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

JENLIH JOHN HSIEH, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	)	Judge Robert L. Barton, Jr.

FINAL DECISION AND ORDER

(*September 4, 2003*)

I. INTRODUCTION

Jenlih John Hsieh (Complainant) has alleged that PMC-Sierra, Inc. (Respondent) engaged in citizenship status discrimination in violation of 8 U.S.C. section 1324b when it terminated his employment. For the reasons stated below, I conclude that Complainant has failed to show that he was discriminated against because of his citizenship status, as is required under 8 U.S.C. section 1324b(a)(1)(B).

II. BACKGROUND AND PROCEDURAL HISTORY

On April 3, 2001, Complainant filed a Charge against Respondent with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), in which he alleged that Respondent had engaged in citizenship status and national origin discrimination in violation of the Immigration and Nationality Act, specifically 8 U.S.C. section 1324b. Charge ¶¶ 4, 9. Complainant alleged that Respondent terminated him and replaced him with an H-1B visa holder from India. Id. at ¶ 9. Respondent first received notice of Complainant's Charge with OSC on April 23, 2001. Tr. 606:12-607:9; RX-PP (letter from OSC to Respondent).

Complainant filed a Charge with the Equal Employment Opportunity Commission (EEOC) on June 13, 2001. Tr. 373:12-375:11 (date stipulated by counsel).

OSC sent Complainant a letter on August 14, 2001, stating that the initial 120-day investigatory

period had expired, that OSC had not yet determined that there was reasonable cause to believe Complainant's Charge was true, and that Complainant could file a complaint with an Administrative Law Judge within ninety days of the receipt of the determination letter from OSC.

On October 23, 2001, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging that Respondent terminated Complainant in violation of 8 U.S.C. section 1324b by engaging in national origin discrimination, citizenship status discrimination, and retaliation. Compl. Part II, ¶ 2, 7, Part III ¶ 1, 3. Complainant alleged that Respondent hired H-1B workers to replace United States citizens. Id., Part II ¶ 7. Complainant sought back pay from April 3, 2001. Id., Part IV ¶ 5-6.

Respondent filed an Answer to the Complaint on December 5, 2001, in which it denied engaging in retaliation and discriminating against Complainant on the basis of his national origin or citizenship status. Answer at 2-3. Respondent asserted four affirmative defenses, namely Failure to State a Cause of Action, Good Cause, Legitimate Action, and Legitimate Nondiscriminatory Reasons. Id. at 4-5. Respondent's affirmative defenses stated that Complainant was terminated pursuant to a reduction in force (RIF), and was selected for the RIF based on his job performance. Id. 3-5. In the Third Affirmative Defense (Legitimate Action), Respondent stated "[Complainant] was not performing adequately as compared to his peers whose positions were not eliminated and therefore he was chosen for the reduction." Id. at 4. However in the Fourth Affirmative Defense (Legitimate Nondiscriminatory Reason), Respondent stated that a reduction was necessary in the position of Unix Administrator and "the business unit analyzed the relative scope and experience for the Complainant and another employee....[u]ltimately the Company decided that the Complainant was not performing up to the Company's expectations and that his scope and experience was not as extensive as the other employee." Answer at 4-5.

Respondent filed a Motion to Dismiss on September 20, 2002, which was partially granted on October 16, 2003. I granted Respondent's motion to dismiss the national origin discrimination claim because this Court does not have jurisdiction over national origin claims that are covered under section 703 of the Civil Rights Act of 1964, pursuant to 8 U.S.C. section 1324b(a)(2)(B). However, I denied Respondent's motion to dismiss with respect to Complainant's citizenship status discrimination and retaliation claims.

On January 27, 2003, Respondent filed a Motion for Summary Decision, which was denied on February 27, 2003, because genuine issues of material fact remained unresolved.

The parties filed a Joint Statement of Undisputed Material Facts (JSUMF), consisting of twenty-three stipulations, on February 25, 2003.

On March 17, 2003, the parties filed a Joint Proposed Final Prehearing Order, which included

Joint Stipulations of Fact (JSF), Joints Stipulations of Law (JSL), Joint Statement of Disputed Facts, Joint Statement of Disputed Legal Issues, each party's final witness and exhibit lists, and Complainant's requested remedies and relief.

The Final Prehearing Conference (FPC) was held on April 2, 2003. The Final Prehearing Order (FPO) was issued on June 2, 2003, which included the stipulations of fact, disputed factual issues, stipulations of law, disputed legal issues, Complainant's requested remedies and relief, Respondent's affirmative defenses, the parties' exhibit lists (indicating the exhibits admitted at the FPC and those not yet admitted), the parties' witness lists, the date and location of the hearing, and the hearing procedures. Additionally, the FPO reflected Complainant's position at the FPC that he no longer wished to pursue his retaliation claim.

The hearing, which took place in San Jose, California, began Monday, June 23, 2003, and ended on Friday, June 27, 2003. Complainant was represented by Phillip J. Griego, Esquire, and Respondent was represented by Marina C. Tsatalis, Esquire, and Jennifer K. Mathe, Esquire. Complainant called nine witnesses during his case-in-chief, including himself, and Respondent called five witnesses during its case-in-defense. Complainant's rebuttal case consisted of Complainant's testimony.

On June 27, 2003, both parties rested, and the testimonial record was complete at that time. I issued an Order Closing Evidentiary Record on July 15, 2003. The evidentiary record consists of the testimony of the witnesses, the written exhibits received in evidence, the written pleadings filed by the parties (which includes the stipulations of fact and law and any affidavits attached to pleadings), and the orders that I have issued in this case. Exhibits not received in evidence and testimony that was stricken are not part of the substantive evidentiary record.

At the close of the hearing, I gave the parties leave to file post-hearing briefs, which were to address solely the issue of liability, not Complainant's damages. Leave to file briefs on Complainant's damages would later be granted, if I found Respondent liable for a violation of 8 U.S.C. section 1324b. Both Complainant and Respondent filed post-hearing briefs on July 31, 2003. At pages vi through xx of Respondent's brief, Respondent delineated 171 questions of fact. For the reasons discussed later in this decision, this was improper and pages vi through xx of Respondent's brief are stricken. See infra Part VI.

