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

September 4, 2015

JULIO RICARDO SANCHEZ MOLINA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 11B00071
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) 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). Julio Ricardo Sanchez Molina (Sanchez), 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 rehire him because of his citizenship and his national origin. The complaint also alleged that Securitas harassed Sanchez and engaged in document abuse.

After some initial difficulties in obtaining service of the complaint, Securitas was ultimately served and thereafter filed an answer denying the material allegations of the complaint. Securitas denied that the company terminated Sanchez; it said that he requested a part time assignment on May 13, 2010, but Securitas was unable to accommodate his request. The answer said Sanchez was still eligible for reassignment but that he had ceased contact with Securitas. The company said further that Sanchez was asked to provide documentation to show his employment eligibility only during the hiring process that, and that the other document requests he 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 Sanchez' Dispositive Motion and Securitas' Motion to Dismiss. Notwithstanding

the nomenclature of these filings, both parties are seeking summary decision in their favor.

II. BACKGROUND INFORMATION

Sanchez was initially hired as an armed security officer on January 30, 2008, and was assigned to work at the Los Angeles Department of Public Social Services Building (DPSS). According to Sanchez' statement, the last day he actually worked there was Friday, November 27, 2009, after which he was hospitalized and remained under medical care and unable to work for some months. His doctor ultimately gave him a release that authorized him to return to work on April 19, 2010. Sanchez says he went to Securitas' office on May 13, 2010, and asked the scheduler to reduce his hours from full time to part time work, but no part time work was offered to him and he never got another offer from Securitas.[1]

Sanchez filed a charge with the Equal Employment Opportunity Commission on or about July 16, 2010, alleging that he had been discriminated against because of a disability and that he was denied a reasonable accommodation. Sanchez also filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) that was accepted as complete on October 8, 2010. OSC sent Sanchez a letter dated February 16, 2010, advising him that he had the right to file a complaint with this office within ninety days of the receipt of the letter. He filed his complaint on March 30, 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),[2] notifying the parties that the allegations of discrimination on the basis of national origin were not cognizable in this proceeding because the complainant had already filed a charge with EEOC. 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. § 2000-e et seq. (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

[1] According to Securitas' prehearing statement, Sanchez accepted an assignment in May, 2010 and is currently on a Worker's Compensation leave of absence. Securitas' answer says the company had no further contact with Sanchez after declining to offer him part time work.

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

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).[3] Because Sanchez acknowledged in his OSC charge that Securitas had more than 800 employees, the remedy, if any, for his allegation of discrimination based on his Nicaraguan 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 12, 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. Sanchez' charge was not perfected until October 8, 2010, so a timely claim would encompass only events occurring on or after April 12, 2010. Because Sanchez also sought to raise claims involving discrimination based on his disability, the order also advised him that any such claims are covered by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012) (ADA), and may not be pursued in this forum. Although Sanchez' EEOC charge did not allege age as a basis for discrimination, he also mentioned in his filings that he was an older worker; the parties were accordingly also advised that claims arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012) (ADEA), are not cognizable in this forum either.

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, pay differentials, hostile work environments, 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.

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

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

IV. THE POSITIONS OF THE PARTIES

A. Sanchez' Dispositive Motion

Sanchez' 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, and complains about coercion and intimidation. Sanchez says further that he was denied part time work and indirectly fired.

Sanchez filed exhibits consisting of 1) a group of documents including a right-to-sue letter, an EEOC charge, and a medical release (3 pp.); 2) a group of documents including an I-9 form and copies of a security training certificate, a guard card, a baton card, a firearm card, a first aid/CPR card, a social security card and ID badges (3 pp.); 3) a page from the Post Orders; and 4) information sent to Nicasio Angulo (sic) and copies of UPS receipts (28 pp.).

B. Securitas' Motion

Securitas's motion was filed by its Senior Employee Relations Representative. The company asserts that all security officers were asked to show documents while on duty only in accordance with Los Angeles county security post orders. The post orders 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, first aid/CPR card, either a California driver's license or a state-issued identification 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 the individuals on Sanchez' witness list were discharged for violations of company policy, but that the company took no adverse action against Sanchez himself.

