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

March 31, 2017

DORIS ELIZABETH RAINWATER, Complainant, v. DOCTOR'S HOSPICE OF GEORGIA, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 15B00004

FINAL DECISION AND ORDER GRANTING RESPONDENT SUMMARY DECISION

Appearances:

Larry A. Pankey
for the complainant

Jamala S. McFadden
Chandra C. Davis
for the respondent

I. INTRODUCTION

Complainant, Doris Elizabeth Rainwater (Ms. Rainwater), alleges that Respondent, Doctor's Hospice of Georgia, Inc. (Doctor's Hospice), discriminated and retaliated against her in violation of the antidiscrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Respondent denies these allegations. Pending is Respondent's Motion for Summary Decision, to which Complainant filed a Response. For the reasons set forth herein, Respondent's Motion will be **GRANTED**, and the complaint will be dismissed.

II. PROCEDURAL HISTORY

On March 12, 2014, Ms. Rainwater filed a charge with the Department of Justice's Immigrant and Employee Rights Section (IER),[1] alleging that Doctor's Hospice discriminated against her on account of her citizenship status in violation of 8 U.S.C. § 1324b(a)(1), retaliated against her for asserting her rights under § 1324b in violation of 8 U.S.C. § 1324b(a)(5), and committed document abuse in violation of 8 U.S.C. § 1324b(a)(6). In a letter dated July 10, 2014, IER informed Ms. Rainwater that it was continuing its investigation of her charge against Respondent and that she now had the right to file her own complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which she did on October 15, 2014.

According to the OCAHO complaint, Ms. Rainwater is currently a United States citizen and is a certified nursing assistant (CNA). She was employed by Respondent from approximately August 2011 until February 27, 2014, when Respondent terminated her allegedly because of her citizenship status and national origin. *See* OCAHO Complaint at 5. The complaint explains that Respondent closed in January 2014 because of an ice storm and did not rehire Ms. Rainwater when its facility reopened. She wrote, "I later found out the reason my employer was not allowing me to return to work was due to my permanent resident card being expired." *Id.* at 6. She claims she was the only employee not called back to work and was the only employee of Latin American descent. Ms. Rainwater asserts that she "called the Justice Department and advised them what [her] employer was doing." *Id.* In addition, the complaint contends that Respondent refused to accept Ms. Rainwater's updated fingerprints and documents issued by the Department of Homeland Security (DHS). Ms. Rainwater requests back pay from February 27, 2014.

On January 27, 2015, Respondent filed an answer to the complaint, denying its material allegations. Respondent explained that on January 8, 2014, all of the employees at its facility in Fayetteville, Georgia, where Complainant worked, were laid off because of severe damage from a snow storm. The Fayetteville facility reopened on approximately February 27, 2014, but was not at full capacity; thus, Respondent hired eleven out of the thirteen previously-employed CNAs. *See* Respondent's Answer at 4. Respondent did not rehire Complainant and Brenda Johnson (Ms. Johnson), who is African-American. *Id.* Respondent further denies that it retaliated against Complainant because she filed or planned to file a complaint and that it refused to accept documents she chose to tender as proof of her eligibility to work in the United States.

Respondent raised four affirmative defenses. Its first defense is that Complainant failed to state a claim upon which relief could be granted. The company states that it reviewed the personnel

[1] On January 18, 2017, the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices was renamed the Immigrant and Employee Rights Section. *See* Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 91768-01 (Dec. 19, 2016); *see* 28 C.F.R. § 0.53.

files of all employees in December 2013 and that approximately ten to fifteen employees had to update their documentation; therefore, it did not single out Ms. Rainwater. Respondent further contends that because the Fayetteville facility was not at full capacity after the storm, it chose not to rehire Ms. Rainwater because of her "lack of work ethic, customer service skills, and attitude." *Id.* at 7.

As its second defense, Respondent states that its actions were taken in good faith and with "reasonable ground for believing" it was acting in compliance with federal and state law. According to Respondent, it asked Ms. Rainwater and other employees to provide current documentation based on its understanding of Georgia state hospice rules. *Id.* Respondent asserted as a third defense that its actions with respect to Complainant were for legitimate, nondiscriminatory, nonretaliatory business reasons. *Id.* at 8. Respondent argued as a fourth affirmative defense that Complainant did not establish a causal connection between "the exercise of any alleged statutory right and any alleged adverse employment action." *Id.* at 9.

On December 30, 2014, Doctor's Hospice informed this tribunal that Ms. Rainwater had also filed a charge against Doctor's Hospice with the Equal Employment Opportunity Commission (EEOC).[2] During a telephonic prehearing conference call, which was held on June 18, 2015, the parties were instructed, in part, to submit statements regarding the issue of whether Ms. Rainwater's national origin claim before OCAHO should be dismissed pursuant to 8 U.S.C. § 1324b(a)(2) and (b)(2),[3] because she also filed a discrimination charge with the EEOC. Respondent subsequently requested dismissal of the OCAHO complaint because of the EEOC charge and the ongoing litigation of the attendant discrimination case in the U.S. District Court for the Northern District of Georgia (N.D. Ga.).

On December 22, 2015, Administrative Law Judge Stacy Paddack, who previously presided over this matter, dismissed Ms. Rainwater's national origin claim pursuant to 8 U.S.C. § 1324b(b)(2), the "no overlap with EEOC complaints" provision. However, Judge Paddack denied Respondent's request to dismiss the retaliation claim because "'OCAHO has jurisdiction over retaliation claims even in the absence of national origin or citizenship status discrimination.'" *See* Order Dismissing National Origin Claim and Staying Proceedings at 2 (Dec. 22, 2015)

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[2] Ms. Rainwater filed her charge of discrimination with the EEOC on August 14, 2014. *See* Respondent's Statement Re Concurrent Filing, Ex. A.

[3] Title 8 U.S.C. § 1324b(a)(2)(B) provides that discriminatory failure to hire or termination on account of national origin does not apply "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 [42 U.S.C.A. § 2000e-2]," which renders the claim subject to the jurisdiction of the EEOC. Title 8 U.S.C. § 1324b(b)(2) is the "no overlap with EEOC complaints" provision, which prohibits the filing of a charge of discrimination predicated on national origin if a charge based on the same set of facts has been filed with the EEOC.

(quoting *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 10 (2004)).[4] Finally, Judge Paddack stayed proceedings of the OCAHO case until disposition of the pending EEOC case in the N.D. Ga.

On October 12, 2016, Doctor's Hospice informed OCAHO that the N.D. Ga. dismissed Ms. Rainwater's EEOC claim on August 15, 2016. The OCAHO case was re-assigned to the undersigned in November 2016, and in an Order dated November 17, 2016, I lifted the stay of proceedings and set a schedule for the filing of dispositive motions with respect to Complainant's remaining claims.

On December 16, 2016, Respondent filed a Motion for Summary Decision (Respondent's Motion) and a Memorandum in Support of Motion for Summary Decision, along with several proposed exhibits. On January 23, 2017, Complainant filed a response (Complainant's Response), along with a Statement of Material Facts and a Response to Respondent's Statement of Material Facts.[5]

III. EVIDENCE CONSIDERED

Respondent's Motion for Summary Decision was accompanied by: Ex. R-1) Respondent's Statement of Material Facts; Ex. R-2) Complainant's IER Charge Form, received March 12, 2014; Ex. R-3) Complainant's OCAHO complaint, filed October 15, 2014; Ex. R-4) Respondent's answer; Ex. R-5) Letter from IER to Respondent dismissing Complainant's charge, dated February 9, 2015; Ex. R-6) Pleadings previously filed with OCAHO and OCAHO orders; Ex. R-7) Rainwater v. Doctor's Hospice of Ga., Inc., No. 1:15-CV-1903-LMM-JSA, Final Report and Recommendation (N.D. Ga. July 22, 2016) (Final Report and

[4] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume 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.

[5] Respondent's discussion and arguments are set forth in the Memorandum in Support of Motion for Summary Decision; however, the undersigned will refer to "Respondent's Motion" when citing to its arguments and exhibits. Similarly, the undersigned will refer to "Complainant's Response" when citing to its arguments, which are presented in its Memorandum in Response to Respondent's Motion for Summary Decision.

