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

March 8, 2001

DANIEL JOSEPH BENDIG, ET AL., Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 20B00033
CONOCO, INC., Respondent.	)	

ORDER DENYING OSC'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This case arises in the context of a reduction in force ("RIF") instituted in 1999 by the respondent Conoco, Inc., a worldwide energy corporation incorporated in Delaware and headquartered in Houston, Texas. At issue are four consolidated cases which involve separate complaints based on the same or similar allegations. The first complaint, filed by Daniel Bendig, alleged that the respondent, Conoco, Inc., terminated him from his employment as a geoscientist for reasons prohibited by the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (INA). It was followed by a companion case filed by the Office of Special Counsel (OSC), which also alleged that Conoco's termination of Bendig's employment discriminated against him based on his citizenship status. Substantially similar companion complaints were subsequently filed separately by David Stemler and by OSC based on similar allegations with respect to the termination of Stemler's employment at Conoco as a geophysicist. Bendig, Stemler and OSC (collectively the complainants) alleged that the company gave preferential treatment to its noncitizen employees in carrying out the RIF. Presently pending is the motion of complainant OSC for partial summary decision which has been fully briefed by the parties and is ripe for adjudication.

II. FACTUAL BACKGROUND

From the materials submitted by the parties, some of the basic facts appear undisputed. Conoco, Inc.

is a global energy corporation involved in many areas of the oil and gas industry, including worldwide exploration, production, transportation, marketing and refining. Exploration and Production (EP) is the function responsible for petroleum liquid and gas production and consists of business units and subsidiaries all over the world which are responsible for various tasks involved in exploration and production processes.

Conoco's Integrated Interpretation Center (IIC) is located in Houston, Texas where its principal function is to provide geoscientific support to the company's business units around the world. The IIC is located within the Upstream division of Conoco, more specifically within the Exploration and Production Technology (EPT) business unit. The manager of the IIC, Robert M. Spring, is a Canadian citizen whose position requires him to manage the geologists and geophysicists who provide global technical support to various business units. Spring is also a member of Upstream Finding team that manages the exploration portfolio, and a member of the Skills Management Decision Board which provides input on people issues. At the time of the events in question in this action, Spring reported to John Hopkins, Vice President for Exploration Technology, who in turn reported to Executive Vice President Rob McKee. McKee reported to Archie Dunham, Conoco's CEO.

In 1998, Spring learned from Glen Bishop, the leader of the Upstream Finding team, that there was to be a major restructuring at Conoco and that the exploration budget for 1999 would shrink from 450-500 million dollars down to 250 million dollars. It was anticipated that the reorganization would result in a 20%-30% reduction in the global pool of exploration personnel within Conoco and its subsidiaries. All the exploration managers were asked to match employment in their respective groups with the anticipated workload and budget in 1999. Spring was the person responsible for developing and presenting the initial recommendations for IIC. A global selection team then met on or about January 28-31, 1999, to discuss the proposed changes and make final decisions. As a result of the reduction in force, approximately 70 geoscientists were laid off, among them Messrs. Bendig and Stemler. Each was informed on or about February 16, 1999, that he would be terminated as part of Conoco's reduction in force.

Complainant Daniel Joseph Bendig is a geophysicist who holds degrees in stratigraphy, geology and physics. He is a dual citizen, of the United States by birth and of the United Kingdom by naturalization in 1996.[1] Bendig was employed from 1978 to 1999 in various capacities at Conoco facilities in Aberdeen, Scotland; London, England; Houston, Texas; Jakarta, Indonesia; and Ponca City, Oklahoma. His last position prior to the RIF was as one of two Team Leaders for Integrated Interpretation Projects at the IIC where he reported to Spring.

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[1] Bendig's dual citizenship raises the question of whether the selection of another citizen of the United Kingdom can be discriminatory as to him because he is also a citizen of the United Kingdom. For purposes of this motion, I have assumed that it can.

