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

August 21, 2009

MATTHEW J. SHORTT, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 08B00029
DICK CLARK'S AB THEATRE, LLC, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Matthew Shortt filed a complaint in which he alleged that Dick Clark's AB Theatre, LLC (Dick Clark's or DCAB), discriminated against him because of his status as a citizen of the United States, and retaliated against him by terminating his employment, all of which was done in violation of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (2006). Dick Clark's filed an answer denying the material allegations of the complaint and raising various affirmative defenses. Prehearing procedures, including discovery and motion practice, were undertaken, after which discovery closed on April 19, 2009. Presently pending is DCAB's motion for summary decision, to which Shortt filed a response in opposition. DCAB filed a reply to the response, which Shortt moved to strike. DCAB then filed a motion for leave to file a reply, to which Shortt filed a response in opposition. I granted the motion for leave to file a reply nunc pro tunc, denied the motion to strike, and permitted Shortt to file a counter-response to the reply, which he subsequently did. The motion is ripe for adjudication.

II. BACKGROUND INFORMATION

Dick Clark's operates a theater and a grill-style restaurant on a seasonal basis in Branson, Missouri. Restaurant employees work at the "front of the house" as bartenders, servers, hostesses, and bus people, or at the "back of the house" as prepworkers, cooks, and dishwashers. A General Manager is in charge of the operations of the restaurant and does the hiring for the front of the house. Hiring for the back of the house is done by kitchen managers. Separate from the restaurant, there is a night club downstairs called Club 57, which features a martini bar and live entertainment.

Marilyn (Mali) Jones was the General Manager for the restaurant when she hired Shortt, who is her brother, to be a server there for the 2006 season. He was asked to come back for the 2007 season, and he did so. The manager in the kitchen that season was Ponciano (Ponch) Garcia III; he was assisted in the hiring for the back of the house by his brother Raudell (Rowdy) Garcia, and by Ellud (or Eluid) Cardenas. All three spoke English as well as Spanish.

In April of 2007, Mali Jones moved downstairs to be the General Manager for Club 57. She was replaced as General Manager of the grill by Dan Stone. Not long after that, Stone suspended Shortt and issued him a warning notice dated May 2, 2007 (exhibit D) which states: "Matt used obscene and vulgar language in front of other staff members. He continued to use vulgar language even after being told to stop by a manager." The plan for improvement provided that "Matt is to follow company policy of not using obscene or vulgar language while on DCHB property. Matt is suspended." A notation appears indicating that the consequences of further infractions will be suspension or termination. Another notation indicates that Shortt refused to sign the notice. Shortt came back to DCAB the next day and spoke with the owner/manager, Chris Lucci, about the suspension, and Lucci told him the suspension, which was for several days, would be upheld.

Although Shortt acknowledges that he was suspended, he denies ever seeing the notice, and contends that there is a factual dispute regarding the reason for his suspension. He asserts that the suspension was triggered by a confrontation and argument he had with Stone when he complained about the restaurant's acceptance of prepaid vouchers with no gratuity included. His affidavit asserts that the whole episode lasted only about 30 seconds, but he did acknowledge in his deposition that in the course of the argument he probably said, "Dan, this is bullshit. You know it is bullshit."

Shortt returned to work after the suspension but was fired by Dan Stone on June 21, 2007, the day after he got into an altercation with another server, Victor Trejo. According to Shortt's complaint, Stone gave him permission to leave work early on June 20 because Shortt was worried about surgery to be performed on his 11 year old niece in Florida that day. When Shortt told Trejo that he was leaving, the two got into an argument. There are disputes about who started the incident, who threatened whom, and exactly what was said. Shortt says Trejo called him a "white bitch" and a "pussy-assed white boy," and he responded by calling Trejo a "Mexican wetback" and "several four letter words," after which he left the premises. Shortt's own deposition testimony was that he called Trejo a "motherfucking Mexican wetback or whatever you are," and that when another employee, Cory Riesman, approached the two of them, he told Riesman to "just get your crazy little redneck Jew ass back in the kitchen." Trejo acknowledged that he called Shortt a "cracker," but said that wasn't until after Shortt said to him, "Fuck you, you fucking wetback Cuban Guatemalan motherfucker." He said Shortt also said, "Come on outside. Right now, Victor, let's go outside." Cory Riesman also said that Shortt "flew off the handle, tried to get me to go outside to fight him."

The next day Shortt found out that Trejo had gone to Corporate Management and accused him of making threats and racial slurs. Shortt says he tried to tell Dan Stone that Trejo had started it, but Stone wouldn't listen, and told him he was being terminated for violating company policy. DCAB's Employee Manual (exhibit B) prohibits fighting or threatening violence in the workplace, boisterous or disruptive conduct in the workplace, insubordination or other disrespectful conduct, and unsatisfactory performance or conduct. The violence prevention policy calls for courtesy and respect between employees and prohibits fighting, "horseplay," threatening, intimidating, coercing or harassing others. All threats of violence are required to be reported as soon as possible.

