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

July 3, 2013

JOSE CARLOS DE ARAUJO,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 12B00041
	)	
JOAN SMITH ENTERPRISES, INC., AKA	)	
CALIFORNIA POOLS AND SPAS AND OR	)	
CALIFORNIA POOLS AND LANDSCAPE	)	
Respondent.	)	
___	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b (2006). Jose Carlos De Araujo filed a complaint in which he alleged that Joan Smith Enterprises, Inc. a.k.a. California Pools and Spas and/or California Pools and Landscape (JSE or the company) discriminated against him on the basis of his United States citizenship and retaliated against him in violation of 8 U.S.C. § 1324b. JSE filed an answer denying the material allegations of the complaint and alleging affirmative defenses, after which prehearing procedures were undertaken.

Presently pending are JSE's motion for summary decision and De Araujo's motion for partial reconsideration of a previous order granting in part and denying in part his motion to compel discovery responses. De Araujo filed a response in opposition to JSE's motion for summary decision and a cross-motion for summary decision; JSE filed a response in opposition to De Araujo's cross-motion and a motion to strike it. De Araujo filed a response to the motion to strike. De Araujo's cross-motion for summary decision and JSE's motion to strike it are also pending.

JSE also filed a response to De Araujo's motion for partial reconsideration. De Araujo was subsequently granted leave to file a supplemental brief in support of this motion, and JSE was given an opportunity to respond to the supplemental brief. Those filings are complete and all the pending motions are ripe for resolution.

II. BACKGROUND INFORMATION

Joan Smith Enterprises, Inc. was founded by Michael Smith and originally incorporated in Arizona in 1990. The company is currently owned jointly as a subchapter S corporation by the Jeremy and Stephanie Smith Trust, and Joan and Michael Smith. Originally operated as a pool company, the business was later expanded to include landscaping services. JSE currently operates as California Pools and Landscaping in the metropolitan area of Phoenix, Arizona. Michael Smith is currently the company's Vice President of Operations.

JSE hired Jose Carlos De Araujo, a citizen of the United States, on January 15, 2007 to work in the pool company's tile and coping division. De Araujo's responsibilities included driving a truck to the worksite, gathering materials, and installing coping and tile on pools, alone or with others. He was generally regarded as a highly skilled craftsman and was described by Jeremy Smith as "the best I've ever seen at coping." De Araujo was laid off on February 11, 2011 for reasons that are disputed by the parties. The decision to terminate De Araujo's employment was made jointly by Michael Smith and Jeremy Smith.

The company says that because of a downturn in the real estate market and the market for swimming pools in the Phoenix area, it could no longer afford to pay De Araujo's salary so it had to let him go. De Araujo contends that JSE started hiring unauthorized workers around November 25, 2010, and that when he started complaining about this, Smith fired him. The company denies that it ever hired unauthorized workers and points out that it has used the E-Verify system to verify the employment eligibility of its workers since January 1, 2008, as required by Arizona law.

De Araujo filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on August 9, 2011, and, on December 6, 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) within ninety days of his receipt of the letter. De Araujo filed his complaint on March 8, 2012 and all conditions precedent to the institution of this proceeding have been satisfied.

III. THE COMPANY'S MOTION FOR SUMMARY DECISION

A. The Positions of the Parties

1. JSE's Motion

JSE asserts that Michael Smith and Jeremy Smith decided to terminate De Araujo's employment for financial reasons, and that they did so before knowing that De Araujo had complained about any alleged violations of immigration law. The company seeks dismissal of the complaint based on the decisionmakers' lack of knowledge of De Araujo's alleged complaints. JSE says De Araujo was hired in 2007 at the height of the construction boom in Arizona to install coping and tile on selected pools, but by 2009 the company was struggling because the market for pools declined precipitously along with the decline in the real estate and construction industries. Because of his experience, his tenure, and the consistent high quality of his work, De Araujo was compensated at a higher rate than other tile and coping employees.

