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

September 2, 2005

RAUL A. GONZALEZ, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00055
TRI-COMPONENT PRODUCTS, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This case arises under the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (INA). Raul A. Gonzalez filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleged that Tri Component Products, Inc. (Tri Component or Tri) discharged him because of his citizenship and national origin in violation of § 1324b(a)(1), retaliated against him in violation of § 1324b(a)(5), and engaged in document abuse in violation of § 1324b(a)(6). Tri Component filed an answer denying the material allegations of the complaint. Prehearing procedures were undertaken and discovery was closed on May 20, 2005.

Presently pending is the motion of Tri Component for summary decision, to which no timely[1] response was made. Because Gonzalez is unrepresented and is detained, I issued a Notice to him on July 12 advising him of the nature and potential consequences of a failure to respond to such a motion. The Notice gave Gonzalez an additional period of time until August 5, 2005 in which to submit countervailing evidence. On July 14, 2005, evidently before he received the Notice, Gonzalez filed Complainant's Reply in Opposition to Respondent's Motion for Summary

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2004). A party has 10 days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). A response to the motion was thus due on July 11, 2005.

Decision with Request for Other Relief. Although exhibits accompanied this response, Gonzalez was nevertheless still given until August 5 to file any additional evidentiary materials pursuant to the Notice.

On August 4, 2005 Gonzalez filed a document captioned "Notice of Delayed Filing" in which he sought additional time for an indefinite period for "submission of its opposition to Respondent's summary decision, affidavits and documents with a memorandum of law in support of complainant's countermotion as soon as feasible." I issued an order giving Gonzalez until August 26 to file his additional evidentiary materials but notified him that the deadline for dispositive motions had expired on June 24, 2005 and that countermotions would accordingly not be entertained.

On August 12, 2005, evidently before he received that order, Gonzalez filed his "Opposition to Respondent's Summary Decision with Affidavits, Documents and Memorandum of Law in Support of Complainant's Countermotion for Directed Verdict." Tri Component filed a timely reply to this filing.

Tri Component's motion for summary decision is ripe for resolution.

II. UNDISPUTED BACKGROUND FACTS

Tri Component Products, Inc. is located in the city of New York where it is engaged in the business of manufacturing automotive parts. It currently has about 78 employees and has for more than ten years employed a minimum of 15 full time nonsupervisory employees. Michael Ratner is the head of the company and Nathanial (sometimes identified with the alternative spelling Nathaniel) Ratner is the Manager of Corporate Development. Asher Herzberg is the Vice President of Corporate Development and has been employed in that capacity since 1980. Herzberg's responsibilities include those of Vice President of Human Resources as well. Floyd Oliver is Tri Component's Supervisor of Shipping and has been employed in that capacity since 2001. Oliver's job includes supervising all the packers and other workers in the Shipping Department. Tatiana Koshkova is Tri Component's Payroll Bookkeeper and she has been employed in that capacity since May 3, 2001. As part of her job, Koshkova fills out and updates I-9 Forms. Juanita Suarez works in the Packing Department and has been employed by Tri Component for 21 years. Adriana Izurieta also works in the Packing Department where she is a packer. At the time of the events complained of, Izurieta had been working at Tri Component for five years.

Raul Gonzalez was paroled into the United States in 1980 as a Mariel Cuban refugee. He was hired at Tri Component on August 6, 2002, at which time he filled out an I-9 Form and presented a New York state driver's license and a social security card as evidence of his identity and eligibility for employment. The I-9 Form Gonzalez completed reflected that he was an alien

authorized to work in the United States until January 3, 2003. Gonzalez worked in the Shipping Department at Tri Component until July 25, 2003 as a non-bulk order packer of transmission parts. He was informed by Floyd Oliver on July 25, 2003 that he was terminated.

On October 24, 2003 Gonzalez filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), alleging that Tri Component discriminated against him. By letter of April 7, 2004, OSC notified Gonzalez that its investigation was still pending but that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Gonzalez filed his complaint with that Office on June 22, 2004.

Gonzalez' parole into the United States was revoked by the Department of Homeland Security on October 19, 2004.

III. THE INSTANT MOTION

Tri Component's motion contends that this forum lacks jurisdiction over Gonzalez' claims of national origin discrimination and that he will be unable to establish a prima facie case as to his other claims. The company also contends that it had legitimate nondiscriminatory reasons for terminating Gonzalez because of complaints made about him by female employees.

Gonzalez' initial response argued that Tri Component's motion was untimely made and that it should be denied because no specified act had been identified which warranted his termination. He also raised issues related to discovery. After the Notice, Gonzalez filed another response which argued that Tri Component's explanation was pretextual and that the real reasons for his discharge were his Cuban refugee status and Tri Component's claim that his work papers were not in order. He also argued that he was discharged in retaliation for requesting pay increases.

IV. EVIDENCE CONSIDERED

Tri Component's motion was accompanied by the affidavits of Asher Herzberg, Floyd Oliver, Tatiana Koshkova, Juanita Suarez, Adriana Izurieta, and Aliza Herzberg. Exhibits accompanied the affidavits of Asher Herzberg, Tatiana Koshkova and Aliza Herzberg as follows: Asher Herzberg's Exhibit A, Tri Personnel Update Notice dated November 12, 2002; Asher Herzberg's Exhibit B, Tri Personnel Update Notice dated November 27, 2002; Asher Herzberg's Exhibit C, Tri Personnel Update Notice dated May 1, 2003; Asher Herzberg's Exhibit D, Tri Component Products Procedures, Chapter 5, page 9 captioned "On Time, All the Time!;" Asher Herzberg's Exhibit E, Tri Component Products Corporation Counseling Statement dated June 10, 2003; Asher Herzberg's Exhibit F, Tri Component Counseling Form dated June 23, 2003; and Asher Herzberg's Exhibit G, Tri Personnel Update Notice dated July 10, 2003. Exhibits accompanying the Koshkova affidavit included Koshkova's Exhibit A, an I-9 Form dated August 6, 2002; and