Stone's affidavit says the altercation was reported to him the same day it occurred, and he then interviewed Trejo and Cory Riesman. Stone says both Trejo and Riesman confirmed that Shortt had used threats of violence, name-calling, and inappropriate language, so he fired Shortt. Trejo was not disciplined. Stone's affidavit says in addition that at the close of the meeting at which he fired Shortt, Shortt threatened both him and John Moran from Human Resources, saying he would "beat [their] ass," and that when told not to return he said, "[y]ou don't know who you are f___ing with. I will take this place apart." Shortt denies making threats to them other than a statement that he would defend his rights and take them to court for discriminating against him.

Shortt's complaint said the real reason he was fired was for threatening to contact authorities because he believed DCAB was hiring unauthorized aliens to work in the kitchen. In an attachment to his complaint, Shortt alleged that when he returned to DCAB for the 2007 season, he began noticing many employees in the kitchen who did not appear to understand English, and in late May or early June he had come to believe that those workers were unauthorized aliens. Shortt said he expressed his concerns about those workers to his sister, to Ponch Garcia, to Ellud Cardenas, to Pat Hurley, DCAB's accountant, and to John Moran, but was vague about precisely when he did that. Shortt said that he made a phone call at the end of May to the Missouri Department of Labor about DCAB not paying the minimum wage, after which Jerry Wolsey, an investigator from Labor, came to the premises, and DCAB had to pay back wages to a number of employees. He also said he made a call later about the kitchen workers, but did not say when he did that. There was no evidence of a visit from immigration authorities, but Shortt said in his deposition that about 11-12 workers were released from the kitchen in December, 2007.

After his termination Shortt applied to the Missouri Division of Employment Security for unemployment benefits, which were initially denied. The Appeals Tribunal thereafter interviewed him by telephone and reversed that decision. No one appeared for DCAB, so the appeal was uncontested. Shortt told the Referee he believed he was discharged because he reported DCAB to the state for not paying the minimum wage, and because he told them he might contact immigration authorities concerning individuals he believed did not have authorization to work. The Referee concluded that while there was a work rule prohibiting

discriminatory and harassing language, the rule was not uniformly applied by the employer. While she characterized Shortt's conduct as "inappropriate," she did not deem it sufficiently willful and wanton to justify the denial of unemployment benefits under Missouri law.

Shortt filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on November 26, 2007, and on March 28, 2008 OSC sent him a letter advising him of his right to file a complaint within 90 days of his receipt of the letter. Shortt filed his OCAHO complaint on June 15, 2008.

III. EVIDENCE CONSIDERED

DCAB's motion was accompanied by exhibits A) the Affidavit of Dan Stone; B) DCAB's Employee Manual (37 pages); C) the deposition of Matthew J. Shortt (74 pages); D) Employee Warning Notice dated May 2, 2007; and E) the deposition of Victor Trejo, Jr. (16 pages).

Shortt's response was accompanied by exhibits 1) the Decision of the Appeals Tribunal, Missouri Division of Employment Security dated July 24, 2007 (3 pages); 2) the Affidavit of Matthew Shortt (4 pages), 3) excerpts from the deposition of Matthew Shortt (8 pages); 4) the deposition of Ponciano Garcia, III (20 pages); 5) the deposition of Marilyn (Mali) Jones (92 pages); 6) the deposition of Melissa Bland (16 pages); 7) excerpts from the deposition of Victor Trejo (3 pages); 8) the deposition of Michael Roy Thomas (10 pages); and 9) the deposition of Cory Riesman (11 pages).

The order permitting the filing of Shortt's counter-response limited the response to 10 pages. Notwithstanding that limitation, the response was accompanied by an additional six pages identified as exhibits A and B. In order to distinguish them from other alphabetically designated exhibits, those identifications will be preceded by the letter C (for complainant). Those exhibits are CA) the affidavit of Matthew Shortt (2 pages), and CB) excerpts from the deposition of Matthew Shortt (4 pages).

In addition to these materials, I have also considered the record as a whole, including pleadings, motions, and the materials appended thereto.

IV. STANDARDS TO BE APPLIED

A. SUMMARY DECISION

OCAHO rules[1] provide that summary decision as to all or part of a complaint may issue 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 the moving party is entitled to a summary decision. 28 C.F.R. § 68.38(c). When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).[2]

Thus, to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the claim. While all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), a summary decision may nevertheless issue if there are no specific facts shown that raise a contested material factual issue. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

B. BURDENS OF PROOF

The traditional burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference raised by the prima facie case disappears, and the plaintiff then must prove by a preponderance of the evidence that the defendant's articulated reason is false and that the defendant intentionally discriminated or retaliated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). To create a factual issue as to pretext, the employee must present sufficient evidence to create an inference that the proffered reason has no basis in fact, did not actually motivate the employer, or

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (2008).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

was insufficient to motivate the decision. *Ipina v. Mich. Jobs Comm.*, 8 OCAHO no. 1036, 559, 574 (1999).