Securitas concludes by stating that the Los Angeles branch has a roster of nearly fifty percent Hispanic employees, that the branch manager in charge of the county client account is a Hispanic, and that there are Hispanic employees in all job categories. Their termination rate at the Los Angeles branch is proportional to the Hispanic branch population. Securitas concludes that it cannot reasonably be concluded that Sanchez 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 within 180 days of the filing of Sanchez' OSC charge, Sanchez continues to complain about a variety of employment experiences over an extended period of time, as well as to raise other 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 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 12, 2010, that specifically involve hiring, recruitment, or discharge. Assignments to a particular worksite or shift, compensation, and other terms and conditions of employment, however, are not encompassed within the reach of the statute.

I have scrutinized the record during the period starting 180 days prior to the filing of Sanchez' OSC charge in search of any evidence that would support an inference that he was adversely treated because of his United States citizenship status, or that he can otherwise establish a colorable claim to relief in this forum. The record is devoid of any such evidence. First, there is no reasonable factual basis to support a claim of 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 Sanchez 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 12, 2010, for the purpose of establishing Sanchez' eligibility for employment in the United States. Sanchez' I-9 form reflects that it was completed by Securitas on November 4, 2009, and any claim of document abuse arising from that hiring incident is time-barred.

Second, Sanchez 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). Sanchez 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. 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 Sanchez says he was constantly harassed and retaliated against, he did not proffer evidence of any nexus between this conduct and his U.S. citizenship, and no activity he described within the time period can be characterized as protected activity within the meaning of 8 U.S.C. § 1324b(a)(5). *See Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 5 (2014).

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 citizen of the United States, Sanchez is a protected individual as defined in 8 U.S.C. § 1324b(a)(3)(A). He was generally qualified for his job when he actually performed it, but the record reflects that he was unable to work between November 27, 2009 and April 19, 2010. The release signed by his physician authorized Sanchez to return to work on April 19, 2010; the release appears to be unqualified, and does not state that Sanchez was limited to part time work. Sanchez nevertheless requested a part time schedule on May 13, 2010, and was not given part time work. Sanchez pointed to no evidence, however, that would support an inference that there is any nexus between the denial of part time work and his United States citizenship. 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 against on some prohibited basis covered by the statute in question. Such facts are not adduced here. Sanchez points to no similarly situated individual not in his protected class who was offered part time work as an armed security guard, and does not, in fact, contend that Securitas ever made part time work available to any armed security guard. Neither did Sanchez offer any direct, statistical, or circumstantial evidence from which an inference of citizenship status discrimination may be inferred.

Sanchez also appears to be suggesting that the company's failure to assign him part time work 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).[4] As explained in *Poland v. Chertoff*, 494 F.3d 1174, 1184-85 (9th Cir. 2007) (ADEA), however, the burden of proof to establish a constructive discharge is 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 court held that an employee's preference for one position over another does not support a claim of constructive discharge, 494 F.3d at 1185. Similarly, the denial of an employee's preference for part time work does not in itself support a claim of constructive discharge either.

No nexus having been established between Sanchez' citizenship status and any adverse employment decision, a prima facie case is not 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 Sanchez' 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 a 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.

[4] 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 1343, 1356 (4th Cir. 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.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Julio Ricardo Sanchez Molina is a citizen of the United States of Honduran national origin.

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

3. Securitas Security Services USA, Inc. completed an I-9 form for Julio Ricardo Sanchez Molina on November 4, 2009.

4. Julio Ricardo Sanchez Molina filed a charge of employment discrimination with the Los Angeles office of the Equal Employment Opportunity Commission on or about July 16, 2010.

5. Julio Ricardo Sanchez Molina filed a charge of employment discrimination with the Office of Special Counsel for Unfair Immigration-Related Employment Practices that was deemed complete on or about October 8, 2010.

6. The Office of Special Counsel for Unfair Immigration-Related Employment Practices sent Julio Ricardo Sanchez Molina a letter dated 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. Julio Ricardo Sanchez Molina filed a complaint with the Office of the Chief Administrative Hearing Officer on March 30, 2011.

B. Conclusions of Law

1. Julio Ricardo Sanchez Molina 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. Julio Ricardo Sanchez Molina 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. Julio Ricardo Sanchez Molina 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. Julio Ricardo Sanchez Molina 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

JULIO RICARDO SANCHEZ MOLINA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 11B00071
SECURITAS SECURITY SERVICES USA, INC., Respondent.	)	

ERRATA

In line seven of the second paragraph on page 1 of the final decision, the word "that" appearing immediately after the words "during the hiring process," as well as the comma following the word "that," are deleted.

The citation to *Yohan v. Central State Hospital* in the paragraph that starts at the bottom of page 5 and continues to the top of 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).

SO ORDERED.

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

Ellen K. Thomas
Administrative Law Judge