Because the hearing is complete, the evidentiary record has been closed, and the parties' post-hearing briefs have been received, this case is ripe for decision as to the remaining unadjudicated issues. This constitutes the decision and order of the Administrative Law Judge pursuant to 28 C.F.R. section 68.52.

III. CREDIBILITY DETERMINATIONS

Complainant presented nine witnesses in its case-in-chief, including Complainant, and called Complainant as a rebuttal witness. Respondent presented five witnesses in its case-in-defense.

As trial judge, I carefully observed the witnesses as they testified, evaluated their testimony, and made credibility determinations with respect to each of the witnesses. These credibility determinations are based both on the substantive content of the witnesses' testimony and my careful observation of the demeanor of the witnesses (including pauses, facial gestures, and body language).

While I have not included specific credibility findings about every witness, I have assessed the credibility of each witness and those assessments are reflected, at least in part, by the fact findings I have made in this decision. However, with respect to certain witnesses, some specific findings regarding credibility are appropriate and included here.

John Hsieh (Complainant)

While I have credited some of Complainant's testimony, I reject his testimony that he did not receive any verbal counseling about his performance. Complainant suggests that he was an exemplary employee with absolutely no employment performance issues. See, e.g., Tr. 87:10-22, 97:8-11. He testified that neither of his supervisors, Chris Smith or Raghu Iyer, nor anyone else with Respondent ever spoke to him about improving his performance. Id. As is reflected in the findings of fact, I do not credit this portion of Complainant's testimony.

Tom Mauro

Tom Mauro is the Human Resources Manager for Respondent's U.S. Operations and his main duty is to recruit and hire employees for Respondent's U.S. offices. Mr. Mauro was generally a credible witness; however, he was not very knowledgeable about Complainant's employment performance.

Chris Smith

Prior to March 2001, Chris Smith was the Leader of the Computer Services Group for the Milpitas/Santa Clara location and was Complainant's supervisor while working for Respondent. Mr. Smith was generally a credible witness. For the most part, he answered questions genuinely and directly. Mr. Smith candidly admitted that he should have recorded Complainant's performance problems and his disciplinary meetings with Complainant. He attributed this omission to being a new manager and not fully understanding the significance and necessity of keeping a detailed account of employment issues. However, I found some of Mr. Smith's lengthy testimony about Complainant's performance issues overinflated and the parts of his testimony that I credited as believable and relevant are reflected in the findings of fact.

Felix Fong

Felix Fong worked as a contractor for Respondent during Complainant's employment. Mr. Fong was a completely incredible witness whose testimony was internally inconsistent and who was evasive and shifty, if not outright dishonest. Tr. 610. I stated during the hearing that I would give no weight to Mr. Fong's testimony. Tr. 624-25.

Ravinder Singh

Ravinder Singh is an H-1B visa holder from India and works as a Unix systems administrator for Respondent. He was hired by Respondent in July 2000, and began work in the United States in April 2001. Complainant alleges that Respondent replaced him with Mr. Singh. Mr. Singh was generally a credible witness. His testimony was candid, spontaneous, and sincere.

Geraldine Jones

Geraldine Jones is Respondent's Vice President of Human Resources. Ms. Jones was generally a credible witness who appeared to be genuinely disturbed and perplexed by the misstatements made by Respondent's counsel to the EEOC and OSC.

Greg Stazyk

Greg Stazyk is Respondent's Manager of Computer Services. While I have credited some of his testimony, there are other parts that I have rejected as not credible. On direct examination, he had obviously been "coached" and merely parroted answers to counsel's very leading questions. He was evasive in answering questions during cross-examination, Tr. 1195-96, and I had to admonish him to listen to Complainant's counsel's questions and try to answer them. Tr. 1197. I reject Mr. Stazyk's assertion that Complainant was selected for termination because of poor performance, Tr. 1160, 1181,1207, because this testimony goes against the weight of the evidence. As the findings of fact reflect, Complainant was selected for termination because of the economic conditions and the need for a RIF. Mr. Stazyk's testimony that he was not aware of Mr. Singh's proposed salary in the United States and did not compare the salaries of Hsieh and Singh when making a decision as to who should be terminated, Tr. 1185, is not believable given the company's serious economic situation that necessitated the RIF. Also, I reject his testimony that a choice was not made between Hsieh and Singh. Tr. 1180. This testimony is contrary to Respondent's statement in the Fourth Affirmative Defense and Respondent's letters to the EEOC.

Raghu Iyer

Raghu Iyer was Respondent's Senior Manager for Product Development until November 30, 2001. He testified by video conference from India, where he now works and lives. Tr. 1407. Previously, Mr. Iyer was Engineering Director for SwitchOn, a company acquired by Respondent at the end of 2000. At SwitchOn, he was Complainant's direct supervisor.

Mr. Iyer was a very credible witness. He has not worked for Respondent since November 30, 2001. Tr. 1407. He does own shares of PMC-Sierra stock worth about $5,000, Tr. 1470:19-1471:5, and indicated that he may return to PMC-Sierra at some future date, although he was not in any current discussions with Respondent. Tr. 1476, 1480. Notwithstanding, his testimony did not seem to have any particular bias. Mr. Iyer answered questions on both direct and cross-examination forthrightly. He frankly acknowledged that he believed Complainant was better qualified than Mr. Singh to do Unix systems administration work based on a comparison of their resumes. Mr. Iyer did not claim that Complainant misrepresented his skills or expertise on his resume. Tr. 1463, 1479. He also stated that he did not believe that Complainant's conduct was insubordinate. Tr. 1467. As illustrated by this testimony, he was candid, and he did not exaggerate. I find that Mr. Iyer's testimony was forthright, honest, and sincere, and consequently I have given his testimony substantial weight.

IV. FINDINGS OF FACT

A. Relationship Between SwitchOn and PMC-Sierra

SwitchOn Networks Inc. (SwitchOn) was acquired by PMC-Sierra in December 2000. Both Complainant and Ravinder Singh were originally hired by SwitchOn. The issue in this case is whether PMC-Sierra engaged in citizenship status discrimination by terminating Complainant, a U.S. citizen, while retaining Ravinder Singh, an Indian citizen and H-1B visa holder.