1. Prima Facie Case of Discrimination Based on Citizenship Status

Applicable law provides that it is an unfair immigration-related employment practice to discriminate against a protected individual with respect to hiring, recruitment, referral for a fee, or termination. 8 U.S.C. § 1324b(a)(1). An individual alleging discriminatory failure to hire has the initial burden of showing a prima facie case under the *McDonnell Douglas* formulation. The traditional manner of doing so is to show that: 1) the individual is a member of a protected class, 2) the individual applied for a job for which the employer is seeking applicants, 3) the individual was rejected despite his or her qualifications, and 4) the position remained open and the employer continued to seek applicants with similar qualifications. *Hammoudah*, 8 OCAHO no. 1050 at 768; *Putnam v. Unity Health Sys.*, 348 F.3d 732, 735-36 (8th Cir. 2003). In order to establish a prima facie case of discriminatory discharge, a complainant must show that: 1) he belongs to a protected class, 2) he was qualified for the position, 3) he was discharged, and 4) the discharge occurred under circumstances giving rise to an inference of discrimination. *Johnson v. AT & T Corp.*, 422 F.3d 756, 761 (8th Cir. 2005).

2. Prima Facie Case of Retaliation

In order to establish a prima facie case of retaliation under 8 U.S.C. § 1324b(a)(5), an employee must show: 1) that he or she engaged in conduct specifically protected by § 1324b, 2) that the employer was aware of the protected conduct, 3) that the employee suffered an adverse employment action, and 4) that there was a causal connection between the protected activity and the adverse employment action. *Ipina*, 8 OCAHO no. 1036 at 568; *see also Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998) (treating employer knowledge, however, as a component of the element of causation).

V. DISCUSSION AND ANALYSIS

A. SHORTT'S CLAIM OF CITIZENSHIP STATUS DISCRIMINATION

1. Discrimination in Hiring

The basis for Shortt's claim of citizenship status discrimination in hiring is not entirely clear, and has been somewhat inconsistent in the course of this proceeding. He appeared at one point to be alleging that the mere presence of allegedly undocumented workers in the kitchen per se demonstrates discrimination against him in hiring, but in this he is mistaken. *See Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO no 964, 632, 695 (1997).

It is undisputed that Shortt never sought or applied for a job in the kitchen, and that he was never rejected for a job in the kitchen in favor of a similarly situated individual of another citizenship status. *Cf. Zarazinski v. Anglo Fabrics Co.*, Inc., 4 OCAHO no. 638, 428, 444-45 (1994) (granting summary decision sua sponte in hiring case where complainant failed to show he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected despite his qualifications, and that after his rejection the position remained open and the employer continued to seek applicants from persons of his qualifications). The kitchen workers Shortt says were "favored" by DCAB were hired at different times by different supervisors for different jobs. In order to establish a claim of disparate treatment, a complainant must show that the employees used as comparators were similarly situated. *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1009 (8th Cir. 2005). Employees hired in different departments by different supervisors at different periods of time were not similarly situated to Shortt.

Any claim with respect to Shortt's own hiring would, moreover, be untimely made because the statute provides that no claim may be filed with respect to employment practices occurring more than 180 days prior to the filing of a charge with the Special Counsel. 8 U.S.C. § 1324b(d)(3). In Shortt's case, no timely claim can be made with respect to events occurring prior to May 30, 2007.

2. Impact of Hiring Practices on Tips or Gratuities

Shortt also alleged at one point that he was adversely affected by DCAB's having non-English speaking workers in the kitchen because they were slow, and he believed this had a negative impact on the tips he received from his customers. No evidence beyond Shortt's belief was offered to support this allegation, and it must be noted in any event that tips are gratuities paid by the customers, not wages paid by the employer. They are, moreover, among the terms and conditions of employment not encompassed in the applicable statute.

OCAHO cases are legion for the proposition that § 1324b does not encompass claims about the terms and conditions of employment. The statutory language is clear and unequivocal. Section 1324b prohibits an employer from discriminating with respect to the hiring, recruitment, referral, or discharge of an individual, but unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the section does not speak at all to such employment issues as compensation, assignment, or other terms, conditions, or privileges of employment, so no prima facie case can be established under § 1324b respecting such terms and conditions of employment.

3. Completion of Paperwork Requirements

Shortt's response to the motion asserts another theory that he characterizes as showing a prima facie case based on allegations that 1) he is a protected individual, 2) as a U.S. citizen he was required to personally complete employment paperwork including form I-9, while 3) non-protected aliens were deliberately excused from this requirement by AB Theatre management.

Shortt's affidavit says that he witnessed Ellud Cardenas, Ponch Garcia, and Rowdy Garcia filling out employment paperwork for kitchen staff. Although his brief says he witnessed Ellud and Rowdy Garcia helping "new Mexican workers" with their paperwork, Shortt's affidavit refers only to helping "kitchen staff."

Ponciano Garcia denied that the kitchen employees were unauthorized, and said that he helped any new employee who asked for help with paperwork. He said,

> Some people just didn't understand the employment form. Some of them are foreign exchange students, couldn't understand the English and, you know, the documentation on there. So I helped whoever asked me to help them.

