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

September 4, 2015

NICASIO ANGULO, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 11B00060
SECURITAS SECURITY SERVICES USA, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is one of three cases in which employees or former employees of the Los Angeles office of Securitas Security Services USA, Inc. (Securitas or the company) assert that they were discriminated against in violation of the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b (2012). Nicasio Angulo, a citizen of the United States, filed a complaint in which he alleged that Securitas fired him from his job as an armed security guard and refused to hire him at certain facilities because of his citizenship and national origin. The complaint also alleged that Securitas retaliated against Angulo and engaged in document abuse.

After some initial difficulties in obtaining service of the complaint, Securitas was ultimately served, and the company's Employee Relations Department thereafter filed an answer denying the material allegations. Securitas acknowledged that Angulo was employed by its Wilshire Boulevard branch office in Los Angeles, California, but denied that the company ever terminated him. The company said Angulo temporarily stopped working when he refused to provide a copy of his renewed guard license, but that he later returned to work when he presented it. The company says further that Angulo was asked to provide documentation to show his employment eligibility only during the initial hiring process, and that the other requests Angulo refers to were for documents required for the armed security guard job, the presentation of which may be requested by the company at any time.

Neither party is represented by counsel. Prehearing procedures have been completed. Presently pending are Angulo's Dispositive Motion and Securitas' Motion to Dismiss. Notwithstanding the nomenclature of these filings, both parties are seeking summary decision in their respective favor.

II. BACKGROUND INFORMATION

Angulo was hired as an armed security guard by Securitas' Wilshire Boulevard branch on June 12, 2009. Angulo's prehearing statement complained of various events going back to May 2009, in particular about not being assigned to jobs at Los Angeles county facilities, such as the Department of Public Social Services (DPSS) or Department of Children and Family Services (DCFS). Angulo says he was assigned in July 2009 to work at the Courthouse for the city of Compton, but he was told on June 30, 2010, that there was no more employment for him at that location. He says the position was taken by a black female sheriff.

Angulo says that after he filed a charge with the Equal Employment Opportunity Commission (EEOC) in July 2010, he was offered work only at commercial worksites, but not at county-based clients such as DPSS or DCFS. The public sector jobs are more desirable because they pay better than the private commercial jobs. Angulo says he was fired again on June 14, 2011, when he refused to sign a general release. He also contends that because Securitas is a private company and not a law enforcement agency, the company should not have the right to inquire into his private information or demand that he show documents several times every day.

Angulo filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) that was accepted as complete on October 19, 2010. OSC sent him a letter dated February 16, 2011, advising him that he had the right to file a complaint with this office within ninety days of the receipt of the letter. Angulo says he received the letter on February 24, 2011. He filed his complaint on March 17, 2011, and all conditions precedent to the institution of this proceeding have been satisfied.

III. THE PRIOR ORDER ISSUED IN THIS MATTER

In order to clarify the permissible scope of this proceeding and to focus the attention of the parties on the specific claims for which relief may be available in this forum, I issued an order pursuant to 28 C.F.R. § 68.10(b),[1] notifying the parties that the allegations of discrimination on the basis of national origin were not cognizable in this proceeding because the complainant had

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014).

already filed a charge with EEOC respecting those allegations, and any overlap with such charges is barred by 8 U.S.C. § 1324b(b)(2). Generally speaking, with limited exceptions, a person or entity is an employer covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2012), if it is engaged in an industry affecting commerce and has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). Claims of national origin discrimination against such employers are not within the scope of § 1324b, and must be directed to EEOC. *See Lima v. N.Y.C. Dep't of Educ.*, 10 OCAHO no. 1128, 8 (2009).[1] Because Angulo acknowledged in his OSC charge that Securitas had more than 800 employees, the remedy, if any, for his allegation of discrimination based on his national origin lies with EEOC.

The prior order also limited the matters to be considered in this proceeding to events occurring on or after April 23, 2010, because 8 U.S.C. §1324b(d)(3) directs that no complaint may be filed respecting any unfair immigration-related practice occurring more than 180 days prior to the filing of a charge with OSC. Angulo's charge was filed on October 19, 2010, so a timely claim would encompass only events occurring on or after April 23, 2010. Because Angulo also sought to raise claims involving discrimination based on his age and disability, the order also advised him that any such claims are covered by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012) (ADEA) and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012) (ADA), and may not be pursued in this forum.