B. *Before Complainant's Hiring*–Ravinder Singh's Hiring

Ravinder Singh is a citizen of India and of Indian national origin. JSF No. 58. He was issued an offer letter on July 4, 2000, for the position of Unix Systems Administrator by SwitchOn Networks India Pvt. Ltd., a wholly owned subsidiary of SwitchOn Networks, Inc. JSF No. 11. He accepted and began his employment with SwitchOn in July 2000. Tr. 680:13-681:3 (Bashteen); 896:22-897:1 (Singh); 1423:4-9 (Iyer). CX-R (Mr. Singh's Employee New Hire Form).

When hired by SwitchOn, Mr. Singh had a degree in Advanced Computing from the University of Lucknow in India, which is the equivalent of a Bachelor's degree in Computer Science from a United States university, and he had a post-graduate diploma in advanced computing. JSF No. 14; Tr. 912:21-913:1 (Singh). CX-E-1 (Mr. Singh's resume).

Prior to hiring Mr. Singh, SwitchOn's recruiting efforts for a Unix systems administrator were focused in California, and SwitchOn made no effort to look for candidates in India. Tr. 675:12-21 (Bashteen); 1411:23-1412:3 (Iyer). As of May 31, 2000, SwitchOn's recruiting efforts in California were unsuccessful. Tr. 677:4-10 (Bashteen); 1411:7-11 (Iyer).

Prior to being hired by SwitchOn, Mr. Singh was interviewed three times by SwitchOn employees for at least one hour each, including his interview with Mr. Iyer, Manager of Product Development for SwitchOn, and was asked about his technical Unix knowledge. JSF No. 12; Tr. 908:12-909:5, 10-17, 912:11-16 (Singh); 1420:22-1421:5 (Iyer).

Mr. Iyer asked Mr. Singh technical questions about Unix systems and commands, network administration, his previous employment, and the kind of equipment he administered, for the purpose of making sure that Mr. Singh was capable of doing the job. Tr. 1413:15-22, 1415:16-1416:3, 16-21, 1417:1-10, 21-1418:2 (Iyer). Mr. Iyer was satisfied with Mr. Singh's responses and with his knowledge of the servers that SwitchOn had. Tr. 1416:8-15, 1417:11-18 (Iyer).

Mr. Singh told Mr. Iyer that he had been administering upwards of forty servers with his current employer, the Center for Development of Advanced Computing (CDAC). Tr.1418:25-1419:10 (Iyer). SwitchOn was looking for someone who had experience administering several machines. Tr. 1420:8-15 (Iyer). Mr. Iyer considered CDAC to be among the leading sources of candidates for Solaris and other computing knowledge. Tr. 1418:3-10, 14-24 (Iyer).

Before interviewing Mr. Singh, Mr. Iyer checked with the other individuals who had interviewed Mr. Singh and received unanimously favorable feedback. Tr. 1420:22-24, 1421:8-18, 1422:4-10 (Iyer). However, it was not until Mr. Iyer reviewed Mr. Singh's resume and interviewed him face-to-face that he made the judgment that Mr. Singh would be able to perform the functions of the Unix administrator position in Milpitas and recommended to Asghar Bashteen, Director of Product Development for SwitchOn, that Mr. Singh should be hired. Tr. 1412:8-17, 1420:16-21, 1421:8-18, 1422:12-16, 1462:1-3 (Iyer). Mr. Bashteen then made the decision to hire Singh. Tr. 680:13-15 (Bashteen).

SwitchOn intended to transfer Mr. Singh to its Milpitas, California location after he obtained an H-1B visa. JSF No. 13; JSUMF No. 5. On August 24, 2000, SwitchOn submitted the Labor Condition Application (LCA) in support of an H-1B visa petition for Mr. Singh to work in SwitchOn's Milpitas facility as a Unix systems administrator. JSF No. 15; JSUMF No. 4. The LCA, which was signed by SwitchOn's Human Resources Director Paula Stevens, listed the position as Unix Administrator, the rate of pay range between $53,000 to $98,000 per year, and the prevailing wage rate as $55,402. JSF No. 16. On September 7, 2000, the Department of Labor certified the LCA for Mr. Singh submitted in the name of SwitchOn. JSF No. 17; JSUMF No. 8.

Although SwitchOn applied for the H-1B visa on behalf of Mr. Singh to work as a Unix Systems Administrator prior to the effective date of SwitchOn's merger with PMC-Sierra, Mr. Singh's petition was still pending when SwitchOn merged with Respondent. JSF Nos. 18, 31. Mr. Singh's H-1B petition designated his salary as $70,000 per year. JSF No. 19. Mr. Singh was never employed directly by SwitchOn Networks, Inc., the California corporation. JSF No. 24. Mr. Singh's salary in Pune, India was the equivalent of $8,484.74 in the United States. JSF No. 25.

When SwitchOn hired Mr. Singh, it expected to grow aggressively and to increase its computing systems. Tr. 676:12-25 (Bashteen); 1409:2-17 (Iyer). Indeed, SwitchOn made efforts to hire an additional systems administrator in Milpitas after hiring Mr. Singh, and shortly thereafter hired Complainant. Tr. 684:19-685:7 (Bashteen).

Mr. Iyer was Mr. Singh's primary contact in the United States while Mr. Singh worked in SwitchOn's Pune, India office, and Mr. Iyer and Mr. Singh communicated via e-mail approximately once or twice a week. JSF Nos. 22-23.

C. Complainant's Hiring

In the summer of 2000, Complainant was working as a senior engineer in network and system administration at Rapid Stream, Inc., when his name was referred to SwitchOn, by Intelligence Connection, a recruitment firm. CX-I-1 (e-mail dated Aug. 17, 2003, from Intelligence Connection to Respondent's Human Resources). SwitchOn needed a Unix system administrator to maintain its Unix operating systems in Milpitas, California. Tr. 1410:1-4, 1429:7-14 (Iyer). Complainant's resume indicates that he has a Bachelor's degree in Economics and a Master's degree in Computer Science. JSF No. 4. Complainant had over ten years of experience as a Unix systems administrator. Tr. 45:16-24. In August 2000, Mr. Bashteen and Mr. Iyer interviewed Complainant and concluded that he was qualified for the job of Network Systems Manager at SwitchOn. JSF No. 7; CX-RRR; Tr. 637-639, 645-650 (Bashteen); 1461:16-1462:9 (Iyer). SwitchOn paid Intelligence Connection a fee of $25,000 for the referral. CX-LLL; CX-MMM. However, the agreement between Intelligence Connection and SwitchOn provided for a full refund of the referral fee if the employee left within the first ninety days of employment. JSF No. 5; CX-LLL.