Shortt contends that helping non-English speaking employees[3] with paperwork creates "definite inferences that discriminatory hiring practices did occur." He is again mistaken. Shortt does not claim that he ever asked for or was refused help with his paperwork, and his suggestion that he has presented a prima facie case of citizenship status discrimination in hiring under § 1324b is misplaced.

In order to establish that he suffered an adverse employment action, an employee must show that there was a "materially adverse change" in the terms and conditions of his or her employment. *See generally Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69-70 (2006). It is not self evident that having to complete employment paperwork without assistance is "materially adverse" to an English-speaking employee. Not all workplace irritants are materially adverse, *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 16 (2007); *Moisant v. Air Midwest, Inc.*, 291 F.3d 1028, 1032 (8th Cir. 2002), and Shortt articulated no rationale for finding that completing employment forms independently was sufficiently burdensome to him to be considered "materially adverse." Again, the employees with whom Shortt seeks to compare himself do not appear to be similarly situated to him, and again he appears to raise issues regarding the terms and conditions of employment. Any claim respecting events at the time of Shortt's hiring in 2006 would, moreover, be barred by 8 U.S.C. § 1324b(d)(3) as untimely made, because Shortt was hired considerably more than 180 days prior to the filing of his OSC charge.

4. Termination

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[3] Shortt's counter-response is accompanied by a second affidavit in which he asserts that the foreign workers who came from Russia and Jamaica all spoke and understood English, and it was only the Hispanic employees who did not. He argues that employees in service industries who do not speak English are "in all probability not citizens of the country and there is a likelihood that some of these individuals are unlawfully present in the United States." The distinction he seeks to draw appears to be based on the national origin or immigration status, not the citizenship status, of the employees.

It is also not clear whether Shortt seeks to pursue a claim of citizenship status discrimination with respect to his termination. He checked a box on the OCAHO complaint form indicating that he was fired because of his citizenship status, but his brief did not focus on this issue. As a citizen of the United States, Shortt is a protected individual, he was qualified for his job and he was discharged.

While Shortt readily meets the first three elements of a prima facie termination case, the fourth element is more elusive. One way of showing that a discharge occurred in circumstances giving rise to an inference of discrimination is to show that a similarly situated individual who is not a member of his protected group was treated differently. *Clark v. Runyon*, 218 F.3d 915, 918-19 (8th Cir. 2000). While Shortt's response contends that he and Trejo were similarly situated because they engaged in identical conduct, and that he was fired while Trejo was retained, he nowhere asserts that Trejo's citizenship status was any different from his own. Trejo says in his deposition that he is a Mexican-American but does not specifically indicate his citizenship status.

Discrimination suits require some evidence of discrimination. *Sefic*, 9 OCAHO no. 1125 at 25 (citation omitted). This means that there must be at minimum a sufficient factual basis to permit an inference that the protected characteristic actually played a role in the employment decision in question and that it had a determinative influence on the outcome. *Id.* Because Shortt did not establish that Trejo's citizenship was different from his, and he pointed to no other evidence remotely suggesting that his own United States citizenship was a factor in his discharge, Shortt failed to show a prima facie case of citizenship status discrimination with respect to his termination.

While Shortt's contention that he and Trejo were similarly situated might otherwise have satisfied the minimal showing required for a prima facie case, *see Wheeler v. Aventis Pharms.*, 360 F.3d 853, 857 (8th Cir. 2004), there is no way it would have survived the more rigorous standard used at the pretext stage, which requires that a comparator be similarly situated in all relevant respects. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 692 (8th Cir. 2002) (noting that the plaintiff's purported comparator did not have a comparable disciplinary history); *Clark*, 218 F.3d at 918 (stating that employees must have engaged in the same conduct without any mitigating or distinguishing circumstances, and the plaintiff Clark alone had a history of threats and violence). Although both Shortt and Trejo participated in the altercation, there was no showing that Trejo had any disciplinary history during his tenure as a server at DCAB, while Shortt had been disciplined for and warned about using obscene and vulgar language only a month before.

Mali Jones said in her deposition with respect to Shortt's discharge that he was aggressive and had a temper, and that he probably would have been fired even sooner but for the fact that he was her brother. She said that people "overlooked some things" about Shortt and tried to help him, although he could get upset and come across as confrontational. She said Dan Stone told her around the time of the suspension that he actually had wanted to fire Shortt then, but when he

learned Shortt was her brother, "out of respect for me he said he put him on suspension." Trejo too, noted that Shortt was "short fused," and said the only reason Shortt kept his job there was because his sister was the manager.

B. RETALIATION

Although Shortt was unable to establish a case of citizenship status discrimination, he may still maintain an action for retaliation because a claim of retaliation survives the dismissal of the underlying discrimination claim. *Adame v. Dunkin Donuts*, 5 OCAHO no. 722, 1, 6 (1995) (*Adame II*); *Adame v. Dunkin Donuts*, 4 OCAHO no. 691, 904, 908 (1994) (*Adame I*). Dan Stone said he terminated Shortt for threatening a fellow employee, using vulgar language, creating a disruptive environment and violating company policies, and that in doing so he considered the previous suspension as well. Shortt contends that this explanation is pretextual and that the real reason for his termination was retaliation for his complaints about the presence of unauthorized workers in the kitchen.

