized to act. *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 2 (1995), 1995 WL 509453, at *6 (O.C.A.H.O.). This is true even where EEOC errs in assuming jurisdiction. *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at *3 (O.C.A.H.O.).

Prior exercise of EEOC jurisdiction over McNier's national origin charge precludes present OCAHO jurisdiction. McNier acknowledges that he filed charge no. 370960476 stemming from the same factual predicate with the San Francisco EEOC Office on May 7, 1996. McNier's national origin OCAHO Complaint is, therefore, dismissed because of anti-overlap prohibitions.

Jurisdictional limits on OCAHO national origin claims do not affect jurisdiction over pendant citizenship status discrimination claims. *Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO 590, at 4; 1993 WL 7233364, at *2–3. Title 8 U.S.C. §1324b protects McNier, a United States citizen against employment discrimination:

> "protected individual" means an individual who—
>
> (A) is a citizen or national or the United States

8 U.S.C. §1324b (a)(3)(A). McNier is, therefore, among the class of individuals protected by the statute. If McNier has made a *prima facie* case of discrimination, his OCAHO citizenship Complaint will survive dismissal of his OCAHO national origin claim.

A complainant bears the burden of establishing citizenship status discrimination. *Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *12; *United States v. Mesa Airlines*, 1 OCAHO 462, 500 (1989), 1989 WL 433898, at *32 (O.C.A.H.O.), *appeal dismissed, Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991). In order to prevail on such a 8 U.S.C. §1324b claim, a complainant must first establish a *prima facie* case of citizenship status discrimination, which resulted in conduct in favor of another not of his class. *Westendorf* , 3 OCAHO 477, at 6–7, 1992 WL 535635, at *7.

A *prima facie* case of 8 U.S.C. §1324b citizenship status discrimination, adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973) and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

> (1) he is a member of a protected class;
>
> (2) the employer had an open position for which he applied;
>
> (3) he was qualified for the position; and
>
> (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Lee v. Airtouch Communications, Inc., 6 OCAHO 901, at 11 (1996), 1996 WL 780148, at *9 (O.C.A.H.O.), *appeal filed,* No. 97–70124 (9th Cir. 1997).

Where a complainant establishes a *prima facie* case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. *St. Mary's Honor Cntr. v. Hicks*, 509 U.S. 502, 507 (1993). Where, however, the complainant is unable to present a *prima facie* case, "the inference of discrimination never arises and the employer has no burden of production." *Lee v. Airtouch*, 6 OCAHO 901, at 11 (citing *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)).

On the basis of the pleadings to date, McNier tentatively appears to satisfy all four prongs of the test: (1) he is a United States citizen; (2) he applied for a tenured track position teaching hospitality management; (3) he had successfully taught hospitality management for

years at CFSU University, consistently earning "Outstanding" accolades; and (4) he was rejected under circumstances giving rise to an inference of discrimination. McNier's citizenship charge therefore withstands dismissal of his national origin charge.

IV. *By September 1, 1997, the Parties Shall Brief the Threshold Issue: Does 8 U.S.C. §1324b Contemplate Actions Against Individuals?*

McNier's Response to Respondent's Affirmative Defenses requests that CFSU administrators Sim, Wallace, and Leong be added as individual respondents in this action. Title 8 C.F.R. §274a.1(g) (Control of Employment of Aliens), the federal regulation implementing 8 U.S.C. §1324a, defines "employer" as:

> a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for renumeration.

Implementing regulations do not provide an 8 U.S.C. 1324b definition of "employer." Where there is no question of piercing a corporate veil, it is uncertain whether 8 U.S.C. §1324b contemplates suit against individuals.[8]

It is the Complainant's burden to prove jurisdiction. *Farmers Ins. Exchange v. Potage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

The parties will be expected to brief the threshold issue of 8 U.S.C. §1324b jurisdiction over individual agents of an employer by no later than ***September 1, 1997***.