Complainant David Paul Stemler is also a United States citizen and holds a baccalaureate degree in geology. Stemler was employed in various capacities from 1980 to 1999, at Conoco facilities in London, England; Ponca City, Oklahoma; Stavanger, Norway and Houston, Texas. His last position prior to the RIF was as a Senior Geophysical Advisor at the IIC, in which capacity he reported to Bendig.

Patrick Jonklaas holds degrees in marine geology and geophysics as well as geology, and is a citizen of the United Kingdom. He is currently employed by Conoco as a geophysicist in its Viet Nam operation. At the time of Conoco's reorganization and downsizing, Jonklaas was an L-1A visa holder employed as a geophysicist in the Integrated Interpretation Projects unit at IIC in Houston, where he reported to Bendig. He continued as a geophysicist at IIC until his transfer to Viet Nam in July of 2000. Jonklaas had previously been employed in other Conoco facilities in London and Aberdeen.

Philip Mark Boyd holds doctoral and baccalaureate degrees in geophysics as well as an MBA. Immediately prior to Conoco's restructuring Boyd was employed as a Team Leader in Conoco's Seismic Imaging Technology Center (SITC) in Ponca City, Oklahoma. He had previously been employed in various capacities in other Conoco facilities in Aberdeen, Scotland; London, England and Ponca City. Boyd is an L-1A visa holder and a citizen of the United Kingdom. He was transferred to the Lobo/San Juan business unit in Houston on or about April 1, 1999, as a Senior Geophysical Advisor. In that capacity, he reports to Greg Leveille, Southern Team Leader, who reports to Barbara Sheedlo, Lobo Asset Manager.

III. RECORD EVIDENCE

A. OSC's Evidence

In support of its motion for partial summary decision OSC furnished the following exhibits: 1) Bendig's Affidavit and Resume; 2) Stemler's Affidavit and Resume; 3) Stemler's Passport; 4) the Deposition of Robert Spring with attachments: a Petition for Non Immigrant worker identified as Spring Deposition Exhibit 8, a letter from Spring to INS dated November 25, 1996, identified as Spring Deposition Exhibit 9, a list captioned "IIC G & G Personnel Rankings" identified as Spring Deposition Exhibit 10, another list captioned "IIC G & G Personnel Rankings" identified as Spring Deposition Exhibit 11; 5) INS' Notice of Approval of L-1A visa for Patrick Jonklaas dated December 19, 1996; 6) the Deposition of Philip Mark Boyd with attachment: Boyd's resume identified as Boyd Exhibit 1; 7) the Deposition of Barbara Sheedlo with attachments including Bendig's Resume and Stemler's Resume; 8) a Memo dated February 16, 1999, from Randy LaBouve to Mark Boyd; 9) a Memo dated August 2, 1999, from Kim E. Miller to Randy LaBouve; 10) a Notice from INS dated November 25, 1996, approving an L-1A visa for Philip M. Boyd and a Notice from INS dated December 15, 1999, approving an extension thereof; 11) a letter dated October 28, 1996, from Robert Stolt to INS; 12) an excerpt from the deposition of John R. Hopkins; 13) four Upstream Organization Charts: the first for Exploration Production effective January 8, 1998, the second for

Exploration Production effective August, 1999, the third for EP- Integrated Interpretation Technology effective May 1, 1998, and the fourth for EP-Integrated Interpretation Technology effective April 1, 1999; and 14) the Deposition of Helen Ione Myers with attachments.

B. Conoco's Evidence

In opposition, Conoco submitted exhibits: A) a Decision dated December 16, 1997 captioned In Re Mallet et al.; B) the Affidavit of Robert Spring; C1) Bendig's EEOC Charge; and C2) Bendig's Original Petition in the Harris County, Texas District Court (No. 2000-06050) dated February 4, 2000; Plaintiffs' Second Amended Petition dated May 17, 2000, filed by Bendig, Stemler, and four other named individuals; Stemler's EEOC charge and Stemler's Original ADEA and Title VII Complaint dated April 3, 2000, filed in the district court for the Southern District of Texas, Houston Div. as No. H-00-1150. Accompanying Conoco's sur-reply was Exhibit A, the deposition of Daniel Bendig.[2]

C. Other Evidence

In resolving this motion, I have also reviewed and considered the record as a whole, including the pleadings and motions as well as the evidentiary materials submitted by both parties in support and opposition to OSC's Motion to Compel Discovery, including OSC's Exhibits 1-13 and Conoco's Exhibits A-D which consist principally of discovery requests and the responses thereto.