Finally, the order advised the parties that the governing statute, 8 U.S.C. § 1324b, does not encompass complaints about the terms and conditions of employment such as work assignments, hostile work environments, pay differentials, and other terms and conditions of ongoing employment. *See, e.g., Smiley v. City of Philadelphia*, 7 OCAHO no. 925, 15, 35 (1997). The statutory language is clear and unequivocal. Section 1324b prohibits an employer from discriminating with respect to the hiring, recruitment, referral, or discharge of an individual, but unlike Title VII, the section does not speak to such employment issues as compensation, shift assignments, or other terms, conditions, or privileges of employment. Claims about being assigned to work at private sector entities rather than at public sector entities accordingly do not

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

come within the terms of the governing statute.

Finally, the prior order gave the parties a schedule for discovery, followed by a deadline for dispositive motions and responses. All the filings have been completed.

IV. THE POSITIONS OF THE PARTIES

A. Angulo's Dispositive Motion

Angulo's motion says he has witnesses who would testify as to a variety of conditions he characterized as a hostile work environment unfavorable to "legalized Latino-Hispanics with an immigrant profile coming from Mexico and Central American countries such as Guatemala, El Salvador, Honduras, and Nicaragua." He also identifies a number of other employees he says were repeatedly requested to show their documents. Angulo says further that he was discriminated against because he is elderly and diabetic and that he was "indirectly fired."

Angulo contends that Securitas is not telling the truth about dismissing him on June 30, 2010, and again on June 14, 2011, and requests that criminal charges be instituted against the company. He says that Securitas refused to send him to Los Angeles county employment sites and offered him only commercial sites that paid less than public sites. Angulo also says that Field Supervisors made fun of him because he is a U.S. citizen of Mexican national origin. Angulo's most recent filing says he is seeking compensation of $1,000,000 or more, and that Securitas' business license should be revoked throughout the country.

Angulo filed exhibits consisting of 1) a group of documents including a right-to-sue notice, a payroll check stub, an incident report (2 pp.), a general release form (3 pp.), another payroll check stub, and an employee site assignment; 2) a group of documents including an I-9 form, a California driver's license, an ID, a firearm card, a guard card, a Firearm Training Academy certificate card, a baton card, a first aid/CPR card, and a prescription; and 3) a letter to respondent with copies of UPS receipts (2 pp.).

B. Securitas' Motion

Securitas's motion was filed by its Senior Employee Relations Representative. The company asserts that security officers, including Angulo, are asked to show certain documents while on duty only in accordance with Los Angeles county security post orders. The post orders (exhibit R-3 with respondent's prehearing statement) direct that security officers must have certain credentials in their possession at all times while on duty and must surrender them upon demand to any county police officer, OPS contract monitor, or other county official. These documents

include a state-issued guard card, a first aid/CPR card, and firearms and baton permits (if applicable). The company says the security guards were asked to provide green cards or other work authorization documents only at the time of their initial hire, not afterward. The company says that individuals on Angulo's witness list were discharged for violations of company policy, but the company took no adverse action against Angulo himself. Angulo was temporarily removed from the work schedule on or about June 28, 2010, for refusal to provide a copy of his renewed guard license, but he returned to work after he provided a renewed license on or about April 14, 2011, and was still an employee of the company as of November 1, 2011.

Securitas concludes by stating that its Los Angeles branch has a roster of nearly fifty percent Hispanic employees; that the branch manager in charge of the county client account is, like Angulo, himself an Hispanic of Mexican national origin; and that there are Hispanic employees in all job categories. The company says the termination rate for Hispanic employees at the Los Angeles branch office is proportional to their population in the branch office, and that it cannot reasonably be concluded that Angulo was discriminated against in violation of the statute.

V. DISCUSSION AND ANALYSIS

Notwithstanding the prior order explaining that the scope of this proceeding is restricted to allegations about events occurring on or after April 23, 2010, Angulo's motion continues to complain about a variety of employment experiences over an extended period of time, as well as to raise a variety of characteristics on the basis of which he says he was discriminated against. As previously explained, this office has no authority to consider claims covered by Title VII, the ADEA, the ADA, or any statute other than 8 U.S.C. § 1324b. Neither does the governing statute address claims of a hostile work environment or other terms and conditions of employment. As explained in the prior order, the only actionable events covered by the statute are those occurring on or after April 23, 2010, that specifically involve hiring, recruitment, or discharge. Assignments to a particular worksite, shift assignments, compensation, overtime, hostile work environments, and other terms and conditions of employment are not encompassed within the reach of the statute.

I have scrutinized the record for the period commencing 180 days prior to the filing of Angulo's OSC charge in search of any evidence that would support an inference that Angulo was adversely treated during the period because of his citizenship status, or that he has otherwise established a colorable claim entitling him to relief in this forum. The record is devoid of any such evidence. First, there is no reasonable factual basis to support a claim for document abuse within the relevant period. Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of

discriminating on the basis of citizenship or national origin. *See Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014). Although Angulo complains that multiple requests were made almost daily for a variety of documents, there is no factual basis upon which to infer that any such document request was made on or after April 23, 2010, for the purpose of establishing Angulo's eligibility for employment in the United States. Angulo's I-9 form reflects that he was hired on June 9, 2009, and any claim of document abuse arising from that hiring incident is time-barred.

