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

May 3, 2013

JOSE PABLO MARTINEZ, Complainant, v. SUPERIOR LINEN, Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 12B00020

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act (INA) as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2006), in which Jose Pablo Martinez is the complainant and Superior Linen (Superior) is the respondent. Martinez, a United States citizen, filed a complaint alleging that the company fired him because of his citizenship status and national origin and in retaliation for complaints he made about the company's preferring unauthorized workers. Superior Linen filed an answer denying the material allegations of the complaint and shortly thereafter filed a motion to dismiss, or in the alternative, for summary decision.

Superior's motion to dismiss was granted in part and denied in part. The motion was granted as to Martinez's allegations of discrimination on the basis of national origin because the INA's prohibition of national origin discrimination does not apply in cases covered under section 703 of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 (2006). 8 U.S.C. § 1324b(a)(2)(B). Superior has more than fifteen employees and is thus an employer covered by Title VII, so the allegations of national origin discrimination were dismissed for failure to state a claim upon which relief may be granted in this forum. The motion to dismiss was denied as to Martinez's allegations of discrimination on the basis of citizenship status and retaliation, and consideration of Superior's alternative motion for summary decision was deferred pending completion of discovery. A scheduling order was issued establishing deadlines for the close of discovery and for filing or renewal of dispositive motions and responses thereto.

Superior subsequently renewed its motion for summary decision and Martinez filed a timely response. Meanwhile, Martinez's motion to compel a response to discovery was granted in part and denied in part, and the renewed motion for summary decision was again deferred pending supplemental answers to interrogatories. After the initial answers were made, Martinez filed another motion to compel supplemental answers and Superior filed its second and third supplemental answers. Discovery is now closed, and the renewed motion for summary decision is ripe for resolution.

II. BACKGROUND INFORMATION

Superior Linen is a commercial laundry and dry cleaning facility located at 125 South 13th Street in Las Vegas, Nevada, that employs approximately 106 people. Doc Wiener is the company's president and Randy Newton is vice president of operations. Jose Martinez is a U.S. citizen who was hired by Superior on or about January 11, 2011 to work in the company's soil department sorting linen in preparation for washing. Martinez was terminated on or about August 1, 2011, after less than seven months of employment, for reasons that are disputed by the parties.

Martinez thereafter filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on or about August 9, 2011, and on December 7, 2011, OSC sent him a letter advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Martinez filed a complaint on January 19, 2012, and all conditions precedent to the institution of this proceeding have been satisfied.

III. THE PARTIES' POSITIONS

A. Superior Linen's Renewed Motion

Superior's renewed motion contends that the company is entitled to summary decision because Martinez has offered no evidence of discrimination or retaliation beyond his bald allegations, and that in fact he was terminated for failure to follow company policy and because his work performance fell below that of others doing similar work. The motion also raises a defense of unclean hands because Martinez himself previously lived and worked illegally in the United States before becoming a citizen. Superior Linen says Martinez brought this proceeding for the purpose of harassing the company. The company emphasizes that Martinez was reprimanded for his job performance and failed to follow company policies and rules. For example, Martinez refused to clock in or out for lunch even after Superior explained to him why employees had to do so. In addition, Martinez encouraged other employees to decrease their productivity and caused disruption among them.

The renewed motion was accompanied by A) Respondent's First Set of Requests for Admission to Complainant (5 pp.); B) Answer to Respondent's First Set of Requests for Admission to Complainant (3 pp.); C) Respondent's First Set of Interrogatories to Complainant (5 pp.); D) Answer to Respondent's First Set of Interrogatories to Complainant (3 pp.); and E) Respondent's Second Set of Requests for Admissions to Complainant (3 pp.).[1] Superior's initial motion was accompanied by 1) the Affidavit of Manuel Calvillo with attachment (3 pp.); 2) the Declaration of Randy Newton (2 pp.); 3) a letter dated September 5, 2011 from Randy Newton to OSC with attachments (4 pp.); and 4) a letter to Randy Newton from OSC.

