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

July 16, 1998

CHRISTINE DELARESE STUBBS, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 97B00064
THE DESOTO HILTON HOTEL, Respondent.	)	

ORDER OF PARTIAL DISMISSAL AND ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF DESOTO HILTON HOTEL FOR SUMMARY DECISION

PROCEDURAL HISTORY

Christine Delarese Stubbs is a permanent resident alien authorized to work in the United States. In September 1995 she was hired as a night auditor at the DeSoto Hilton Hotel in Savannah, Georgia. She was still working there on June 5, 1996, when the hotel was purchased by Savannah Hotel Associates, LLC, which then required all the DeSoto employees to complete new employment forms. On July 26, 1996 Stubbs filed a charge with the Office of Special Counsel (OSC) alleging that the hotel had violated the Immigration and Nationality Act as amended 8 U.S.C. § 1324b (INA).

Stubb's OSC charge appears in the record as a part of her complaint. It reflects one allegation: that Antonia Sotille on behalf of the respondent hotel rejected Stubbs' proffer of an alien registration card (green card) as proof of her identity and employment eligibility, and requested that she provide her driver's license and social security card instead. INA requires employers to verify the employment eligibility of all new employees, 8 U.S.C. § 1324a(b). For purposes of complying with the verification system, an em-

ployer may not request more or different documents than are required to show the person's identity and employment eligibility, or refuse to honor documents tendered for that purpose which reasonably appear to be genuine. 8 U.S.C. § 1324b(a)(6).[1] An alien registration card is proof of both identity and employment eligibility. 8 U.S.C. § 1324a(b)(1)(B)(ii) (Supp. 1997) (formerly codified at § 1324a(b)(1)(B)(v) (1994)). OSC notified Stubbs on December 2, 1996 that it did not intend to file a complaint on her behalf.

Stubbs subsequently filed her own timely complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) which included not only the allegations of document abuse[2] described in her OSC charge, but also allegations that the hotel discriminated against her based on her national origin and citizenship status, retaliated against her because she filed the OSC charge, and itself engaged in sexual harassment. INA prohibits certain acts of discrimination on the basis of one's national origin or citizenship status, 8 U.S.C. § 1324b(a)(1)(A) and (B), and also forbids acts of retaliation against a person for engaging in certain conduct protected by the law. 8 U.S.C. § 1324b(a)(5).

A timely answer was filed denying the material allegations of the complaint. Discovery and motion practice followed, and on May 18, 1998 respondent filed a motion for partial summary decision together with supporting materials. The motion seeks partial summary decision in the hotel's favor with respect to Stubbs' allegations of sexual harassment and retaliation on the grounds that 1) the claim of sexual harassment is not properly within the scope of her national origin discrimination claim, and 2) the allegation of retaliation lacks a factual basis because the allegedly retaliatory reduction in Stubbs' hours of work preceded the filing of her OSC charge. Materials accompanying the motion included Exhibit A, the Affidavit of Rod Musselman; Exhibit B, Stubbs' response to the hotel's first set of interrogatories, and Exhibit C, the OSC charge. No response was received to this motion, and the time for response has elapsed.[3]

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[1] 8 U.S.C. § 1324b(a)(6) was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub.L. 104–208. The amendment applies to practices occurring after September 30, 1996 and is not relevant to this case.

[2] An employer's rejection of valid documents and/or a request for other, different documents is colloquially known as "document abuse."

[3] Rules of Practice and Procedure for Administrative Hearings codified at 28 C.F.R. Pt. 68 (1997) provide that a party shall have ten (10) days following service of a motion to respond to that motion. 28 C.F.R. § 68.11(b). When service is had by mail

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STANDARDS FOR SUMMARY DECISION

OCAHO rules provide that an Administrative Law Judge may enter a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to a summary decision. 28 C.F.R. § 68.38(c). The purpose of the rule is to ensure that the facts which underlie a summary decision are established through vehicles designed to ensure their reliability and veracity: depositions, answers to interrogatories, admissions and affidavits. *Cf. Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987). Supporting materials, in other words, must be of "evidentiary quality." *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994).