JSE says that by late 2010, there wasn't as much work for tile and coping employees. To expand revenue, JSE acquired Garden Fusion, a landscaping company that had been one of its subcontractors, with the intent of using Garden Fusion's existing workforce. It then changed its own trade name from California Pools and Spas to California Pools and Landscape. The company decided at that time to continue using Personnel Concepts, Inc. (PCI), the professional employer organization that Garden Fusion had been using, to handle its human resources and payroll functions. JSE says it entered into a Client Service Agreement with PCI on or about November 5, 2010, pursuant to which PCI took responsibility for employment-related paperwork, including preparing I-9 forms and using the E-Verify system to verify the employees' employment eligibility. Michael Smith's affidavit states that based on conversations with Mark Euting, PCI's owner, he believes that PCI verified the employment eligibility of Garden Fusion's employees.

Michael Smith also states in his affidavit that he was tasked with the responsibility of evaluating staffing needs, and met with Jeremy Smith and Vice President Paul Tipton to discuss JSE's financial condition, methods to improve the company's profitability, and the tile and coping division's drain on resources. They thought that while De Araujo performed superior quality work, he worked too slowly and took too long to complete jobs. Michael Smith and other management employees told De Araujo that the only way they could keep him on would be if he increased the speed of his work or he adjusted his rate of pay. A decision was made to change

the pay structure and responsibilities for De Araujo's position, and on January 13, 2011, Michael Smith and Paul Tipton met with De Araujo and told him that he would be put on a salaried basis rather than being paid per piece. At the same time De Araujo was asked to assume additional responsibilities, including the direction and coordination of landscaping crews. After a month under this arrangement, Michael Smith and Jeremy Smith told De Araujo that JSE could not afford to continue his employment.

Michael Smith said he concluded that the costs of an in-house tile and coping division were greater than the costs of subcontracting similar work. Shortly thereafter the other tile and coping crew leader, Javier Medina, was also laid off together with his helper, Petronillo Castrellon, and JSE closed the tile and coping division altogether. Nehemia Cifuentes, who had been De Araujo's helper, was transferred to the masonry crew, a part of the landscaping department. JSE began contracting with Spartan Concrete for its coping work and with Arizona Desert Tile for its tile work. Michael Smith's affidavit states that De Araujo was laid off for financial reasons, not in retaliation for any conversation or complaint about unauthorized workers.

Exhibits accompanying the motion were 1) the affidavit of Michael Smith with attachments (8 pp.); A) Comparative Income Statement; B) Client Service Agreement (6 pp.); C) email exchanges dated from October 31, 2010 to November 2, 2010 (4 pp.); D) email exchanges dated from January 1, 2011 to January 3, 2011 (2 pp.); E) Employee Status Change form for Carlos dated January 14, 2011; F) Employee Status Change form for Carlos dated February 11, 2011; G) Employee Status Change forms for Javier Medina and Petronilo Castrellon dated August 8, 2011 (2 pp.); H) Employee Status Change form for Nehemias dated January 17, 2011; and exhibit 2) portions of the deposition of Jose Carlos De Araujo dated December 18, 2012 with attached Employee Status Change form for Carlos dated November 14, 2011 (32 pp.).

2. De Araujo's Response and Cross-Motion

De Araujo's response to the motion asserts that he was initially recruited in 2006 by Paul Tipton, then a Vice President, and that he was hired in January 2007. He worked directly under Tipton until the fourth quarter of 2010, when there was a reorganization in upper management and Michael Smith came back as a manager. De Araujo says he met with Michael Smith and Paul Tipton in October 2010 to discuss changes and the company's expectations.

De Araujo challenges a number of the assertions in the Michael Smith affidavit. De Araujo asserts that his work assignments were much broader than installing tile and coping, and that he was paid more because he had responsibility for the payroll paperwork for both crews. In response to Smith's comments about productivity, De Araujo says his "interest was to deliver the highest quality not the fast poor quality work" and that he "did not 'cut corners' in order to get jobs done faster and jump to another job and make more money . . . ."