Second, Angulo has not shown a prima facie case of retaliation. To do so, he must point to evidence that: 1) he engaged in conduct protected by § 1324b; 2) the employer was aware of the protected conduct; 3) he suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *See Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009). Angulo proffered no evidence that he engaged in any conduct protected by the governing statute at any time prior to the filing of his OSC charge in October 2010. To qualify as protected conduct in this forum, the conduct must implicate some right or privilege specifically secured under § 1324b, or a proceeding under that section. *See, e.g.*, *Harris v. Haw. Gov't Emps. Ass'n*, 7 OCAHO no. 937, 291, 295 (1997); *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no OCAHO jurisdiction over threats to report employer "to EEOC, OSC, the Immigration Department (sic), the American Counsel General, the ALCU (sic), the NAACP, and Georgia Legal Services," or agencies other than OSC or this office). While Angulo says he was retaliated against for filing a charge with EEOC, filing with EEOC is not protected activity within the meaning of 8 U.S.C. § 1324b(a)(5). *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 5 (2014). A claim of retaliation for the filing of an EEOC charge is not cognizable in this forum and must be referred to EEOC itself. *Id*.

Finally, the burden shifting paradigm in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), provides the framework for analysis in a disparate treatment discharge case. A prima facie case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). Alternatively, in a case alleging disparate treatment, the discharged employee may establish the fourth prong by a showing that others similarly situated but outside the plaintiff's protected group were treated more favorably. *De Araujo*, 10 OCAHO no. 1087 at 7; *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002). An employee may also establish the fourth element of a prima facie disparate treatment case by any other circumstantial, statistical, or direct evidence giving rise to an inference of discrimination. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

As a U.S. citizen, Angulo is a protected individual as defined in 8 U.S.C. § 1324b(a)(3)(A). He was clearly qualified for his job since he actually performed it. Angulo says he was "indirectly fired," and appears to be suggesting that being assigned to work at private sector venues rather than to public sector venues constitutes a constructive discharge. A constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable person would be forced to resign. *See Banuelos v. Transp. Leasing Co.*, 1 OCAHO no. 255, 1636, 1648 n.5 (1990).

The Ninth Circuit, in which this matter arises, has observed that the proper focus in evaluating a claim of constructive discharge is on the reasonable employee's perspective, not on the employer's subjective intent. *See Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (Title VII).[2] But a transfer of work locations was found insufficient to support a constructive discharge finding in *Poland v. Chertoff*, 494 F.3d 1174, 1184-85 (9th Cir. 2007) (ADEA), in which a customs agent was involuntarily transferred from a supervisory position in Portland, Oregon, to a nonsupervisory position in Virginia, and retired after eight months because the separation from his family was difficult and the new position was a "career ender." The court held that the transfer and demotion, although retaliatory, was insufficient as a matter of law to establish a constructive discharge, 494 F.3d at 1184, and that an employee's preference for one position over another does not support a claim of constructive discharge, 494 F.3d at 1185. The court explained that the standard of proof was a high one "because federal antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment situation was intolerable." 494 F.3d at 1184-85.

The parties dispute whether Angulo was discharged on June 14, 2011; he says he was discharged for not signing a general release, which may have to do with the resolution of his charges. Assuming arguendo that there was some adverse employment decision made on June 14, 2011 that would be covered by § 1324b; nothing in the record permits or supports an inference that Angulo's U.S. citizenship was the cause of any such employment decision. Discrimination suits require some evidence of discrimination. *Curuta v. N. Harris Montgomery Cmty. Coll. Dist.*, 9 OCAHO no. 1099, 15-16 (2003).

While the burden of showing a prima facie case is not onerous, there must be some facts adduced from which a reasonable inference could arise that the complaining individual was discriminated

[2] The circuits are split as to whether a plaintiff must present evidence of the employer's specific intent. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1323, 1356 (1995) (collecting cases). The definition provided in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146-48 (2004) did not impose an intent requirement.

against on some prohibited basis covered by the statute in question. Such facts are not adduced here. Angulo points to no similarly situated noncitizen who was treated more favorably than he was. He provided no indication as to the citizenship status of the black female sheriff he says took over the job at the Compton facility.[3] While Angulo's complaint also asserted that a young Hispanic female was not removed from her job, he provided no information about the citizenship status of this individual either. Neither did Angulo offer any direct, statistical, or circumstantial evidence from which an inference of citizenship status discrimination may be inferred.