IV. STANDARDS APPLICABLE TO THE MOTION

Rules applicable to OCAHO proceedings[3] provide that summary decision on all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). Where a genuine issue of material fact is raised, the case must be set for hearing. 28 C.F.R. § 68.38(e). In determining whether there is a genuine issue, 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).[4] Doubts are to

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[2] Although Conoco's sur-reply also referred to an Exhibit B, the deposition of David Jenkins, the Bendig deposition was the only one received.

[3] 28 C.F.R. Pt. 68 (2000).

[4] 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

be resolved in favor of the party opposing summary decision. Id.

It is also well established that in resolving a motion for summary decision the factfinder cannot make credibility determinations. United States v. DeLeon Valenzuela, 7 OCAHO no. 993, 1084, 1086-87 (1998). If the resolution of a material fact in dispute turns on a credibility determination, summary decision may not issue. On the contrary, the evidence must be construed in the light most favorable to the nonmoving party, the nonmoving party is to be believed and all reasonable inferences are to be drawn in favor of that party, Vogel v. Glickman, 117 F.Supp. 2d 572, 573 (W.D. Tex. 2000), without weighing the evidence, assessing its probative value, or resolving factual disputes. Wise v. Lucent Technologies, Inc. Pension Plan, 102 F.Supp. 2d 733, 739 (S.D. Tex. 2000).

The substantive law at issue determines which facts are material in a given case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The standard under which the claims in this case are to be assessed is less than crystal clear because courts have encountered difficulties in applying the paradigmatic disparate treatment analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to reduction in force cases.[5] It is the essence of a reduction in force that capable employees nevertheless have to be terminated and that the employees whose jobs are eliminated will never be able to show the fourth element required by the classic McDonnell Douglas formulation: that the employer replaced them or sought applicants for their now nonexistent positions. Courts have been inconsistent in determining what if any additional showing is needed to satisfy that element.

As contemporaneous commentators pointed out, see, e.g., Robert K. Sholl & Dean A. Strang, Age Discrimination and the Modern Reduction in Force, 69 MARQ.L.REV. 331, 346 (1986), it is the Fifth Circuit, in which this case arises, which initially set the terms of the debate about the proper approach to RIF cases. In Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982), that court reversed a verdict for the plaintiff in such a case on the grounds that no prima facie case had been made, holding that a plaintiff in a RIF case makes out a prima facie case by: (1) showing that he was a member of the class protected by the statute and was adversely affected by the employer's decision, (2) showing that he was qualified to assume another position at the time, and (3) "producing evidence, circumstantial or direct, from which a factfinder might reasonably conclude

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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 omitted from the citation.

[5] The McDonnell Douglas paradigm has itself come under increasing criticism from commentators challenging both its utility and its intellectual honesty, and urging its modification or abolition. See, e.g., Stephen W. Smith, Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?, 12 LAB.LAW. 371 (1997), Deborah C. Malamud, The Last Minuet, Disparate Treatment After Hicks, 93 MICH.L.REV. 2229 (1995).

that the employer intended to discriminate in reaching the decision at issue." 656 F.2d at 129. The Williams court found that the plaintiff had not satisfied the final criterion. Id. The court went on to explain that because the employer's responsibility was to treat the protected characteristic neutrally and not to accord special treatment on the basis of it, a plaintiff must produce "some evidence that an employer has not treated [the protected characteristic] neutrally ... Specifically the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of [the protected characteristic], or (2) that defendant regarded [the protected characteristic] as a negative factor in such consideration." Id. at 129-30.

