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

CELIA SIMON, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00009
INGRAM MICRO INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(*January 27, 2003*)

I. INTRODUCTION

On August 22, 2002, Ingram Micro, Inc. (Respondent) filed a Motion for Summary Decision. Respondent contends that there are no genuine issues of material fact. Three affidavits and other documentation support Respondent's motion. Celia Simon (Complainant) filed a Response to the Motion for Summary Decision, supported by her affidavit, and asserted that Respondent's Motion for Summary Decision is procedurally insufficient, because the affidavits are not made with personal knowledge; and is substantively insufficient because the facts show that she was terminated for failing to provide documents beyond those permitted under 8 U.S.C. section 1324a(b)(1), and that Respondent engaged in a pattern and practice of discrimination. This Order grants Respondent's Motion for Summary Decision because there are no genuine issues of material fact with respect to Complainant's claims against Respondent based on citizenship status discrimination and document abuse, and Respondent is entitled to judgment as a matter of law.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Complainant's name when hired by Respondent was Celia Reyes-Gomez. Charge ¶ 1. During her employment with Respondent, she married and changed her name to Celia Simon. Affidavit of Christopher Tisdale (Tisdale Affidavit), Exhibit 1. Thus, the Celia Reyes-Gomez referenced in the employment application and I-9 form and other documents attached to the Tisdale Affidavit is the Complainant Celia Simon. See Tisdale Affidavit, Exhibits 2-5.

On June 11, 2001, Complainant filed a Charge of citizenship status discrimination and document abuse under 8 U.S.C. section 1324b with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Complaint, Part I ¶ 1, Charge ¶ 4. Complainant stated in her Charge that she "worked for 5 years at Ingram Micro with false papers." Charge ¶ 9. Complainant alleged that after she presented new legal documents, on April 9, 2001, Respondent subsequently fired her on May 3, 2001, for using false documents in the past. Id. In a letter to Complainant dated October 3, 2001, OSC stated that there was insufficient evidence of reasonable cause to believe she suffered discrimination prohibited by 8 U.S.C. section 1324b. Complaint attachment. OSC also found that Complainant was not subjected to document abuse because she was not "requested to produce more or different documents during the I-9 employment reverification process." Id. Additionally, OSC stated that "there are no laws that bar a company from having an 'honesty policy' which require [sic] employees to provide truthful and accurate information on all company employment documents, and documents required to be completed by Federal and State laws, and for actively enforcing such policies." Id. The letter further states that when an employee signs a Form W-4, Form I-9, and other Federal employment documents, the employee is attesting under penalties of perjury that the information he/she is providing is true. Id.

On December 21, 2001, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent had engaged in citizenship status discrimination and document abuse. Complaint, Part I ¶ 6, Part III ¶ 2, Part V ¶ 3. Complainant represented that other workers in her situation with different citizenship were also fired. Id. at Part III ¶ 6. Complainant stated that she received work authorization on March 29, 2001, and has been a Legal Permanent Resident (LPR) since October 19, 2001. Id. at Part I ¶ 4.

On February 20, 2002, I issued a Notice of Default informing the parties that Respondent was in default because it had received the Complaint, but failed to file an answer within thirty days. I ordered Respondent to file an answer and a memorandum addressing why a default judgment should not be entered and why the Notice of Default should be vacated, by March 20, 2002. Notice of Default, Feb. 20, 2002.

On March 26, 2002, Respondent submitted an insufficient Answer. In my Prehearing Order dated March 28, 2002, I explained the Answer's deficiencies: untimeliness, failure to file a memorandum addressing why there is good cause to accept a late filed answer, why a default judgment should not be entered, and why the Notice of Default should be vacated, failure to address the specific allegations of the Complaint, and failure to attach a certificate of service. Prehearing Order, Mar. 28, 2002, at 2. I scheduled a prehearing conference for April 9, 2002, in order to hear from both parties on whether judgment should be entered for Complainant. Id.

On April 9, 2002, Respondent filed its Amended Answer. The Amended Answer denied that Respondent discriminated against Complainant based upon her citizenship status and denied that Respondent committed document abuse by refusing to accept valid work authorization documents. Amended Answer ¶¶ 3, 5. Respondent submitted that Complainant was terminated for violating

company policy by providing false employment-related information. Id. ¶¶ 5, 16.

On April 10, 2002, Respondent submitted an affidavit from Christopher Tisdale, a paralegal in Respondent's legal department, which discussed in detail the reasons the Complaint had not been answered in a timely manner. Ten exhibits were attached to the affidavit: (1) Complainant's Address/Name Change form, (2) Complainant's Employment Application, (3) Complainant's Form I-9, (4) Respondent's Associate Handbook signed by Complainant in 1996, (5) Respondent's Associate Handbook signed by Complainant in 2000, (6) a decision of an administrative law judge for the California Unemployment Insurance Appeals Board discussing an employee of Respondent who used a fraudulent social security number, (7) a letter to Complainant from OSC dismissing her Charge, (8) a certified mail receipt, (9) the original answer to the Complaint, and (10) a letter from Christopher Tisdale to me, copied to all parties.

I heard from both parties at the prehearing conference on April 9, 2002. Because of the strong judicial policy to decide cases on the merits, I set aside the entry of default and accepted Respondent's Amended Answer. Order Setting Aside Entry of Default and Accepting Respondent's Amended Answer, Apr. 11, 2002.

On July 11, 2002, Complainant sent a letter requesting that I issue subpoenas for Laura Sanchez, Judith Tobia, and Respondent's Personnel Officer to attend the hearing, that was not yet scheduled. The letter did not request any subpoenas for discovery purposes. Because a hearing had not yet been scheduled, I deferred ruling on the application for subpoenas.