In order to state a prima facie case of retaliation under § 1324b, Shortt's first obligation is to identify some conduct on his part that is specifically protected under that section. The statute prohibits retaliation against any individual "for the purpose of interfering with any right or privilege secured under this section." 8 U.S.C. § 1324b(a)(5) (emphasis added).

The gravamen of Shortt's retaliation complaint, however, is that he was fired because of his intent to inform federal officials that the respondent was engaged in the hiring and employment of unauthorized aliens in violation of 8 U.S.C. § 1324a. Shortt does not contend that he ever suggested to anyone at DCAB that he intended to file a charge of discrimination with OSC, and there is no indication prior to November 19, 2007, when he signed his charge, that he had any such intent; he said only that he might contact ICE or Immigration to report illegal workers. Of the complaints he said he did make, moreover, none was made to Dan Stone. While Shortt now says he was complaining about discrimination, it appears that what he actually said to others while he was employed at DCAB was that he objected to the presence of allegedly illegal workers in the kitchen and to the fact that they did not speak English. His OCAHO complaint says at paragraph 34,

> Informing an employer that the entity may be hiring and employing unauthorized aliens in violation of 8 U.S.C. 1324a, and reporting such suspected activity to federal immigration officials, are protected activity within the scope and meaning of 8 U.S.C. 1324b.

His complaint says further that Shortt was fired because of "Respondent's belief that Complainant intended to contact federal officials regarding a suspected violation of 8 U.S.C. § 1324a."

OCAHO case law, however, does not support the proposition that complaints about violations of § 1324a constitute protected conduct under § 1324b. The weight of authority is expressly to the contrary; in order to qualify as protected conduct in this forum, the claim must implicate a right or privilege specifically secured under § 1324b, or a proceeding under that section. *Harris v. Haw. Gov't Employees Assoc.*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no jurisdiction over threats to report employer to EEOC, the Immigration Department (sic), the American Counsel General, the ALCU (sic), the NAACP, Georgia Legal Services, or agencies other than OSC or this office).

The right of individuals to file written complaints respecting the hiring of unauthorized aliens or other potential violations of 8 U.S.C. § 1324a is expressly set out in § 1324a(e)(1)(A), and the procedures for so doing are set out in 8 U.S.C.§§ 274a.9(a)(and (b). This right is specifically secured under those particular provisions, and not under § 1324b. Apart from those provisions, there is no authorization in the statute for private enforcement of the employment eligibility verification system. *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 9 (2003).

Absent interference with rights or privileges secured under § 1324b, an allegation of violations of § 1324a therefore fails to state a claim. *See, Adame I*, 4 OCAHO no. 691 at 908-09. In *Palacio v. Seaside Custom Harvesting*, 4 OCAHO no. 675, 744, 756 (1994), for example, it was held that § 1324b provided no cause of action where the employer fired the employee because she called INS and said her employer was not properly complying with the I-9 paperwork requirements. Palacio made no assertion that she was retaliated against for pursuing a claim of discrimination on her own behalf, and reporting violations of § 1324a was held not to be protected conduct under § 1324b. *Id.* Similarly, in *Adame II*, 5 OCAHO no. 722 at 6-7, where the complainant said she was terminated because she complained to INS and IRS about the conduct of the former owner, she failed to allege sufficient facts to come within the coverage of §1324b.

Section 1324b(a)(5) is not a catch-all statute; it prohibits retaliation only when that retaliation is engaged in for the purpose of discouraging activity related to the filing of OSC charges or interfering with rights or privileges secured specifically under § 1324b. Despite dictum in *Diarrassouba v. Medallion Financial Corp.*, 9 OCAHO no. 1076, 9 (2001), to the effect that § 1324(a)(5) should be broadly construed as a whistleblower statute, the holding in that case did not require such a broad reading of the statute and is not inconsistent with other OCAHO case law. In *Diarrassouba*, the complainant had recommended his friend, Simms Efua, for a vacant technician job, but despite Efua's superior qualifications the company hired another candidate instead, whom Diarrassouba alleged was undocumented. Diarrassouba pressed the issue and was terminated, not because he complained that hiring the other candidate violated § 1324a, but because he complained that his friend Efua was discriminated against in violation of § 1324b. 9 OCAHO no. 1076 at 8-9 (distinguishing *Adame* and *Palacio*). Shortt, in contrast, identified no third party who applied for and was denied employment in the kitchen on prohibited grounds, nor does it appear that he ever made a complaint about discrimination under § 1324b until well

after he was fired.

Where, as here, Shortt did not establish that any of his complaints preceded the first incident of discipline, at which point Stone already wanted to fire him, the timeline does not support an inference of retaliation. *See Carrington v. Des Moines*, 481 F.3d 1046, 1051 (8th Cir. 2007) (noting that protected activity occurred only after supervisors began investigating the plaintiff's performance); *Kaspar v. Federated Mut. Ins. Co.*, 425 F.3d 496, 503 (8th Cir. 2005) (finding no retaliation where plaintiff was disciplined for the same problems both before and after protected conduct).