The OCAHO rule is analogous to and is modeled upon Rule 56 of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to the case law developed by the federal district courts in deciding whether a summary decision should issue. OCAHO jurisprudence has long followed the guidance provided by the federal rules, as is directed by 28 C.F.R. § 68.1. *See, e.g., United States v. Mr. Z Enters.*, 1 OCAHO 162, at 1129 (1990).[4]

It is the responsibility of the party seeking a summary judgment to demonstrate that there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The nonmoving party is accordingly entitled to the benefit of all favorable inferences that can be drawn from the record. *Weaver v. Jarvis*, 611 F. Supp. 40, 44 (N.D. Ga. 1985), citing *Irwin v. United States*, 558 F.2d 249 (5th Cir. 1977).[5] Where the moving party's submissions fail to demonstrate the absence of disputed factual issues

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an additional five (5) days is added to the prescribed period. 28 C.F.R. § 68.8(b)(2). The response to the motion was therefore due by June 2, 1998.

[4] Citations to OCAHO precedents reprinted in the bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, and Volumes 3 through 6, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1–6 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 6, however, are to pages within the original issuances.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

or that the party is entitled to summary decision, the motion must be denied, even if the non-moving party chooses not to respond at all. *See, e.g., United States v. Hemons*, 774 F. Supp. 346, 349 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1333 (3d Cir. 1992).

DISCUSSION

A. *The Allegations of National Origin Discrimination*

The allegations of national origin discrimination will be dismissed on alternate grounds independent of those raised by the hotel's motion. I am unable to rule upon Stubbs' allegations of national origin discrimination at all, let alone summarily, because I am without jurisdiction to do so. I must accordingly dismiss the national origin allegations altogether.

A motion for summary decision, like one to dismiss for failure to state a claim, may be adjudicated only after finding jurisdiction over the subject matter, because to rule on the validity of a claim is, in itself, an exercise of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 683–84 (1946). Where a court lacks statutory or constitutional power to adjudicate a case, dismissal is more appropriately entered on jurisdictional grounds because, unlike a summary decision or a dismissal for failure to state a claim, a jurisdictional dismissal has no res judicata or collateral estoppel effect. *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1130–31 (2d Cir. 1976), *modified on other grounds by Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir. 1984), *cert. denied*, 469 U.S. 884 (1984).

Whether a federal court or agency has subject matter jurisdiction is determined by whether the power to hear the case has been granted under either the constitution or laws of the United States. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Stubbs' allegations of national origin discrimination are purportedly made pursuant to the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (INA), which specifically defines and limits the authority of administrative law judges. With respect to claims of national origin discrimination, the INA restricts that authority to cases involving employers of more than three employees up to a ceiling of fourteen employees. 8 U.S.C. § 1324b(a)(2). INA's provisions prohibiting discrimination on the basis of national origin expressly do not apply to:

> [a] person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e–2 of Title 42.

8 U.S.C. § 1324b(a)(2)(B).

Where an employer has fifteen or more employees (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), national origin discrimination claims ordinarily fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). Regulations also make clear that IRCA does not apply to discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under 42 U.S.C. 2000e–2. 28 C.F.R. § 44.200(b)(ii). Both the statutory and the regulatory restrictions are expressed in absolute terms, and are not conditioned on whether or not the individual has actually filed a charge with the EEOC.

It is undisputed that the hotel had more than fourteen employees at all times relevant to Stubbs' complaint. Stubbs checked a box on the OSC charge form indicating that respondent had 15 or more employees. The hotel's answer refers to its "re-hiring" of 175 employees. The EEO–1 form attached to its answer is only partially legible, but appears to indicate that there are 142 employees. Although Stubbs also checked a box on the OSC charge form indicating that she had not filed an EEOC charge based on the same facts, the subsequent record makes clear that she did file an EEOC charge based on 42 U.S.C. § 2000e–2 (Title VII). Her EEOC charge itself does not appear of record, but there are several references to it, including the hotel's response to the EEOC's request for information, attached to the answer. The parties acknowledged the filing at a telephonic prehearing conference, and Stubbs' response to the hotel's interrogatories (Exhibit B) confirms that she filed EEOC charge No. 115960561, which is evidently still pending in the investigative stage before that agency. EEOC did not dismiss that charge as being outside the scope of its jurisdiction.

Because it is undisputed that the number of employees exceeds OCAHO jurisdictional limits for claims of national origin discrimination, those allegations must be dismissed for lack of jurisdiction.