De Araujo also takes issue with Smith's characterization of the timing of the downturn in the economy. He says that the downturn came in 2008, that he made more in 2010 than in 2009, and that the Landscape Department grew bigger in 2011. De Araujo contends that "Garden Fusion's existing landscaping employees" that Smith referred to are the illegal workers that he, De Araujo, complained about at a meeting on November 25, 2010. De Araujo says that Garden Fusion has been dissolved as a corporation and that those workers then became JSE's third crew of coping and deck paver installers. De Araujo says the Landscape Department was created in November 2010, that he was transferred to it, along with other tile and coping employees, on January 14, 2011 by Paul Tipton, and that there are now five crews. De Araujo takes vigorous issue with the statement in Smith's affidavit that based on conversations with Mark Euting of PCI he believed that PCI verified the employment eligibility of the former Garden Fusion workers, and insists that Garden Fusion's workers, in particular Mario and Tyson, were unauthorized for employment.

De Araujo says he received no warning that his job was in jeopardy, that the company never got out of the tile and coping business, and that the Landscape Division is now up to five crews that are still doing tile and coping work. He asserts as well that he established a prima facie case and that he is entitled to summary decision.

Exhibits accompanying De Araujo's response include C-1) the affidavit of Paul Tipton dated May 14, 2013; C-2) the affidavit of Primitivo Salmeron Ciriaco dated May 14, 2013; C-3) the affidavit of Carlos De Araujo dated May 14, 2013; C-4) the deposition of Jose Carlos De Araujo with attachments (283 pp.); C-5) Respondent's Response to Complainant's Requests for Admission dated February 11, 2013 (17 pp.); C-6) Respondent's Response to Complainant's Second Requests for Admission dated February 11, 2013 (6 pp.); C-7) Arizona Corporation Commission record dated May 9, 2013 (9 pp.).

B. Legal Standards to be Applied

1. 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). 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

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

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). [2]

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. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 n.18 (1970).

That there may be factual disputes between the parties does not preclude summary decision where the disputes are not material. 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. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (copy. 1983, 1984). Factual disputes the resolution of which is unnecessary to the decision are therefore not sufficient to avert a summary decision. A factual issue is genuine only if it has a real basis in the record. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

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[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).

In the absence 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 based on a speculative possibility that a material issue might turn up at trial. *Cf. United States v. Manos & Assocs., Inc.*, 1 OCAHO no. 130, 877, 884 (1989).

2. The Relative Burdens of Proof

The familiar burden shifting analysis in an employment discrimination case 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 using the *McDonnell Douglas* framework. If the complainant successfully does so, the burden of production shifts to the employer to proffer a nondiscriminatory reason for the decision at issue. *See Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 568 (1999). If the employer provides such a reason, the burden shifts back to the employee to show that the employer's reason is pretextual. *Id.* Any presumption created by the prima facie case simply drops out of the picture. *See 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.

3. 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 any 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).

4. Retaliation

A complainant can meet the burden of showing 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. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009). In appropriate circumstances, an inference of causation may be drawn from temporal proximity between the protected conduct and the adverse employment action. *See Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1069 (9th Cir. 2004); *Little v. Windemere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002). It is a showing of causation, however, and not just temporal proximity per se, that is vital to the employee's case. *See Martinez v. Superior Linen*, 10 OCAHO no. 1180, 7-8 (2013) (citing *Sodhi v. Maricopa Cnty. Special Health Care Dist*, 10 OCAHO no. 1127, 8-9 (2008)); *Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005). A showing of causation requires evidence to demonstrate that the decisionmaker actually knew of the employee's protected activity. *See Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007).

Section 1324b(a)(5) provides in pertinent part that,

> It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this section.

To qualify as protected conduct in this forum, the conduct therefore 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, and Georgia Legal Services," or agencies other than OSC or this office).