The Williams formulation was sharply criticized in Oxman v. WLS-TV, 846 F.2d 448, 454 (7th Cir. 1988) as fusing the "prima facie" and "pretext" steps and thus obviating the central purpose of McDonnell Douglas to relieve the plaintiff of the burden of showing intent in the first instance. By way of contrast, the court in Coburn v. Pan Am. World Airways, Inc., 711 F.2d 339, 343 (D.C. Cir.), cert. denied, 464 U.S. 994 (1983), flatly rejected the idea that a plaintiff must show "something extra" in a RIF case, and held that a prima facie case may be satisfied by a showing that the plaintiff was fired pursuant to a RIF and a nonprotected employee who held a similar position was retained. Still another approach was taken in Earley v. Champion Int'l Corp., 907 F.2d 1077, 1082 (11th Cir. 1990), which held that where a plaintiff's position is entirely eliminated, he must show that an open position for which he qualified was actually available in the company at the time of his termination. The Fifth Circuit apparently continues to adhere to the Williams modification of the traditional elements of the classic McDonnell Douglas paradigm. See Woodhouse v. Magnolia Hosp., 92 F.3d 248, 252 (5th Cir. 1996), Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 41 (5th Cir. 1996), Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995).

The parties in this case have also argued vigorously over whether it is Nguyen v. ADT Engineering, Inc., 3 OCAHO no. 489, 915 (1993) which sets the proper standard for a prima facie reduction in force case before this office and whether that standard requires that the terminated employee was actually or constructively replaced by a nonprotected individual. Although Nguyen was actually decided using the classic McDonnell Douglas analysis, Id. at 928-31, it nevertheless also discussed in dictum the burden of proof in a RIF case. Id. at 927-28. It concluded that because the complainant had not met the more lenient evidentiary standard of McDonnell Douglas, he could not satisfy the more stringent RIF standard. Id. at 931. Nguyen's analysis of the RIF standard, however, was expressly guided by the Sixth Circuit's modifications to the McDonnell Douglas formula, Id. at 929; there appears no persuasive reason why that court's formulation should override the analysis utilized by the Fifth Circuit, in which this case arises.

As in any other disparate treatment case, once a prima facie case is made, the employer must merely set forth, through admissible evidence, "reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). The defendant's burden is one of production, not persuasion. Thus the employer need only set out a legitimate, nondiscriminatory reason for its

action, regardless of that reason's ultimate persuasiveness. Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 958 (5th Cir. 1993). If the employer has articulated a legitimate nondiscriminatory reason for the employment decision, the plaintiff must present evidence that the reason proffered by the defendant is actually a pretext for discrimination and that the defendant's employment decision was in fact informed by discriminatory motives. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-256 (1981).

A disparate treatment claim cannot succeed, whatever the employer's decisionmaking process, unless it is shown that the employee's protected trait actually played a role in that process and had a determinative influence on the outcome. Lindsey v. Prive Corp., 161 F.3d 886, 895 (5th Cir. 1998), (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). Cf. Woodhouse 92 F.3d at 253 ("Although [the protected characteristic] need not be the sole reason for the adverse employment decision, it must actually play a role in the employer's decisionmaking process and have a determinative influence on the outcome.")

V. DISCUSSION

For purposes of the instant motion, OSC has not challenged Conoco's decision to downsize, nor does it contend that the reduction in force itself was anything other than a legitimate management decision. Neither has it complained about the mechanics of the process by which the reduction in force was implemented. Rather, it is the propriety of Conoco's selection of the particular individuals to be separated or retained, rather than the reorganization itself, which is the central issue presented. The complainants have asserted that Bendig and Stemler were selected for termination on the basis of their United States citizenship, while others not in their protected group were retained in or transferred to other jobs for which the complainants were qualified. OSC's motion contends that there is no genuine issue of fact as to liability and that partial summary decision is warranted as a matter of law. Conoco opposes the motion, arguing first that OSC's evidence has not made out a prima facie case, and second that the employment decisions were made based upon the relative qualifications of the persons retained and those terminated, not on the basis of anyone's citizenship or visa status.