Koshkova's Exhibit B, an I-94 form for Gonzalez indicating parole into the United States until April 19, 2004. (While reference is made to Koshkova's Exhibit C, no such exhibit accompanied the submission.) Exhibits accompanying the affidavit of Aliza Herzberg included Aliza Herzberg's Exhibit A, New York State Department of Correctional Services Inmate Information message dated June 24, 2005 consisting of two pages; Aliza Herzberg's Exhibit B, New York State Department of Correctional Services Inmate Information message dated June 24, 2005 consisting of two pages; and Appendix A, Gonzalez' Amended Complaint with Request for Expansion of the Caption for Inclusion of More Respondents.

No affidavits accompanied Gonzalez' initial response. His first set of exhibits included Gonzalez' Exhibit A, a leaflet captioned "The I-9 Process in a Nutshell;" Gonzalez' Exhibit B, an I-94 Form dated June 9, 1980; Gonzalez' Exhibit C, a Notice of Parole Revocation from the Department of Homeland Security dated October 19, 2004; Gonzalez' Exhibit D, an I-94 Form for Gonzalez indicating parole into the United States until April 19, 2004 (a duplicate of Koshkova's Exhibit B except that a portion appears to be highlighted); Gonzalez' Exhibit E, a sample I-94 Form bearing an INS stamp; Gonzalez' Exhibit F, a Notice of Alien File Custody Review dated April 25, 2005; and Gonzalez' Exhibit G, page 2 of a New York State Department of Labor Unemployment Insurance Form.

Gonzalez' second set of materials submitted on August 12, 2005 included attachments identified as Exhibits A-S and Appendix A. Many are duplicates of other exhibits or pleadings already of record. To distinguish these documents from Gonzalez' first set of exhibits which were also denominated alphabetically (as were Tri Component's exhibits as well), the second set of exhibits will be identified as Gonzalez' Exhibit A2, B2, C2 et cetera. Gonzalez' second exhibits accordingly include Gonzalez' Exhibit A, the affidavit of Tatiana Koshkova (the same affidavit as was filed by Tri Component); Gonzalez' Exhibit B2, Tri Component's Preliminary Witness and Exhibit List dated June 7, 2005; Gonzalez' Exhibit C2, a Termination Form (R00082) dated July 25, 2003 consisting of four pages which appear to be substantially identical; Gonzalez' Exhibit D2, a handwritten letter from Gonzalez to the Office of Special Counsel dated May 25, 2004; Gonzalez' Exhibit E2, a Notice of Parole Revocation from the Department of Homeland Security dated October 19, 2004 (a duplicate of Gonzalez' previous Exhibit C); Gonzalez' Exhibit F2, two I-94 Forms appearing to be duplicates of Gonzalez' previous Exhibits B and D; Gonzalez' Exhibit G2, page 2 of an Unemployment Insurance Claim Investigation Report Form (a duplicate of Gonzalez' first Exhibit G); Gonzalez' Exhibit H2, two letters from Asher Herzberg addressed To Whom it May Concern, the first dated August 1, 2003 and the second dated September 26, 2003; Gonzalez' Exhibit I2, pages 1-4, 7-15, and 20 from a transcript of hearing dated December 2, 2003 and captioned New York Department of Labor Unemployment Insurance; Gonzalez' Exhibit J2, 7 pages consisting of Spanish language statements signed by Adriana Izurieta and Juanita Suarez, with English translations thereof and a Certificate of Completion of a course on medical interpretation together with a "Certificate of Accuracy;" Gonzalez' Exhibit K2, the affidavit of Adriana Izurieta (a duplicate of the affidavit filed by Tri Component); Gonzalez' Exhibit L2, the affidavit of Asher Herzberg (a duplicate of the affidavit

filed by Tri Component) together with a Tri Component's Response to the Office of Special Counsel dated January 13, 2004 and a cover letter of the same date signed by Asher Herzberg; Gonzalez' Exhibit M2, the affidavit of Juanita Suarez (a duplicate of the affidavit filed by Tri Component); Gonzalez' Exhibit N2, the affidavit of Floyd Oliver (a duplicate of the affidavit filed by Tri Component); Gonzalez' Exhibit O2, Tri Personnel Update Notice dated November 12, 2002 (a duplicate of Asher Herzberg's Exhibit A); Gonzalez' Exhibit P2, Tri Component Products Procedures Chapter 15 page 35 captioned "Performance Evaluation;"[2] Gonzalez' Exhibit Q2, page 36 from Tri Component Procedures captioned "Exit Interview;" Gonzalez' Exhibit R2, 4 pages from the INS Handbook for Employers Rev. 11/21/91, with a handwritten notation "2003;" Gonzalez' Exhibit S2, his own affidavit, and Appendix A, Tri Component's Answer to Statement of Facts, consisting of 12 pages.

Tri Component's Reply was accompanied by additional affidavits executed by Asher Herzberg and Floyd Oliver and dated August 12, 2005.

In addition to the materials submitted by the parties in connection with the pending motion, I have also considered the record as a whole, including pleadings, exhibits, discovery responses and all other materials of record.

V. STANDARDS APPLICABLE TO THE MOTION

OCAHO rules 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] While all facts and reasonable inferences

[2] Gonzalez' list of his exhibits describes this page as "Tri Component's Performance Evaluation/Salary Increase Policy Statement (Rules Book), 1p." but the caption does not purport to include a salary increase policy statement.