On August 25, 2000, Complainant was offered the position of Network Systems Manager with SwitchOn Networks. JSF No. 2; JSUMF No. 2; CX-J-2 (Complainant's employment offer letter). SwitchOn agreed to pay Complainant a base salary of $100,000, plus benefits and stock options. CX-J-1-2. Complainant commenced his employment with SwitchOn on September 11, 2000. JSF No. 6. CX-Q (Complainant's Employee New Hire Form). As Network Systems Manager at SwitchOn, Complainant was responsible for supporting the computer system environment at SwitchOn's Milpitas, California operation, supporting the engineering department, installing software, managing the Unix

system server and managing the network. JSF Nos. 9-10.

Complainant's employment was at-will. Tr. 179:10-180:19 (Hsieh); 686:7-22 (Bashteen); 815:8-11 (Stevens). CX-J-1 (Complainant's employment offer letter); RX-NN-1 (SwitchOn's Employment, Confidential Information, Invention Assignment, and Arbitration Agreement, signed by Complainant).

Complainant was born in Taiwan, but is a naturalized United States citizen. JSF No. 1; Tr. 112:25-113:2, 113:13-14 (Hsieh). Both Mr. Iyer, who recommended Complainant for hire, and Mr. Bashteen, who hired Complainant, knew that he was an American citizen. Tr. 56:8-14 (Hsieh); 1427:13-1428:1 (Iyer); 690:9-19 (Bashteen). Complainant's resume (CX-I-1), and his Employment Eligibility Verification (Form I-9) (CX-L) that he completed for employment for SwitchOn, state he is a United States citizen. Mr. Iyer is of Indian national origin, who was working for SwitchOn on a H-1B visa. JSF No. 8.

D. Complainant's Employment at SwitchOn

Mr. Iyer was Complainant's direct supervisor at SwitchOn. JSF No. 21; Tr. 66:12-13 (Hsieh); 1430:16-18 (Iyer). Mr. Iyer had daily contact with Complainant at SwitchOn and noticed that there were simple problems that Complainant could not diagnose and fix on his own, that he required help from others, and that he could not understand help that was offered, such that Mr. Iyer started to think that Complainant was not as competent as he had thought. Tr. 1430:19-1431:7 (Iyer). On a number of occasions, Mr. Iyer spoke to Complainant about his performance deficiencies. Tr. 1432:12-19, 1434:10-24, 1437:11-14, 19-22 (Iyer).

By December 2000, Mr. Iyer felt that Complainant was not demonstrating all the experience and expertise that was listed on his resume, that he needed more help than anticipated, that he was not as technically competent as they would have liked him to be, and that Complainant responded negatively to requests. Tr. 1438:9-19 (Iyer). Mr. Iyer told SwitchOn's Director of Human Resources, Paula Stevens, that he had hoped that Complainant would be able to perform Unix administration work, but that Complainant had not performed in the way that Mr. Iyer had expected. Tr. 733:23-734:2, 751:12-16 (Stevens).

Christopher Smith, who was the Leader of Respondent's Computer Services Group in San Jose until Spring 2002, when he was promoted to the Manager of the Computer Services Group in San Jose, and is a United States citizen, first met Complainant in the fall of 2000 in preparation for the merger between SwitchOn and Respondent. Tr. 388:18-24, 389:2-6, 434:24-435:5 (Smith). The fourth quarter of 2000 was an extremely busy time for Mr. Smith, and his Computer Services group had more work than it could handle. Employees in his group were typically working fifty to sixty hours per week. Tr. 440:20-441:1, 441:18-24 (Smith). Because Complainant was not part of his group prior to the merger, Mr. Smith

worked with Complainant only periodically before December 31, 2000. Tr. 68:5-7 (Hsieh); 419:19-21 (Smith).

However, even before the merger, Mr. Smith had some concerns about Complainant's performance. Mr. Smith believed that Complainant had caused a major e-mail system crash because Mr. Smith checked the log files on the server and confirmed that Complainant was on the machine at the operative time. Tr. 495:22-497:5 (Smith). In December 2000, Mr. Smith spoke to Complainant about his belief that Complainant caused the major e-mail outage. Tr. 451:10-452:2 (Smith).

Greg Stazyk, Respondent's Manager of Computer Services and Mr. Smith's supervisor, became aware of the e-mail outage from the user complaints. Tr. 1157:20-1158:1, 1159:7-14, 1160:20-1161:5 (Stazyk). Because it was such a major, high-profile outage, Mr. Stazyk had his staff conduct an investigation to determine the cause of the problem, and received a report after the investigation that Complainant had been working on the machine and had installed a server in the SwitchOn office, resulting in the outage. Tr. 1161:6-1162:12 (Stazyk).

Mr. Stazyk called Mr. Smith about this incident in December 2000, told him that it was unacceptable, and directed him to tell Complainant that he was not to make any changes to the e-mail servers without prior approval from him or Mr. Smith. Tr. 531:9-532:1 (Smith); 1160:10-19, 1162:17-25, 1164:1-6 (Stazyk). Mr. Smith conveyed Mr. Stazyk's instruction to Complainant and told him that he was not to make any more unauthorized changes on the server. Tr. 452:18-21 (Smith).

Mr. Smith had little contact with Mr. Iyer before the acquisition closed. Tr. 437:3-7 (Smith). Mr. Smith did not ask about the performance of any of the employees that he was acquiring from SwitchOn prior to the close of the acquisition. Tr. 446:9-12 (Smith). Mr. Smith and Mr. Iyer understood that every SwitchOn employee would become employed by Respondent when the acquisition closed. Tr. 437:14-21, 438:18-24, 445:8-10, 693:24-694:10 (Smith); 1438:23-1439:5 (Iyer). Mr. Iyer did not provide any negative comments about Complainant's work performance to Mr. Smith prior to the merger of SwitchOn and PMC-Sierra. Tr. 420 (Smith); 1441:9-18, 1442:8-10 (Iyer).