More importantly, even had Shortt engaged in conduct protected under § 1324b, he failed in addition to demonstrate that the decisionmaker who actually fired him had any knowledge of his complaints. The critical and ultimate question in any employment discrimination case is the state of mind of the decisionmaker. *Sodhi v. Maricopa County Special Health Care Dist.*, 10 OCAHO no. 1127, 19 (2008). Shortt offered no evidence to establish any causal relation between his complaints and Dan Stone's decision to fire him, and it is undisputed that the only thing Shortt ever complained to Stone about was DCAB's acceptance of prepaid vouchers that had no gratuities added.

That Shortt complained to the kitchen managers or to his friends or to DCAB's accountant or to someone in human relations about the kitchen workers establishes nothing about Dan Stone's knowledge of these complaints. There can be no causal link between Shortt's allegedly protected activity and the adverse employment decision if the decisionmaker was unaware of the protected activity. *Alamprese*, 9 OCAHO no. 1094 at 8-9 (noting that an employer cannot be motivated by a factor which is unknown to him); *Wolff v. Berkley, Inc.*, 938 F.2d 100, 103 (8th Cir. 1991) (causal link does not exist if employer is not aware of protected conduct).

Corporate persons act only through their authorized agents; it is thus not enough for Shortt to say that he complained to "management." It was not some vague actor named "management" who fired Shortt; it was Dan Stone. Stone was the person who made the decision, and it is undisputed that Shortt never took his concerns about the workers in the kitchen to Stone. Shortt characterized Stone as "straight laced" and said about him that "Dan is someone you don't talk to unless he talks to you at the time. . . . you just kind of stay away from him." Neither did Shortt offer any evidence that anyone else communicated his concerns about the kitchen workers to Stone, although he says that they should have. Shortt argues that he complained to Stone's predecessor and to "management officials in the corporate office," that is, to the accountant and the human resources manager, and that their knowledge of his complaints should be imputed to Stone because their failure to inform him constituted "reckless indifference." His counter-

response argues that Stone should be charged with constructive knowledge of his complaints.[4]

But retaliation, like discrimination, is an intentional wrong. While knowledge may have a necessary role in forming intent, it cannot be equated to it. What Shortt proposes is, as a matter of logic, not an inference, but a total fiction. Common sense tells us that in the real world, no one can form a motive or intent to discriminate or retaliate based solely on someone else's uncommunicated knowledge. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1175 (11th Cir. 2005) (declining to impute someone else's knowledge of plaintiff's disability to the decisionmaker who fired her); *Silvera v. Orange Co. Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001) (refusing to equate constructive knowledge with actual intent). It is for precisely this reason, as Judge Easterbrook explained in *Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992), that there is no such thing as "constructive intent." No causal link can be established here between Shortt's complaints and his discharge where it is undisputed that Stone was unaware of those complaints. *See Jackson v. UPS*, 548 F.3d 1137, 1143 (8th Cir. 2008) (citing cases).

Shortt also argues that Stone's proffered reason is pretextual because while DCAB had a policy prohibiting vulgar language and name-calling, the policy wasn't enforced, and good natured banter among employees, including the casual use of offensive language and ethnic name-calling, was commonplace. He does not contend, however, that either the argument he had with Stone prior to his suspension or his altercation with Trejo constituted good natured banter. He noted in his deposition that on the day of the argument with Trejo, their dispute was heated, and "the name-calling was not fun."

Shortt paints with too broad a brush, moreover, when he asserts that evidence in the record is that "[R]espondents did not enforce their workplace policies against any other employee." To begin with, the assertion is factually incorrect; Ponciano Garcia said in his deposition that an employee named Tanya was fired for threatening Cory Riesman, which appears to reflect at least one instance of the enforcement of the same workplace policy. Inconsistencies between different supervisors in matters of discipline, standing alone, do not, in any event, raise inferences of disparate treatment or pretext. *See Silvera*, 244 F.3d at 1261 n. 5 (differences in treatment by different supervisors will seldom support a viable claim). That neither party put forward specific evidence about the discipline of other employees does not, moreover, support the conclusion that there were no such instances.

Short contends that pretext is also shown by the fact that Melissa Bland was told not to come back because she was acting "too much like Shortt." Bland said that Ponch (Ponciano Garcia)

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[4] Shortt cites *Zamora v. Elite Logistics, Inc*., 449 F.3d 1106, 1120 (10th Cir. 2006) for the proposition that DCAB had a duty to inquire. The cited decision, however, was vacated, 194 Fed. Appx. 996 (10th Cir. 2006), and subsequently superseded by *Zamora v. Elite Logistics, Inc*., 478 F.3d 1160 (10th Cir. 2007) (en banc).

told her that Dan Stone and all the managers had a meeting and discussed that she was "acting too much like Matt Shortt," and they didn't want her back. Bland said she too noticed that several kitchen employees didn't speak English, but she never made any complaints to management about that. She said the questions she would ask "would be like pay and stuff, I mean, it was all, you know, when we doing buffets and not getting tips, how much, you know, how we were getting paid." She said,

> During buffet, Thanksgiving, when I asked about how our pay was going to go because were there (sic), and also New Year's Eve we were there until after midnight that we weren't waiting on tables, I asked if we were going to get paid, and I was told I questioned that sounded like Matt would ask.