Complaints about the employment of unauthorized workers, standing alone, thus 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); *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 *Arres* court, while affirming the decision below on other grounds, found it was error for the district court to award summary judgment to the defendant Remcor based on the mistaken view that § 1324b(a)(5) provided a remedy for individuals who filed a charge or complaint about violations of immigration law. *Arres*, 333 F.3d at 813; *see also, Tiengkham v. Elec. Data Sys. Corp.*, 551 F. Supp. 2d 861, 871 (S.D. Iowa 2008) (agreeing with *Arres* about the limited nature of the cause of action contained in § 1324b).

C. Discussion and Analysis

First, it does not appear that De Araujo has presented a prima facie case with respect to his allegations of retaliation. It is undisputed that De Araujo never complained about employment discrimination until he filed his OSC charge of citizenship discrimination on August 9, 2011, well after his discharge on February 11, 2011. Both parties appear to assume that termination of an employee for protesting the employment of unauthorized aliens is cognizable under §1324b(a)(5), but this assumption is in error. The statutory and regulatory provisions for individuals to make complaints about unauthorized workers are set forth at 8 U.S.C. § 1324a(e)(1)(A) and 8 C.F.R. § 274a.9. The enforcement procedures provided in 8 C.F.R. § 274a.9 do not include a private right of action for individuals to enforce the provisions of § 1324a(a)(1), and § 1324a includes no anti-retaliation provision.

Charges about discrimination, in contrast, are made as provided in 8 U.S.C. § 1324b(b) and the authorization for a private right of action is expressly provided in 8 U.S.C. § 1324b(d)(2). As pointed out in *Arres*, Congress chose to provide an anti-retaliation provision in § 1324b and omitted such a provision from § 1324a. 333 F.3d at 815. Whether as a matter of public policy it would have been preferable to include a provision in § 1324a to prohibit retaliation for filing complaints about immigration violations is a question best addressed to legislators. I am not at liberty to alter the legislative choice that Congress made, and complaints about violations of immigration law do not constitute protected conduct for purposes of § 1324b(a)(5). *Cf. Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 9 (2003).

In a letter sent to JSE on July 22, 2011, an attorney acting on De Araujo's behalf asserted that,

> [T]he true and illegal reason for the termination was that Mr. DeAraujo (sic) had complained and disclosed to the employer that the employer was violating Arizona state law by employing illegal aliens. Pursuant to A.R.S. § 23-1501(3)(c)(ii) it is a wrongful termination for an employer to terminated the employment relationship in

> retaliation for the employee having disclosed to the employer that the employer or a co-employee is violating the state law of Arizona.

These assertions do not state a claim upon which relief may be granted pursuant to § 1324b(a)(5) because complaints about such violations do not constitute protected conduct for purposes of § 1324b. *See Adame v. Dunkin Donuts*, 4 OCAHO no. 691, 904, 908-10 (1994).

De Araujo's deposition testimony similarly raises no valid retaliation claim under § 1324b(a)(5). De Araujo testified that "in the fourth quarter of 2010 the company started using illegal hiring practices, knowingly hiring illegal aliens, underpaying them, and in the process I was fired." De Araujo testified that he believed he had been retaliated against for a verbal complaint he made to Travis Kuchel in January 2011 and at an earlier meeting on November 25, 2010 with Kuchel and Michael Smith about the legal status of the Garden Fusion employees. Even assuming arguendo that De Araujo was fired for complaining that the Garden Fusion workers were unauthorized, this would not demonstrate a prima facie case of retaliation pursuant to 8 U.S.C. § 1324b(a)(5) because De Araujo's conduct does not come within the ambit of the statute's protection.

As a citizen of the United States, De Araujo is, however, a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) for purposes of a citizenship discrimination complaint. It is uncontested that he qualified for his job; a letter of recommendation attached to his complaint says De Araujo has "a skill that is second to none and he is referred to as an artist when it comes to deck and tile setting/installation." There is also no doubt that the termination of De Araujo's employment constituted an adverse employment action.