It is uncontested that Bendig and Stemler are members of a protected class and that they were adversely affected in Conoco's restructuring. OSC states that its evidence shows the complainants Bendig and Stemler were both qualified to perform Jonklaas' job as a geophysicist or Boyd's job as Senior Geophysical Advisor and that it is entitled to partial summary decision as to those jobs.[6] OSC states further that it need not establish that Bendig and Stemler were better qualified for those jobs than

[6] OSC acknowledges that there are factual disputes as to some other issues and jobs, but seeks summary decision as a matter of law based on these two specific positions.

were Jonklaas and Boyd.[7]

While it is true that the complainant is not necessarily obliged to show better qualifications than the person retained in order to make a prima facie case, OSC is nevertheless obliged to furnish some basis from which it may be inferred that the citizenship status of the laid off employees played some role in the decision to terminate them while retaining others. A showing that a terminated employee has better qualifications than another employee retained in a similar job is simply one of the many circumstances which may give rise to an inference of discrimination. See generally Scott v. University of Mississippi, 148 F.3d 493, 508 (5th Cir. 1998), abrogated on other grounds by Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). As was explained in EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1181 (5th Cir. 1996),

> In the context of a reduction in force, which is itself a legitimate nondiscriminatory reason for the discharge, the fact that an employee is qualified for his job is less relevant-- some employees may have to be let go despite competent performance. [citation omitted] If, however, the older employee shows that he was terminated in favor of younger, clearly less qualified individuals, a genuine material fact issue exists (emphasis added).

Similarly, a plaintiff might make the necessary showing, for example, by evidence that some criterion was differentially applied to him, Rubinstein v. Administrators of the Tulane Educational Fund, 218 F.3d 392, 400 (5th Cir. 2000), petition for cert. filed 69 U.S.L.W. 3366 (U.S. Nov. 13, 2000) (No. 00-789), or by evidence of statistical disparities, Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 190 (5th Cir. 1983), or by anecdotal evidence of conduct or remarks showing hostility to a protected characteristic, Kelly v. Boeing Petroleum Servs. Inc., 61 F.3d 350, 357 (5th Cir. 1995), or by any other circumstantial evidence suggestive of discrimination. Williams v. Trader Publ'g Co., 218 F.3d 481, 484 (5th Cir. 2000). But in order to establish the final factor of a prima facie RIF case, a plaintiff in the Fifth Circuit must produce some evidence that the employer has not treated the protected characteristic neutrally. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 812 (5th Cir. 1991). See also Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 149-50 (5th Cir. 1995) cert. denied, 516 U.S. 1047 (1996). I am not satisfied that under this standard OSC has presented evidence sufficient to support an inference that discrimination was the basis for either employment decision. OSC contends that the final element "is satisfied by evidence that during its 'reduction in force', Respondent's number of expatriates increased (Exh. 14, Myers Dep. Tr. 15, 19) and it retained or transferred at least two non-U.S. citizen L-1A visa holders (Jonklaas and Boyd) in or to positions not authorized by their L-1A managerial visas." I am asked to draw from these two alleged facts and circumstances an inference that discrimination occurred.

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[7] OSC also states that it will show at trial that Stemler was better qualified for the position occupied by Jonklaas but it acknowledges there is a dispute of fact about this issue.

The first assertion rests on two excerpts from the deposition testimony of Helen Myers:

> 1. Q. How many expatriates[8] are there currently in the offices that you mentioned, the Houston, Denver, Ponca City and Lafayette?
>
> A. Approximately 100.
>
> . . .
>
> 2. Q. Do you know how many expatriates are or were working for Conoco in late 1998 or early 1999?
>
> A. It would be a guess.
>
> Q. What would your best guess be?
>
> A. Maybe 75, 80.