As of December 31, 2000, SwitchOn Networks, Inc. merged with PMC-Sierra, Inc. and SwitchOn Networks, Inc. ceased to exist as a separate entity. JSF No. 27. SwitchOn employees became employees of Respondent following the acquisition. Tr. 694:11-19 (Bashteen); 817:20-25, 820:7-10 (Stevens); 1439:6-10 (Iyer). After the merger of PMC-Sierra and SwitchOn, Mr. Singh became an employee of PMC-Sierra, Inc. (India), a wholly owned subsidiary of PMC-Sierra, Inc. JSF No. 29.

E. Complainant's Employment at PMC-Sierra

Complainant started reporting to Mr. Smith upon the close of the acquisition. Tr. 182:21-24

(Hsieh); 419:14-18, 463:19-23 (Smith); 1458:1-2, 7-9 (Iyer); JSF No. 37. Following the merger of SwitchOn and PMC-Sierra, Complainant was reclassified as a Systems Administrator, but continued doing Unix systems administration. JSF Nos. 33, 36.

Mr. Smith's position during the time that he supervised Complainant was Leader of the Computer Services Group, and he reported to Greg Stazyk, Manager of Computer Services. Tr. 431:15-432:12 (Smith); 1159:15-17 (Iyer).

In early January 2001, Mayur Patel, an employee in Mr. Smith's Computer Services Group, reported to Mr. Smith that users were dissatisfied with Complainant and were coming to Mr. Patel to fix things that Complainant did, and that he was upset because he was feeling the brunt of Complainant not being able to do his job. Tr. 497:5-498:8 (Smith); 1074:23-1075:6, 1082:4-7, 1083:7-14 (Patel). Mr. Patel made the same complaint to Mr. Smith on a second occasion. Tr. 497:11-21 (Smith).

Around January 2001, Mr. Iyer conveyed his concerns about Complainant's performance to Mr. Smith, provided examples of simple tasks that Complainant was not able to perform, said that he was expecting "much better" from someone with Complainant's experience, and told Mr. Smith that he should take note and monitor Complainant's performance. Tr. 1441:9-1442:10 (Iyer).

Mr. Smith believed that he should try to correct an employee's performance issues through oral counseling before placing an employee on probation, and if oral counseling was not successful, then he would contact human resources. Tr. 368:3-25, 524:4-15 (Smith). Mr. Mauro, who was Manager of Human Resources, expected that a manager would speak with an employee with whom he was having performance issues one-on-one before involving Human Resources. Tr. 297:22-298:2 (Mauro).

On February 12, 2001, Mr. Smith and Mr. Iyer discussed Complainant's performance problems with him in a sit-down meeting in a conference room. Tr. 524:16-525:9, 25-526:2 (Smith); 1444:10-25 (Iyer). In the February 12, 2001 meeting, Mr. Iyer told Complainant that he did not feel that his employment performance matched his experience level. Tr. 526:15-527:3 (Smith); 1445:1-9 (Iyer). Mr. Iyer also told Complainant that he did not own up to his mistakes, that his reactions were not acceptable, and that he should take measures to improve. Tr. 1445:1-9 (Iyer).

In the February 12, 2001 meeting, Mr. Smith articulated his concerns to Complainant about his performance, including the issues he had observed with Complainant's troubleshooting skills. Tr. 528:1-12 (Smith). Complainant was defensive and denied that there was a problem, and he almost walked out of the room because he did not want to hear the feedback. Tr. 527:21-25 (Smith); 1445:20-1446:2 (Iyer).

Mr. Smith was a new manager at the time he supervised Complainant, having been promoted into the position of Leader of Computer Services in the summer of 2000, and did not understand the

significance of documenting his discussions with Complainant. Tr. 599:15-600:8 (Smith). Mr. Stazyk suggested that Mr. Smith put Complainant on a performance improvement plan and advised him to speak with human resources, and Mr. Smith agreed. Tr. 367:15-368:25, 534:2-17 (Smith); 1165:5-21 (Stazyk). Mr. Smith understood that Respondent had a formal probation procedure, and he planned to put Complainant on probation. Tr. 366:7-25, 386:2-12 (Smith). However, Complainant was not put on probation or a performance improvement program before the March 2001 RIF. Moreover, he was not given any written evaluation or written warning about his performance. Tr. 74:16-23 (Hsieh); 377:2-13 (Smith).

Complainant conceded that he never heard Mr. Smith, Mr. Stazyk, or anybody at Respondent compliment his performance. Tr. 216:5-16, 217:6-12 (Hsieh). Complainant was never promoted by SwitchOn or Respondent and did not receive a raise from either company. Tr. 182:14-20 (Hsieh). As of March 2001, Mr. Smith had not had any performance issues with any other employee, disciplined any employee, put any employee on a performance improvement plan or probation, or given any employee a written warning. Tr. 533:11-534:1 (Smith). Complainant did not know of any instance in which Mr. Smith counseled or disciplined any other employee for performance issues. Tr. 215:17-25 (Hsieh).

Although there were some concerns about Complainant's performance, and I accept Respondent's contention that Complainant's performance was not as good as others in the Computer Services Group, I do not credit Mr. Stazyk's testimony that Complainant was terminated because he was a poor performer. Tr. 1160:1-12, 1181:7-8, 1207:12-24. In fact, such testimony is contrary to Mr. Smith's deposition testimony that Complainant was terminated as part of the overall reduction in force, Tr. 417:9-15 (Smith), and also goes contrary to Respondent's statements to Complainant in the termination letter, CX-G-1, and to Respondent's statements to EEOC regarding Complainant's charge of discrimination. CX-C-4; CX-K-1. Moreover, Respondent has not sought to discredit Complainant's assertion that he was working long hours, including evenings and weekends, from January through March 2001 prior to the RIF. Tr. 77:3-78:1 (Hsieh). Mr. Smith testified that the Computer Services Group had more than enough work to keep all of his systems administrators busy. Tr. 390:8-15, 440:20-441:21, 545:22-546:1 (Smith), and indeed he needed more, not fewer, Unix administrators. Tr. 417:18-25 (Smith). Thus, it is clear that Mr. Smith's Computer Services Group was understaffed, and he was seeking more help. Under such circumstances, it is expected that an employee might make some mistakes. However, it is telling that Complainant was not put on probation, was not put on a performance improvement plan, and was not given an unsatisfactory performance evaluation or even given a written warning. If his performance had been as bad as Respondent now suggests, it seems strange that none of these occurred. Moreover, I note that prior to the March 2001 RIF, Mr. Smith did not intend to fire Complainant; and was hopeful that Complainant's performance would improve after he put specific steps into place with the assistance of human resources. Tr. 386:2-12, 546:6-18, 549:21-25 (Smith); CX-RR (e-mail from Mr. Smith to Mr. Bashteen and Mr. Shukla dated February 2, 2001).