B. *The Allegations of Retaliation by a Reduction in Work Hours*

The hotel's motion seeks summary decision as to the claim that Stubbs' hours of work were reduced in retaliation for her filing a charge with OSC, stating that the reduction in hours was motivated by other considerations and suggesting further that as a matter of law no causal connection can be shown between the filing of the charge and the reduction in hours because the alleged retaliatory event preceded the allegedly precipitating event. Stubbs' OCAHO complaint, on the other hand, alleges that the acts of retaliation occurred later: "[s]ince my complaint[6] . . . [m]y hours have been reduced from 32–40 hours wk to 24 hrs week *from July to now* . . . ." (emphasis added)

In support of its request for summary decision as to this claim, the hotel relies upon the exhibits attached thereto, and principally upon the affidavit of Rod Musselman, General Manager of the Savannah DeSoto Hilton since December 8, 1996. The affidavit states that in his capacity as General Manager, Musselman oversees the scheduling and work hours of employees and has access to all the documents reflecting scheduling and work hours. It also states:

> 5. Upon purchasing the hotel, the DeSoto Hilton began utilizing an employee time card system, whereby the work hours of employees were maintained on daily time cards.
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> 6. In June, 1996, shortly after the purchase of the hotel, the DeSoto Hilton recognized it had a shortage of business. In an attempt to conserve operation costs, the DeSoto Hilton was forced to reduce the work hours of all front desk employees, including the night auditors. This reduction was accomplished in June, 1996 according to seniority.
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> 7. As General Manager of the DeSoto Hilton, I am familiar with Ms. Christine D. Stubbs ("Ms. Stubbs"), and her employment as a night auditor with the DeSoto Hilton.
>
> 8. I have addressed Ms. Stubbs' allegations that her work hours were reduced. I have concluded that all front desk employees—not just Ms. Stubbs—experienced a reduction in work hours in June, 1996 as a result of the DeSoto Hilton's attempt to control costs.
>
> 9. Ms. Stubbs hours were not reduced any more than any other employee at her level of seniority.
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> 10. In sum, Ms. Stubbs' hours were reduced in the same manner and for the same reason as any other front desk employee as a result of the DeSoto

[6] This evidently refers to the OSC charge filed on July 26, 1996.

> Hilton's attempt to control costs in June, 1996. Absolutely no other factor influenced the reduction in hours that Ms. Stubbs experienced.

The affidavit concludes with the statement "I have read the foregoing affidavit consisting of ten (10) paragraphs and swear that the information contained therein is true and correct to the best of my knowledge and belief."

Sufficiency of the Affidavit

With respect to affidavits submitted with a motion for summary decision, OCAHO rules provide that such affidavits "shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein." 28 C.F.R. § 68.38(b). The purpose of the rule to ensure that facts are established in a manner designed to ensure their reliability and veracity. The affidavit of Rod Musselman fails in numerous respects to meet these requirements. *Cf. Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980) (per curiam). First, and most obviously, testimony according to "the best of my knowledge and belief" is properly disregarded. *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950). The best of one's knowledge or belief, however strongly held, is not the same as fact. It is opinion.

Second, the affidavit does not show affirmatively that the affiant is competent to testify to the matters stated therein because it furnishes no clue as to the source of the affiant's information and why he believes as he does. Where the events described in the affidavit purportedly took place in June, 1996 and Musselman did not, as far as can be discerned from the face of the affidavit, come onto the scene at DeSoto Hilton until December of that same year, it is unclear how he would have acquired his professed knowledge of events which took place there in June. *Cf. Williams v. Evangelical Retirement Homes*, 594 F.2d 701, 703 (8th Cir. 1979). DeSoto Hilton's response to OSC's initial request for information, dated September 12, 1996 and attached to the hotel's answer, was signed by a predecessor of Musselman's, Bill Beard, who indicated that *he* became General Manager on July 15, 1996; he identifies his own predecessor in that capacity as Graham Asher, and indicates further that he had no personal knowledge of events which took place prior to his appointment. He further states that he obtained all his information from the Human Resource Manager

and from the Front Office Manager. How Musselman acquired his alleged knowledge is, by contrast, wholly unexplained.