The Declaration of Randy Newton, Vice President for Operations, states that Martinez was terminated primarily because of his poor job performance, but also for causing disruption and discontent among the other employees. The company's response to OSC's questionnaire says that Martinez advised fellow workers to slow down production to gain more work hours, and that he refused to clock in and out for lunch. Managers referred to reports from other workers that Martinez made negative remarks about the company, talked a lot, complained about everything, and hardly did any work. One employee allegedly said Martinez stood at the tail end of the work band so he did not have to work fast. Another manager "brought it to Randy's attention that Jose's production was down, and [that Jose was] telling fellow employees to 'slow down, relax, it's not costing you to be here.'"

B. Martinez's Response

Martinez's response in opposition to the motion urges that summary decision is unwarranted because Martinez was not terminated for the reasons given by Superior Linen but because of his citizenship status and for his reporting violations of 8 U.S.C. § 1324b and OSHA rules. He asserts that four individuals who were unauthorized for employment were kept on board after his termination. Martinez denies that he encouraged others to decrease productivity, caused disruption or discontent among coworkers, or received any reprimands. He says that he was the leader responsible for efficiency and productivity on the second shift in the soil department, and that daily work reports show he did a good job.

Accompanying Martinez's response to the renewed motion are exhibits A) CBW Daily Sheets and Soil Department Log Sheets (9 pp.); B) a copy of Martinez's passport; and C) State of Nevada Employment Security Division Notice of Monetary Determination, and letter dated October 31, 2012 from Bank of America (3 pp.). Documents accompanying Martinez's reply to

[1] Superior subsequently filed errata noting that the second requests for admission were addressed incorrectly and not received by Martinez who therefore did not have an opportunity to respond to them. They are accordingly not considered.

answer to complaint included 1) a letter to Martinez from the Nevada Occupational Safety and Health Administration dated March 28, 2011; 2) a Personal Action Request dated July 29, 2011 signed by Doc Wiener; and 3) a duplicate of exhibit 2.

Martinez's response in opposition to the renewed motion for summary decision says that he "made a complaint in front of Randy Newton (V.P. Operations), Tracy (Supervisor), and Irene (Office Manager) about employment discrimination in favor of unauthorized alien workers." His OSC charge provides more detail, noting that he was notified that he was laid off on May 23, 2011, at which time he asked his supervisor and the HR secretary if they were aware of who had the legal right to work "because they were laying me off and letting undocumented workers come to work in the USA for the position that belonged to me." He said he was called back the next day, but "they insisted on asking me about the undocumented workers . . . and I told them that that wasn't my job and that that was something that human resources had to take care of." Later he received a warning on July 27, 2011 for violating company policies, and was notified of his termination on August 1, 2011. Martinez said his firing was the company's way to retaliate against him for reporting discrimination and violations of OSHA regulations, "NRS 618.445."

It is unclear from the record who Martinez believes was the person actually responsible for his discharge. His reply to the answer stated that the unnamed person who requested his termination,

> didn't have the right to nor was he in a position to do it because he was the person in charge of the Soil and not a Supervisor (DW) and he was in the same position that I had occupied around that time. (We were in charge of the Soil Department. He handled the first shift and I worked the second shift, respectively).

Martinez's OSC charge complains of paperwork irregularities and says that "whoever requested my termination is not my supervisor and doesn't have a higher position than my supervisor; because my supervisor didn't write down if he was in agreement with my termination or not because it wasn't on the paperwork." The assertion is otherwise unelaborated. Martinez's discharge papers indicate that his termination was requested by Doc Wiener, the president of the company. The form is also signed by Tracy Trelz, the general manager, and Irene C. Leyva, the office manager. The reasons stated are failure to follow protocol per Superior Linen rulebook, unsatisfactory work quality, and failure to follow company policy.

IV. LEGAL STANDARDS TO BE APPLIED

A. Summary Decision

OCAHO rules[2] 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 summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[3]

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. *See Celotrex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000). 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 the 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), summary decision may nevertheless issue if no specific facts are shown that raise a contested material factual issue. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.18 (1970).

A fact is material if it might affect the outcome of a case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a factual issue is genuine only if it has a real basis in the record, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In the absence

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[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (2012).

[3] 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.

of any proof it will not be assumed that the nonmoving party could or would prove the necessary facts. A party opposing a motion for summary decision may not demand a trial simply based on a speculative possibility that a material issue might turn up at trial. *See generally United States v. Manos & Assocs., Inc.*, 1 OCAHO no. 130, 877, 884 (1989).