F. Mr. Singh's Employment at PMC-Sierra

The Immigration and Naturalization Service approved Mr. Singh's petition for an H-1B visa to work for SwitchOn on or about January 16, 2001. JSF No. 38; JSUMF No. 12.

On March 5, 2001, Mr. Smith wrote an e-mail to Paula Stevens, describing the need for a Unix systems administrator in the Computer Services group at Respondent's Milpitas location. JSF No. 40. Mr. Smith understood that Mr. Singh had been hired by SwitchOn to be a Unix systems administrator in SwitchOn's Milpitas site and that he was awaiting approval of his visa to relocate to the Milpitas office. JSF No. 32; Tr. 438:8-24, 439:15-25 (Smith); 1440:2-10 (Iyer); CX-RR (e-mails between Mr. Smith, Mr. Bashteen, and Mr. Shukla dated February 1-2, 2001), CX-TT (e-mail from Mr. Iyer to Ms. Stevens, Mr. Shukla, Mr. Bashteen, and Mr. Smith dated January 18, 2001).

In late February or early March 2001, Mr. Smith conducted a technical interview of Mr. Singh to help determine his abilities as a Unix systems administrator. Tr. 551:16-552:4 (Smith); 904:16-905:5, 916:21-917:5 (Singh). Mr. Smith asked Mr. Singh very detailed technical questions about Unix systems administration and Mr. Singh knew the answers. Tr. 552:5-13 (Smith); 915:17-916:9 (Singh). Mr. Smith felt comfortable with how Mr. Singh articulated himself, how quickly he gave the answers, and his familiarity with the information, and was confident that Mr. Singh would be able to perform the Unix administration tasks. Tr. 552:20-553:13 (Smith); 917:6-14 (Singh).

On or about March 16, 2001, Mr. Singh obtained an H-1B visa stamp permitting him to work in Milpitas, California, for Respondent. JSF No. 39. Prior to the March 2001 RIF, Mr. Smith checked with Mr. Singh's manager in India, Mr. Shukla, and received favorable feedback about Mr. Singh. Tr. 412:14-24, 553:24-554:1 (Smith). Also, prior to the March 2001 RIF, Mr. Iyer had recommended Mr. Singh to Mr. Smith. Tr. 440:16-19, 553:14-23 (Smith). Mr. Iyer told Mr. Smith that the reason why SwitchOn hired Mr. Singh and planned to bring him to Milpitas was because he was a qualified administrator. Tr. 440:16-19 (Smith). Indeed, Mr. Smith had not received negative feedback about Mr. Singh from any source. Tr. 554:3-5 (Smith).

Mr. Iyer did not express concern about Mr. Singh's performance to Mr. Smith, nor did Mr. Iyer have any reason to be dissatisfied with Mr. Singh's work. Tr. 1425:25-1426:6, 1440:18-1441:2 (Iyer). Mr. Iyer had received positive feedback about Mr. Singh from Subodh Shukla, who was Mr. Singh's manager in India, and conveyed that information to Mr. Smith. Tr. 1426:2-6, 1440:23-1441:8 (Iyer). Mr. Smith had no concern that there would not be enough work for his group when Mr. Singh arrived. Tr. 440:20-441:1 (Smith).

Complainant did not provide any evidence about Mr. Singh's work performance or whether Mr. Singh's performance was better or worse than his own performance. Tr. 132:16-25 (Hsieh). Indeed,

Complainant acknowledged that he does not have any evidence that Mr. Singh was a poor performer. Tr. 131:25-132:3, 12-15 (Hsieh).

G. Respondent's Reduction in Force and Complainant's Termination

Prior to the RIF in March 2001, Respondent implemented cost cutting measures, including closing its open job requisitions, instituting a hiring freeze, and freezing capital expenditures. Tr. 308:5-13 (Mauro); 443:14-444:7 (Smith); 670:12-18 (Bashteen); 1171:16-1172:3 (Stazyk). In March 2001, Respondent determined that it had to reduce its headcount in order to reduce operating expenses, due to its deteriorating financial condition, JSF No. 41, and therefore decided to conduct a RIF. Tr. 1146:16-25 (Jones). Because Respondent was going to reduce the size of its employee population and design community, it decided that it also had to reduce its support groups, including information technology. Tr. 1107:12-23, 1109:21-1110:8, 1144:22-1145:4 (Jones). There was no decision by the executive team to use citizenship as a factor in the selection of employees for termination, nor did the executive team communicate that citizenship was a factor that managers should consider. Tr. 1138:6-17 (Jones).

On March 15, 2001, Greg Stazyk learned that there was going to be a RIF and was tasked with selecting candidates from the Computer Services Group for termination. Tr. 1159:24-1160:2, 1170:1-18 (Stazyk). Mr. Stazyk was told by his supervisors, Greg Aasen and Ken Huckell, that he needed to reduce ten percent of his full-time employees and all of his contractors, although Stazyk developed an alternative plan for a more limited reduction that ultimately was approved. Tr. 1172:4-18 (Stazyk). Mr. Stazyk selected Allentown, Pennsylvania, and the San Jose area, including Santa Clara and Milpitas, as the sites in which the reductions in the Computer Services Group would occur. Tr. 1174:3-14 (Stazyk).