Third, although a corporate manager may review specific books and records of the company and testify as to the facts contained therein, *Jefferson Constr. Co. v United States*, 283 F.2d 265, 267 (1st Cir. 1960), *cert. denied*, 365 U.S. 835 (1961), the Musselman affidavit does not allege that this is what he did. While the affidavit states that Musselman has "access to all documents reflecting scheduling and work hours", it does not identify those documents with any specificity or point to any concrete or particular facts that he obtained by reviewing them. The affidavit does not even say that he reviewed them, only that he had access to them. In addition, it sets forth conclusions rather than facts. The Eleventh Circuit has consistently held that conclusory allegations in an affidavit without specific supporting facts have no probative value. *Evers v. General Motors Corp*. 770 F.2d 984, 986 (11th Cir. 1985), citing *Gordon v. Terry*, 684 F.2d 736, 744 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983). For example, the affidavit states: "I have concluded that all front desk employees—not just Ms. Stubbs—experienced a reduction in work hours in June 1996 as a result of the DeSoto Hilton's attempt to control costs", and "Ms. Stubbs' hours were not reduced any more than any other employee at her level of seniority." Neither assertion is supported by specific facts such as to how many other front desk employees there were, what their comparative seniority status was, who made and implemented the decisions to reduce whose hours and when, what documents if any Musselman reviewed and precisely how he came to the conclusions he set forth. Insofar as can be ascertained from the hotel's response to EEOC's request for information, attached to its answer to the complaint, there was no other night auditor at Stubbs's level of seniority; it is therefore unclear to whom Musselman could be comparing her. The affidavit contains only Musselman's conclusions and a passing reference to phantom documents. *Cf. Connick v. TIAA Ass'n of Am*., 784 F.2d 1018, 1020 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986).

Fourth, a corporation is an artificial person which can act only through its agents: the bare statement that in June, 1996 DeSoto Hilton "recognized a shortage of business" or was "forced to reduce the hours of work" with no indication that any specific person recognized a shortage or decided to reduce Stubbs' or another employee's hours is wholly uninformative. While Musselman is competent to testify as to his own state of mind, his opinion as to

the previous state of mind of the company before he joined it, or as to the previous actions or state of mind of a person of undisclosed identity made on information and belief is not the kind of evidence upon which a summary decision may reliably rest. *Cf. The Toro Co. v. Krouse, Kern & Co., Inc.*, 644 F. Supp. 986, 990 (N.D. Ind. 1986), *aff'd*, 827 F.2d 155 (7th Cir. 1987). Bald self-serving conclusions based on undisclosed conversations with unnamed persons are not "such facts as would be admissible in evidence," even under the liberal evidentiary standards in these proceedings.

While the strict rules of evidence governing the admissibility of hearsay evidence in judicial proceedings are not applicable to administrative proceedings, *Richardson v. Perales*, 402 U.S. 389, 400 (1971), and a witness in OCAHO proceedings may therefore testify about what he heard from a third party, this fact does not provide a license for a witness to present conclusory and self-serving opinions which do not either identify the source of the information or disclose the facts which underlie the conclusions. *Monroe v. Board of Educ. of Wolcott, Conn.*, 65 F.R.D. 641, 649 (D. Conn. 1975).

Ordinarily formal defects in an affidavit will be held to have been waived where the nonmoving party does not object to or move to strike the defective matter. *Munoz v. International Alliance of Theatrical Stage Employees and Moving Picture Mach. Operators*, 563 F.2d 205, 214 (5th Cir. 1977), citing *Auto Drive-Away Co. of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446 (5th Cir. 1966). Here, however, the defects are not merely formal or technical. It is not clear that the requirement that an affidavit state facts, as opposed to conclusions, is one that may be waived. In any event, even were I to consider the defective affidavit, it would be insufficient to support a summary decision because it establishes only Musselman's conclusions and opinions.

The Request for Oral Argument

The hotel has requested oral argument on the motion for summary decision. Because oral argument would not cure the defects in the Musselman affidavit and would therefore serve no useful purpose, the request will be denied.

If, in fact, the reduction in Stubbs' hours took place at a time certain in June 1996, and if it was motivated by considerations

other than those described in the complaint, the hotel is free to renew its motion and to present competent supporting evidence in the form of authenticated documents and/or a competent witness to establish those facts. On the present record it has not been demonstrated either that there is no genuine issue as to these allegations or that the hotel is entitled to summary decision thereon.

C. The Allegations of Sexual Harassment

The hotel's motion for summary decision correctly points out that claims of sexual harassment are not properly within the scope of a national origin discrimination claim under INA, and alleges further that those same allegations are presently pending before EEOC under charge number 115960561. Stubbs' answers to interrogatories (Exhibit B) indicate, however, that her EEOC charge is based upon race.

While INA confers no independent jurisdiction over sexual harassment, or indeed over any other terms and conditions of employment,[7] it does provide that it is unlawful to retaliate against any individual because he or she has filed an OSC charge or a complaint. 8 U.S.C. § 1324b(a)(5).