No nexus having been established between Angulo's U.S. citizenship status and an adverse employment decision, a prima facie case has not been shown. Conclusory and unsupported allegations do not provide an adequate basis for summary decision, and review of the record as a whole suggests that in the final analysis Angulo's subjective perception of discrimination is all there is. While this belief is no doubt sincere, it is devoid of evidentiary support. An individual's subjective perception of discrimination, however strongly held, does not substitute for evidence and cannot preclude a summary decision. *Curuta*, 9 OCAHO no. 1099 at 12.

When a party fails to set forth specific facts or identify with reasonable particularity the evidence precluding summary decision, the motion must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation. In order to withstand summary decision, the party who bears the burden of proof must come forward with sufficient competent evidence to support all the essential elements of the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Such evidence was not presented here.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Nicasio Angulo is a citizen of the United States.

2. Securitas Security Services USA, Inc. is a security company that employs more than 800

[3] Angulo does not suggest, moreover, that the sheriff was herself a Securitas employee rather than a public employee. Just as the transfer of an employee's duties to an outside contractor does not constitute a "replacement" of the employee for purposes of a *McDonnell Douglas* analysis, *see Humphries v. Palm*, 9 OCAHO no. 1112, 8-9 (2004), the decision of a public body to cease using an outside contractor and assign the duties to a public employee instead would not constitute a "replacement" for purposes of this analysis.

people.

3. Securitas Security Services USA, Inc. hired Nicasio Angulo at its Wilshire Boulevard branch in Los Angeles, California, on or about June 9, 2009, to work as an armed security guard.

4. Nicasio Angulo filed a charge of employment discrimination with the Los Angeles office of the Equal Employment Opportunity Commission on or about July 27, 2010.

5. Nicasio Angulo filed a charge of employment discrimination with the Office of Special Counsel for Unfair Immigration-Related Employment Practices on or about October 19, 2010.

6. The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Nicasio Angulo a letter on February 16, 2011, advising him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety days of his receipt of the letter.

7. Nicasio Angulo filed a complaint with the Office of the Chief Administrative Hearing Officer on March 17, 2011.

B. Conclusions of Law

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

2. Securitas Security Services USA, Inc. is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

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

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

5. Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin. *Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014).

6. Nicasio Angulo was unable to establish a prima facie case of document abuse within the meaning of 8 U.S.C. § 1324b(a)(6).

7. A prima facie case of retaliation within the meaning of 8 U.S.C. § 1324b(a)(5) is established by evidence that: 1) the employee engaged in conduct protected by § 1324b; 2) the employer was aware of the protected conduct; 3) the employee suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse employment action. *Shortt v. Dick Clark's AB Theatre, LLC*, 10 OCAHO no. 1130, 6 (2009).

8. Nicasio Angulo was unable to establish a prima facie case of retaliation within the meaning of 8 U.S.C. § 1324b(a)(5).

9. A prima facie showing in a disparate treatment discharge case within the meaning of 8 U.S.C. § 1324b(a)(1) is made by evidence that the employee: 1) is a member of a protected class; 2) was qualified for the position held; 3) was discharged; and 4) was replaced by a person not in the same protected class, *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 7 (2013); alternatively, the fourth prong may be satisfied by a showing that others similarly situated but outside the plaintiff's protected class were treated more favorably, *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002), or by any other circumstantial, statistical, or direct evidence giving rise to an inference of discrimination, *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

10. Nicasio Angulo was unable to establish a prima facie case of citizenship status discrimination within the meaning of 8 U.S.C. § 1324b(a)(1).

11. When a party fails to set forth specific facts or identify with reasonable particularity the evidence precluding summary decision, summary decision must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001).

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

ORDER

Securitas' motion is granted and the complaint is dismissed.

SO ORDERED.

Dated and entered this 4th day of September, 2015.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Civil Procedure.

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

September 23, 2015

NICASIO ANGULO, Complainant, v. SECURITAS SECURITY SERVICES USA, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 11B00060

ERRATA

The citation to *Yohan v. Central State Hospital* in the first paragraph on page 6 of the final decision is corrected to read as follows:

> *Yohan v. Cent. State Hosp.*, 4 OCAHO no. 593, 13, 21-22 (1994) (finding no jurisdiction over threats to report an employer to agencies other than OSC or this office).

The citation to *Martin v. Cavalier Hotel Corporation* in footnote 3 on page 7 of the final decision is corrected to read as follows:

> *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1323, 1356 (4th Cir. 1995) (collecting cases).

SO ORDERED.

Dated and entered this 23rd day of September, 2015.

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Ellen K. Thomas
Administrative Law Judge