Recommendation); Ex. R-8) Rainwater v. Doctor's Hospice of Ga., Inc., No. 1:15-CV-1903-LMM-JSA, Order (Aug. 15, 2016); Ex. R-9) Transcript of Complainant's deposition; Ex. R-10) Transcript of Ms. Johnson's deposition; Ex. R-11) Declaration of Caroline Charleston (Ms. Charleston); and R-12) Transcript of deposition of Mary Ann Portwood (Ms. Portwood).[6]

The deposition transcripts also contained supporting exhibits. The transcript of Ms. Rainwater's deposition included the following: Ex. D1) Ms. Rainwater's resume; Ex. D2) Job description of the CNA position at Respondent, signed by Ms. Rainwater August 24, 2011; Ex. D3) Copies of Complainant's Georgia Nurse Aide Registry cards, LPR card, Georgia identification card, First Aid training card, and Social Security card; Ex. D4) Ms. Rainwater's complaint filed May 27, 2015, in the N.D. Ga.; Ex. D5) Receipt of Respondent's employee handbook signed by Ms. Rainwater August 24, 2011; Ex. D6) Respondent's 2012 Employee Handbook; Ex. D7) Employee Warning Letter to Ms. Rainwater, dated August 16, 2012; Ex. D8) Declaration of Ms. Charleston; Ex. D9) List identifying ten of Respondent's employees, their race, national origin, and rehire date; Ex. D10) Series of events in question written by Ms. Rainwater, undated; Ex. D11) Letter from Complainant to Abigail Olson of IER, dated March 11, 2014; and Ex. D12) Undated note from Ms. Portwood to Rainwater asking her to bring updated LPR card.

The transcript of Ms. Johnson's deposition included a copy of Respondent's Employee Handbook (Ex. 1) and the Subpoena requiring her to testify in the civil action before the N.D. Ga. (Ex. 2). The transcript of Ms. Portwood's deposition was also accompanied by Respondent's Employee Handbook (Ex. 1).

Complainant's Response includes the following proposed exhibits: Ex. C-1) Complainant's declaration; Ex. C-2) Request for Filing Original Discovery Material; Ex. C-3) State of Georgia, Dep't of Labor, Separation Notice to Complainant, dated January 8, 2014; Ex. C-4) Respondent's response to EEOC inquiry, dated January 14, 2015; Ex. C-5) Email correspondences between EEOC and Respondent; Ex. C-6) Page 15 of Respondent's employer handbook; Ex. C-7) Transcript of Ms. Johnson's deposition; and Ex. C-8) Transcript of Ms. Portwood's deposition.

IV. FACTS ESTABLISHED BY THE RECORD

These facts are based on the submissions and pleadings of the parties, deposition testimony, and the facts as found by U.S. Magistrate Judge Justin S. Anand of the N.D. Ga.[7] The factual

[6] For clarity, the undersigned will identify each of Respondent's exhibit with an "R" followed by a consecutive number. Complainant's exhibits will also be cited to in this manner.

[7] On August 15, 2016, U.S. District Judge Leigh Martin May adopted Judge Anand's Report and Recommendation and granted Doctor's Hospice's Motion for Summary Judgment. *See* Respondent's Motion, Ex. R-8.

findings of Judge Anand were predicated on the statement of facts provided by Ms. Rainwater and Doctor's Hospice. *See* Final Report and Recommendation at 2.

A. Summary of Facts

Ms. Rainwater was born in San Salvador, El Salvador, and identifies as Hispanic and Latin American. *See* Complainant's Statement of Material Facts at 1. She is a CNA and was hired by Doctor's Hospice to work at its facility in Fayetteville, Georgia on August 29, 2011. Doctor's Hospice has inpatient hospice centers and offers in-home services. Ms. Rainwater was responsible for providing nursing assistance and basic medical help to the patients. Report and Recommendation at 3. In November 2013, Doctor's Hospice conducted an annual review of its employees' personnel files to ensure that employees who had expired documentation provided updated documentation. *Id.* at 6. Ms. Portwood, who was then Respondent's administrator, discovered that Ms. Rainwater's lawful permanent resident (LPR) card, or "green card," had expired. On November 27, 2013, Ms. Portwood and Ms. Charleston, the director of nursing at the Fayetteville location, informed Ms. Rainwater that she was suspended until she could present a valid LPR card. *Id.*

After she was suspended, Ms. Rainwater contacted the Department of Justice and the Immigration and Naturalization Service.[8] *See* Complainant's Statement of Material Facts at 2. She indicated that an unidentified individual from the Department of Justice informed her that it was "discriminatory" for Doctor's Hospice to not allow her to work because of an expired LPR card.[9] Final Report and Recommendation at 8. An unidentified person from "INS"[10] then called

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[8] As of March 1, 2003, the functions of the former Immigration and Naturalization Service (INS) were transferred to DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002). The undersigned infers that Complainant contacted DHS and that her references to the Department of Justice mean IER.

[9] At the time of the alleged discriminatory acts, U.S. Citizenship and Immigration Services (USCIS), which is a division of DHS, advised that an LPR or green card (Form I-551) may or may not have an expiration date and further instructed employers not to reverify an LPR card on the Employment Eligibility Verification Form I-9. *See* USCIS, Handbook for Employers: Guidance for Completing Form I-9 (M-274) at 16 (Apr. 30, 2013). USCIS stated that it "includes expiration dates even on documents issued to individuals with permanent employment authorization." *Id.* USCIS has recently updated the M-274 and continues to provide these instructions. *See* Handbook for Employers (M-274) at 13,16 (Jan. 22, 2017), https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/E-Verify%20Manuals%20and%20Guides/M-274-Handbook-for-Employers.pdf.

Ms. Portwood and informed her that LPR cards never expire. Ms. Rainwater also testified that Abigail Olson from the Department of Justice called Doctor's Hospice on her behalf and spoke to Julie West (Ms. West), the owner of Doctor's Hospice.[11]

On December 12, 2013, Ms. Rainwater went to the Fayetteville location to give her fingerprints to Ms. Charleston and told Ms. Charleston that she had spoken with the Department of Justice. *Id.* at 9. Ms. Charleston reiterated to Ms. Rainwater that she could not work at Doctor's Hospice with an expired LPR card. Ms. Rainwater testified that she told Ms. Charleston that the Department of Justice informed her it was "discrimination" to not allow her to work. *Id.* at 9. Complainant asserts that she also informed Ms. Charleston that she had applied to become a U.S. citizen. *See* Complainant's Statement of Material Facts at 4. Ms. Rainwater was allowed to return to work on December 17, 2013, and was no longer required to present an unexpired LPR card. Report and Recommendation at 7, 9.

On January 8, 2014, the Fayetteville location closed because a pipe had burst after an ice storm. *Id.* at 11. All employees were laid off. Ms. Rainwater and Ms. Johnson, who is also a CNA, were not rehired when the facility reopened. *Id.* at 12. Doctor's Hospice contends that after the Fayetteville location reopened, it was not at full capacity. *Id.*

B. Ms. Rainwater's Testimony

Ms. Rainwater was deposed on October 30, 2015. She testified that she became a U.S. citizen on July 2, 2014. Rainwater Dep. 91:14. She acknowledged that she received a copy of the employee handbook when she was hired by Respondent.

1. Employment

Ms. Rainwater stated that compared to her colleagues, she considered her work performance to be "average" and at "100 percent." *Id.* 30: 10, 16. Complainant worked the night shift with Ms. Johnson and Pam Anderson (Ms. Anderson), a registered nurse (RN), during the latter part of 2013. Complainant stated that she was written up once during her employment with Respondent. She did not recall exactly when that occurred but stated it was when she used to work the day shift. The administrator had told her that she and two other CNAs were going to be written up because "somebody complain[ed] they are not take [sic] care of the light." *Id.* 39:9-40:5. Complainant explained that another CNA, who was responsible for taking care of the lights, was outside that day. Complainant confirmed that she received a written warning for this on August

[10] Based on the evidence of record, which reflects correspondences from IER to Doctor's Hospice, the undersigned presumes that the reference to INS in this instance is in fact to IER.

[11] Abigail Olson was at the time of the events at issue an Equal Opportunity Specialist with IER. *See* Respondent's Motion, Ex. R-5 at 3.

11, 2012, and that it was the only written warning she received while employed by Respondent. She also testified that neither before nor after receiving this written warning did she receive any verbal counseling about her work performance. She also acknowledged that Ms. Anderson once informed her that another CNA asked that Complainant make sure that the cabinets are properly stocked for the next shift. *Id.* 138: 8-19.

According to Complainant, Ms. Charleston became her supervisor in November or December 2013. Complainant stated that Ms. Charleston worked during the day shift and would be leaving when Complainant was arriving for the night shift. Complainant testified that Ms. Charleston never had any discussions with Complainant about her work performance. She also testified that on one occasion in September 2013, Ms. Charleston told Ms. Anderson that a patient had complained about Ms. Rainwater not listening to the patient. Complainant explained that this patient cannot talk and writes and texts to communicate, which is why Complainant believes it is a lie that the patient complained about her. Complainant further stated that other nurses, her former supervisor, Jimmy Williams, and Ms. Anderson, who was also her shift supervisor, never complained about her work performance.