OSC does not explain what significance OSC attaches to Myers' estimates or what it believes these numbers standing alone serve to establish. It is not shown how many of the expatriates are geophysicists in exploration business units. Without any comparative data showing the total number of employees in the protected class before and after the reduction, without any information about the citizenship status of the other 68 geoscientists who were laid off, and without any effort to control for the identity of the decisionmaker[s], the particular jobs the individuals held and their relative qualifications or other relevant objective factors, I am unable to afford significant probative value to Myers' gross estimate of the number of expatriates. While refined statistical comparisons of retention rates between protected and nonprotected groups may well have probative value sufficient to show that a particular correlation has little likelihood of occurring by chance,[9] there has been no such comparison here.

The second prong of OSC's argument rests upon the premise that because Jonklaas and Boyd were authorized by their L-1A visas to work only in certain managerial positions and the positions which they

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[8] According to the Myers deposition, an expatriate in Conoco parlance is someone who is payrolled in one country and works in another.

[9] In probability terms significance occurs when an assumption is so unlikely to be correct that it may be rejected in favor of the premise at issue. For a cautionary note on the use of statistics in legal proceedings generally, see Lawrence Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 HARV.L.REV. 1329 (1971).

occupied after the reorganization were not the managerial positions upon which their visas were predicated, they should therefore be treated as ineligible for those jobs. I do not find the question of whether Jonklaas' and Boyd's jobs fell within the INS definition of "managerial capacity" as defined in 8 C.F.R. § 214.2(1)(1)(ii)(B), or whether they should have had L-1B rather than L-1A visas, to have any dispositive effect on the resolution of this motion. While the parties have argued at length about what jobs at Conoco fall within particular visa categories, that issue remains in my view wholly tangential to the issues that must be resolved here: first, is there evidence in the record from which it can reasonably be inferred that there is a nexus between Conoco's employment decisions and the complainants' United States citizenship status, and second, if so, can it be conclusively determined on this record that Conoco's proffered reasons for its decisions to retain Jonklaas and Boyd and terminate Bendig and Stemler are either unworthy of belief or are not the real reasons for those decisions.

As noted, it is not clear that a protected individual laid off in a RIF in the Fifth Circuit can satisfy the final element in a prima facie case simply by showing that nonprotected individuals were retained in other similar jobs.[10] Under the INA, an employer has the statutory right, but no obligation, to prefer a United States citizen over an equally qualified alien when making an employment decision. 8 U.S.C. § 1324b(a)(4). There is nothing inherently suspicious in the retention of a temporary visa holder occupying a different job during a reduction in force even though an equally qualified United States citizen is laid off. The INA does not require an employer to fire employees from other jobs in order to provide jobs for United States citizens to move into. OSC's evidence appears to fall short of the Fifth Circuit's requirement of specific facts leading to an inference that complainants were more likely than not terminated because of their United States citizenship.

That question need not long detain us, however, because Conoco has in any event already done all that would be required had a prima facie case been shown: it has proffered its reasons for the employment decisions. The deposition of Robert Spring sets forth in detail the process by which Conoco came to the conclusion that Jonklaas and Boyd were the best qualified candidates for the positions they occupied after the reorganization. Spring described the mechanics of the process, and the respective rankings of the employees retained compared to those terminated appear in the record as Spring deposition exhibits 10 (containing numerical rankings of certain employees for "Performance" and "Potential"), and 11 (containing numerical rankings for certain employees for "Performance" and "Potential" as well as a "Combined Rating" for each). In addition, Spring's affidavit and deposition

[10] If OSC is correct in stating that neither Jonklaas' nor Boyd's post-reorganization jobs were supervisory or managerial jobs, their jobs were pro tanto not "similar" to Bendig's (although they would be similar to Stemler's).

testimony also point to certain performance problems and complaints made about both Bendig and Stemler. Spring asserted that Bendig was the lowest ranked supervisor at the IIC and lacked critical skills, while Stemler was not proficient in seismic interpretation and had problems with promptness. While Stemler had outstanding qualifications in seismic acquisitions, Spring said there were no jobs in that area. The deposition testimony and other exhibits provide evidentiary support for Conoco's explanations. Thus even were I to apply the more liberal standard in cases like Coburn and find that the fourth element of a prima facie case may be satisfied when the laid off plaintiff held a substantially similar position to a retained employee not in his protected group, OSC's motion for summary decision would still have to be denied.