B. The Relative Burdens of Proof

The familiar burden shifting analysis in employment discrimination cases is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination 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 against the plaintiff. *Id. See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

1. Discriminatory Discharge

A prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. Alternatively, in a case alleging disparate treatment the discharged employee may establish the fourth prong by a showing that others similarly situated but outside the plaintiff's protected group were treated more favorably. *Cf. Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002). An employee may also establish the fourth element of a prima facie case by other circumstantial, statistical, or direct evidence giving rise to an inference of discrimination. *Cf. Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

If the complainant successfully makes a prima facie case using the *McDonnell Douglas* framework, the burden of production shifts to the employer to proffer a nondiscriminatory reason for the employment decision at issue. *See Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999). If the employer does so, the burden shifts back to the employee to show that the employer's reason is pretextual, *id.*, and any presumption created by the prima facie case simply drops out of the picture, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). This means that once an employer has proferred a legitimate nondiscriminatory reason, the employer will ordinarily be entitled to summary resolution unless the complainant can show that there is a genuine issue of fact with respect to pretext. *Cf. Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) (employee must "put forth *specific* and *substantial* evidence

that [employer's] reasons are really a pretext for . . . discrimination"). In order to survive a motion for summary judgment, a plaintiff must do more than establish a prima facie case and deny the credibility of the employer's witnesses.

2. Retaliation

An individual can meet the burden to show a prima facie case of retaliation by presenting evidence that: 1) the individual engaged in conduct protected by § 1324b, 2) the employer was aware of the protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse employment action. *Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009). A showing of causation requires a showing that the decisionmaker knew of the employee's protected activity. *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007). The linchpin of a retaliation claim is the causal connection between the protected conduct and the adverse employment action; to show the causal link, there must be sufficient evidence to raise an inference that the protected activity is the likely reason for the adverse action. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). Essential to that showing is evidence that the decisionmaker was aware that the employee engaged in the protected activity. *Id.* (citing *Gunther v. Cnty of Wash.*, 623 F.2d 1303, 1316 (9th Cir. 1979)).

In order to qualify as protected conduct in this forum, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *See, e.g.*, *Harris v. Haw. Gov't Emps. Ass'n*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO 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). Thus complaints about the presence of undocumented workers, standing alone, do not constitute protected conduct for purposes of this analysis because § 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. *See Cavazos v. Wanxiang Am. Corp.*, 10 OCAHO no. 1138, 1-2 (2011); *see also Arres v. IMI Cornelius Remcor, Inc.*, 333 F.3d 812, 813-14 (7th Cir. 2003) (observing that § 1324b(a)(5) does not provide a remedy for individuals who filed a charge or complaint about violations of immigration law rather than about discrimination).

The paradigmatic circumstantial evidence giving rise to an inference of retaliation is temporal proximity between the protected conduct and the adverse action; where the adverse action follows closely on the heels of the protected conduct, an inference of causation ordinarily arises. *See Bell v. Clackamas County*, 341 F.3d 858, 867 (9th Cir. 2003) (finding evidence of retaliation sufficient where a lowered performance review, and ultimately termination, followed

immediately after plaintiff's complaints). *See generally* Justin P. O'Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. Rev. 741 (2002). Generally speaking, the greater the temporal gap, the more attenuated the inference. *See, e.g.*, *Clark Cnty Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (noting that an adverse action occurring twenty months after protected conduct "suggests, by itself, no causality at all"). There is no bright line rule that a particular time is either per se too long or per se sufficiently short to establish the connection. *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003). It is causation however, and not just temporal proximity per se, that is vital to the employee's case. *See Sodhi v. Maricopa Cnty. Special Health Care Dist.*, 10 OCAHO no. 1127, 8-9 (2008); *see also Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005).

V. DISCUSSION AND ANALYSIS

Superior Linen did not specifically challenge the first three elements of Martinez's prima facie discharge case, and it is evident from the record that as a U.S. citizen, Martinez is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3). It is similarly not contested that Martinez had the basic qualifications for the job that he performed for a period of about seven months, or that he suffered an adverse employment action when he was fired. His prima facie case nevertheless falters at the threshold because the fourth element is somewhat more problematical.