Ms. Charleston provided a written statement in which she describes several alleged instances where complaints were made against Ms. Rainwater. *See* Respondent's Motion, Ex. R-11. Complainant expressed that she was not aware of any of these allegations and that they were not true. Complainant explained that after she was terminated, she ran into Ms. Parkwood who said, "The only reason for this is because of [Ms. Charleston] and Ms. [West]," who did not want Complainant, Ms. Johnson, or Ms. Anderson to continue working. *Id.* 140:10-11.

2. Suspension

In November 2013, Respondent reviewed the personnel files of all its employees. Complainant was informed that she could no longer continue working at Doctor's Hospice because her LPR card had expired; if she continued working, Doctor's Hospice would be "tagged"[12] by the State of Georgia. Rainwater Dep. 50: 1. Complainant was instructed to bring an updated LPR card and an updated Georgia state ID. Complainant replied, "Yes, everybody do it yearly," when asked if anyone else had to update their files. *Id.* 52: 8. As far as Complainant knew, she was the only employee who had an LPR card. According to Complainant, from 2011 to 2013, she was the only Hispanic employee. Zadia Garcia, who is Mexican, was hired to replace Complainant while she was suspended.

[12] Complainant did not explain what a "tag" is but Ms. Portwood testified that she understood a tag to be when the State of Georgia would discover something "is not correct" or "not where it should be" and would provide Respondent with a certain amount of time to fix the issue. Portwood Dep. 19: 2-6. Ms. Portwood stated that a tag could result in a penalty but she did not know what kind of penalty. *Id.* 19:10.

Complainant explained that after she was suspended, she "went to immigration," and told them about the suspension. *Id.* 55: 11. Complainant stated that she was given a number to contact the Department of Justice, which she did, and the Department informed her they would call Doctor's Hospice on her behalf.[13] Complainant also testified that she complained about "race harassment" and national origin discrimination at Doctor's Hospice to the Department of Justice but not to anyone at Doctor's Hospice. Before she returned to work, Ms. Rainwater told Ms. Charleston, "Look, I say this is discrimination, because immigration tells me that I'm able and eligible to work." *Id.* 99: 5-6.

Complainant was allowed to return to work on December 17, 2013, and no longer had to provide an updated Georgia ID or LPR card. Rainwater Dep. 55:7, 97: 6-8. She stated that after she returned to work, her colleagues, with the exception of Ms. Johnson and Ms. Anderson, did not speak to her. *Id.* 64: 12-18. Complainant explained that she experienced stress and humiliation when her colleagues ignored her and did not greet her. *Id.* 90: 5-17. She also testified that they did not make any jokes or derogatory comments about her race or national origin. *Id.* 92: 10-93:2. Complainant indicated that Ms. Johnson informed her that Ms. Charleston had told the staff that Complainant could not work because she did not have her green card. *Id.* 56: 10-17, 57:23. Ms. Anderson also told Complainant that Ms. Charleston had commented on Complainant not being able to work because of her expired LPR card.

According to Ms. Rainwater, after she complained to the Department of Justice, Ms. West's attitude towards her changed from friendly and engaging to one that was neither. Complainant further claims that Ms. West said to her, "We have the best lawyer, and nobody beat or play with my lawyers." *Id.* 152:3-5. In addition, Ms. Rainwater testified that after she complained to the Department of Justice, she then called Ms. West who said, "Look, Doris, you should have talked to me about this prior to going to the Department of Justice to complain about these things." *Id.* 95: 11-13.[14] According to Ms. Rainwater, this conversation occurred the week after the Fayetteville facility closed in January. *Id.* 160:12-13. She called Ms. West at this time to inquire when she would be able to return to work. Ms. Rainwater also stated that when she returned to work in mid-December, she informed the Department of Justice that Respondent had not paid her for the two-week period during which she was suspended.[15]

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[13] Based on admissions in the record, the undersigned presumes that Ms. Rainwater first contacted DHS about her suspension, who informed her about IER, which enforces the INA's antidiscrimination provisions. *See* 28 C.F.R. § 0.53.

[14] According to Judge Anand's report, Doctor's Hospice denies this assertion. *See* Final Report and Recommendation at 11. In addition, Doctor's Hospice contends it did not learn about Ms. Rainwater contacting the Department of Justice until after she was terminated. *Id.*

[15] Complainant asserts that she lost $900 in wages during this time, as she earned $12.50 per hour and worked approximately 36 hours per week. *See* Complainant's Statement of Material Facts at 5.

3. Termination

In January 2014, there was an ice storm that caused damage to the Fayetteville facility, requiring it to temporarily close on January 8. Doctor's Hospice terminated all its employees at that facility so they could collect unemployment benefits.

The facility reopened on February 27, 2014. Respondent did not call Complainant back so she called Ms. Charleston who told her that she was no longer employed by Respondent. Ms. Johnson was also not asked to return when the Fayetteville facility reopened. Complainant called Ms. Charleston again after she was not rehired but Ms. Charleston never returned her calls. Complainant spoke to Ms. Portwood at that time who told Complainant that the "census is low," meaning there were not enough patients, and to call Ms. West. Rainwater Dep. 66: 12. When Complainant called Ms. West, she told Complainant not to call her and to call Ms. Charleston. Complainant opined that she was not called back to the Fayetteville facility because she did not have an LPR card and because Ms. West did not "want" her there. *Id.* 65: 10.

When asked why she thinks Respondent terminated her on account of her national origin, Complainant testified, "Because my origin, and making comment when the patient that not can speak, that use the telephone – like I said . . . I always go around and Pam, we three we go in the rooms, no one person." *Id.* 68:13-17. When asked the question again, Complainant stated, "For I Hispanic . . . The card expired, and they worry - - my card, I no have the card, yes, I back [sic] to work for - - I complained to Justice Department , but still no have my card." *Id.* 69: 6-11. Complainant also believes she was retaliated because she was not rehired after the Fayetteville facility reopened and because her phone calls to Doctor's Hospice were never returned.

Since January 2015, Ms. Rainwater has been employed by the Cancer Treatment Centers of America in Newnan, Georgia, as a CNA.

C. Ms. Johnson's Testimony

Ms. Johnson was deposed on December 28, 2015. She was hired by Respondent as a CNA in March 2010. During the period in question, she worked with Complainant and Ms. Anderson. Ms. Johnson worked with Complainant for about two years. According to Ms. Johnson, her relationship with Ms. Charleston was not a "good one." Johnson Dep. 19:20. Ms. Johnson indicated she did not have any problems with Ms. Portwood. Ms. Johnson opined that Ms. Charleston did not like how Ms. Johnson, Complainant, and Ms. Anderson all worked well together. Ms. Johnson testified that Ms. Rainwater was a very good worker and that Ms. Anderson never complained about Ms. Rainwater's work or Ms. Johnson's work.

Ms. Johnson described one incident when a nurse came into the conference room and said that Ms. Charleston had called and said that Complainant would not be coming in because of "some immigration problem." *Id.* 34: 10-12. Ms. Johnson was surprised because she was not aware of any problems that Complainant had with immigration. Ms. Johnson did not recall any direct comments from Ms. Charleston regarding Complainant's national origin or her race.

Ms. Johnson had to provide Respondent with updated information about her CPR and CNA registry and once was asked to present her updated driver's license. Ms. Anderson informed her when the facility was closed on January 8. Ms. Johnson was not rehired when it reopened and she did not know why, as she had been employed by Respondent for five years and there were no complaints or disciplinary actions against her. Ms. Johnson called Ms. Charleston to inquire about this but Ms. Charleston never returned her calls.

D. Ms. Portwood's Testimony

Ms. Portwood was deposed on December 28, 2015. At the time of the deposition, she was the director of nursing at Homestead Hospice in Newnan, Georgia. She was previously the administrator at Doctor's Hospice, where she was employed from August 2013 until approximately March 2014. At Doctor's Hospice, one of Ms. Portwood's supervisors was Ms. West. As the administrator, Ms. Portwood was responsible for overseeing the staff, including the CNAs and RNs.

Ms. Portwood stated that her relationship with Ms. Charleston was initially good but then at some point, "there was a lot of tension," and their relationship went "downhill" from there. Portwood Dep. 16: 2-5. Ms. Portwood stated that her interaction with Complainant was limited because Complainant worked during the night shift. Ms. Portwood described her relationship with Complainant as "okay" and stated they were always cordial towards one another. *Id.* 17:4. Ms. Portwood did not have any complaints about Complainant.