De Araujo's ability to demonstrate the fourth element of a discriminatory discharge case under *McDonnell Douglas* has been somewhat compromised, however, by his testimony at his deposition that he did not believe he had been discriminated against either because of his Brazilian national origin or because he is a naturalized United States citizen. De Araujo said he just checked all the boxes and left it to others at OSC to decide where the facts fit. In order to withstand a motion for summary decision there must be some factual basis that would permit an inference that citizenship status played a role in the employment decision in question and that basis appears to be lacking here. Discrimination cases require some evidence of discrimination, *cf. Sefic v. Marconi Wireless*, 9 OCAHO no. 1125 at 25, and at this stage there must be some evidence from which an inference of discrimination may reasonably be drawn.

The burden of establishing a prima facie case in the Ninth Circuit is nevertheless a minimal burden; the showing required does not need to rise even to a preponderance of the evidence level. *See Schechner v. KPIX-TV,* 686 F.3d 1018, 1022 (9th Cir. 2012) (quoting *J.R. Simplot*, 26 F.3d at 889). Assuming arguendo for purposes of the instant motion that De Araujo could show a prima facie case of disparate treatment or retaliation, JSE met its burden of production by

proffering a legitimate nondiscriminatory reason for discharging De Araujo: that while highly skilled, De Araujo was "too specialized," too slow, and not efficient at running an entire crew.

Evidence in the form of mail exchanges among Michael Smith, Jeremy Smith, and Paul Tipton between October 31, 2010 and November 2, 2010 reflect a management decision to get De Araujo and other skilled craftsmen to work faster and to supervise cheaper help. An email from Jeremy Smith to Mike Smith dated November 1, 2010 observes that a decision had to be made by March about the skilled craftsmen. Jeremy Smith wrote,

> We are . . . making the assumption these guys can manage crews and essentially be crew chiefs. At the price we are paying them, they will have to manage several crews for them to pencil out. As we move forward and higher into these areas, we can not (sic) afford and do not need to pay for more "experts" in their craft. For the in-house model set up to work, we must higher (sic) good productive managers to teach and train inexpensive talent.

Michael Smith said the company was not managing labor as profitably as it needed to.

The proffered reasons are sufficient to shift the burden of production back to De Araujo to raise a genuine factual question, considering all the evidence cumulatively, as to legitimacy of JSE's explanation. *Cf. Shelley v. Geren,* 666 F.3d 599, 609 (9th Cir. 2012); *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 600 (9th Cir. 1993). To survive summary decision, De Araujo must point to evidence sufficient to allow a reasonable factfinder to conclude that the reason given for his termination is false, or that the true reason was discrimination or retaliation for protected activity. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 (9th Cir. 2000).

De Araujo attempts to meet this burden chiefly by asserting that Garden Fusion employees were not authorized for employment in the United States, including in particular certain individuals he identified as Mario and Tyson, and that Tyson had been picked up by immigration authorities but then released. De Araujo's affidavit alleges in addition that Nehemias Cifuentes, his former helper, told him that his papers were "no good." Cifuentes denied this in his deposition testimony and examination of his I-9 form and supporting documents reflect that Cifuentes presented what appears to be a facially valid permanent resident card together with a social security card, and that his I-9 appears to have been properly completed.

While De Araujo also disputed a number of the assertions in the Michael Smith declaration, he did not contend that he was a fast worker, and the affidavit of Paul Tipton confirmed that "[b]eing a custom production contractor Carlos was a bit slower but in this particular phase of work I always chose the quality of work over speed." That higher management had other

priorities and chose speed instead might be questioned as a matter of business judgment, but does not make that choice discriminatory. An employer has broad discretion in defining the expectations for employees' performance, *Yefremov v. NYC Dep't of Transp.*, 3 OCAHO no. 562 at 1584, and a plaintiff's subjective evaluation of his own performance does not suffice to create a factual issue, *cf. Coleman*, 232 F.3d at 1286. 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.