[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

therefrom are to be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), a summary decision may nevertheless issue where there are no specific facts shown which raise a contested material factual issue. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). An issue is genuine only if it has a real basis in the record. *United States v. B & F Golf Servs., Inc.*, 6 OCAHO no. 851, 261, 262 (1996).

The traditional burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case 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. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. 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). The burden of proof for a prima facie case is de minimus. *Farias v. Instructional Systems, Inc.*, 259 F.3d 91, 98 (2d Cir. 2001).

Once the employer satisfies its burden of production by setting forth and supporting a facially valid reason for the employment decision, the presumption created by the prima facie case disappears and the burden reverts to the employee to prove that the employer's reason is pretextual. *Id*. at 143. This means that once an employer has proffered a nondiscriminatory reason, the employer will be entitled to summary resolution unless the complainant can point to evidence that could reasonably support a finding of discrimination. *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000).

A prima facie case of retaliation is shown by evidence of 1) participation in protected activity known to the defendant; 2) an employment action disadvantaging the plaintiff; and 3) a causal connection between the protected activity and the adverse employment action. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996); *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1110, 9 (2004). Document abuse is shown when an employer requests more or different documents than are required to establish employment eligibility if the request is made under circumstances which give rise to an inference of an intent to discriminate. 8 U.S.C. § 1324b(a)(6). Document abuse may also be established by a showing that the employer refused to honor documents tendered that appear to be genuine and to relate to the individual if the refusal is made with an intent to discriminate. *Id.*

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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).

VI. TRI COMPONENT'S AFFIDAVITS AND EXHIBITS IN SUPPORT OF THE MOTION

Tri Component's motion was accompanied by six affidavits and eleven exhibits in support of its position that Gonzalez was fired because of repeated complaints female coworkers made to management that he habitually harassed them and used offensive language.

A. The Affidavit of Floyd Oliver

Floyd Oliver's affidavit identifies the affiant as the person who trained Gonzalez and supervised him during his tenure at Tri Component. It notes that Gonzalez requested a salary increase on November 12, 2002, which Oliver forwarded to Asher Herzberg. Herzberg denied the request because during his first three months Gonzalez had been found sleeping and eating on the job and had been disciplined for working too slowly. The affidavit says further that Gonzalez repeatedly asked Michael Ratner for a raise and that Oliver told him it was inappropriate to keep harassing the owner of the company for a raise but Gonzalez refused to stop. On June 10, 2003 Gonzalez was verbally counseled about a breach of company policy for not calling in about an absence.

The affidavit states further that later in June 2003 Juanita Suarez complained about Gonzalez harassing her and Adriana Izurieta and using inappropriate language. Nathanial Ratner told the affiant that the women had made complaints to him as well. Oliver informed Gonzalez that there had been complaints about his behavior and language and that further incidents would result in his termination. Gonzalez asked who had complained and what it was they claimed he had said. The affiant told Gonzalez that it didn't matter who complained, he had to stop it. When the same women complained again in July, Oliver, Nathanial Ratner and Asher Herzberg met and agreed that Gonzalez' termination was warranted. Oliver told Gonzalez at the end of the shift that same day that he was terminated for misconduct.

B. The Affidavit of Juanita Suarez

The affidavit of Juanita Suarez states that she worked in the same area as Gonzalez during his tenure there, and that he began saying provocative things to her. Sometimes he said things to himself, but in a loud voice so others could hear. Gonzalez commented on her clothing, for instance about her skirt looking nice and tight, and she told him not to bother her. He began to say dirty things every day which disturbed her greatly. He told her if she would "taste what a Cuban man is" she would have left her husband already. She complained to both Nathanial Ratner and Asher Herzberg. Mr. Ratner spoke to Floyd Oliver and Mr. Herzberg and they attempted to stop Gonzalez, but he continued to harass her. One day the affiant and Adriana Izurieta were coming out of the ladies' room and Gonzalez threatened to send Cuban women to attack them and beat them up. He was very aggressive. Even after he was fired Gonzalez came back and sneaked into the work area and yelled at Suarez in Spanish. He asked her if she was

happy she got him fired and accused her of being in love with him. Gonzalez also waited outside the building on the corner and the end of the work day, so the women started to leave in groups. Suarez said she is still afraid of Gonzalez.

C. The Affidavit of Adriana Izurieta

The affidavit of Adriana Izurieta states that the affiant also worked in the same area as Gonzalez. He began to say abusive and inappropriate things, sometimes to himself in a loud voice so others could hear him. She asked him to stop. He made many comments to Juanita Suarez, often about her breasts. He threatened them both and said he would get Cuban women to hurt them. The affiant told Suarez she was scared of Gonzalez and Suarez complained to management. After Gonzalez was fired he continued to bother them. One day he hid in a doorway near Tri Component and popped out when she and Suarez were walking home. She was fearful then that he would harm them and she is still afraid of him.

D. The Affidavit of Asher Herzberg

Asher Herzberg's affidavit summarized Gonzalez' work history. It said that Gonzalez' request for a salary increase in November, 2002 was denied because he had been found sleeping and eating on the job during his first three months, and had been disciplined for the slow pace of his work (Asher Herzberg's Exhibit A). On November 27, 2002 Gonzalez requested a loan of $100.00 which was approved for $50.00 (Asher Herzberg's Exhibit B). In early 2003 Tatiana Koshkova informed the affiant that Gonzalez' work authorization had expired and she wanted to ask him for a new one. Herzberg told her she could seek the updated information but that Gonzalez' employment status should not be affected. On May 1, 2003 Gonzalez requested a loan of $50.00 which Herzberg approved. On June 3, 2003 Gonzalez did not come to work and did not notify anyone why he was absent or when he would return. This was a violation of company policy which requires an employee to call within one half hour of the start time (Asher Herzberg's Exhibit D). On June 10, 2003 Gonzalez was verbally counseled about this incident. His supervisor wrote a Counseling Statement which the affiant placed in Gonzalez' personnel file (Asher Herzberg's Exhibit E).