Stubbs' OCAHO complaint alleges acts of retaliation which she describes as follows: "[s]ince my complaint[8] I have been subjected to sexual harassment by my supervisor . . . [m]y hours have been reduced from 32–40 hrs wk to 24 hrs week from July to now. I was asked to filled (sic) out another Post Employment Information sheet-P–09. I have been told to speak clearly, than I now speak, (sic) because of my accent. I was subjected to racial and national slurs."

Reading these allegations in the light most favorable to Stubbs, as I must for purposes of this motion, it is at least arguable that she is alleging that the acts of sexual harassment occurred in retaliation for her filing of the OSC charge. Accordingly, I did not dismiss those allegations on jurisdictional grounds, but exam-

[7] Discriminatory acts prohibited by 8 U.S.C. § 1324b(a)(1) are those specifically related to hiring, recruitment, referral for a fee or discharge of an employee or prospective employee. Title VII, by contrast, prohibits not only discrimination in hiring and firing, but also discrimination with respect to compensation, promotion and other terms, conditions or privileges of employment. 42 U.S.C. § 2000e–2(a)(1).

[8] The OSC charge was filed on July 26, 1996.

ined them under the same standards applied to the other alleged acts of retaliation: that is, whether there is any genuine issue of material fact or whether respondent is entitled to summary decision.

The specific allegations of sexual harassment set forth in Stubbs' answers to interrogatories (Exhibit B) set forth an alleged course of offensive conduct commencing in October 1995 and continuing with specific incidents described in February 1996, May 1996 and on July 1, 1996. It is undisputed that Stubbs filed her OSC charge on July 26, 1996. Every specific incident of sexual harassment which Stubbs set forth in her answers to interrogatories occurred prior to the filing of her OSC charge and could not, therefore, have been causally related to that filing. In order to state a *prima facie* case of retaliation under 8 U.S.C. § 1324b, an individual must allege facts which reflect: 1) participation in protected conduct, 2) the employer's awareness of the conduct, 3) adverse treatment of the individual by the employer after the conduct, and 4) a causal connection between the conduct and the adverse action. *United States v. Hotel Martha Washington Corp.*, 5 OCAHO 786, at 537 (1995), *Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO 624, at 323 (1994). Because Stubbs did not file her charge until July 26, 1996 the specific acts of sexual harassment averred here cannot have been motivated by the filing and Stubbs therefore does not state a *prima facie* case of retaliation. Assuming for purposes of the motion that the alleged acts of sexual harassment occurred, respondent would still be entitled to a summary decision that they were not taken in retaliation for Stubbs' filing a charge with OSC.

FINDINGS AND CONCLUSIONS

I have considered the motion of the DeSoto Hilton Hotel together with the prior pleadings and all attachments thereto including affidavits, answers to interrogatories and other documentary evidence on the basis of which I make the following findings:

1. Christine Delarese Stubbs is a permanent resident alien authorized to work in the United States.

2. Christine Delarese Stubbs was hired as a night auditor at the DeSoto Hilton Hotel in Savannah, Georgia in September of 1995.

3. On June 5, 1996, the DeSoto Hilton Hotel was purchased by Savannah Hotel Associates, LLC.

4. On July 26, 1996, Christine Delarese Stubbs filed a charge with the Office of Special Counsel (OSC) against the DeSoto Hilton Hotel.

5. On December 2, 1996, OSC notified Stubbs that it did not intend to file a complaint on her behalf.

6. On January 30, 1997, Christine Delarese Stubbs filed a complaint with the Office of the Chief Administrative Hearing Officer.

7. The specific acts of sexual harassment alleged by Stubbs in her answers to interrogatories occurred in February 1996, May 1996 and July 1, 1996 and were not motivated by or causally related to Stubbs' subsequent filing of her charge with OSC.

ORDER

DeSoto Hilton's request for oral argument is denied.

DeSoto Hilton is entitled to summary decision that the alleged acts of sexual harassment occurring in February and May of 1996 and on July 1, 1996 were not undertaken in retaliation for Stubbs' having filed a charge of discrimination with OSC on July 26, 1996.

Stubbs' allegations of national origin discrimination are beyond the reach of this forum and are accordingly dismissed for want of jurisdiction.

Stubbs' remaining allegations of retaliation, as well as those of document abuse and citizenship status discrimination which are not addressed in the hotel's motion will be addressed in a telephonic case management conference to be convened at a mutually convenient date in order to schedule further proceedings.

SO ORDERED.

Dated and entered this 16th day of July, 1998.

Ellen K. Thomas
Administrative Law Judge