While JSE agreed that De Araujo's skills were unrivalled, it nevertheless expected him to increase his speed and rely more on lesser-skilled workers – the classic contemporary employer expectation that employees can continually "do more with less." The question is not whether JSE's expectations or Smith's assessment of De Araujo's performance are fair, reasonable, or objectively "correct." *Cf. Villiarimo*, 281 F.3d at 1063. It is whether there is any factual basis in the record from which a rational trier of fact could conclude that Michael Smith didn't really believe those reasons and used them as a cover up for citizenship status discrimination. De Araujo provided no evidence that would permit such a conclusion. Evidence must be both specific and substantial to create a triable issue, *Aragon*, 292 F.3d at 659, and De Araujo did not present or point to evidence sufficient to raise a genuine issue of material fact. Even viewed in the light most favorable to De Araujo, the facts simply do not support a finding of pretext.

IV. DE ARAUJO'S CROSS-MOTION AND JSE'S MOTION TO STRIKE IT

De Araujo's cross-motion was not made as an independent motion, but asserted at the conclusion of his response to JSE's motion. JSE's response asserts that De Araujo's cross-motion for summary decision is untimely filed and should be stricken. The company points out that the deadline for dispositive motions was April 15, 2013 and that De Araujo's cross-motion was not filed until May 15, 2013. JSE objects as well to what it characterizes as irrelevant and objectionable declarations and exhibits accompanying De Araujo's motion, noting that declarations must be made on personal knowledge, not hearsay or conclusions that lack evidentiary quality. Finally, JSE argues that De Araujo has failed to present any actual evidence that he was terminated for complaining about illegal hiring practices.

De Araujo's response to the motion to strike argues that his cross-motion was timely filed and should be considered and granted, not stricken. He asserts that if JSE is allowed to hire underpaid undocumented workers for financial reasons, then every employer will be free to do the same thing. He also asserts that JSE's pleadings "are full of contradictions," and that the Smith affidavit is objectionable because Michael Smith only came back to work in the fourth quarter of 2010, and therefore cannot testify about events that occurred from January 2007 to October 2010.

JSE's motion to strike De Araujo's cross-motion for summary decision will be denied. I did not, as JSE requested, exclude De Araujo's materials from consideration solely because they contained hearsay, but have considered those submissions for what they were worth. While JSE is correct that declarations must be made by competent witnesses having personal knowledge of the facts stated, the company's assertion that hearsay is inadmissible without exception in this forum is simply incorrect.

Exclusion of hearsay evidence is not mandated either by the Administrative Procedure Act, 5 U.S.C. § 556 et seq., or by the OCAHO rules, which provide the governing standards for administrative adjudication in this forum. OCAHO rules require instead that affidavits in support of a motion for summary decision should show affirmatively that the affiant is competent to testify to the matters contained therein, and shall set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557. 28 C.F.R. § 68.38(b).

Unless expressly made so by statute or agency rules, the Federal Rules of Evidence are not controlling in administrative proceedings. *See*, *e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (noting that neither the APA nor the Social Security Act, 42 U.S.C. § 205 (a)-(b), prohibits hearsay evidence). While the federal rules may be used as a general guide in OCAHO proceedings, 28 C.F.R. § 68.40(a), our proceedings are not controlled by those rules, and hearsay is freely admitted. *See*, *e.g*., *United States v. Haim Co., Inc.*, 7 OCAHO no. 988, 1030, 1035 (1998) (noting that it is well established that hearsay is admissible in OCAHO administrative proceedings). The probative weight to be given to such evidence will depend, of course, upon a number of factors such as bias, whether the hearsay evidence is corroborated or contradicted by other evidence, and other circumstances providing indicia of reliability, but there is no categorical exclusion. While De Araujo's affidavits do contain conclusions and opinions, moreover, the remedy is a motion to strike the defective portions, not the document as a whole.

The motion to strike De Araujo's cross-motion will be denied. The cross-motion itself will be denied as well.

V. DE ARAUJO'S MOTION FOR PARTIAL RECONSIDERATION

A. The Positions of the Parties

De Araujo's motion for partial reconsideration requests reconsideration of a previous order that granted in part and denied in part his motion to compel discovery. That order directed JSE to answer certain interrogatories, but denied De Araujo's request to compel the production of documents. His original document request sought documents consisting of the records of a

specific checking account that De Araujo said PCI used to pay illegal aliens, as well as hiring records, I-9 forms, E-Verify records, employee identifications, and employment applications for all the employees that were paid from PCI's checking account. De Araujo also sought records of the "discharge and readmission" for those employees.