Ms. Portwood was responsible for reviewing the employees' personnel files and she discovered that some employees had expired documents, such as a CPR licenses, driver's licenses, and car insurance. Between the Fayetteville facility and another one of Respondent's facilities, there were approximately ten to fifteen employees who had to provide updated documents. Ms. Portwood explained that the state would place a "tag" on Respondent for not having current documents and described a "tag" as when the state informs you there is something incorrect in the record that must be corrected within a certain time frame. *Id.* 18:23-19:6.

Complainant was one of the employees who had to provide updated documentation, including her LPR card. Ms. Portwood testified that Respondent employed other foreign employees. Ms.

Portwood immediately informed "Jane" and Ms. West[16] because she was unfamiliar with LPR cards and she was informed by Ms. West that Complainant could not continue working for Respondent if her LPR card was expired. Ms. Portwood spoke to Ms. Rainwater's husband and told him that Ms. Rainwater had to provide an unexpired LPR card and he said he would take care of that. Ms. Portwood recalled that she then spoke to a lady from "I[N]S," who told Ms. Portwood that LPR cards never expire and that she needs to make herself "knowledgeable about immigrants working in America." *Id.* 21: 14. Ms. Portwood responded that she was following her employer's instructions. Ms. Portwood did not remember dates but did not dispute that Ms. Rainwater returned to work after this conversation and that subsequently the Fayetteville location temporarily closed because of the ice storm.

Ms. Portwood did not recall any comments that were made about Ms. Rainwater's national origin or race. Ms. Portwood also testified that Ms. Rainwater never complained to her about her employment at Doctor's Hospice. Ms. Portwood indicated that there were some employees with whom Ms. Charleston, who is African-American, had problems, including Complainant and Ms. Anderson, but she did not think that the problems were motivated by race.

V. POSITIONS OF THE PARTIES

A. Respondent's Motion

Respondent argues that there are no genuine issues of material fact with respect to Complainant's claims of (1) citizenship status discrimination, (2) document abuse, or (3) retaliation. As to the citizenship status discrimination claim, Respondent argues that Ms. Rainwater has failed to establish a *prima facie* case because she did not demonstrate that Respondent acted with discriminatory intent. According to Respondent, its policy of requesting updated documentation concerned all employees and was not applied only to Ms. Rainwater. Respondent had this policy to avoid receiving a "tag" from the state. Moreover, Ms. Rainwater was not the only individual who was not rehired after the Fayetteville facility reopened, as Ms. Johnson, who is African-American, was also not rehired. The company also posits that Respondent was not singled out for adverse treatment due to discriminatory animus because there is testimony indicating that Ms. Charleston did not like Complainant, Ms. Johnson, *or* Ms. Anderson, who is Caucasian.

Concerning Ms. Rainwater's claim of document abuse, Respondent argues that she also failed to demonstrate the required discriminatory intent. Respondent acknowledges its "actions were arguably incorrect based on the federal INS laws," but again contends it suspended Complainant

[16] Neither Ms. Portwood's deposition nor other evidence of record identifies who Jane is. The N.D. Ga. also noted that Complainant did not identify who "Jane" was and that Ms. Portwood did not recall Jane's last name. *See* Final Report and Recommendation at 6 n.1.

to avoid being tagged by the state and not because of any "citizenship status animus." Respondent's Motion at 15.

With respect to Ms. Rainwater's retaliation claim, Respondent argues that it did not learn about Ms. Rainwater's complaint to the Department of Justice until March 2014, one month after she was not rehired. *Id.* at 16. Although Respondent recognizes that Ms. Rainwater told Ms. Charleston, "Immigration tells me that I'm able and eligible to work," Respondent argues this single statement was made without context and is not protected activity. *Id.* at 17. For these reasons, Respondent also contends that Ms. Rainwater has failed to establish a causal connection between the protected activity and adverse employment action.

Respondent also asserts that the February 9, 2015 letter from IER dismissing Complainant's charge shows that Respondent cooperated with IER and that it acted in good faith and without any animus towards its employees. Respondent notes that the Final Report and Recommendation further supports Respondent's position that it should be granted summary decision.

B. Complainant's Response

Complainant asserts that her two claims against Respondent are the two-week suspension for having an expired LPR card and retaliatory termination following her complaints about the previous suspension. According to Complainant, she has presented both direct and circumstantial evidence of discrimination. There is direct evidence, she argues, "[B]ecause Complainant was improperly suspended for the expired permanent resident card." Complainant's Response at 11. She also argues that these actions "directly violate[]" 8 U.S.C. § 1324b(a)(1) and (a)(6) and that "[b]eyond doubt, direct evidence exists that Respondent suspended Complainant for at least two weeks for having an expired Permanent Resident Card." *Id.* at 12. Complainant further explains that because an LPR card is "unique and intrinsic to the foreign born," it should amount to direct evidence of an adverse employment action. *Id.* at 13.

Complainant states there is also circumstantial evidence of discrimination because "(1) she was born in El Salvador; (2) she was competently working for Respondent as a Nurse's Aide; (3) she suffered a suspension for an expired Permanent Resident Card; and (4) no one else was suspended over a Permanent Resident Card." *Id.*

In support of her retaliation claim, Ms. Rainwater contends she engaged in protected activity because she complained to Ms. Charleston and Ms. West about discrimination, she suffered an adverse employment action, and there was a causal connection between these two elements. According to Ms. Rainwater, she has demonstrated the causal connection by virtue of the fact that only one month passed between when she engaged in protected activity and when she was terminated. In addition, her testimony indicates that Ms. West and Ms. Charleston "conveyed anger toward" her for making the complaints. *Id.* at 15. Complainant also asserts that Respondent's allegations of her poor work performance are pretext. In support of this argument,

Complainant cites to Respondent's employer handbook, which states that a "[w]ritten reprimand" will follow a first offense of rudeness or discourtesy to the patients or staff, and to Respondent's admission to the EEOC that it did not recall that there were any written complaints against Complainant. *Id.* at 22 (citing Exs. C-4, C-6).

C. Final Report and Recommendation of U.S. Magistrate Judge Anand

Judge Anand recommended that Doctor's Hospice's Motion for Summary Judgment be granted and that judgment be entered in its favor on all of Ms. Rainwater's claims. In relevant part,[17] the court dismissed Ms. Rainwater's claim of national origin discrimination because there was no evidence that Doctor's Hospice discriminated against her because she is from El Salvador. The court found that the reason for her suspension was her expired LPR card and not because she is originally from El Salvador. *See* Final Report and Recommendation at 31-33. The court also found that Ms. Rainwater failed to establish a *prima facie* case of national origin discrimination pursuant to the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), because she did not show that Doctor's Hospice treated similarly situated persons outside her protected class more favorably than it treated her. *Id.* at 35. The court further concluded that she did not present any evidence to support her claim that Doctor's Hospice's decision not to rehire her after the Fayetteville facility reopened was a part of her *prima facie* case of national origin discrimination, as Ms. Johnson, who is African-American, was also not rehired. *Id.* at 43. Finally, the court determined that Ms. Rainwater did not establish a *prima facie case* of retaliation because she did not engage in protected activity as defined under Title VII and even assuming she had, there was not enough evidence to support a causal link between the protected activity and the adverse employment action. *Id.* at 49-51, 59-61.

VI. DISCUSSION

A. Legal Standards

1. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on Supreme Court precedent, OCAHO case law has held, "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v.*

[17] Before the N.D. Ga., Ms. Rainwater also asserted claims of race discrimination and race harassment by Doctor's Hospice, which are not cognizable in this tribunal. *See* 8 U.S.C. § 1324b.

Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* Fed. R. Civ. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." Moreover, "the court must view all facts and all reasonable inferences to be drawn from them 'in the light most favorable to the non-moving party.'" *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 3 (2000) (quoting *Matsushita*, 475 U.S. at 587).

2. Document Abuse

"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." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5-6 (2015). Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017). "These two elements, an act and an intent, are essential to a claim of document abuse." *Id.*

A claim of document abuse that is based on citizenship status discrimination may be raised only by protected individuals as defined in 8 U.S.C. § 1324b(a)(3). *See United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 29-33 (2017) (following *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, 16 (2002), and relying on the plain language of 8 U.S.C. § 1324b(a)(6), which references § 1324b(a)(1)). A cognizable claim of document abuse that is based on national origin discrimination can be raised by any work authorized individual against an employer, who has four or more employees and is not covered by Title VII. *Id.* at 30.