Ponciano Garcia denied making that statement to Bland, but even assuming he did, there is nothing in her testimony which suggests that her comments and questions addressed anything other than pay issues, that she ever engaged in any protected activity, or that any comparison between her and Shortt implicated rights under § 1324b.

Although Shortt is correct that the record reflects a number of factual disputes, the disputed matters have no bearing on the question of Dan Stone's motivation for firing Shortt. Employees differed, for example, in their testimony as to how widespread ethnic name-calling was, and who did or didn't engage in it. Both Trejo and Ponciano Garcia denied telling Shortt the workers in the kitchen were unauthorized, although Shortt said that they both did. Garcia said that there were no illegal workers, and that he never said there were. Mali Jones did not think there were illegal workers either. Some of the people to whom Shortt said he complained did not remember his doing so, and it is unclear how many of Shortt's complaints preceded his discharge. Jones said Shortt kept saying there were illegal workers, but she never heard him complain to anyone else about that, and she never heard anyone say he was going to contact Immigration until after she left to move back to Florida at the end of June, 2007. Ponciano Garcia also said it was not until after Shortt was fired that he said he was going to contact federal Immigration officials. There is a sharp dispute between the parties as to what was said at the meeting when Shortt was fired. Resolution of these disputes is unnecessary to this decision.

An issue of fact is material only if it might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and only if it must inevitably be decided, William W. Schwartzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1983, 1984). Factual disputes the resolution of which is unnecessary to the decision are therefore not sufficient to avert a summary decision. Accordingly, it is unnecessary to resolve the question of who was the aggressor in the altercation between Shortt and Trejo, who was the first to threaten whom, or exactly what was said. Stone talked to Trejo and Riesman after the argument, and he made the decision to terminate Shortt based on their account of Shortt's threats and the language he used. As explained in *McCullough v. Univ. of Ark.*, 559 F.3d 855, 862 (8th Cir. 2009) (citing cases), the critical inquiry in such circumstances

is not whether the employee actually engaged in the particular conduct for which he was terminated, but whether the employer in good faith believed him to be guilty of conduct warranting discharge. Shortt has not offered evidence sufficient to raise a genuine issue with respect to the veracity of Stone's proffered reason.

While Shortt attaches significance to the decision of the Appeals Tribunal for the Missouri Division of Employment Security, his application for unemployment benefits did not, as Shortt contends, present an "identical claim." His appeal considered only the question of whether he satisfied the requirements to qualify for unemployment benefits under Missouri law. The Referee did not purport to adjudicate issues of discrimination or retaliation in that uncontested appeal. The instant case does not pose the exact issues unambiguously decided by the Missouri Division of Employment Security, so their decision is entitled to no preclusive effect in this forum. *See Leonard v. Sw. Bell Corp. Disability Income Plan*, 341 F.3d 696, 702 (8th Cir. 2003); *Fife v. Bosley*, 100 F.3d 87, 89-90 (8th Cir. 1996).

VI. THE PROPRIETY OF CLOSING DISCOVERY

Shortt's prior motion seeking to extend discovery reflects that he identified a retired INS/ICE agent as an expert four days prior to the close of discovery. His Supplemental Preliminary Witness List identified the expert as one "who can testify to AB Theatre's employment of illegal immigrants." He said that he intended at some unspecified future time to file a motion to compel in order to obtain the production of materials the expert would need to examine, including I-9 forms, transcripts of depositions, and employment applications, in order to give an opinion as to the reasonableness of Shortt's belief that the workers in the kitchen were unauthorized. Shortt said he also needed to depose additional individuals whose addresses had not been obtained until shortly before the closing date for discovery who may have heard him complain about non-English speaking workers in the kitchen.

I denied the motion to extend discovery as well as Shortt's motion for reconsideration of the denial because the discovery Shortt requested would not have assisted him in establishing his case. Additional information about the immigration status of DCAB's kitchen workers or its hiring practices with respect to kitchen workers would not alter or affect the outcome here because those facts, if any there be, are not material to Shortt's claim that Dan Stone fired him because of his United States citizenship status or in retaliation for engaging in activity protected under § 1324b.

Dan Stone had no role in the hiring of kitchen workers, and Shortt does not contend that he did. None of the prospective witnesses Shortt identified had any role in his termination, nor does Shortt contend that they did. The proposed witnesses are kitchen managers, DCAB's accountant, and former employees who may have heard Shortt complain about workers in the kitchen not speaking English or being unauthorized for employment. While Shortt contends that

their views about his "good faith belief" that illegal aliens worked in the kitchen, or their awareness of his
complaints about illegal workers, are highly relevant to his retaliation claim, none of the evidence he identified sheds light on the decisive issue in this case. Even assuming arguendo that every employee in the kitchen was unauthorized and Shortt complained to all his proposed witnesses, testimony to that effect would not make it any more or less probable that Stone's motive in firing Shortt was retaliatory within the meaning of § 1324b(a)(5) where Stone had no knowledge of those complaints, and the complaints themselves do not constitute conduct protected under § 1324b.