JSE's response says it could not be compelled to produce documents that are in the possession, custody, and control of Personnel Concepts, Inc., a separate legal entity owned by different persons. JSE says it already produced its own hiring and discharge documents with its prehearing statement and that it has no other responsive documents in its custody, possession, or control. To the extent that De Araujo's motion sought to compel the production of payroll records, moreover, JSE points out that this request extends beyond the scope of the original document request.

De Araujo's supplemental brief asserts that his motion should be granted based on newly acquired evidence consisting of exhibits 1) the deposition of Mark R. Euting dated February 11, 2013 with attachments (22 pp.); 2) the deposition of Nehemias Cifuentes dated February 13, 2013, with attachments (46 pp.); and 3) the deposition of Monte Rollins, Jr. dated February 13, 2013, with attachments (46 pp.). JSE's response to the supplemental brief states that the company has no objection to consideration of De Araujo's supplemental evidence, but contends that the evidence simply does not show what De Araujo claims it does.

B. Discussion and Analysis

I have reconsidered the scope of the previous order and decline to alter it as requested. The discovery De Araujo is seeking would not assist him in establishing his case because there is no information about the former Garden Fusion employees or their immigration status that would alter or affect the outcome here. The critical question in this case is not whether any given individual's work documents were genuine; it is whether Michael Smith and Jeremy Smith fired De Araujo because of his United States citizenship status or in retaliation for engaging in activity protected under § 1324b.

Thus even assuming arguendo that every former employee of Garden Fusion was unauthorized for employment in the United States, that fact would not make it any more or less probable that JSE's motive in firing De Araujo was retaliatory within the meaning of § 1324b(a)(5) where no complaint De Araujo made prior to his termination involved conduct protected under § 1324b. Based on examination of the entire record, I am therefore not persuaded that there is any additional evidence which would assist De Araujo in supporting his case, and thus conclude that even if he were to obtain all the discovery he seeks, his claim would still not survive summary decision.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Jose Carlos De Araujo is a citizen of the United States.

2. Joan Smith Enterprises, Inc., currently operates in the metropolitan area of Phoenix, Arizona, under the name California Pools and Landscaping; it was previously known as California Pools and Spas.

3. Jose Carlos De Araujo was hired by Joan Smith Enterprises, Inc. on or about January 15, 2007 to work in its tile division installing coping and tile on selected pools.

4. Jose Carlos De Araujo was generally regarded as a highly skilled craftsman, expert in the area of tile and coping installation.

5. Jose Carlos De Araujo was laid off by Joan Smith Enterprises, Inc. on or about February 11, 2011.

6. Jose Carlos De Araujo filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on August 9, 2011.

7. OSC sent Jose Carlos De Araujo a letter on December 6, 2011 advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of his receipt of the letter.

8. Jose Carlos De Araujo filed his complaint on March 8, 2012.

B. Conclusions of Law

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

2. Joan Smith Enterprises, Inc. 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. Jose Carlos De Araujo did not establish a prima facie case of citizenship status discrimination or retaliation.

5. In order to withstand a properly supported motion for summary decision, 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. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

6. 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. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

7. 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 Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).

8. Assuming arguendo that Jose Carlos De Araujo presented a prima facie case of citizenship status discrimination or retaliation, JSE proffered a legitimate nondiscriminatory reason for terminating him.

9. Jose Carlos De Araujo did not point to specific and substantial evidence to create a triable issue, or point to evidence sufficient to raise a genuine issue of material fact as to whether JSE's reasons for terminating him were a pretext for discrimination or retaliation for protected conduct.

10. The complaint must be dismissed.

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

JSE's motion to strike De Araujo's cross-motion for summary decision is denied. De Araujo's motions for summary decision and for reconsideration are denied. JSE's motion for summary decision is granted and the complaint is dismissed.

SO ORDERED.

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

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.