3. Retaliation

Title 8 U.S.C. § 1324b(a)(5) provides that it is an unfair immigration-related employment practice "to intimidate, threaten, coerce, or retaliate against any individual for the purpose of

interfering with any right or privilege secured under [§ 1324b] or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and other federal remedial statutes prohibiting employment discrimination. *See, e.g.*, *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 154-55 (1996)." *Chellouf v. Inter American University of Puerto Rico*, 12 OCAHO no. 1269, 5 (2016).[18]

A claim of retaliation can be established by direct evidence or circumstantial evidence. *Crawford v. Carroll*, 529 F.3d 961, 975-76 (11th Cir. 2008); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013). Direct evidence "proves the fact at issue without the need to draw any inferences." *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (referencing *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11-12, 16-17 (2003)); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) ("Direct evidence is 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption.'") (quotation omitted). The Eleventh Circuit defines "direct evidence of discrimination as 'evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" *Wilson*, 376 F.3d at 1086 (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999)). OCAHO's definition is not dissimilar. *See Diversified Tech.*, 9 OCAHO no. 1095 at 21 ("Direct evidence [of intentional discrimination] . . . ordinarily means there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision.") (citations omitted).

Circumstantial evidence "suggests, but does not prove, a discriminatory motive." *Wilson*, 376 F.3d at 1086. A retaliation claim may be established by circumstantial evidence, which generally calls for the burden shifting framework set forth in *McDonnell Douglas*, 411 U.S. 792. *See Crawford*, 529 F.3d at 976; *Breda*, 10 OCAHO no. 1202 at 7. Under this framework, the plaintiff must first establish a *prima facie* case. The burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for the challenged employment action. If the defendant does so, the inference raised by the *prima facie* case disappears and the plaintiff must then prove by a preponderance of the evidence that the defendant's articulated reason is false and that the defendant intentionally discriminated or retaliated against the plaintiff. *Breda*, 10 OCAHO no. 1202 at 7-8 (citations omitted); *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015); *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)). Once the employer satisfies its burden of production by setting forth a facially valid reason for the

[18] The alleged discriminatory acts occurred in the State of Georgia. Therefore, the reviewing United States Court of Appeals for the Eleventh Circuit is the reviewing court for this decision, should it be appealed. *See* 28 C.F.R. § 68.57.

employment decision, the burden reverts to the employee to show that the employer's reason is pretextual. *Gonzalez-Hernandez*, 11 OCAHO no. 1254 at 8. The employer will generally be entitled to summary decision unless the complainant can demonstrate that there is a genuine issue of fact regarding pretext. *Id*.

A *prima facie* case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual's protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action. *Chellouf*, 12 OCAHO no. 1269 at 5-6 (citing *Breda*, 10 OCAHO no. 1202 at 8). There must be proof that the decisionmaker knew of the protected conduct at the time the decision was made before an inference of causation may arise.[19] *Id.* at 6 (citing *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79, 85 (1st Cir. 2006)); *see also Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1278 (11th Cir. 2008) (citations omitted). Moreover, the U.S. Supreme Court has held, "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013); *Chellouf*, 12 OCAHO no. 1269 at 14 (following *Nassar*).

Circumstantial evidence of the causal connection includes temporal proximity of the adverse action to the protected activity, differential treatment, and comments by an employer that intimate a retaliatory mindset. *Chellouf*, 12 OCAHO no. 1269 at 6 (citation omitted). Temporal proximity between an employer's knowledge and the adverse employment action may alone establish causality but "the temporal relationship must . . . be 'very close.'" *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1182 (11th Cir. 2010) (quoting *Thomas*, 506 F.3d at 1364); *Martinez v. Superior Linen*, 10 OCAHO no. 1180, 7 (2013). "It is causation however, and not just temporal proximity per se, that is vital to the employee's case." *Martinez*, 10 OCAHO no. 1180 at 8 (citing *Sodhi v. Maricopa Cnty. Special Health Care Dist.*, 10 OCAHO no. 1127, 8-9 (2008); *Porter v. Cal. Dep't of Corrs.*, 419 F.3d 885, 895 (9th Cir. 2005)).

B. Application

[19] The second factor identified in *Chellouf* is actually subsumed by the fourth factor, as an employer's knowledge is often necessary, but not sufficient, evidence of a causal connection. Therefore, a more accurate statement of the elements of a *prima facie* case of retaliation is that a complainant must show (1) that she engaged in statutorily protected conduct; (2) that she suffered an adverse employment action; and, (3) that there is some causal relation between the two events. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2008) (outlining the three elements to show a prima facie claim of retaliation in the context of Title VII) (citation omitted). Nevertheless, the instant case does not present a need to reconcile the respective utilities of a three-factor test compared with a four-factor one.

1. Document Abuse Claim

As an initial matter, the undersigned notes that it construes Ms. Rainwater's claim that the two-week suspension because of her expired LPR card violated 8 U.S.C. § 1324b as a document abuse claim under 8 U.S.C. § 1324b(a)(6) because a suspension does not fall within the scope of 8 U.S.C. § 1324b(a)(1). The statutory language only "prohibits an employer from discriminating with respect to the hiring, recruitment, referral, or discharge of an individual" and "unlike Title VII, the section does not speak to such employment issues as compensation, shift assignments, or other terms, conditions, or privileges of employment." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 3 (2015). It is undisputed that Doctor's Hospice suspended Ms. Rainwater because her LPR card expired, advised her she would be able to return to work if she could provide an updated LPR card, and eventually allowed her to return to work. These series of events are not encompassed by § 1324b(a)(1).

Rather, Doctor's Hospice's request for an unexpired LPR card falls more appropriately within the scope of 8 U.S.C. § 1324b(a)(6), which, in part, prohibits an employer from requesting "more or different documents than are required" for satisfying the employment verification requirements of § 1324a(b). As an LPR, Ms. Rainwater's LPR card, regardless of whether it contained an expiration date, is a valid List A document that established both her identity and work authorization. *See* 8 U.S.C. § 1324a(b)(1)(B)(ii); *see also* USCIS, Form I-9, List of Acceptable Documents (Nov. 24, 2016), https://www.uscis.gov/sites/default/files/files/form/i-9.pdf. Although Doctor's Hospice's request for an unexpired LPR card sufficiently establishes the required act to prove a claim of document abuse under 8 U.S.C. § 1324b(a)(6), Ms. Rainwater's claim based on her suspension and the request for that card nevertheless fails for other reasons.

a. National Origin

Complainant asserts that Respondent's request for an unexpired LPR card was on account of her national origin, because she was born in El Salvador. The undersigned recognizes that Judge Paddack dismissed Ms. Rainwater's national origin claim in the December 22, 2015 Order because she filed a discrimination charge with the EEOC. The "no overlap with EEOC complaints" provision of 8 U.S.C. § 1324b(b)(2) refers specifically to a practice described in § 1324b(a)(1)(A), which prohibits discrimination with respect to the hiring, recruitment or referral for a fee, or discharge of an individual because of an individual's national origin. Document abuse is its own unfair immigration-related employment practice, separate from the practices covered under § 1324b(a)(1)(A). In addition, "allegations of document abuse under § 1324b(a)(6) pose no issues cognizable by EEOC." *Caspi v. Trigild Corp.*, 6 OCAHO no. 907, 957, 959 n.2 (1997); *see also Ondina-Mendez*, 9 OCAHO no. 1085 at 16 (holding that national origin-based document abuse is not a form of national origin discrimination cognizable under Title VII). For these reasons, the December 22 Order dismissing the national origin claim does not preclude adjudication of Ms. Rainwater's national origin-based document abuse claim.