Respondent filed its Motion for Summary Decision on August 22, 2002, which was supported by the Christopher Tisdale affidavit previously filed with the Court. The Motion for Summary Decision asserts that Complainant was fired for violating its consistently-enforced honesty policy, which is a legitimate nondiscriminatory reason for termination.

A telephone prehearing conference was held on September 17, 2002, primarily to discuss Respondent's Motion for Summary Decision. I ordered Respondent to supplement its Motion for Summary Decision with further information because it appeared that the Tisdale affidavit contained several statements not based upon personal knowledge. Prehearing Conference Transcript (PHC Tr.) at 21-22, 35-36. At the end of the conference, both parties expressed an interest in pursuing settlement discussions. PHC Tr. at 48. I allowed Respondent until September 20, 2002, to contact Complainant to discuss whether settlement was possible. Prehearing Conference Report and Order Setting Summary Decision Amended Filing Dates, Sept. 18, 2002, at 2. If the parties could not reach a settlement, I ordered Respondent to supplement its Motion for Summary Decision by October 4, 2002, and Complainant to respond to the Motion by October 25, 2002. Id.

On October 11, 2002, Respondent filed a Motion for Stay of Order Setting Summary Decision Amended Filing Dates, which requested that filing of supplemental papers to the Motion for Summary Decision be stayed pending the anticipated execution of a settlement agreement.

I granted Respondent's motion, vacated all procedural dates, and stayed the action. Order Granting Respondent's Motion to Stay Order Setting Summary Decision Amended Filing Dates, Oct. 17, 2002. I gave the parties until November 7, 2002, to submit a signed settlement agreement and joint motion to dismiss, or a status report explaining what steps had been taken to complete the settlement and why settlement had not been finalized. Id.

On November 8, 2002, I received a letter from Respondent's counsel, also served on Complainant, stating that Complainant had verbally agreed to a settlement on October 3, 2002, but Respondent had been unable to communicate with her since that time. Respondent requested until November 22, 2002, to prepare the supplemental papers for its Motion for Summary Decision. Complainant also submitted a letter to me. This letter, dated October 24, 2002, was originally rejected because she had not served Respondent, but was later served on Respondent, and I read the letter. In the letter, Complainant admits that she verbally agreed to the settlement and discusses reasons why she was reluctant to accept the settlement.

Thus, on November 19, 2002, I issued an Order directing Respondent to file its supplement to its Motion for Summary Decision by December 9, 2002, and directing Complainant to file her response by December 23, 2002. Order Setting New Procedural Dates, Nov. 19, 2002.

On December 9, 2002, Respondent filed two affidavits to supplement its Motion for Summary Decision: Mark Okey, Respondent's corporate counsel, and Diana Janis, a manager with Respondent's Human Resource Information Systems.

Complainant filed her Response to Motion for Summary Decision (C's Response) on December 23, 2002, with an attached affidavit by Complainant dated December 21, 2002. Complainant argues that Respondent's Motion for Summary Decision is both procedurally and substantively deficient. Procedurally, Complainant contends that the affiants supporting the motion lack personal knowledge of the matters testified to in the affidavits and that Respondent has failed to attach documentary records of events in the testimony of the affiants. C's Response at 1-6. Substantively, she argues that the sole reason she was terminated was because Respondent engaged in citizenship status discrimination and document abuse. Id. at 6-9. Complainant attached to her response a Spanish-version of a pamphlet she received from OSC.

On January 2, 2003, I ordered OSC to provide the Court and parties with an English version of the pamphlet attached to Complainant's Response, by January 16, 2003. Order Requesting Documents from Office of Special Counsel, Jan. 2, 2003. On January 13, 2003, OSC sent the Spanish version of Complainant's pamphlet; however, OSC stated that they no longer possessed the English version of the pamphlet. OSC provided a copy of a newer English edition of the pamphlet and translated one of the Spanish sentences in question that was no longer part of the new edition of the pamphlet. OSC Letter of January 10, 2003, Responding to Judge Barton's Order (OSC Letter, Jan. 10, 2003).

On January 6, 2003, Respondent's counsel, Jeffrey Swiatek, Esq., telephoned the Court to ask if he could supplement Respondent's Motion for Summary Decision with a certified translation of Complainant's narrative attached to her Charge, which was written in Spanish. The Court informed him that Respondent could submit the documentation as a supplement to its Motion for Summary Decision.

On January 9, 2003, I issued an Order Requiring Respondent to Provide Further Documents Regarding Its Motion for Summary Decision. I ordered Respondent to provide a copy of the Form I-9 signed by Complainant when she was hired and a copy of Complainant's letter of resignation referenced in paragraph fifteen of her affidavit.

On January 21, 2003, Respondent submitted a supplemental affidavit from Mark Okey. Attached to Mr. Okey's affidavit was Complainant's letter of resignation and Complainant's Form I-9 dated March 6, 2000. Additionally, Respondent submitted a translated version of Complainant's narrative provided to OSC with her Charge. In the cover letter, counsel for Respondent misrepresents the facts when he states that my law clerk "requested that [he] provide a copy of the translation." This mischaracterizes the conversation between Mr. Swiatek and my law clerk. Mr. Swiatek inquired whether he could send a copy of the translation to the Court to supplement Respondent's Motion for Summary Decision; this tribunal never requested a copy of the translation.

On January 22, 2003, I issued an Order Striking Respondent's Supplemental Affidavit because Respondent did not follow my Order of January 9, 2003, and Mr. Okey's affidavit was replete with legal argument in the form of an affidavit. Thus, Mr. Okey's affidavit was not considered when ruling upon this motion. Additionally, Respondent's translation of Complainant's narrative attached to her Charge to OSC was also not considered when ruling upon this motion.