Martinez's complaint said that Superior discharged him and retained four individuals he believed did not have the right to work in the United States. His OSC charge identifies those four individuals as Lazaro (no last name) in the sheets department, Juan (no last name) in the washing department, Juan (no last name) in the soil department, and Adan Carrasco in the soil department. Materials obtained in discovery reflect that the four individuals referred to were Lazaro Flores, Juan Alcantar, Juan Flores, and Adan Carrasco. It is undisputed, however, that both Lazaro Flores and Juan Alcantar worked in different departments from Martinez, and for purposes of a discriminatory discharge case they cannot be considered similarly situated to him.

There was, moreover, no indication that either Juan Flores or Adan Carrasco engaged in conduct of comparable seriousness to Martinez's own. While Flores was terminated on January 28, 2012 because of invalid work documents and thus may have been unauthorized for employment, there is on the other hand no evidence suggesting any problem with either Adan Carrasco's immigration status or his authorization for employment. Carrasco evidently abandoned the job on January 19, 2012 but was rehired on April 17, 2012 and laid off on October 1, 2012. Flores once came to work drunk and Carrasco often came late, but there is no suggestion either of them defied direct instructions, was insubordinate, or engaged in disruptive conduct such as encouraging others to slow down on the job.

In order to establish an inference of discrimination based on disparate treatment of similarly situated individuals, the employee must show that the potential comparators are similarly situated in all material respects, *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (citing *Aragon*, 292 F.3d at 660), and no such showing was made. Individuals are similarly situated when they have similar jobs and display similar conduct. *See Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 641-42 (9th Cir. 2003) (although employees Vasquez and Ng held positions at the same level, they did not engage in "problematic conduct of comparable seriousness" and therefore were not similarly situated).

With respect to his claim of retaliation, Martinez did not specifically identify the person he believed to be ultimately responsible for his discharge, or point to any evidence suggesting that whoever was responsible had knowledge about any conduct by Martinez that was specifically protected under § 1324b. Although the record reflects that Martinez filed a formal complaint about safety violations with the Nevada OSHA department and received a letter dated March 28, 2011 acknowledging receipt of that complaint, there is no evidence other than his unsworn statement that Martinez ever made a complaint of discrimination prior to his termination. Superior Linen's original motion to dismiss said that Martinez said something in May about the presence of unauthorized workers, but when he was asked for additional information he declined to cooperate and said it was not his responsibility to help the company's investigation. Martinez in addition offered no evidence or explanation of how either Doc Wiener or the unnamed individual he thought requested his discharge came to have knowledge of his allegedly protected activity. There is no factual basis from which an inference may be drawn that Martinez's discharge in August was causally related to his alleged reporting of unauthorized workers in May.

Nevertheless, because the burden of establishing a prima facie case in the Ninth Circuit is so minimal–the degree of proof for a prima face case "does not even need to rise to the level of a preponderance of the evidence"–I will assume for the purposes of considering the instant motion that Martinez has shown a prima facie case of both disparate treatment and retaliation. *See Villiarimo*, 281 F.3d at 1062 (quoting *J.R. Simplot*, 26 F.3d at 889). Superior then met its burden of production by proffering two reasons for his discharge: poor performance and failure to follow company rules. These are legitimate nondiscriminatory reasons sufficient to shift the burden of production back to Martinez to demonstrate a factual issue as to legitimacy of Superior's explanation of his termination. *Cf. Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993).

In support of his view that his work performance was superior, Martinez offered as an exhibit certain CBW Daily Sheets and Soil Department Log Sheets. The documents are virtually incomprehensible, and no explanation was provided as to their meaning or significance. An employer has broad discretion in defining the expectations for employees' performance,

Yefremov v. NYC Dep't of Transp., 3 OCAHO no. 562, 1556, 1584 (1993), and a plaintiff's subjective evaluation of his own performance does not suffice to create a factual issue. *Cf. Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1286 (9th Cir. 2000). Thus a difference of opinion between an employer and employee with respect to expectations or to the quality of the employee's job performance is not, in itself, sufficient to create a genuine issue of material fact.