Nevertheless, Ms. Rainwater's claim of document abuse based on national origin will be dismissed. There is no evidence in the record, direct or circumstantial, to support her claim that Doctor's Hospice requested an updated LPR card because she is Hispanic or because she was born in El Salvador. Based on the testimony of Complainant, Ms. Johnson, and Ms. Portwood, as well as the pleadings of the parties, it is clear that no reference to Complainant's *national origin*, meaning her Hispanic ancestry or the fact that she was born in El Salvador, was ever made while she was employed by Doctor's Hospice. *See, e.g.,* Rainwater Dep. 92:10-17; Johnson Dep. 35:12-22; Portwood Dep. 23: 1-6. Complainant herself admitted this, as she replied "no" when asked if her coworkers ever made any comments about her national origin or race. Rainwater Dep. 92:13, 17. Moreover, Ms. Rainwater's allegation that Ms. Charleston spread rumors that Ms. Rainwater was "illegal" also does not have any bearing on her national origin—as opposed to her citizenship status—and is, in fact, unsupported by the record. Ms. Rainwater testified that coworkers informed her that Ms. Charleston had told the staff that Ms. Rainwater did not have her green card, which is why she could not work. *See* Rainwater Dep. 57:7-20. Ms. Johnson further recounted that a nurse told the staff that Ms. Charleston had said Ms. Rainwater was not coming to work because of a "problem with immigration" when asked if Ms. Charleston had ever talked about Ms. Rainwater's El Salvadorian[20] origin. *See* Johnson Dep. 33:21-34:13. This comment, however, speaks to Ms. Rainwater's citizenship status, rather than to her national origin. Complainant's assertion that only she, as a person born in El Salvador, could be asked to present an updated LPR card and was, therefore, discriminated against on account of her national origin collapses the clear statutory distinction between national origin and citizenship status into nonexistence and is further not supported by the record. *See, e.g.*, Final Report and Recommendation at 31 ("Plaintiff has cited to no evidence that her suspension was related to her being from El Salvador, or even from Latin America. Instead, the undisputed evidence in the record establishes that the reason for that suspension was because her green card had expired . . . ."). In short, there is not a scintilla of evidence to indicate that Ms. Rainwater's suspension and Respondent's request of her for an unexpired LPR card was based on her Hispanic or El Salvadorian national origin; to the contrary, all available evidence indicates that these actions occurred on account of her citizenship status as a lawful permanent resident. *Cf. Cooper v. S. Co.*, 390 F.3d 695, 745 (11th Cir. 2004) (finding summary judgment appropriate where plaintiff's assertions were conclusory and based on her own subjective belief) *overruled on other grounds, Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457-58 (2006). Thus, even construing Ms. Rainwater's claim liberally and viewing the facts most favorably to her as the nonmoving party, she has failed to establish a *prima facie* case of document abuse premised on national origin discrimination because there is no evidence of discriminatory intent based on her national origin.

b. Citizenship Status

[20] Different sources report the adjectival form of El Salvador as, alternatively, El Salvadoran, El Salvadorian, or El Salvadorean. The undersigned will use "El Salvadorian" in the instant decision.

Complainant's claim of document abuse premised on citizenship status discrimination also fails as a matter of law. As stated above, a document abuse cause of action premised on citizenship status can only be maintained where the victim was a protected individual at the time of the alleged abuse. *See Ondina-Mendez*, 9 OCAHO no. 1085 at 16; *see also McNier v. San Francisco State Univ.*, 7 OCAHO no. 947, 411, 417 n.3 (1997) (noting that the critical date for assessing the relevance of an individual's status under 8 U.S.C. § 1324b is the date of the alleged discrimination and that subsequent status changes are irrelevant); *Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO no. 590, 1919, 1922-23 (1993) (dismissing a claim for citizenship status discrimination where an individual was not a protected individual at the time of the alleged discrimination but became a protected individual subsequently). Title 8 U.S.C. § 1324b(a)(3) defines a protected individual, in part, as an alien lawfully admitted for permanent residence, but not 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" or "who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application." Complainant's own admissions reflect that although she was an LPR at the time of the alleged discriminatory acts, she did not file for naturalization on a timely basis to render her a protected individual.[21]

Ms. Rainwater stated on her OSC charge form that she became an LPR on September 8, 2003, which is confirmed by the copy of her LPR card, and applied for naturalization on November 13, 2013. *See* Respondent's Motion, Ex. R-9, Ex. D3. She testified that she was naturalized on July 2, 2014. Section 316(a) of the INA sets forth the requirements for naturalization and in relevant part states:

> No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, (1) immediately preceding the

[21] Respondent asserted that Ms. Rainwater is a member of a protected class under 8 U.S.C. § 1324b(a)(6), *see* Respondent's Motion at 12, but this concession is not dispositive because whether an individual qualifies as a protected individual under 8 U.S.C. § 1324b(a)(3) is a legal determination. *See, e.g.*, *Noel Shows, Inc. v. U.S.*, 721 F.2d 327, 330 (11th Cir. 1983) ("A stipulation by the parties to a lawsuit as to questions of law is not binding on the trial court.") (citation omitted); *accord United States v. Noorealam*, 5 OCAHO no. 797, 611, 614 (1995) (modification by the Chief Administrative Hearing Officer) (noting that stipulations of law by parties are not binding in OCAHO proceedings). Moreover, Respondent's assertion was made prior to a recent clarification of case law regarding the scope of 8 U.S.C. § 1324b(a)(6), *see Mar-Jac Poultry*, 12 OCAHO no. 1298 at 29-33, and may have confused Complainant's current status as a United States citizen with her prior non-protected status at the time of the alleged discriminatory events. Thus, for all of these reasons, Respondent's indication that Ms. Rainwater is a protected individual for purposes of 8 U.S.C. § 1324b(a)(6) is neither binding nor dispositive of that issue.

> date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application . . . .

8 U.S.C. §1427(a).[22] Consequently, the earliest date Ms. Rainwater could have applied for naturalization was on or about September 8, 2008, but she applied more than five years after this date, thereby failing to apply within the statutorily required first six months of becoming eligible. Thus, she lost her status as a protected individual when she failed to apply for naturalization within six months of the date that she first became eligible to apply. *See Santos v. USPS*, 9 OCAHO no. 1105, 5 (2004) (citing 8 U.S.C. § 1324b(a)(3)(B)(i)). Although Ms. Rainwater, as a United States citizen, is currently a protected individual under 8 U.S.C. § 1324b(a)(3), she did not become so until several months after the dates of the alleged discriminatory actions. Accordingly, because Ms. Rainwater was not a protected individual on the dates she allegedly experienced document abuse on account of her citizenship status, her claim under 8 U.S.C. § 1324b(a)(6) premised on citizenship status necessarily fails as a matter of law.[23]

For all these reasons, Doctor's Hospice will be granted summary decision as to Ms. Rainwater's claim of document abuse, regardless of whether it is premised on national origin or citizenship status.

2. Retaliation

Doctor's Hospice will also be granted summary decision as to Ms. Rainwater's retaliation claim because she did not meet her burden of proving a *prima facie* case of retaliation.

As an initial point, the failure of Ms. Rainwater's document abuse claim does not necessarily preclude her separate retaliation claim even though she was not a protected individual at the time the alleged retaliatory actions occurred. *See Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 12

[22] There are certain provisions that *reduce* the required period of continuous residence after becoming an LPR in order to become eligible for naturalization. *See* 8 U.S.C. § 1430. Complainant has not alleged, however, that she falls within any category that lengthened her required period of residence prior to becoming eligible to naturalize, and based on the standard period of five years of residency as an LPR, she is simply unable to establish that she was a protected individual at the time of the alleged discriminatory actions.

[23] As Ms. Rainwater's citizenship status-based document abuse claim is precluded as a matter of law, I need not decide whether she established that Doctor's Hospice acted with the requisite discriminatory intent. *See United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 22 (2014).

(2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015); *see also Fakunmoju v. Claims Admin. Corp*., 4 OCAHO no. 624, 308, 321 (1994) (holding that OCAHO retains jurisdiction over a retaliation claim based on an intent to file a charge or complaint under 8 U.S.C. § 1324b, even if OCAHO later determines that the underlying substantive basis for the charge or complaint is meritless), *aff'd* 53 F.3d 328 (4th Cir. 1995) (Table).

Ms. Rainwater engaged in conduct protected under 8 U.S.C. § 1324b when she contacted and informed IER that her employer was suspending her because of an expired LPR card. Ms. Rainwater testified that she told Ms. Charleston it was "discrimination" to suspend her because the Department of Justice had told her she can work with an expired LPR card. Rainwater Dep. 99:5-6. In addition, Ms. Portwood testified that a woman from the Department of Justice called her after Ms. Rainwater was suspended and informed Ms. Portwood that LPR cards never expire. Portwood Dep. 21:13. Although none of the individuals deposed referred to IER specifically, references to the Department of Justice and evidence in the record reflecting the correspondences between Abigail Olson of IER and Ms. Rainwater or between Ms. Olson and Respondent all reasonably support the conclusion that Ms. Rainwater contacted IER after she was suspended.