Although I am ruling for Respondent on the merits, from the very beginning of this case (when a Notice of Default was entered) to the present, neither Respondent nor its counsel have been diligent in complying with the OCAHO rules of practice or my orders.

III. STANDARDS GOVERNING MOTIONS FOR SUMMARY DECISION

The OCAHO Rules of Practice and Procedure (OCAHO Rules) permit me to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." See 28 C.F.R. § 68.38(c) (2002). OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure (FRCP) 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, FRCP 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO Rules. See United States v. Aid Maint. Co., Inc., 6 OCAHO no. 893, 810, 813 (1996), 1996 WL 735954, at *3; United States v. Tri Component Prod. Corp., 5 OCAHO no. 821, 765, 767

(1995), 1995 WL 813122, at *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the case are deemed "material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, an issue of material fact must be "genuine." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Thus, disputed facts that are not material do not preclude granting summary judgment. There are no genuine issues of fact for trial when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. at 587. In deciding whether a genuine issue of material fact exists, 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." Id.

The party requesting summary decision bears the initial burden of asserting the absence of genuine issues of material fact by "identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting in part FRCP 56(c)). After the moving party has met its initial burden, the nonmoving party must then come forward with "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587.

Because this case arises under the jurisdiction of the United States Ninth Circuit Court of Appeals (Ninth Circuit), the case law of that Circuit is authoritative in this case. Under Ninth Circuit law, pro se litigants in the ordinary civil case are not treated more favorably than parties with attorneys of record. Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir. 1986) (granting summary judgment against a pro se litigant and holding that the district court did not have a duty to tell a pro se litigant of the measures he should have taken to oppose a motion for summary judgment); Karlozian v. Clovis Unified Sch. Dist., 8 Fed. Appx. 835, 836, 2001 WL 488880, at *1 (9th Cir.) (unpublished) (holding that a pro se litigant in an employment discrimination case should not be treated more favorably than a party with an attorney).

IV. ANALYSIS

A. Factual Findings

For purposes of summary judgment, I must view all facts and reasonable inferences in favor of Complainant, pursuant to the law cited above. The facts recited below are based either on Complainant's own admissions in her Complaint (and her Charge filed with OSC attached to her Complaint) or her affidavit, or the uncontested statements in the affidavits submitted by Respondent. For the purpose of deciding this motion, I have accepted the truth of certain statements in Complainant's affidavit, even though these clearly are based on hearsay and could not be within her personal knowledge. See, e.g., C's Response, attached affidavit (Simon Affidavit) ¶¶ 19-21.

Viewing all facts and drawing all inferences in favor of Complainant, for the purpose of adjudicating the present motion, I conclude that the relevant facts are as follows:

1. Complainant began work at Respondent's Santa Ana plant in April 1996. She was transferred to Respondent's Newark facility in February 2000. Simon Affidavit ¶ 2.

2. Complainant was authorized to work on March 29, 2001, and obtained LPR status on October 19, 2001. Thus, at the time Complainant was hired in 1996, she was a Mexican citizen who was without legal status in the United States. Complaint, Part I ¶ 4; Charge ¶ 9.

3. On her employment application and Form I-9, Complainant provided a social security number not assigned to her, stated she was an LPR, and gave an alien number not assigned to her. See PHC Tr. at 30 (Complainant's statement that she used a false Social Security Number); Charge ¶ 5 (new alien number), Tisdale Affidavit, Exhibit 1 (new social security number), Exhibits 2-3 (previous social security and alien numbers).

4. On March 25, 1996, Complainant signed an employment application which stated that she understood that "falsification, omission or misstatement of information may result in refusal to hire, or if hired, dismissal from employment" and that she would not hold Respondent liable if her employment was "terminated due to falsity of the statements and answers in this application form." Tisdale Affidavit ¶ 3, Exhibit 2. The employment application also stated just above the signature line, in capital letters, as follows: "I HEREBY ACKNOWLEDGE THAT I HAVE READ THE ABOVE STATEMENT, UNDERSTAND IT, AND THAT ALL INFORMATION I HAVE SUBMITTED IS FACTUAL, CORRECT AND SUBJECT TO COMPLETE VERIFICATION." Id.

5. Complainant signed Respondent's handbook on October 9, 1996, and March 6, 2000, which stated that failure to complete all employment documents and records accurately could lead to "disciplinary action up to and including termination." Tisdale Affidavit ¶ 6, Exhibits 4-5.

6. Complainant worked for Respondent for five years with false papers (from April 1996 through March 2001). Charge ¶ 9, Simon Affidavit ¶¶ 2, 5.

7. In the year 2000, Respondent began downsizing, closing branches, consolidating, and laying off employees. The Newark branch, where Complainant worked, closed in August 2001. Simon Affidavit ¶ 3, Exhibit 1.

8. On March 29, 2001, Complainant, a citizen of Mexico, completed legalization of her immigration and social security papers. Id. at ¶ 5, Complaint, Part I ¶ 4. Complaint, Part I ¶ 4.

9. About the time Complainant legalized her immigration papers, she received a pamphlet from OSC, written in Spanish, entitled You Have the Right to Work. Simon Affidavit ¶ 5, Exhibit 2, OSC Letter, Jan. 10, 2003, attachments.

10. In April 2001, Complainant completed a name/address change form on which she notified Respondent that her name had changed due to marriage and included a new social security number, SSN2, that was different than a social security number she had given in the past, SSN1. Simon Affidavit ¶ 6, Motion for Summary Decision at 1-2, Tisdale Affidavit ¶ 2, Exhibits 1-2. At that time, Respondent's employee asked to see Complainant's social security card, which stated "valid for work only with INS authorization." The employee then asked to see Complainant's INS employment authorization. Simon Affidavit ¶ 6.