V. *By September 1, 1997, the Parties Shall Brief These Threshold Issues: Is CFSU Immunized by State Sovereign Immunity from 8 U.S.C. §1324b? If CFSU Is Otherwise Immunized from Suit, Has California Consented to Be Sued for Discrimination in Federal Forae?*

The Eleventh Amendment to the United States Constitution divests federal courts of jurisdiction in suits against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1871 (1990).

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[8]*But see* n.1, *supra*, and the Ninth Circuit's opinion in *Miller v. Maxwell's Intern., Inc.*, 991 F.2d 583, a finding no individual liability in Title VII actions, and related cases.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. Amend. XI. While the amendment literally only addresses suits by a citizen of a state other than that against which relief is sought, the Supreme Court has extended this prohibition to suits by all persons against a state in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S. Ct. at 1871; *Pennhurst State School and Hospital v. Halderman*, 104 S. Ct. 900, 907 (1984); *Employees v. Missouri Dept. of Public Health and Welfare*, 93 S. Ct. 1614, 1615 (1973).

There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity. *Port Auth. Trans-Hudson Corp.*, 110 S. Ct. at 1871; *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989). Secondly, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S. Ct. at 1871; *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3146 (1985); *Clark v. Barnard*, 2 S. Ct. 878, 882 (1883).

Title 8 U.S.C. §1324b is silent on the subject of state sovereign immunity. In a recent case, the United States Court of Appeals for the Tenth Circuit held that §1324b does not reach state employees. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994), *reh'g denied*. *Hensel* holds that because §1324b does not waive Eleventh Amendment immunity, such claims must be dismissed for want of jurisdiction. *Id*. at 508. More recently, in a case unrelated to §1324b jurisdiction, the Supreme Court emphasized that Congress can only abrogate Eleventh Amendment immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1123 (1996) (quoting *Dellmuth v. Muth*, 109 S. Ct. 2397, 2399–2400 (1989)). No such intention is manifest in §1324b.

Accordingly, it is necessary to determine: (1) whether CFSU, a university, is an arm of the state for purposes of Eleventh Amendment immunity; and (2) even were I to find CFSU an arm of the state under state law, whether California has waived its immunity to suit in federal court where discrimination is alleged. To make this determination, I am guided by Supreme Court and Ninth Circuit[9] prece-

[9]Title 8 U.S.C. §1324(b)(i)(1) provides that a party may seek review of a §1324b case "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."

dent, as well as by state law. If CFSU is not an arm of the state, I have jurisdiction here. To similar effect, if California has waived its immunity, I may exercise jurisdiction. The parties will be expected to brief these issues by no later than ***September 1, 1997.***

VI. *By September 1, 1997, Respondent Is Ordered To Provide Factual Information and Documentation of Its Assertions*

CFSU shall provide by ***September 1, 1997,*** answers to the following questions:

A) When did CFSU (1) reach its decision not to interview McNier, and (2) inform McNier that he was not under consideration?

B) What was Qu's immigration and work-authorization status ***on those dates***?

C) On what date did the hiring committee reach its decision to hire Qu? When did the Dean approve this decision?

D) What was Qu's immigration and work-authorization status ***on those dates***?

E) What were Qu's qualifications on those dates?

F) Which universities award PH.D.s in hospitality management? When was the first PH.D. awarded from each?

G) Do the Chair and Director of the Hospitality Management Department hold a PH.D. in Hospitality Management? Have previous Chairs and Directors of the Hospitality Management Department held PH.D.s in this subject? List the names and terminal degrees of all Hospitality Management faculty, past and present.[10]

H) What was McNier's total CFSU compensation during each academic year? List each academic year and McNier's total compensation during that year.[11]

[10]Because CFSU's pleadings describe the Hospitality Management program as of recent vintage, this should be no hardship. Answer, Exhibit A.

[11]CFSU provided incomprehensible documentation of McNier's salary.

VII. *McNier Should Effect Entry of Appearance by Counsel, If Any*

McNier's May 23, 1997 letter advises that he has counsel to represent him, but counsel has not yet entered an appearance. Complainant should promptly advise whether and by whom he is represented, and provide an entry of appearance.

SO ORDERED.

Dated and entered this 3d of July 1997.

MARVIN H. MORSE
Administrative Law Judge