Complainant also established that some employees of Doctor's Hospice were aware of this protected conduct. Ms. Portwood testified that she spoke to a woman from the Department of Justice who informed her that LPR cards never expire. Portwood Dep. 21:13. In addition, Ms. Rainwater testified that Ms. West told her that she should not have complained to the Department of Justice and should have spoken to Ms. West first. Rainwater Dep. 95: 11-13. Judge Anand indicated that Doctor's Hospice denied this claim. *See* Final Report and Recommendation at 11. However, before this tribunal, Respondent neither objected to this claim nor presented any countervailing evidence. Accordingly, construing the facts in Ms. Rainwater's favor, as I must, I fully credit Ms. Rainwater's testimony. According to Ms. Rainwater, this conversation occurred after the snowstorm but before Ms. Rainwater filed a charge with IER in March 2014.[24]

[24] In analyzing Ms. Rainwater's claim of retaliation under Title VII, Judge Anand wrote, "In order for an employee engaging in opposition activity to be protected under the anti-retaliation provision of Title VII, he or she must be opposing conduct that is made an 'unlawful employment practice' by Title VII," which is defined as, *inter alia*, "discrimination against an employee 'with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" Final Report and Recommendation at 49 (quoting 42 U.S.C. § 2000e-2(a)). The N.D. Ga. considered Ms. Rainwater's complaint to Ms. Charleston that the Department of Justice had said it was discrimination to suspend her for an expired LPR card as the alleged protected activity. *Id.* at 48-49. The court concluded, in part, that Ms. Rainwater did not engage in protected activity for purposes of Title VII because she did not show that she had a "good-faith" or subjective belief that she had been discriminated against on the basis of her race or national origin when she complained to Ms. Charleston about discrimination. *Id.* at 51. The district court's conclusion on this point does not foreclose my analysis of Ms. Rainwater's retaliation claim, however, because

Complainant has also established that she suffered an adverse employment action when Doctor's Hospice chose not to rehire her when the Fayetteville facility reopened in February 2014.

However, I find that Complainant failed to establish a causal link between the protected conduct and the adverse employment action. Although the parties did not offer specific dates for many of the events in question, the undersigned has been able to construct a general timeline of events, construing any ambiguities in favor of Ms. Rainwater. Ms. Rainwater was suspended on November 27, 2013, and allowed to return to work on December 17, 2013. She evidently called IER during this period, as Ms. Portwood and Ms. West both spoke to the Department of Justice after Ms. Rainwater's suspension and before she was allowed to return to work without an unexpired LPR card. The decision not to rehire Ms. Rainwater occurred sometime in January or February 2014, as the Fayetteville facility reopened on February 27, 2014.[25] All the employees at the Fayetteville location were laid off on January 8, 2014, because of damage to the facility. The undersigned accordingly finds that approximately one to three months elapsed between when Ms. Rainwater engaged in protected activity and when she suffered an adverse employment action.

Ms. Rainwater has not disputed that her discharge on January 8, 2014, was part of a businesswide discharge of employees on account of an ice storm and resulting damage to the facility where she worked due to a burst pipe. Thus, she has not alleged that her discharge on that date was retaliatory in any way. It is also undisputed that her suspension in late 2013 occurred *before* she contacted IER. Consequently, the only adverse employment action for which she has alleged a retaliatory causal connection related to her protected conduct is her failure to be rehired when her facility reopened on February 27, 2014.

Her allegations and evidence, however, are insufficient to establish the required causal link, even construing all reasonable inferences in her favor. Consequently, she has failed to establish a *prima facie* case of retaliation in violation of 8 U.S.C. § 1324b(a)(5).

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protected conduct for purposes of IRCA's antiretaliation provisions is different than protected conduct under Title VII's antiretaliation provisions. Moreover, Judge Anand also found that Ms. Rainwater had not established a causal linkage between her protected conduct and the adverse employment action. Again, that finding is not necessarily binding in this forum, but it does have significant instructive or persuasive value as discussed below.

[25] Ms. Rainwater indicated that Ms. Charleston informed her that she could not return to work on January 10 or 12, 2014, but did not give a reason or return Ms. Rainwater's phone calls. Ex. D10. Crediting this assertion, which is not documented or clearly corroborated, nevertheless does not establish the requisite causal linkage—even with the closer temporal proximity—because there is no evidence of any retaliatory animus by Ms. Charleston based on the Complainant's contacts with IER after Complainant returned from her suspension and because of the existence of the subsequent, intervening event of the lack of capacity when the facility reopened.

As an initial point, the temporal proximity between the time Ms. Rainwater contacted IER in late November or early December 2013 and the time she was not rehired in January or February 2014 is insufficient by itself to establish the causal link. *See Brown*, 597 F.3d at 1182. Mere temporal proximity, without more, may show causality, but the proximity must be "very close." *Thomas*, 506 F.3d at 1364 (quoting *Clark Cnty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001)). Even construing the evidence in Ms. Rainwater's favor, at least one month, if not more, separated her protected conduct and the alleged retaliatory action. Such proximity may provide modest support for the causality element but is not dispositive. *Cf. Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) ("We have held that a period as much as one month between the protected expression and the adverse action is not too protracted.") (citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998)).

Nevertheless, even if the temporal proximity were closer, intervening events may break the chain of causality in a retaliation claim. *See, e.g., Brisk v. Shoreline Foundation, Inc.*, 654 F. App'x 415, 417 (11th Cir. 2016); *Henderson v. FedEx Express*, 442 F. App'x 502, 506 (11th Cir. 2011); *Booth v. Birmingham News Co.*, 704 F. Supp. 213, 215-16 (N.D. Ala. 1988) (noting there were intervening factors for the adverse action that occurred after the protected activity), *aff'd without op.*, 864 F.2d 793 (11th Cir.1988); *Twigg v. Hawker Beechcroft Corp.*, 659 F.3d 987, 1002 (10th Cir. 2011). In Ms. Rainwater's case, the intervening events were the ice storm, the subsequent closure of her facility, and her facility's reopening at less than full capacity which meant that not all prior CNAs, including Ms. Rainwater, were rehired. These events were subsequent to Ms. Rainwater's protected activity and break any chain of causality; indeed, the record reflects that these intervening events, rather than retaliation for contacting IER, became the cause of the end of Ms. Rainwater's employment with Doctor's Hospice. In other words, but for the ice storm, a broken pipe, the facility closure, and the facility reopening with less-than-full capacity, the record fairly suggests that Ms. Rainwater would have remained employed at the Fayetteville facility, notwithstanding her prior contact with IER. Furthermore, she was taken off suspension and returned to employment *after* she contacted IER, which further undercuts her assertion of a causal link between her protected activity and the ultimate decision not to rehire her. In short, Ms. Rainwater has failed to demonstrate that but for her contacting IER, she would have been asked to return to work for Respondent when the Fayetteville facility reopened at less-than-full capacity.

Ms. Rainwater points to only two comments that would, arguably, evince a retaliatory animus by her former employer and, thus, suggest a causal connection notwithstanding these intervening events; however, neither of these is sufficient, either individually or in combination, to establish a causal linkage in light of the intervening events described above and the overall record. *See Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (11th Cir. 2007) ("In cases where temporal proximity between protected activity and allegedly retaliatory conduct is missing, courts may look to the intervening period for other evidence of retaliatory animus.'") (quoting *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000)).

According to Ms. Rainwater, Ms. West made two comments about her contacting the Department of Justice. The week after the facility closed in January 2014, Ms. Rainwater called Ms. West, who said, "[Y]ou should have talked to me about this prior to going to the Department of Justice to complain about these things." Rainwater Dep. 95:11-13. This comment certainly reflects disappointment or unhappiness by Ms. West with Ms. Rainwater's choice of action, but that unhappiness by itself is insufficient to establish a causal link between Ms. Rainwater's conduct and the ultimate decision not to rehire her, particularly since the facility did not reopen until over a month later.

Complainant also testified that Ms. West said, "We have the best lawyer, and nobody beat or play with my lawyers." *Id.* 152:3-5. Complainant did not specify when Ms. West made the latter statement, only that she said this after Complainant contacted IER. Without any further context, the probative value of this statement is limited, as this comment only supports Ms. Rainwater's assertion of a causal linkage between her contact with IER and the decision not to rehire her if it occurred after her suspension ended or after she and the other employees were laid off following the ice storm. Although the undersigned draws all reasonable inferences in favor of Ms. Rainwater as the non-moving party, assigning a specific time frame to this comment amounts to pure speculation, rather than a reasonable inference. Indeed, this comment could have occurred before Ms. Rainwater returned from suspension, which would render its causal linkage to the subsequent, later decision not to rehire Ms. Rainwater negligible. Consequently, this comment, too, does not provide sufficient support for Ms. Rainwater's alleged causal connection underlying her retaliation claim.

The additional evidence in the record also does not support Ms. Rainwater's allegations of causality. For instance, although Ms. Portwood surmised that Ms. Charleston did not like Complainant, the evidence of record does not identify any retaliatory statement or action by Ms. Charleston towards Ms. Rainwater that is plausibly connected to Ms. Rainwater's contact with IER. Management's refusal to return telephone calls from its employees and assertions that Ms. Charleston did not have a good relationship with certain employees, including Ms. Rainwater, are revealing of unprofessionalism and possible discord in the workplace, but without more, do not suffice to establish a retaliatory motive. *See, e.g., Chapman v. Al Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) ("Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions.'") (quoting *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)).