The question is not whether Superior's expectations or its assessment of Martinez's performance are fair or even objectively "correct." *Cf. Villiarimo*, 281 F.3d at 601-02. It is whether there is any factual basis in the record from which a rational trier of fact could conclude that the decisionmaker didn't really believe those reasons and used them as a cover up for citizenship status discrimination. Martinez provided no evidence that would permit a reasonable factfinder to believe that the reasons Superior Linen gave for firing him are false, or that the true reason was discrimination on the basis of his U.S. citizenship status or retaliation for conduct specifically protected under § 1324b. He provided, in fact, little actual evidence, and for the most part simply reiterated the same unsworn allegations.

Evidence of pretext must be specific and substantial if it is to create a genuine issue of material fact. *See Cornwell v. Electra Credit Union*, 439 F.3d 1018, 1029 (9th Cir. 2006); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221-22 (9th Cir. 1998). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401(1971) (citation omitted). To prevent summary judgment, there must be sufficient evidence of pretext to permit a rational factfinder to find that the employer's explanation is pretextual. *Wallis*, 26 F.3d at 890. What this means is that Martinez must point to specific and substantial evidence sufficient to raise a genuine issue of material fact as to whether Superior's reasons are really a pretext for discrimination and/or retaliation. Martinez pointed to no such evidence and the record is otherwise devoid of materials showing any indicia of discrimination or of any nexus between Martinez's U.S. citizenship and his termination. Discovery responses attached to Superior's motion reflect that when Martinez was asked to identify any documents or evidence supporting his claims, he responded by identifying only Title 8 of the United States Code.

A genuine issue respecting pretext is not raised unless the employee adduces competent, objective evidence casting doubt on the validity of the employer's reasons. An individual's subjective belief that he was discriminated against, however strongly held, does not suffice. *Sefic*, 9 OCAHO no. 1125 at 25 (citations omitted). Vague suspicions of retaliation not anchored by a showing of concrete specific facts similarly do not provide a sufficient showing because a complainant's burden at the summary decision stage requires more than is needed to overcome a motion to dismiss. The generalized and conclusory statements that were sufficient to resist the initial motion to dismiss in this matter are not sufficient to withstand a motion for summary decision. Where a party fails to set forth specific facts or identify with reasonable particularity

the evidence precluding summary decision, the motion must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the record as a whole, including pleadings, affidavits, materials obtained in discovery, and other evidentiary materials, I make the following findings of fact and conclusions of law in accordance with 28 C.F.R. § 68.38(b).

A. Findings of Fact

1. Jose Pablo Martinez is a citizen of the United States.

2. Superior Linen is a commercial laundry and dry cleaning facility located in Las Vegas, Nevada.

3. Jose Pablo Martinez was hired by Superior Linen on or about January 11, 2011 to work in the company's soil department sorting linen for washing.

4. Jose Pablo Martinez was terminated on or about August 1, 2011.

5. Randy Newton, Vice President of Operations for Superior Linen, said Martinez was fired primarily because of poor job performance, but also for causing disruption and discontent among other employees.

6. Lazaro Flores and Juan Alcantar were not similarly situated to Martinez because they worked in a different department.

7. Juan Flores and Adan Carrasco were not similarly situated to Martinez because they did not engage in conduct of comparable seriousness.

8. Juan Flores may not be authorized for employment in the United States.

B. Conclusions of Law

1. Jose Pablo Martinez is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. Superior Linen 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. In order to establish an inference of discrimination based on disparate treatment of similarly situated individuals, the employee must show that the potential comparators are similarly situated in all material respects. *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006).

5. In order to establish a prima facie case of retaliation, an employee must present competent evidence that: 1) the individual engaged in conduct protected by § 1324b, 2) the employer was aware of the protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse employment action. *Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009).

6. Assuming Jose Pablo Martinez established a prima facie case pursuant to 8 U.S.C. § 1324b, Superior Linen proffered a legitimate nondiscriminatory reason for his termination.

7. Jose Pablo Martinez failed to point to evidence creating a genuine issue of material fact as to whether the explanation given by Superior Linen is a pretext for discrimination.

8. There is no genuine issue of material fact and Superior Linen is entitled to summary decision as a matter of law.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 3rd day of May, 2013.

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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 files a timely petition for 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 sixty (60) days after the entry of such Order.