On June 23, 2003 the affiant and Floyd Oliver gave Gonzalez a written final warning because of complaints that had been made to management by female employees that Gonzalez was disturbing and harassing them (Asher Herzberg's Exhibit F). Gonzalez did not deny saying inappropriate things to his female co-workers. The Counseling Form advised Gonzalez that if it happened again he would be terminated. On July 10, 2003 Gonzalez requested a loan of $20.00 which Herzberg approved (Asher Herzberg's Exhibit G). On July 25, 2003 Oliver informed Herzberg that additional complaints had been made about Gonzalez harassing and making inappropriate comments to female co-workers. The affiant discussed the complaints with Oliver and Nathanial Ratner and they decided to terminate Gonzalez pursuant to the final warning given to him on June 23. After his termination, Gonzalez returned to Tri Component to pick up his

paycheck. Herzberg offered him the opportunity to discuss the termination but Gonzalez refused to speak with him.

Gonzalez never provided the updated documentation Tatiana Koshkova requested after the expiration of his work authorization, but because he had provided a driver's license and social security card no employment action was taken based on this. Gonzalez never complained about Koshkova's requests for immigration related documentation and the first Tri Component knew about his allegations of document abuse was when it received notification from the Department of Justice about his charge in December, 2003.

The affiant stated further that 46 of Tri Component's 78 employees were noncitizens at the time they were hired.

E. The Affidavit of Tatiana Koshkova

Tatiana Koshkova's affidavit states that she noticed in March or April of 2003 that Gonzalez' work authorization had expired in January. She asked Gonzalez to update his I-9 Form and he agreed. When she followed up a month later he said it was too expensive to obtain a new work authorization. She told him she just needed some proof he had current authorization. Koshkova said that she is a lawful permanent resident and an immigrant herself so she understood his concerns about the expense. A few weeks later Gonzalez brought in a white card which did not look authentic, had no seal, and looked like it was in his handwriting. Koshkova asked him to provide a document with a seal but all he presented was Exhibit B (Koshkova's Exhibit B). Koshkova followed up again, but Gonzalez never provided an updated document. There were no employment consequences to Gonzalez and she never said to him that there would be.

F. The Affidavit of Aliza Herzberg

The affidavit of Aliza Herzberg states that the affiant reviewed the New York state website for the Department of Correctional Services and printed copies of the complainant's incarceration record as Aliza Herzberg's Exhibits A and B. The affiant stated further that in January 2005 the complainant was ordered deported.

VII. GONZALEZ' AFFIDAVITS AND EXHIBITS IN OPPOSITION TO THE MOTION

A. Exhibits With Gonzalez' First Response

Gonzalez' initial exhibit A sets out INS interim rules explaining the circumstances under which an I-94 Form bearing a refugee stamp may be temporarily accepted as a receipt. Other documents demonstrate that Gonzalez was paroled into the United States on June 9, 1980 (Gonzalez' Exhibit B) and that his parole was revoked on October 19, 2004 (Gonzalez' Exhibit

C). Gonzalez' Exhibit D is an I-94 Form reflecting parole until April 19, 2004. Gonzalez' Exhibit E is a page showing a sample I-94 Form with an INS stamp. Gonzalez' Exhibit F is a letter from the U.S. Immigration and Customs Enforcement agency dated April 25, 2005 which reflects that Gonzalez' custody status was to be reviewed by the Field Office Director on or about July 5, 2005 for consideration of release on an order of supervision. Gonzalez' Exhibit G, the form Tri Component filed with the state unemployment agency, reflects that the reason the company gave for discharging Gonzalez was: "Claimant was disrupting other employees during work hours by engaging them in nonbusiness related conversations and loud talking."

B. Affidavit and Exhibits With Gonzalez' Second Response

1. The Affidavit of Raul Gonzalez

Gonzalez' affidavit states he was initially hired at Tri Component at the rate of $6.50 an hour and that he never received a pay increase. He said he was not given an information package or a rule book but that after learning about Tri Component's policies he sought pay increases and discussed the fact that many others got no increases either. Every request he made for an increase was denied. Gonzalez discussed Tri Component's policies with Floyd Oliver on numerous occasions. Oliver once told Gonzalez he did not have authority to fire him. Oliver called the affiant in on July 18, 2003 and asked to see his papers. Gonzalez showed Oliver a New York driver's license, a social security card, an updated I-94 Form valid until April 19, 2004, and an expired Employment Authorization Document (EAD) (I-765). Oliver then sent Gonzalez to the payroll office where he showed the same documents to Tatiana Koshkova and Alan Gold. On July 25, 2003 at about 4:30 in the afternoon Oliver called Gonzalez in and said he had been terminated for misconduct and because he had no working papers. Gonzalez averred further that since June 23, 2003 "he had not had a word with either Ms. Juana Suarez or Adriana Izurrieta (sic)" and that Suarez once "provoked" him while she was on the phone with her husband. Gonzalez said others had also been fired because of accusations by Suarez. Gonzalez said that he was fired because of his documents and that on or about April 19, 2003 he had "presented to the employer a renewed and stamped I-94 issued by an immigration officer."