Mr. Stazyk decided to make reductions in the San Jose Computer Services Group because some of Respondent's deepest cuts were being made in San Jose, and the reductions in Computer Services would have to be proportional. Tr. 1173:19-1174:2, 15-17 (Stazyk). On March 16, 2001, Mr. Stazyk told Mr. Smith that Respondent was going to engage in a RIF and instructed him to terminate the contractor, Felix Fong, and to select one employee from his Computer Services Group for inclusion in the RIF. JSF No. 42; Tr. 398:8-11, 424:13-425:4, 508:14-24, 534:23-536:13 (Smith); 1170:12-23, 1174:24-1175:6, 1176:14-19 (Stazyk). As of March 16, 2001, Mr. Smith's Computer Services Group consisted of nine employees–Chris Smith, Steve Daniels (Sr. Systems Administrator), Lester Kossow (Sr. Unix Systems Administrator), Mike Zelle (Systems Administrator), Mike Grubb (Desktop Support), Mayur Patel (Systems Administrator), Nigel Turner (Systems Administrator), Rick Smith (Systems Administrator), and Complainant (Systems Administrator)–and one contractor, Felix Fong, and Mr. Smith knew that Ravinder Singh (Unix Systems Administrator) would be arriving in the United States and would be working in the Computer Services Group. Tr. 538:23-539:19 (Smith); CX-A (organizational chart of Respondent's Computer Services Group).

Thus, the reduction in the Computer Services Group was part of an overall reduction at the San Jose sites, resulting from a cutback in costs and projects. Tr. 536:24-537:4 (Smith); 1211:15-20 (Stazyk). Mr. Stazyk suggested to Mr. Smith that Complainant was the most obvious candidate to eliminate because of performance issues. Tr. 402:1-7, 537:16-538:2 (Smith); 1175:8-13, 1176:20-22, 1177:24-1178:1, 14-17, 21-1179:2, 1181:16-23 (Stazyk). Mr. Stazyk allowed Mr. Smith to think about the decision of whom to terminate from the Computer Services Group over the weekend and get back to Mr. Stazyk on Monday with his final decision. Tr. 538:8-12 (Smith); 1175:8-13, 1176:20-1177:1, 1179:12-17 (Stazyk). Mr. Stazyk did not have any indication that any other employee in the San Jose Computer Services Group had any performance issues, or that there were any problems with Mr. Singh's performance in India. Tr. 1179:18-1180:8. (Stazyk).

On the basis of his education and experience, Complainant was more qualified than Mr. Singh. CX-SSS (Comparison of Hsieh and Singh); CX-I-1-4 (Resume of John Hsieh); CX-E-1-4 (Resume of Ravinder Singh). Indeed, Mr. Iyer candidly admitted that based on the interviews and a comparison of their respective resumes, he believed that Mr. Hsieh was more qualified to perform Unix systems administration work. Tr. 1479:12-19. Mr. Smith did not know Complainant's educational background or how many years of experience Complainant had working as a Unix administrator. Tr. 86:1-87:1 (Hsieh); 413:3-7, 444:14-19 (Smith). However, at the time that Mr. Smith selected Complainant for termination, he was the only one in the Group about whom Mr. Smith had received complaints. Tr. 543:8-16 (Smith). At the time that Mr. Smith selected Complainant for termination, Mr. Smith felt that the performance of everyone else in his group was above satisfactory, and had no doubts or concerns about their skills or ability to perform their responsibilities. Tr. 543:17-22, 554:18-25 (Smith).

Mr. Smith had reviewed Mr. Singh's resume prior to selecting Complainant for termination. Tr. 407:4-13, 548:3-549:2 (Smith); RX-K-1-6 (an e-mail to Mr. Smith dated February 1, 2001, with Mr. Singh's resume attached). Mr. Singh's experience in a large-scale Unix environment maintaining large numbers of servers impressed Mr. Smith because that was similar to the Respondent's computer environment. Tr. 549:3-20 (Smith); CX-E-1-3 (Mr. Singh's resume). Mr. Smith analyzed the relative scope and experience for Complainant and Ravinder Singh, and ultimately decided to terminate Complainant. Answer at 4-5 (Fourth Affirmative Defense); CX-NNNN-2, 3, 6 (Respondent's response to Complainant's second set of interrogatories). Mr. Smith had Mr. Singh's resume, feedback from two managers whose opinions he trusted, and his own telephone interview of Mr. Singh, all of which indicated that Mr. Singh was a competent systems administrator, and he had no indication that Mr. Singh would not be a good performer. Tr. 554:18-555:5, 14-18 (Smith). At the time of the March 2001 RIF, Mr. Smith did not know what Mr. Singh was paid in India or what he would be paid when he arrived in the United States, and did not know whether he would be paid more or less than Complainant. Tr. 554:6-17. Mr. Smith selected Complainant for termination in the RIF because Mr. Smith was not having problems with the performance of anyone else in his Group, had positive reports about Mr. Singh, and Mr. Smith had concerns about Complainant's work performance. Tr. 542:19-543:7, 556:7-11 (Smith). On March

19, 2001, Mr. Smith told Mr. Stazyk that he had selected Complainant for termination. Tr. 508:21-509:6, 556:12-16 (Smith); 1180:24-1181:5 (Stazyk). Complainant was terminated from employment with Respondent as part of a RIF on March 26, 2001. JSF No. 44, JSUMF No. 15.

With respect to the citizenship of the employees in Mr. Smith's Computer Services Group, Complainant John Hsieh, Chris Smith, Lester Kossow, Steve Daniels, Mike Zelle, Mike Grubb, and Mayur Patel were U.S. citizens; Nigel Turner was a citizen of the United Kingdom; Rick Smith was a Canadian citizen; and Ravinder Singh, who had not yet arrived in the United States, was a citizen of India. Tr. 540:15-16 (Smith); 840:9-842:13 (Stevens). As of March 2001, Mr. Smith knew that Mr. Kossow, Mr. Zelle, and Mr. Grubb were U.S. citizens, and he knew that Rick Smith, and Ravinder Singh were not U.S. citizens. Tr. 539:25-540:20 (Smith). Mr. Smith never asked Complainant his citizenship. Tr. 118:25-119:6 (Hsieh). Neither Mr. Bashteen nor Mr. Iyer ever discussed Complainant's citizenship with Mr. Smith or Mr. Stazyk. Tr. 694:20-695:2 (Bashteen); 1459:4-14 (Iyer). Complainant never showed Mr. Smith or Mr. Stazyk his passport, his I-9 form, or his resume. Tr. 119:7-14, 120:6-17 (Hsieh). Moreover, English is not Complainant's native language, and he sometimes spoke Chinese at work. Tr. 113 (Hsieh).