11. About two weeks later, through the course of administrative processing, Respondent noticed that Complainant claimed a new social security number and Respondent requested documentation explaining why the two social security numbers Complainant provided to Respondent were different. Id. at ¶ 7, Motion for Summary Decision at 2.

12. Complainant never stated, admitted, or implied to anyone at Respondent's company that she had given the company a false social security number at the time she was hired. Simon Affidavit ¶¶ 8, 17.

13. Complainant gave Respondent a copy of a notice from the Social Security Administration (SSA) entitled "Notice to Third Party of Social Security Number Assignments" dated April 27, 2001, confirming that she was validly assigned social security number SSN2. Id. at ¶ 9, Exhibit 4.

14. On May 1, 2001, Respondent rejected this notice as a satisfactory explanation as to why Complainant had used two social security numbers and again asked Complainant to seek a letter from the SSA about why her number had changed. Id. at ¶ 11. A human resource employee for Respondent wrote instructions to Complainant about what documentation was needed to rectify the discrepancy. Id., Exhibit 5.

15. Complainant gave Respondent another notice from the SSA that confirmed that Complainant received SSN2 in March 2001, and stated that the SSA had not assigned Complainant any other social security number. Simon Affidavit ¶ 12, Exhibit 6.

16. On May 3, 2001, Judith Tobia of Respondent's Human Resource Department told Complainant that she was suspended for seventy-two hours, during which time she must receive explanatory documentation from the SSA or face termination. Id. at ¶ 13.

17. Complainant was unable to get the documentation from the SSA, and on either May 3 or May 4, 2001, Complainant signed a letter of resignation, informing Respondent that

she was signing the letter to avoid having her employment record show that she was terminated for using false papers. Id. at ¶ 14-15 (stating that she signed the letter of termination on May 4, 2001), Charge ¶¶ 6, 9, Complaint, Part III ¶ 4 (stating that she was fired on May 3, 2001). For purposes of this motion, it is of no consequence whether Complainant's employment with Respondent ended on May 3 or May 4, 2001.

18. During Complainant's employment with Respondent, her work performance had been exemplary and without disciplinary action of any kind. Simon Affidavit ¶ 2.

19. Mark Okey, corporate counsel for Respondent, was never present during any conversations between Respondent's Human Resource staff and Complainant. Id. at ¶ 16.

20. Laura Sanchez is an employee of Respondent who used a false social security number when she was hired. Simon Affidavit ¶ 19. When she obtained a legal social security number, she notified Respondent that she had provided a false social security number upon hiring. Id., Affidavit of Mark Okey (Okey Affidavit) ¶ 4. After a brief suspension, Laura Sanchez remained with the company. Simon Affidavit ¶ 19.

21. Laura Sanchez is a Mexican citizen. PHC Tr. at 26-30 (statements by Complainant).

22. From February 1995, through May 2002, Respondent terminated 283 employees for providing false information on a job application and/or other work documents. Affidavit of Diana Janis (Janis Affidavit) ¶ 4.

23. In 2001, the year Complainant was fired, Respondent terminated thirty-seven employees for providing false information on employment documents. Specifically, twelve were terminated for providing a false social security number. Janis Affidavit ¶ 4.

B. Legal Conclusions

After establishing the material facts in the case, the remaining legal issues are whether Respondent has met its burden of demonstrating that there are no genuine issues of material fact in dispute and whether it is entitled to judgment as a matter of law. 28 C.F.R. § 68.38 (c) (2002). I will examine both the procedural and substantive sufficiency of Respondent's Motion for Summary Decision.

1. Procedural Sufficiency

Complainant argues that the Motion for Summary Decision is procedurally insufficient for two reasons. First, Complainant argues that Respondent's Motion for Summary Decision is supported by affidavits that cannot be accepted because the affiants do not have personal knowledge

of the events testified to therein. C's Response at 1-2. Specifically, Complainant argues that the affidavit of Mark Okey is "replete with inadmissible hearsay and statements which patently cannot be within his personal knowledge." Id. at 2. Complainant also attacks the affidavits of Christopher Tisdale and Diana Janis, and argues that their testimony is not based upon personal knowledge. Id. at 3-5.

Second, Complainant argues that Respondent's Motion for Summary Decision is procedurally insufficient because Respondent failed to attach documentary records or evidence of the matters referenced in the affidavits, such as the employment records of those who were terminated. Id. at 5-6. Complainant fails to support her assertion with citation of any authority and, in fact, her position is contrary to the case law as decided by the Ninth Circuit.

a. Contents of Affidavits

(1) Inadmissible Hearsay

A motion for summary decision does not have to be supported by affidavits. 28 C.F.R. §§ 68.38(a), 68.38(c) (2002). However, any affidavits supporting a motion for summary decision must include facts as would be admissible in a proceeding subject to 5 U.S.C. sections 556 and 557. See 28 C.F.R. § 68.38(b) (2002). Oral and documentary evidence may be received unless the evidence is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. § 556(d) (2002). "All relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence." 28 C.F.R. § 68.40(b) (2002).