2. Gonzalez' Second Set of Exhibits

Gonzalez' Exhibit C2, his Termination Form, states on the line for Reason, "Disruptive behavior/lateness/work papers not in order." The words "lateness" and "work papers not in order" are scratched out. Gonzalez' Exhibit D2, a letter he sent to OSC, makes detailed accusations about the adequacy of its investigation and about misconduct on the part of an individual at the New York State Department of Labor. Gonzalez' Exhibit H2 reflects that Asher Herzberg signed two "To Whom it May Concern" letters confirming Gonzalez' employment, neither of which stated a reason for his separation. Gonzalez' Exhibit P2 reflects that Tri Component's performance evaluation period runs from June through July, and that salary increases, if any, are effective after the July vacation period. Gonzalez' Exhibit Q2 states that

terminated employees will have the opportunity to discuss the reasons for separation with management.

VIII. TRI COMPONENT'S RESPONSIVE AFFIDAVITS

Tri Component's reply to Gonzalez' second response was accompanied by a second affidavit of Asher Herzberg and a second affidavit of Floyd Oliver. Herzberg's second affidavit reiterates that on July 25, 2003 he instructed Floyd Oliver to terminate Gonzalez at the end of that day because of complaints made about him by female coworkers. Herzberg said that on the following Monday or Tuesday Floyd Oliver filled out the company's internal form used to record the reasons for departure of an employee. These forms are helpful as a reminder in case a former employee reapplies years later. Herzberg said he reviews and signs all such forms and that he is the only one who can finally approve a termination. Oliver gave Gonzalez' form to Herzberg to sign. When he reviewed it Herzberg noted that the form was incorrectly completed. Herzberg is the person who crossed out the words "lateness" and "work papers not in order" on the form, then he signed it. He reminded Oliver than the only reason for Gonzalez' termination was because of the women's complaints. Oliver cannot authorize a termination by himself. The decision to terminate was made by Nathanial Ratner, Herzberg, and Oliver together. Oliver just made a mistake in filling out the form and Herzberg corrected it.

Oliver's second affidavit states that the affiant filled out the termination form in draft for Herzberg's review and authorization. He said he mistakenly added the items "lateness" and "work papers not in order" because he thought Herzberg might want to remember these things about Gonzalez if he reapplied at some point in the future. Those were not the reasons for Gonzalez' termination.

IX. DISCUSSION

Gonzalez initially asserted two preliminary reasons why Tri Component's motion should not be considered. First, he alleges that the motion was not made by the June 24 deadline for filing dispositive motions as set out in the order governing prehearing procedures. The record reflects, however, that a facsimile transmission of the motion was received in this office on June 24, 2005 thereby tolling the running of the time pursuant to 28 C.F.R. § 68.6(c). The motion is therefore timely.

Gonzalez also made a general objection to the consideration of Tri Component's five affidavits accompanying the motion because the company had previously asserted in response to his requests for the production of documents that no affidavits existed from those five individuals. The affidavits in question are dated June 23 and June 24, 2005; I find no reason to believe that they were in existence in December of 2004 when Tri Component made its responses to

Gonzalez' document requests. That Tri Component had offered to submit affidavits to OSC or to the New York Department of Labor upon request does not mean that such affidavits already existed where there is no indication whatever that OSC or the DOL either requested or received such affidavits.[4] As was explained in the order granting in part and denying in part Gonzalez' motion to compel, an employer is not required to execute affidavits in order to satisfy a document request and Tri Component was accordingly not compelled to create documents which did not already then exist. There is nothing in the discovery rules which prohibits an employer from waiting until after the close of discovery to take affidavits from its own managers or employees. Those affidavits and the motion will accordingly be considered.

A. Discrimination on the Basis of National Origin

As a threshold matter, I note that 8 U.S.C. § 1324b(a)(2)(B) specifically exempts from coverage an employer's discrimination because of national origin "if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964." Title VII, codified at 42 U.S.C. § 2000e et seq., covers national origin discrimination by most employers of fifteen or more individuals.[5] The INA specifically bars any overlap between charges filed under the two statutes, 8 U.S.C. § 1324b(b)(2), and, as was noted in *Guzman v. Yakima Fruit & Cold Storage*, 9 OCAHO no. 1066, 8 (2001), cases are legion to the effect that claims of national origin discrimination made in this forum must be dismissed upon a showing that the number of a respondent's employees exceeds fifteen.

The charge Gonzalez filed with OSC, a copy of which is attached to his complaint, reflects his acknowledgment that Tri Component had more than 15 employees during the period relevant to this case. Accordingly it is undisputed that Tri Component is an employer within the meaning of Title VII, and consequently that Gonzalez' allegations of discrimination on the basis of his Cuban national origin are covered under section 703 of that act. These allegations must accordingly be dismissed in this forum.

B. Discrimination on the Basis of Citizenship Status

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[4] Although Gonzalez' Exhibit I2 reflects at page 10 that an "affidavit" was offered at the DOL hearing, the colloquy makes clear that this was not an affidavit at all but a written statement in Spanish by one of the women who had complained about Gonzalez. The statement was not accepted at the hearing both because it was not an affidavit and because it was in Spanish. The written statements in Spanish from both women were produced to Gonzalez in discovery and appear in the record as part of Gonzalez' Exhibit J2.

[5] An employer is defined in Title VII as a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. 42 U.S.C. § 2000e(b).

Tri Component's motion says that Gonzalez is unable to establish a prima facie case of citizenship status discrimination. It argues first that Gonzalez is not a protected individual under 8 U.S.C. § 1324b(a)(3)(B) because he did not apply for citizenship within six months of becoming eligible and because he is currently the subject of a deportation order.

The relevant section of the statute provides that a protected individual is, inter alia,

> an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization . . . (emphasis added)

8 U.S.C. § 1324b(a)(3)(B).

Gonzalez entered the United States in 1980 as a Mariel Cuban refugee; nothing in the record suggests that his status was ever adjusted to that of a lawful permanent resident or that he ever became eligible as such to apply for citizenship. Although Gonzalez' parole into the United States was revoked on October 19, 2004, his current immigration status is not relevant to the preliminary question of liability. For purposes of this motion the issue is whether Gonzalez was a protected individual at the time the events complained of occurred. Construing the record in the light most favorable to Gonzalez, it appears that as a Mariel Cuban refugee he was.