When an employer sets forth and supports a facially valid reason for the employment decision, the presumption created by the prima facie case disappears and the burden reverts to the moving party to prove that the employer's reason is pretextual. Stults v. Conoco, Inc., 76 F.3d 651, 657-58 (5th Cir. 1996), Guthrie v. Tifco Industries, 941 F.2d 374, 377 (5th Cir. 1991), cert. denied, 503 U.S. 908 (1992) ("The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge"). An employer's reason cannot be shown to be a pretext for discrimination unless the plaintiff introduces some evidence,

whether circumstantial or direct, that permits the jury to believe that the reason was false and that illegal discrimination was the actual reason. Nichols v. Lewis Grocer, 138 F.3d 563, 566 (5th Cir. 1998) (citing Hicks, 509 U.S. at 515); Swanson v. General Servs. Admin., 110 F.3d 1180, 1185 (5th Cir. 1997). Once an employer raises the issue of comparative qualifications as the reason for the employment decision it is incumbent upon a complainant seeking summary decision to produce some evidence that the employer's proffered reason is unworthy of credence or is not the real reason for the decision. OSC made no attempt to rebut Conoco's explanations.

Instead of contending that Conoco's explanations are pretextual, OSC suggests that it has no burden to show pretext because Conoco could not as a matter of law have any legitimate reason for retaining Jonklaas and Boyd in lieu of the complainants because the former are, as to those jobs, unauthorized aliens, citing Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 683-84 (1997). That theory rests, however, on a fundamental misunderstanding of Iron Workers. In that case, the respondent had failed to consider any of seven United States citizen job applicants for a particular job because it had preselected an illegal and undocumented alien employee. Id. at 683. The employer in that case did not contend that the undocumented worker was better qualified; indeed, Lake conceded that it did not even consider the comparative qualifications of the applicants. Id. at 684. Rather, Lake offered a series of shifting, inconsistent and implausible reasons for not considering them. Lake's initial explanation for the decision was that it wanted to "do a favor" for the illegal employee and

help him get a green card.[11] Id. at 683. This proffered reason was ultimately rejected as insufficient justification for refusing to consider the United States citizen applicants. Id. at 684. The proffered reason implicitly acknowledged that the employee's immigration status was a factor in the employment decision.

Unlike the first reason offered in Iron Workers, Conoco's proffered reason in this case has nothing to do with the citizenship or visa status of any of the individuals involved. It is based on comparative qualifications and may not simply be rejected out of hand. I am not at liberty, as OSC urges I do, to simply disregard the employer's actual explanation without countervailing evidence that it is not the real reason for the decision. Stults, 76 F.3d at 657 (citing cases). To the contrary, I must, for purposes of this motion, take the nonmoving party's evidence as true. See generally W. Schwartzer et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 479 (1992).

OSC cites no other authority for the proposition that an employer's explanation for an employment decision must invariably be rejected if that reason could constitute a violation of another statute. Although neither party cited or acknowledged it, there is persuasive analogous authority holding precisely to the contrary. In Hazen Paper, 507 U.S. at 612, for example, the Court expressly found that a motivation which is unlawful under another body of law can nevertheless constitute a legitimate reason for purposes of satisfying a defendant's burden of production under the McDonnell Douglas-Burdine formulation. Thus it held that firing an older employee to prevent his pension benefits from vesting could not, without more, violate the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA), even though it would constitute a violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (ERISA). Id. at 612-613. The Court went on to explain that,

> Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

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[11] The employer had provided a totally different (and wholly fabricated) explanation to the Department of Labor, and also asserted as after-the-fact justification that the complainants were overqualified and that it did not hire union members. Id. at 682-85.

Id. at 612.