With respect to Complainant's argument that the affidavits contain inadmissible hearsay, the law cited above allows evidence admissible in an administrative proceeding under 5 U.S.C. sections 556 and 557, to be considered in deciding a summary decision motion. Under 5 U.S.C. section 556, evidence may be admitted unless it is irrelevant, immaterial, or unduly repetitious. Furthermore, under the OCAHO Rules, all relevant and reliable information is generally admissible. 28 C.F.R. § 68.40(b) (2002). The testimony of Respondent's three affiants is neither irrelevant, immaterial, or unduly repetitious. I have not adopted as fact, for purposes of this motion, the portions of Respondent's affidavits that are disputed by Complainant, or that are unreliable hearsay, such as conversations between Complainant and a third party. However, an entire affidavit should not be stricken merely because a portion of the affidavit contains admissible hearsay. Frederick v. City of Portland, 98 F.3d 1345, 1996 WL 583641, at *2 (9th Cir.) (unpublished) (upholding the district court's decision to strike portions of an affidavit that were inadmissible hearsay).

(2) Personal Knowledge

Complainant argues that Mark Okey, Diana Janis, and Christopher Tisdale lack the personal knowledge necessary to testify to the facts in their respective affidavits. On September 18, 2002, I ordered Respondent to supplement its Motion for Summary Decision with an affidavit or affidavits from individuals with personal knowledge of the events alleged in the Motion because portions of Christopher Tisdale's affidavit, initially submitted to support Respondent's motion, contained several statements that were not shown to be within his personal knowledge on the face of the affidavit. Prehearing Conference Report and Order Setting Amended Summary Decision Filing Dates, Sept. 18, 2002, at 2. Thus, on December 9, 2002, Respondent submitted the affidavits of Mr. Okey and Ms. Janis to supplement its Motion. Complainant now argues that none of the affiants possess personal knowledge and their affidavits should not be accepted to support the Motion.

Rule 56(e) of the Federal Rules of Civil Procedure requires that "affidavits shall be made on personal knowledge". Fed. R. Civ. P. 56(e). By contrast, the OCAHO Rules require that affidavits supporting a motion for summary decision show that the affiant is competent to testify to the matters stated therein. 28 C.F.R. § 68.38(b) (2002). Competence to testify is a different standard than personal knowledge; however, because I ordered Respondent to provide affidavits from individuals with personal knowledge, I will examine whether Respondent's three affidavits are supported by personal knowledge. Case law interpreting FRCP 56(e) requiring affidavits to be made on personal knowledge will guide my analysis. As shown below, the Okey and Janis affidavits meet even the more stringent standards required by the Federal Rule of Civil Procedure and certainly meet the competence standard required by the OCAHO rules of practice.

Personal knowledge and competence to testify may be inferred from the affidavits themselves. Barthelemy v. Air Lines Pilot Assoc., 897 F.2d 999, 1018 (9th Cir. 1990). Personal knowledge may be presumed by an affiant's position of employment and a statement in the affidavit that the affiant possesses personal knowledge of the testimonial content. Id. (inferring personal knowledge by position of employment), Sheet Metal Workers' Int'l Assoc. Local Union No. 359 v. Madison Indus., Inc. of Ariz., 84 F.3d 1186, 1193 (9th Cir. 1996) (holding that the lower court abused its discretion concluding that an affiant lacked personal knowledge when the affiant stated he had personal knowledge and he was employed in a position to have such knowledge).

Company and industry practice may be inferred by the affiant's position and duration of employment. In re Kaypro, 218 F.3d 1070, 1075 (9th Cir. 2000) (holding that a credit manager's testimony of his firm's practices and industry practices was within his personal knowledge). Personal knowledge may come from review of files and records. N.H. Ins. Co. v. Blaze Constr., Inc., 28 F.3d 107, 1994 WL 274032, at *1 (9th Cir.) (unpublished) (holding that a manager could authenticate business records), Wash. Cent. R.R. Co., Inc. v. Nat'l Mediation Bd., 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) ("personal knowledge . . . is not strictly limited to activities in which the declarant has personally participated....[b]ased on personal knowledge of the files and records, a declarant may testify to acts that she or he did not personally observe but which are described in the record, including requests or statements by third persons made to someone other than the declarant.").

Mark Okey has been counsel for Respondent since 1994, and since 1998, has served as Director and Senior Corporate Counsel. Okey Affidavit ¶ 2. Mr. Okey states in his affidavit that he regularly provides "advice and direction to all Company branch facilities with regard to personnel issues, including terminations from employment." Id. Further, Mr. Okey testifies that his testimony is based upon his "review of Company business records as well as [his] experience as Director and Senior Corporate Counsel." Id. at ¶ 3. His affidavit contains testimony about the personnel practices of Respondent, of which he is familiar as corporate counsel. Additionally, Mr. Okey's affidavit authenticates paragraphs two through ten of Christopher Tisdale's affidavit. Id. Mr. Okey established personal knowledge by acknowledging that the basis of his testimony is his experience as Director and Senior Corporate Counsel and his review of company records. Both of these sources of personal knowledge are legally acceptable and in accordance with statutory and regulatory authority, as well as my Orders, as cited above.

Diana Janis was hired by Respondent in 1995, as Senior Manager of Human Resource Administration, and now serves in the position of Director HR Information Systems and Compliance. Janis Affidavit ¶ 1. Ms. Janis processes "information and documentation relating to hiring and termination from employment, as well as custody and management of other employment records, for all Company employees and branch locations." Id. Ms. Janis's affidavit contains testimony about employment records and personnel policy. She states that her testimony is based on her personal experience and her review of Company business records. Id. at ¶¶ 3-4. Again, both of these sources of personal knowledge are legally adequate and in conformity with statutory and regulatory authority, as well as my Orders, as cited above.