Second, Tri Component argues that Gonzalez has shown no causal relationship between his discharge and his citizenship status. Although the burden of showing a prima facie case is de minimus, it is still a burden. It is not at all clear on this record that Gonzalez could satisfy that burden with respect to the fourth element of a prima facie case, that is, that his discharge took place under circumstances giving rise to an inference of discrimination. *See Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2d Cir. 1997). Gonzalez did not show, for example, that a citizen of some country other than Cuba was treated more favorably than he was. *Cf. McGuinness v. Lincoln Hall*, 263 F.3d 49, 52-53 (2d Cir. 2001) (black male offered more favorable severance package than white female plaintiff). He did not show that he was replaced by a citizen of some country other than Cuba. *Cf. Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76-77 (2d Cir. 2005) (duties of 61 year old plaintiff reassigned to younger employee). Although he made a general reference to Suarez' and Izurieta's Ecuadorian national origin, he did not identify their citizenship status or the citizenship status of any other workers. He did not identify any similarly situated employee at Tri Component with a citizenship status other than Cuban who engaged in comparable conduct and who was not fired, nor has he suggested that there was any such

individual. *Cf. Graham v. Long Island R.R.*, 230 F.3d 34, 41-42 (2000) (similarly situated white employees were allegedly given multiple last chance waivers while black plaintiff was fired after being given only one). In short, none of the usual factual scenarios giving rise to an inference of discrimination has been shown.

Inferences ordinarily arise from facts, not from speculation or from thin air. *Cf. Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir. 1998) (cannot infer discrimination from thin air); *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1076, 1092 (1997) (inferences are drawn from facts, not from the air). I nevertheless assume without deciding for purposes of this analysis that Gonzalez could make out a prima facie case of citizenship status discrimination sufficient to trigger the respondent's burden of production to set forth a legitimate nondiscriminatory reason as to the allegation of citizenship status discrimination.

Tri Component's motion asserts that the company has put forth sufficient evidence of such a reason and that Gonzalez is unable to rebut its explanation. Gonzalez disagrees. First, he argues that Tri Component did not meet its burden of production because the reason it gave for firing him is too broad and too vague. He said the particular language he allegedly used to the women has not been presented with adequate specificity and that in any event the women's complaints were hearsay. But the question here is not exactly what Gonzalez said, or even whether the complaints were true, it is whether the company's proffered reason, that they fired Gonzalez because of complaints made by Juanita Suarez and Adriana Izurieta, was sufficient to satisfy its burden. The employer's burden at this stage is merely one of production, not of persuasion; it involves no assessment of credibility. *Reeves*, 530 U.S. at 142. Thus while Gonzalez does not accept Tri Component's explanation as sufficient to support his discharge, I find that Tri Component presented affidavits and exhibits sufficient to proffer a facially legitimate reason, that is, complaints by female employees that Gonzalez harassed them. The burden was thereby shifted back to Gonzalez to bring some evidence of pretext.

Gonzalez argues in response that too many explanations have been offered and that the explanations offered are inconsistent because Tri Component presented "a variety of definitions" as the reason for his discharge. While shifting and inconsistent reasons may indeed be sufficient under appropriate circumstances to create a factual issue as to pretext, *see, e.g., Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 170 (2d Cir. 2001); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994), Gonzalez mischaracterizes the evidence in this case. He set out the following list which he says are the inconsistent reasons Tri Component gave: "continued disruptive activities in the workplace, absenteeism, constant loud talking, use of offensive and threatening language, speaking in a negative and disruptive way, using inappropriate and offensive language, disruptive behavior, disruptive manner, performance deficiencies, misconduct, inappropriate and ineffective to constantly ask the president of the company to increase his salary, harassing and saying inappropriate things in the workplace, inappropriate comments to his coworkers and accusing complainant of presenting a forged government document."

While most, but not all, of the phrases on Gonzalez' list are based on statements made in Tri Component's brief in describing Gonzalez' history with the company, it is not accurate to suggest that the company's witnesses said that Gonzalez was discharged for each of those reasons. Gonzalez does not explain, moreover, and it is not immediately apparent, why he views the statements "continued disruptive activities in the workplace," "constant loud talking," "use of offensive and threatening language," "speaking in a negative and disruptive way," "using inappropriate and offensive language," "disruptive behavior," "disruptive manner," "harassing and saying inappropriate things in the workplace," and "inappropriate comments to his coworkers" as inconsistent reasons rather than as slightly variant descriptions of the same reason. I do not find these descriptions inconsistent with each other or with the statement made to the New York Department of Labor that Gonzalez was discharged for "disrupting other employees during work hours by engaging in nonbusiness related conversations and loud talking."

While the company's brief argued that it had other grounds for discharging Gonzalez, each of its witnesses uniformly and consistently said that Gonzalez was fired because of the complaints by the female employees. There is thus little in the way of evidence to support Gonzalez' claims that he was also fired for absenteeism or for performance deficiencies or for requesting salary increases or for presenting a forged document. The record is clear and the evidence is consistent that Gonzalez' unauthorized absence on June 3, 2003 resulted in the issuance of a verbal warning, not a discharge, based on his failure to call in (Asher Herzberg Exhibit E).[6] Similarly, the record reflects that Gonzalez' conduct and performance deficiencies in the first three months on the job were the grounds given for denying him a pay increase, not for discharging him (Asher Herzberg Exhibit A). Asher Herzberg Exhibit F, the final warning of June 23, 2003 indicates that Gonzalez was specifically told that any more reports of disturbing other employees during work hours would result in his discharge. Additional complaints followed the warning.