Based on examination of the entire record, I am not persuaded that there is any additional evidence which would assist Shortt in supporting his case, and thus conclude that even if he were to obtain all the discovery he sought, his claim would still not survive summary decision.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT

1. Matthew Shortt is a citizen of the United States.

2. Dick Clark's AB Theatre, LLC (DCAB) is located in Branson, Missouri, where it operates a restaurant run by a General Manager.

3. Marilyn (Mali) Jones is Matthew Shortt's sister, and was the General Manager who hired him as a server in the restaurant for the 2006 season.

4. Matthew Shortt was asked to return and work as a server in the restaurant for the 2007 season, and he did so.

5. In April 2007, Mali Jones moved to another position and was replaced as the General Manager of the restaurant by Dan Stone.

6. On or about May 2, 2007 Dan Stone had an argument with Matthew Shortt and suspended him for using obscene and vulgar language.

7. On June 20, 2007 Matthew Shortt and Victor Trejo got into an argument, part of which was witnessed by Cory Riesman, during which Shortt and Trejo each used vulgar language.

8. Victor Trejo reported his altercation with Matthew Shortt to Dan Stone the same day it occurred, and Stone interviewed Trejo and Cory Riesman about the incident.

9. On June 21, 2007 Dan Stone terminated Matthew Shortt.

10. Dan Stone said that he terminated Shortt for threatening a fellow employee, using vulgar language, creating a disruptive environment and violating company policies, and that he considered the previous suspension as well.

11. Victor Trejo was not disciplined for the incident of June 20, 2007.

12. DCAB's Employee Manual (exhibit B) prohibits fighting or threatening violence in the workplace, boisterous or disruptive conduct in the workplace, insubordination or other disrespectful conduct, and unsatisfactory performance or conduct; it also calls for courtesy and respect between employees and prohibits fighting, "horseplay," threatening, intimidating, coercing or harassing others.

13. Matthew Shortt filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on November 26, 2007.

14. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent Matthew Shortt a letter dated March 28, 2008 advising him of his right to file a complaint within 90 days of his receipt of the letter.

15. Matthew Shortt filed a complaint with the Office of the Chief Administrative Hearing Officer on June 15, 2008.

B. CONCLUSIONS OF LAW

1. Matthew Shortt is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A) (2006).

2. Dick Clark's AB Theatre, LLC, is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

3. All conditions precedent to the institution of this proceeding have been satisfied.

4. Matthew Shortt did not establish a prima facie case of citizenship status discrimination under 8 U.S.C. § 1324b(a)(1).

5. Matthew Shortt did not establish a prima facie case of retaliation under 8 U.S.C. § 1324b(a)(5).

6. Dick Clark's AB Theatre, LLC proffered a nondiscriminatory and nonretaliatory reason for terminating Matthew Shortt.

7. Matthew Shortt failed to show that Dick Clark's AB Theatre, LLC's reason for terminating him was a pretext for discrimination or retaliation.

8. Where a nonmoving party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party's case, summary judgment will ensue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

9. When the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).

10. The complaint must be dismissed.

VIII. ATTORNEY'S FEES

As the prevailing party, respondent DCAB may file a petition for attorney's fees in accordance with the provisions of 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(d)(6).

OCAHO cases follow the "double standard" set out by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978), for attorney's fees in employment discrimination cases. *See, e.g., Rusk v. Northrop Corp.*, 4 OCAHO 607, 153, 174 (1994). A prevailing plaintiff is ordinarily entitled to attorney's fees under the *Christiansburg* standard, in all but "special circumstances," 434 U.S. at 416-17, but a prevailing defendant may be awarded attorney's fees only when the plaintiff's lawsuit is "unfounded, meritless, frivolous, or vexatiously brought." *Id.* at 421; *see also Ojeda-Ojeda v. Booth Farms, L.P.*, 9 OCAHO no. 1121, 3 (2006); *EEOC v. Kenneth Balk & Assocs., Inc.*, 813 F.2d 197, 198 (8th Cir. 1987).

DCAB should accordingly file a petition for attorney's fees only if it believes it can satisfy the standard for an award to a prevailing respondent. The petitioner bears the burden of proof on that issue. Any such petition should include the itemized statement required by 28 C.F.R. § 68.52(d)(6), and also provide evidence of the prevailing market rate in the appropriate geographical area for lawyers of reasonably comparable skill, experience, and reputation. *See Moysis v. DTG Datanet*, 278 F.3d 819, 828-29 (8th Cir. 2002).

ORDER

The complaint is dismissed. DCAB will have until September 24, 2009 to file its petition for attorney's fees. Shortt will have until October 15, 2009 to file a response.

SO ORDERED.

Dated and entered this 21st day of August, 2009.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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