Christopher Tisdale had been a paralegal in Respondent's Legal Services Department for eighteen months at the time of the affidavit. Tisdale Affidavit ¶ 1. Tisdale neither gave a description of his job function nor stated his basis for personal knowledge or competency to testify to most of the events stated in paragraphs two through ten of the affidavit. These events include Complainant's history with the company, the circumstances surrounding Complainant's termination, and information about another employee fired for using a false social security number. However, this information need not be stricken because, as mentioned above, Mr. Okey incorporated these portions of Tisdale's affidavit into his testimony, confirmed their accuracy, and based his personal knowledge on review of company records and his experience as Director and Senior Corporate counsel. Okey Affidavit ¶ 3.

Thus, the testimony contained in the affidavits of Mark Okey, Diana Janis, and Christopher Tisdale is relevant, material, and not unduly repetitious. The statements contained in the affidavits of Mark Okey, Diana Janis, and Christopher Tisdale are supported by competent testimony based upon personal knowledge. Furthermore, for purposes of this motion, I have viewed the facts in the light most favorable to Complainant and have drawn all reasonable inferences in her favor. The only testimony accepted as fact from the above three affidavits is the uncontradicted testimony of Respondent's affiants.

b. Documentary Evidence

Complainant also argues that Respondent's motion is procedurally insufficient because Respondent failed to attach documentary evidence of all matters testified to in the affidavits. In this case, summary decision may be decided on the pleadings, and supporting documentation is not required for a motion for summary decision to be procedurally sufficient. 28 C.F.R. § 28.38(c) (2002). Indeed, neither the OCAHO Rules of Practice nor the FRCP require that documentary evidence be submitted in support of a summary judgment motion. A party may submit a motion for summary decision without supporting affidavits or documents. Id.

However, Respondent did provide documentary evidence to support the affidavit testimony. Christopher Tisdale attached ten exhibits to his affidavit, including Complainant's Address/Name Change Form, Complainant's Employment Application, Complainant's Form I-9, and Respondent's Associate Handbook signed by Complainant in 1996 and 2000. The procedural and evidentiary requirements for a motion for summary decision do not require that Respondent attach all documents or records referenced in the affidavit. If Complainant wanted Respondent to produce any further documentation, she had a number of discovery techniques available to her, such as requests for production of documents and subpoenas duces tecum. Complainant did not submit any subpoenas requesting witnesses to appear for depositions; and, to date, the Court is not aware that Complainant engaged in any discovery. Complainant's contention that Respondent's Motion for Summary Decision is procedurally improper because it does not attach all documents mentioned in the affidavits is without merit. Therefore, Respondent's Motion for Summary Decision is procedurally sufficient.

2. Legal Sufficiency

Because Respondent moved for summary decision, it has the burden of establishing that there is no genuine issue as to any material fact and is entitled to summary decision as a matter of law. 28 C.F.R. § 68.38(c) (2002). Complainant alleges that Respondent engaged in citizenship status discrimination and document abuse in violation of 8 U.S.C. section 1324b. Complaint, Part III ¶ 2, Part V ¶ 3.

a. Citizenship Status Discrimination

An employer may not terminate a "protected individual" because of the individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B) (2002). In employment discrimination cases, the complainant must establish a prima facie case of discrimination; then the respondent must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and, if the respondent does so, the complainant must show by a preponderance of the evidence that the respondent's reason is untrue and the respondent intentionally discriminated against the complainant. See Wisniewski v. Douglas County Sch. Dist., 1 OCAHO no. 29, 153, 156-57 (1988), see generally Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142-43 (2000).

(1) Prima Facie Case

To demonstrate a prima facie case of citizenship status discrimination, Complainant must allege and show that: (1) she belongs to a class protected by 8 U.S.C. section 1324b, (2) she suffered an adverse employment action, and (3) there was disparate treatment from which the Court may infer a causal relationship between her protected status and the adverse employment action, Wisniewski 1 OCAHO at 157 (1988), citing generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Complainant has met the first two prongs required to demonstrate a prima facie case. She has established that she was an LPR at the time of the employment action, which is a protected class under 8 U.S.C. section 1324b. Complaint, Part I ¶ 4; 8 U.S.C. § 1324b(a)(3)(B) (2002). Complainant has also established that she suffered an adverse employment action by signing a resignation letter under protest because termination by Respondent was imminent. Simon Affidavit ¶ 15.

Complainant has failed to allege or show a causal connection between her protected citizenship status and the adverse employment action, which is required to establish a prima facie case. In fact, in her Complaint, she acknowledges that other employees in her situation with different citizenship were also fired. Complaint, Part III ¶ 6. Additionally, Laura Sanchez is the only example of an employee who used a false social security number and remained with Respondent that Complainant has produced. Complainant's own evidence negates any inference or finding of discrimination on the basis of citizenship status. Sanchez is a Mexican citizen and an LPR, just as Complainant is a Mexican citizen and an LPR. Thus, an employee within Complainant's protected class remained with Respondent's company after engaging in the same conduct as Complainant. This is not disparate treatment. Evidence of disparate treatment would be retaining an employee who was a citizen of a country different than Complainant, such as retaining a native or naturalized United States citizen, while dismissing a Mexican citizen or an LPR.

In this case, Respondent did not apply its honesty policy with absolute uniformity; however there is no evidence to suggest discriminatory motive. In fact, Respondent's human resource employee attempted to assist Complainant to obtain the documentation she needed from the SSA to avoid termination by writing down instructions for her. This action is not commensurate with an intent to terminate Complainant on the basis of her citizenship status.

Complainant also points to Respondent's downsizing and plant closings to support her claim of disparate treatment. However, Complainant has not produced any evidence that Respondent targeted non-citizens when downsizing.

Complainant has failed to establish a prima facie case of employment discrimination on the basis of citizenship status.

(2) Legitimate Nondiscriminatory Reason

Even if Complainant had been able to demonstrate a prima facie case of employment discrimination on the basis of citizenship status, Respondent has demonstrated a legitimate nondiscriminatory reason for Complainant's termination.