The only evidence which arguably suggests additional reasons for Gonzalez' discharge is the Termination Form, which reflects that some of the language originally put there by Floyd Oliver was scratched out. Gonzalez argues that Herzberg's alteration of the draft Termination Form is evidence of pretext and that the appropriate inference to be drawn from it is that Tri Component engaged in fraud and criminal conspiracy to deprive him of his rights and to cover up the real reasons for his discharge. The exhibit is too slender a reed to support such an inference where the document fails altogether to conceal any of the scratched out words: as Gonzalez' own brief acknowledges, all the words on the form "are still clearly and distinctly visible." As an effort at concealment the markings are woefully inadequate. In order to draw the inference Gonzalez suggests, I would have to conclude that Tri Component's affidavits are false and that Herzberg actually intended to conceal the words on the form but just did a thoroughly incompetent job of

[6] Company policy requires that an employee who cannot come to work must call in within one half hour of the start time. An employee who fails to do so may be charged with an unexcused absence (Asher Herzberg Exhibit D).

it. This inference is not reasonable in the context of the record as a whole.

Gonzalez also contends that there is a factual issue as to whether he engaged in any specific act of misconduct on July 25, 2003. I credit his assertion that he did not say or do anything wrong on July 25, 2003, notwithstanding the evident misunderstanding at the unemployment hearing as to exactly what happened on that day. For purposes of this motion I credit as well Gonzalez' claim that he had no conversation with Suarez and Izurieta after June 23, but I do not necessarily infer therefrom that he didn't continue to "[say] things to himself but in a loud voice so I and others could hear" as described in the affidavits of Suarez and Izurieta.

While Gonzalez has quarreled over the specifics, he never denied that the women made continuing complaints about him. Even his own translations of Izurieta's and Suarez' Spanish language statements, which he himself put in the record as Gonzalez' Exhibit J2, reflect that Suarez said that he kept coming on to her and saying dirty things and that she kept calling Nathanial Ratner to tell him she couldn't take it any more. Izurieta's statement says that she asked Gonzalez to stop saying obscene words and that he was hostile and threatening both to her and to Suarez. These complaints are of a character that a prudent employer would ignore only at its own peril. *See Fairbrother v. Morrison*, 412 F.3d 39, 48-49 (2d Cir. 2005) (employer may be liable for acts of non-supervisory coworkers upon showing that employer knew about harassment and failed to take remedial action); *Feingold v. New York*, 366 F.3d 138,152 (2d Cir. 2004) (employer liable for coworker harassment if it provided no avenue for complaint or if it knew of the harassment and did nothing). In order to prevent summary resolution at this stage, there must be sufficient evidence of pretext to permit a rational fact finder to find that the employer discriminated on the basis alleged. *Van Zant*, 80 F.3d at 714. Gonzalez' evidence is simply insufficient to accomplish this.

C. Retaliation

Tri Component's motion next argues that there are no facts or evidence which support Gonzalez' claim of retaliation. It says no prima facie case has been made for a such a claim because Tri Component had no knowledge of Gonzalez' OSC charge until it received a letter from OSC in December of 2003. The record supports this assertion and Gonzalez has articulated no basis upon which a finding of retaliation under § 1324b could be predicated.

Gonzalez filed his charge with OSC on October 24, 2003 and Tri Component was evidently not informed of the existence of this charge until December of 2003. Thus while Gonzalez established that he suffered an adverse employment action in July of 2003, he is unable to show any causal connection between that event and the subsequent filing of his charge in October. It is well established that an employment decision cannot be motivated by a factor which is unknown to the employer. *Alamprese v. Del Taco*, 9 OCAHO no. 1094, 8-9 (2003); *Woodman*, 411 F.3d at 81-82 (citing cases). Because Gonzalez was terminated in July of 2003, well before Tri Component knew of any protected activity on his part, the discharge could not have been

retaliatory. There has been no evidence presented which raises an issue of triable fact as to Tri Component's knowledge of any conduct on Gonzalez' part which was protected under § 1324b.

Gonzalez' second response to Tri Component's motion raises an entirely new theory as to his retaliation claim. He now asserts that his retaliation claim "does not arise from the statutory provision set out at § 1324b(a)(5)," but arises because he was fired for requesting salary increases and that such requests constitute protected activity under the Fair Labor Standards Act.[7] The short answer to this assertion is that if Gonzalez' retaliation claim does not arise from § 1324b(a)(5), it is not cognizable in this forum. The weight of authority in OCAHO case law has long so held. *Monda v. Staryhab*, Inc., 8 OCAHO no. 1002, 86, 98-99 (1998); *Bent v. Brotman Med. Ctr. Pulse Health Servs.*, 5 OCAHO no. 764, 362, 365 (1995); *Yohan v. Central State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994).

D. Document Abuse

Tri Component's motion urges that because Gonzalez' allegations of document abuse do not relate to the initial hiring process they are not covered by § 1324b(a)(6). It says that Koshkova's requests to Gonzalez for updated information do not support a claim of document abuse because Section I of Form I-9 is not covered by § 1324a(b). Tri Component says it never attempted to reverify Gonzalez' driver's license or social security card, and it "never requested further documentation to support the information in Section 2 of the Form I-9 which is covered by § 1324a(b) and relates to the Employer Review and Verification." The company accordingly contends that the allegations of document abuse fail to state a claim and that this forum lacks jurisdiction over those allegations.