The question is not, as Conoco has vehemently argued it is, whether I have any authority to decide whether an individual is working in or out of his visa status. That is a fact, and may be determined like any other. The question is whether the latter fact, if established, would show that the complainant's citizenship status was a factor in the decision to terminate him. Standing alone, I cannot find that it would. Unless a protected characteristic actually motivated the employment decision, a discharge may be unfair or even unlawful and yet not be evidence of discrimination. Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir.), cert. denied, 510 U.S. 976 (1993). As noted in Simms v. First Gibraltar Bank, 83 F.3d 1546, 1556 (5th Cir.), cert. denied, 519 U.S. 1041 (1996), the act complained of "may have been unsound, unfair, or even unlawful yet not have been violative of the FHA" (Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.) in the absence of evidence from which it could be inferred that race was a factor. The court summed up by noting,

> The FHA does not create a cause of action for bungling a deal, failing to follow industry custom, violating the Equal Credit Opportunity Act, or even making false representations to a government agency. [citation omitted] Hicks, 509 U.S. at 521, 113 S.Ct. at 2754 ("Title VII is not a cause of action for perjury"). The FHA instead prohibits a lending institution from using race, or any other prohibited factor, as a basis for making a lending decision.

Id. at 1559.

Similarly here, under the reasoning set forth in Hazen Paper, the fact that an L-1A visa holder may be working outside the limits of a particular visa does not, without more, constitute a violation of 8 U.S.C. § 1324b. While Hazen Paper is not controlling, I would not depart from its reasoning, coming as it does from the highest authority, in the absence of a more compelling justification than has been offered thus far for doing so.

Unlike the situation in Iron Workers, no facts and circumstances have been shown here which create a nexus between the employment decisions and the citizenship status of the complainants. Liability depends upon whether the protected trait actually motivated an employer's decision. The characteristic must have actually played a role in the decisionmaking process and had a determinative influence on the outcome. Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2105 (2000) (citing Hazen Paper). Where a plaintiff has offered no evidence at all to rebut the employer's facially benign explanations, no inference of discrimination can be drawn. Scott, 148 F.3d at 507 (quoting EEOC v. Louisiana Office of Comm. Servs., 47 F.3d 1438, 1447 (5th Cir. 1995); Bodenheimer, 5 F.3d at 958 (plaintiff must tender factual evidence from which factfinder could reasonably conclude that defendant's reasons were pretext for discrimination); see also Moore, 990 F.2d at 817 n. 24 (listing cases and noting that "the most prevalent flaw in the losing plaintiffs' evidence

is the absence of proof of nexus between the firing (or failure to promote) and the allegedly discriminatory acts of the employer"). No nexus has been shown here either.

OSC's reliance on Iron Workers is also inapposite because that case was not decided summarily, but only after a hearing on the merits and an opportunity to assess the totality of the evidence and the credibility of the witnesses. In that case it was shown at trial that Lake's shifting and inconsistent explanations either had no basis in fact or did not actually motivate the employment decision. 7 OCAHO at 686. The putative reasons were not only found unworthy of credence, they were accompanied as well by evidence of outright mendacity. Id. at 689-94. It is generally inappropriate, however, to make dispositive determinations about the credibility of an employer's proffered explanation in a summary judgment proceeding. Lindsay v. Prive, 987 F.2d 324, 327 (5th Cir. 1993). The reason this is so was aptly stated in International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1265-66 (5th Cir. 1991) (collecting cases), cert. denied, 502 U.S. 1059 (1992):

> [A] party's state of mind is inherently a question of fact which turns on credibility. Credibility determinations, of course, are within the province of the fact-finder . . . Only through live cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility. A cold transcript of a deposition is generally no substitute . . .

VI. CONCLUSION AND ORDER

It is the responsibility of the party moving for summary decision to demonstrate that there are no genuine issues of material fact and that the party is entitled to a summary decision. 28 C.F.R. § 68.38(c), Primera, 4 OCAHO no. 615, 259, 261. That burden has not been met here.

OSC's motion for summary decision is denied.

SO ORDERED.

Dated and entered this 8th day of March, 2001.

Ellen K. Thomas
Administrative Law Judge