Terminating an employee for falsifying employment information is a legitimate nondiscriminatory reason. Garcia v. Int'l Rehab. Assoc., 29 F.3d 631, 1994 WL 386340, at *2 (9th Cir.) (unpublished) (terminating an employee for misrepresenting his educational background on an employment application is a nondiscriminatory reason), Davis v. George May Int'l Co., 12 F.3d 1106, 1993 WL 493704, at *2 (9th Cir.) (unpublished) (lying on an employment application is a legitimate nondiscriminatory reason); Aguirre v. KDI American Prod., Inc., 6 OCAHO at 661 (1996) (terminating and refusing to rehire an employee who engages in dishonest conduct, including presenting false employment eligibility documents or making a false statement on the employment application and I-9 form, does not violate section 1324b). Routine dismissal for employment-related dishonesty supports an employer's legitimate nondiscriminatory reason for termination. Garcia, 1994 WL 386340, at *2, Aguirre 6 OCAHO at 661.

From February 1995, through May 2002, Respondent terminated 283 employees for providing false information on a job application and/or other work documents. Additionally, in 2001, Respondent terminated thirty-seven employees for providing false employment-related information, twelve of whom specifically were terminated for fraudulently using a social security number. Christopher Tisdale stated in his affidavit that Respondent has a consistently applied policy of terminating employees who fraudulently use social security numbers. Tisdale Affidavit ¶ 8. Diana Janis stated in her affidavit that she was not aware of any instance when Respondent did not terminate an employee after discovering their fraudulent use of a social security number. Janis Affidavit ¶ 3. Mark Okey stated in his affidavit that Ms. Sanchez is the only exception to the policy of terminating employees for fraudulently using social security numbers on employment documents. Okey Affidavit ¶ 3. Furthermore, Respondent put Complainant on notice of its honesty policy on the employment application and the employee handbook, both of which stated that falsification of employment information could result in termination. Complainant signed both the employment application and the employee handbook.

Respondent allowed Complainant repeated opportunities to explain the discrepancy between the social security number she gave upon hire, and the new social security number that she provided on her name/address change form. When Complainant could not provide a plausible explanation and the SSA unequivocally stated that she had not been assigned any other social security number, Respondent logically inferred that Complainant had provided a social security number upon hire that did not validly belong to her. By committing dishonest acts, including fraudulently providing a social security number that was not assigned to her, Complainant violated the terms of her employment application, Respondent's employee handbook, Respondent's company honesty policy, and the law of the United States.

Respondent terminated Complainant in accordance with its consistent policy of dismissing employees who provide fraudulent employment-related information to the company, which is a legitimate, nondiscriminatory reason for termination.

(3) Pretext

Just as Complainant failed to state a prima facie case by producing no evidence that similarly situated employees of other citizenship or citizenship status were treated more favorably, Complainant has not produced any evidence to establish that Respondent's legitimate nondiscriminatory reason is pretextual for illegal discrimination. Complainant suggests that because she never stated or admitted to anyone at Respondent's company that she was not authorized to work or had fraudulently used a social security number (Factual Findings (F.F.), infra ¶ 12), Respondent could not have known she lacked work authorization and, therefore, the expressed reason for her discharge was pretextual.

However, given that Complainant presented two different social security numbers to Respondent, and failed adequately to explain the discrepancy, Respondent could reasonably conclude that Complainant had fraudulently presented a social security number that was not assigned to her. Moreover, one of the exhibits attached to Complainant's affidavit is a May 4, 2001, letter from the SSA, in which the District Manager for the SSA represents that they had only assigned her one number, specifically social security number SSN2. F.F., infra ¶ 15. One can reasonably conclude from this letter that the social security number SSN1 presented by Complainant when she first applied for work with Respondent was not a number assigned by the SSA to Complainant. Further, in her Charge filed with OSC, Complainant has admitted as much. Respondent reasonably and correctly concluded that Complainant lied both on her employment application and her Form I-9. Complainant's failure to admit to Respondent that she fraudulently presented a social security number that was not assigned to her, see C's Response at 6, Simon Affidavit ¶ 17, provides further justification for Respondent's unwillingness to condone her actions. Finally, the fact that Respondent began downsizing, closing branches, consolidating, and laying off employees, including closing one of the locations where Complainant previously worked (F.F., infra ¶ 7), does not demonstrate that Respondent's asserted basis for terminating Complainant was pretextual. Complainant has produced no evidence to show that the downsizing was the reason she was terminated or that lawful employees who were Mexican citizens were treated in a disparate manner.

I conclude that Complainant has not presented evidence of a prima facie case of citizenship status discrimination. Respondent has established that Complainant was terminated pursuant to a consistent policy applied to employees who provide fraudulent employment-related information.

Because Respondent has met its burden by demonstrating that there is no genuine issue as to any material fact with respect to Complainant's citizenship status discrimination claim, Respondent is entitled to summary decision on Complainant's citizenship status allegation.

b. Document Abuse

To establish a case of document abuse in violation of section 1324b(a)(6), 8 U.S.C. § 1324b(a)(6) (2002), a complainant must show that, in connection with the employment verification process, an employer has requested from the employee more or different documents than those required by the employment eligibility provisions established by section 1324a, for the purpose or with the intent to discriminate against the employee on account of the employee's national origin or citizenship status. Mendez v. Sugar Creek Packing Co., 9 OCAHO no. 1085, at 17 (2002). The employee also may establish a violation of section 1324b(a)(6) by showing that an employer refused to honor a document tendered by the employee that on its face reasonably appears to be genuine, for the purpose or with the intent of discriminating against the employee on account of the employee's national origin or citizenship status. Id.