Tri Component's reading of the relevant statutory provisions is unduly crabbed. The prohibition against document abuse is not restricted to initial hiring; it encompasses reverification as well. *Getahun v. DuPont Pharm. Co.*, 8 OCAHO no. 1029, 417, 423 (1999) (although reverification is not expressly mentioned in § 1324b, OCAHO case law concludes that employee protection at the reverification stage is coextensive with protection at initial hire). While Tri Component may not have sought reverification of Gonzalez' driver's license and social security card, it is nevertheless clear that Tri Component did seek to reverify Gonzalez' employment eligibility. Tatiana Koshkova made requests to Gonzalez to produce an updated employment authorization document and rejected his I-94 Form. For purposes of this motion I assume, without deciding,

[7] While the FLSA contains its own retaliation provision, 29 U.S.C. § 215(a)(3), Gonzalez cites no authority, and I am unaware of any, for the proposition that requests for pay increases constitute protected activity under that statute or any other.

that the I-9 Koshkova rejected was a valid one[8] and that she requested more or different documents than were necessary in order to satisfy the requirements of § 1324a(b).

Gonzalez' claim of document abuse must ultimately fail nonetheless, because there is not a scintilla of evidence suggesting that Koshkova made the requests for an updated work authorization document or rejected Gonzalez' I-94 with the intent to discriminate against Gonzalez on the basis of his Cuban citizenship or on any other basis prohibited by § 1324b. While OCAHO cases decided prior to September 30, 1996 treated document abuse as a strict liability offense, *see, e.g.*, *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO no. 414, 181, 187-89 (1992), the statute was amended effective September 30, 1996 and now provides that such refusal of or request for documents now violates the section only "if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)." 8 U.S.C. § 1324b(a)(6). Under the old per se standard, there might have been a sufficient showing to establish liability. Now, however, in order to establish document abuse, just as is true with respect to any other form of intentional discrimination, a complainant is required to adduce some evidence that would permit a rational fact finder to infer that the act complained of occurred under circumstances giving rise to an inference of discrimination. *See Patterson v. County of Oneida*, 375 F.3d 206, 221 (2d Cir. 2004). There has been no evidence of such circumstances identified or presented here and there is accordingly no factual basis upon which such an inference may be drawn.

X. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the basis of the record and for the reasons more full stated herein, I make the following findings and conclusions:

A. Findings

1. Raul Gonzalez was paroled into the United States as a Mariel Cuban refugee in 1980.

2. Tri Component Products, Inc. is an employer located in New York where it is engaged in the business of manufacturing automotive parts.

3. Tri Component Products, Inc. has about 78 employees.

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[8] The parties dispute whether the I-94 Form Gonzalez presented had a stamp on it or whether it reasonably appeared on its face to be genuine. I find that resolution of the issue is not material to the resolution of this case and make no findings with respect to it. *See B & F Golf*, 6 OCAHO no 851 at 262 (disputed fact is material only if it must be resolved to decide the motion).

4. Raul Gonzalez was hired by Tri Component Products, Inc. on August 6, 2002.

5. On August 6, 2002 Raul Gonzalez presented a New York State driver's license as evidence of his identity and an unrestricted social security card as evidence of his employment eligibility.

6. Raul Gonzalez completed an I-9 Form on August 6, 2002 which reflected that he was an alien authorized to work until January 3, 2003.

7. In March or April, 2003 Tatiana Koshkova requested on Tri Component's behalf that Raul Gonzalez update his I-9 Form by providing a current work authorization document.

8. Tatiana Koshkova rejected Gonzalez' I-94 Form on Tri Component's behalf and made at least one additional request to Gonzalez for an updated work authorization document.

9. Juanita Suarez and Adriana Izurieta made repeated complaints to management about offensive comments Raul Gonzalez was making in their presence in the workplace.

10. Raul Gonzalez was given a final written warning on June 23, 2003 which advised him that he was not to disrupt other employees during working hours and if it happened again he would be terminated.

11. About a month after Raul Gonzalez received a written warning about disrupting other employees, Juanita Suarez and Adriana Izurieta again complained that he continued to make offensive remarks.

12. Floyd Oliver, Raul Gonzalez' immediate supervisor; Asher Herzberg, Vice President of Corporate Development and Human Resources; and Nathanial Ratner, Manager of Corporate Development, collectively decided on July 25, 2003 that Gonzalez should be terminated.

13. On July 25, 2003 Floyd Oliver informed Raul Gonzalez that his employment at Tri Component was terminated that day.

14. On October 24, 2003 Gonzalez filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices which asserted that Tri Component discharged him because of his citizenship and national origin in violation of § 1324b(a)(1), retaliated against him in violation of § 1324b(a)(5), and engaged in document abuse in violation of § 1324b(a)(6).

15. The Office of Special Counsel for Immigration Related Unfair Employment Practices sent Gonzalez a letter dated April 7, 2004 telling him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of his receipt of the letter.

16. On June 22, 2004 Gonzalez filed a complaint with the Office of the Chief Administrative Hearing Officer.

B. Conclusions

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

2. At the time of the events giving rise to this case Raul Gonzalez was a protected individual within the meaning of § 1324b(a)(3)(B).

3. At the time of the events giving rise to this case Tri Component was an entity within the meaning of § 1324b(a)(1).

4. At the time of the events giving rise to this case Tri Component was an employer within the meaning of the Civil Rights Act of 1964 as amended (Title VII), 42 U.S.C. § 2000e(b).

5. Gonzalez' allegations of national origin discrimination are covered under section 703 of the Civil Rights Act of 1964 as amended (Title VII).

6. Gonzalez failed to demonstrate specific facts raising a genuine contested issue of material fact with respect to his remaining claims under § 1324b(a)(1), § 1324b(a)(5), and § 1324b(a)(6).

7. Gonzalez set forth no viable legal theory under which his claim of retaliation could succeed.

ORDER

The complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 2nd day of September, 2005.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

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