Moreover, although Judge Anand's findings do not necessarily warrant the application of *res judicata*,[26] they are probative as to the lack of causality underlying Complainant's retaliation claim:

[26] Judge Anand's findings regarding Ms. Rainwater's retaliation claim under Title VII were premised on Ms. Rainwater's complaints to Ms. Charleston on December 12, 2013, rather than her contact with IER at approximately the same time; thus, his findings are not issue preclusive *per se*. Nevertheless, his causality analysis is instructive and probative because the alleged

> Nevertheless, under the circumstances of this case, the Court finds that temporal proximity alone cannot establish the causal connection because of the intervening event of the snowstorm and the closing of the Fayetteville facility. Moreover, the Defendant has presented evidence that Plaintiff was not the only CNA that was not rehired after the facility reopened. Defendant argues that "both the layoff and the decision not to rehire Plaintiff were based on business decisions that affected other employees, not just Plaintiff." It is undisputed that Doctor's Hospice did not rehire all of the CNAs for the facility, and that Brenda Johnson, who is black and was born in the United States, was also not rehired. Thus, the undisputed evidence indicates that Plaintiff was not singled out for retaliatory treatment, because she was not the only CNA that was not rehired after the Fayetteville facility reopened. Under these circumstances, the Court finds that Plaintiff has not presented sufficient evidence of a causal link between her complaint to Charleston on December 12, 2013, and the decision not to rehire her after the Fayetteville facility reopened.

Final Report and Recommendation at 61-62 (internal record citations omitted).

Overall, neither the evidence of temporal proximity nor the other, circumstantial evidence in the case sufficiently establish the element of causality required to establish a *prima facie* case of retaliation.[27] The record reflects intervening events ultimately led to Ms. Rainwater's separation from Doctor's Hospice, and she has failed to establish a causal connection between her protected

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protected conduct occurred at approximately the same time in both cases, because the intervening events between the protected conduct and the adverse employment action are the same in both cases, and because the adverse employment action at issue in both cases—*i.e.* the decision not to rehire Ms. Rainwater—is identical.

[27] Although there are some unresolved factual issues regarding Ms. Rainwater's performance as an employee and regarding how many written complaints were made against her, these issues are ultimately not material as Ms. Rainwater has failed to establish a *prima facie* case of retaliation regardless of her work performance. To be sure, Ms. Rainwater vehemently denied the complaints about her job performance, particularly those alleged in Ms. Charleston's written declaration. *See* Respondent's Motion, Ex. R-11. She did acknowledge, however, during her deposition that two complaints were made against her, though she attempted to explain why these complaints were misleading. *See* Rainwater Dep. 39:7-40:9; 138: 8-14. Nevertheless, because Ms. Rainwater did not meet her burden of setting forth a *prima facie* case of retaliation, I need not address the issue of her work performance or whether that issue was pretextual. *See Breda,* 10 OCAHO no. 1202 at 7-8.

activity and the decision not to rehire her when her employer reopened its facility at less-than-full capacity. Consequently, Ms. Rainwater has failed to establish a *prima facie* retaliation claim under 8 U.S.C. § 1324b(a)(5). Accordingly, Doctor's Hospice will also be granted summary decision as to Ms. Rainwater's retaliation claim.

VII. CONCLUSION

Doctor's Hospice's Motion for Summary Decision will be granted in its entirety because it met its burden of showing that there are no genuine issues of material fact with respect to Ms. Rainwater's document abuse claim or retaliation claim. First, Ms. Rainwater failed to present any persuasive, objective evidence to show that Doctor's Hospice committed document abuse against her because of her El Salvadorian or Latin American origin. She also failed to set forth a cognizable claim of document abuse on account of her citizenship status at the time of the alleged document abuse because as an LPR who did not apply for naturalization within the requisite time frame, she was not a protected individual and, therefore, lacks standing to assert a document abuse claim predicated on citizenship status. Second, Ms. Rainwater failed to present a *prima facie* case of retaliation because there was insufficient evidence to support a causal link between her protected activity and the adverse employment action. Summary decision is entered for Doctor's Hospice, and Ms. Rainwater's complaint is dismissed.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Doris Rainwater was granted lawful permanent resident status on September 8, 2003.

2. Doris Rainwater applied for naturalization on November 13, 2013.

3. Doctor's Hospice of Georgia, Inc. hired Doris Rainwater on August 29, 2011, as a Certified Nursing Assistant.

4. Doris Rainwater was employed at Doctor's Hospice's facility in Fayetteville, Georgia.

5. In November 2013, Doctor's Hospice reviewed the personnel files of its employees to ensure their documentation was up to date.

6. On November 27, 2013, Doctor's Hospice suspended Doris Rainwater because her lawful permanent resident card had expired and she was instructed to provide an updated card in order to continue working.

7. After she was suspended, Doris Rainwater contacted the Department of Homeland Security about her suspension and the agency in turn referred Ms. Rainwater to the Department of Justice's Immigrant and Employee Rights Section.

8. Doris Rainwater contacted the Immigrant and Employee Rights Section, which informed her that she could not be suspended for an expired lawful permanent resident card.

9. The Immigrant and Employee Rights Section contacted Doctor's Hospice and informed Doctor's Hospice that lawful permanent resident cards do not expire.

10. Doctor's Hospice called Doris Rainwater to return to work, which she did on December 17, 2013, without having to provide an updated lawful permanent resident card.

11. On January 8, 2014, the Fayetteville facility closed because of damage due to an ice storm.

12. Doctor's Hospice terminated all its employees at the Fayetteville location so that they could collect unemployment benefits.

13. The Fayetteville facility reopened on February 27, 2014, and was not at full capacity.

14. Doris Rainwater was not rehired when the Fayetteville facility reopened.

15. Brenda Johnson, who is African-American, was not rehired when the Fayetteville facility reopened.

B. Conclusions of Law

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

2. OCAHO regulation 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

3. Circumstantial evidence "suggests, but does not prove, a discriminatory motive." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). For individual claims of discrimination, the relative burdens of proof and production are typically allocated using the traditional burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Odongo v. Crossmark, Inc.*, 11 OCAHO no. 1236, 7 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015). Under the *McDonnell Douglas* framework, the complainant must first establish a *prima facie* case; second, the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the respondent does so, the inference of discrimination raised by the *prima facie* case

disappears unless the complainant establishes that the proffered reason is pretextual. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015).

4. "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." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5-6 (2015). Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show (1) that, in connection with the employment verification process required by 8 U.S.C. § 1324a(b), an employer has requested from the employee more or different documents than those required or has rejected otherwise acceptable valid documents and (2) that either of these actions was undertaken for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017).

5. A retaliation claim may be established by circumstantial evidence, which generally calls for the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Crawford v. Carroll*, 529 F.3d 961, 976 (11th Cir. 2008); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7 (2013).

6. A *prima facie* case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action. *Chellouf v. Inter American University of Puerto Rico*, 12 OCAHO no. 1269, 5-6 (2016) (citing *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013)); *cf. Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2008) (outlining the three elements to show a prima facie claim of retaliation in the context of Title VII) (citation omitted).

7. "Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013); *Chellouf v. Inter American University of Puerto Rico*, 12 OCAHO no. 1269, 14 (2016) (following *Nassar*).

8. Circumstantial evidence of the causal connection includes temporal proximity of the adverse action to the protected activity, differential treatment, and comments by an employer that intimate a retaliatory mindset. *Chellouf v. Inter American University of Puerto Rico*, 12 OCAHO no. 1269, 6 (2016) (citation omitted).

9. Doris Rainwater did not present any objective evidence to support her claim of document abuse on account of her El Salvadorian or Latin American national origin.

10. Doris Rainwater was not a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3) at the time of the alleged document abuse and therefore cannot be the subject of a document abuse claim based on citizenship status.

11. Doris Rainwater engaged in activity protected under 8 U.S.C. § 1324b when she called the Immigrant and Employee Rights section to complain about her suspension for an expired lawful permanent resident card.

12. Doris Rainwater suffered an adverse employment action when Doctor's Hospice did not rehire her when the Fayetteville facility reopened.

13. Doris Rainwater failed to establish a *prima facie* case of retaliation because she did not present sufficient evidence of a causal link between her protected activity and the adverse employment action.

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

Doctor's Hospice's Motion for Summary Decision is granted, and Ms. Rainwater's complaint is dismissed.

SO ORDERED.

Dated and entered on March 31, 2017.

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James R. McHenry III
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 Appellate Procedure.