The legislative history of 8 U.S.C. section 1324b(a)(6) reveals that Congress intended to permit "an employer who has constructive knowledge that an alien is unauthorized to work" to request further documents without the inference of intentional discrimination. 142 Cong. Rec. S4401-01, S4411 (daily ed. Apr. 30, 1996) (statement of Sen. Simpson).

Complainant has failed to allege or show that Respondent requested additional documentation with the purpose or intent of discriminating against her. As previously noted, in the Complaint Complainant specifically did not allege that other workers of different citizenship status were treated differently. Complaint, Part III ¶ 6. In Complainant's Response to the Motion for Summary Decision, she asserts that "Respondent took advantage of the non-citizens of its employees and through unlawful document abuse or other similar discriminatory artifices, accomplished a reduction in its severance obligations." C's Response at 9. This assertion does not allege or show that Respondent requested the additional documentation (explanation from the SSA) with the purpose or intent of discriminating against Complainant.

As discussed infra (Part IV(B)(2)(a)(3) and Part IV(B)(2)(b)), Respondent had constructive knowledge that Complainant was fraudulently using a social security number not assigned to her, because there was no other explanation for the two different social security numbers Complainant provided to Respondent. Requesting information from an employee to determine if he or she has violated a consistently-enforced "honesty policy" is not illegal discrimination or document abuse. This position is shared by OSC. In a letter to Complainant dismissing her Charge, OSC stated "...this Office finds you were not subjected to document abuse under the anti-discrimination provisions of the [INA], because you were not requested to produce more or different documents during the I-9 employment reverification process....In addition, there are no laws that bar a company from having an 'honesty policy' which require [sic] employees to provide truthful and accurate information on all company employment documents...." Complaint, attachment.

Further, Complainant comes to this Court with unclean hands as she is requesting redress for document abuse, when, for approximately five years, she herself knowingly and intentionally worked

without employment authorization for Respondent by fraudulently representing that she possessed a social security number assigned to her by the SSA, and that she was authorized to work. On March 25, 1995, she signed an employment application with Respondent that contained a fraudulently used social security number. Tisdale Affidavit, Exhibit 2. In the paragraph above her signature the application provides as follows: "I understand that falsification, omission or misstatement of information may result in refusal to hire, or if hired, dismissal from employment." Moreover, the following words appear in capital letters just above the signature line on the employment application: "I HEREBY ACKNOWLEDGE THAT...ALL INFORMATION I HAVE SUBMITTED IS FACTUAL, CORRECT AND SUBJECT TO COMPLETE VERIFICATION." In truth and in fact, she lied on the application by providing a social security number not assigned to her by the SSA. F.F., infra ¶ 4.

On March 6, 2000, Complainant signed a Form I-9 under penalty of perjury. Tisdale Affidavit, Exhibit 3. On the Form I-9 she stated that she was an LPR, even though in her Complaint she acknowledges that she did not become an LPR until March 2001. Complaint, Part I ¶ 4, F.F., infra ¶ 8. On the Form I-9, she fraudulently provided a social security number and LPR Alien Number that did not belong to her. Tisdale Affidavit, Exhibit 3 (the I-9 form lists the alien registration number as A097856433), compare Charge ¶ 5 (in which Complainant lists her alien registration number as being A079353357). Above Complainant's signature is a conspicuous, bolded statement: "I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form." Id. Using fraudulent documents to secure employment is against the law. 8 U.S.C. § 1324c(a) (2002), see also 42 U.S.C. § 408(a)(7)(B) (2002) (stating that using a false social security number with the intent to deceive is a felony punishable by fine or imprisonment for up to five years).

In her Response to the Motion for Summary Decision, Complainant states that she informed Respondent of her valid social security number pursuant to "INS instructions" which stated in Spanish "neither you nor your employer will become involved in problems if you correct your papers now." C's Response at 6, Exhibit 2. In fact, Exhibit 2 was a pamphlet disseminated by OSC, not INS. OSC's official translation of the above statement is, "[y]ou and your employer will avoid problems if you present your legal papers now." OSC Letter, Jan. 10, 2003. Complainant cites this sentence as a justification for coming forward with her valid social security number, as well as an exoneration for fraudulently using employment authorization information in the past. C's Response at 6-7, Charge ¶ 9. Although I am not bound by OSC's disseminated material and its interpretation of the law, see Cruz v. Able Serv. Contractors, Inc., 6 OCAHO no. 837, 144, 152-53 (1996), from an examination of OSC's newer edition of the same pamphlet, it seems that the above statement is no longer their policy or viewpoint because it has been omitted from the pamphlet. OSC Letter, Jan. 10, 2003, attached pamphlet: You Have the Right to Work. As OSC states in its letter to Complainant dismissing her Charge, there is no law that bars a company from enforcing a consistent "honesty policy." Consistent enforcement of an honesty policy is neither citizenship status discrimination nor document abuse.

Because Complainant has failed to allege that by requesting additional documentation, Respondent possessed the purpose or intent to discriminate against her. Complainant has not established a prima facie case of document abuse. Respondent has met its burden of establishing that there is no genuine issue of material fact with respect to Complainant's document abuse claim and, accordingly, Respondent is entitled to summary decision on the document abuse claim.

V. CONCLUSION

This Order grants Respondent's Motion for Summary Decision because there are no genuine issues of material fact with respect to Complainant's claims against Respondent based on citizenship status discrimination and document abuse, and the record taken as a whole could not lead a rational trier of fact to find for Complainant. Respondent is entitled to judgment as a matter of law.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes the final agency decision. As provided by statute, no later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the 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 of transacts business. See 8. U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).