Mr. Smith did not make negative remarks about U.S. citizens. Tr. 121:8-10 (Hsieh); 695:3-5 (Bashteen); 1076:11-1077:3 (Patel); 1459:19-21 (Iyer). Mr. Smith did not consider Complainant or anybody's citizenship in deciding who to terminate in the reduction in force. Tr. 542:3-5; Tr. 543:23-544:8, 555:19-21 (Smith).

Although Mr. Stazyk could have vetoed Mr. Smith's selection of Complainant for the RIF, Mr. Stazyk considered Complainant the obvious candidate for termination and saw no reason to disagree with Mr. Smith's choice. Tr. 1181:24-1182:8 (Stazyk). Mr. Stazyk then recommended to Ken Huckell, Greg Aasen, and Teri McNaughton that Complainant should be the employee from the San Jose IT group to be terminated in the RIF and his recommendation was accepted. Tr. 1182:9-15, 21-22, 1186:2-11 (Stazyk); CX-HH (e-mail from Greg Stazyk to Greg Aasen, Teri McNaughton, and Ken Huckell dated March 21, 2001). Mr. Stazyk prepared his Headcount and Expense Reduction Plan on March 19 or 20, 2001, before he had any notice that Complainant would be making any claim against Respondent. Tr. 1186:5-19, 1187:19-1188:17 (Stazyk).

Neither Mr. Bashteen, Ms. Jones, Mr. Mauro, or Ms. Stevens had any role in selecting Complainant for termination in the March 2001 RIF. Tr. 696:3-5, 9-11 (Bashteen); 1108:23-1109:1, 1112:10-13 (Jones); 260:16-17, 307:19-25 (Mauro); Tr. 822:6-9, 823:8-10, 824:10-13 (Stevens). Ms. Jones did not know Complainant before he was terminated, had not heard of him, and was not familiar with his performance. Tr. 1112:2-6 (Jones). Mr. Iyer did not play any role in selecting any employee for termination in the March 2001 RIF, was not consulted regarding Complainant's termination, and never asked anyone to terminate Complainant. Tr. 1460:2-9 (Iyer).

Neither Mr. Iyer nor anyone else from SwitchOn ever told Mr. Smith that Complainant had been hired with the intent that he would be fired as soon as Mr. Singh received his visa. Tr. 546:19-23 (Smith). Mr. Smith was never asked to terminate Complainant as part of a conspiracy with SwitchOn. Tr. 546:24-547:2 (Smith). Mr. Smith was never concerned that there was insufficient work in the Group to keep Mr. Singh and the other systems administrators busy. Tr. 545:22-546:1 (Smith). Mr. Smith did not have any plans to replace Complainant with Mr. Singh. Tr. 546:2-5, 550:1-3 (Smith); CX-RR (e-mail from Mr. Smith to Mr. Bashteen and Mr. Shukla dated February 2, 2001). Indeed, as of February 2, 2001, Mr. Smith planned to have Complainant and Mr. Singh assist with the move to Mission Towers, which was expected to take place in the summer of 2001. Tr. 550:4-551:8 (Smith); CX-RR (e-mail from Mr. Smith to Mr. Bashteen and Mr. Shukla dated February 2, 2001).

Respondent's executive team made the decision to inform the employees who would be terminated in the March 2001 RIF, that their terminations were the result of business conditions and were no fault of their own, because they wanted to help the employees obtain new employment and because the RIF was in fact necessitated by business conditions. The local managers were informed that this was the message they were supposed to convey to the employees who were being terminated. Tr. 1110:19-1111:18 (Jones). The termination letter provided by Respondent to Complainant, which was signed by Tom Mauro, Manager of Human Resources, states in the first paragraph that "I wish to confirm that the termination of your employment is solely the result of business needs and that it is not related to any dissatisfaction with your work." JSF No. 45; CX-G-1. However, this letter was a form letter drafted by human resources personnel and was not intended to address the specific reasons for each individual employee's inclusion in the RIF. JSF No. 47; Tr. 1115:2-5 (Jones). Mr. Smith and Mr. Stazyk did not see Complainant's termination letter prior to Complainant's termination, did not play any role in drafting it, were not consulted by anyone with regard to its content, and did not sign it. JSF No. 48; Tr. 311:25-312:2 (Mauro); 565:2-16 (Smith); 1116:4-7, 18-21 (Jones); 1190:15-1191:5 (Stazyk). Over ten percent of Respondent's overall employee population was terminated in the March 2001 RIF, amounting to the termination of 205 employees out of the total population of 1736 in March 2001. JSF No. 49. In the Computer Services Department, seven of the eight remaining employees were United States citizens. JSF No. 51.

In addition to the written letter, Respondent's human resource group in Canada also prepared a written script for managers to read to those who were being terminated in the RIF. Tr. 1117:1-9 (Jones). The script was not intended to address the reason for each individual employee's selection for termination. Tr. 1117:14-17 (Jones). Mr. Smith did not play any role in preparing the script that he was given to read in the March 2001 RIF, nor was he consulted about its content. Tr. 557:11-24 (Smith); 1117:10-13 (Jones). In informing Complainant that he was being terminated, Mr. Smith read the script, but skipped the portion that said the decision was not based on Complainant's performance, because Mr. Smith did not believe that line to be true. Tr. 558:5-14 (Smith).

Prior to the RIF, Respondent's human resources personnel were not cognizant of Complainant's

performance or the specific reasons for inclusion in the RIF. As of March 26, 2001, Ms. Stevens had not spoken with anyone about the reason why Complainant had been selected for termination. Tr. 824:22-825:3 (Stevens); 1191:6-17 (Stazyk). Ms. Stevens never supervised Complainant, never worked with him, and had no knowledge of the quality of his work performance. Tr. 825:4-12 (Stevens). Ms. Stevens never heard anyone at SwitchOn or Respondent express any preference for H-1B candidates or employees over U.S. citizens. Tr. 813:24-814:6 (Stevens). Mr. Mauro was never told that citizenship had anything to do with the selection decisions. Tr. 308:1-4 (Mauro).

H. Post-RIF Events

After the March 26, 2001 RIF, Respondent's Milpitas site closed, all of the Computer Services employees from that site moved to Respondent's Santa Clara facility. JSF No. 54. Out of the 281 employees remaining in Respondent's Santa Clara location after the March 26, 2001 RIF, more than two thirds (247 employees) were U.S. citizens. JSF No. 50. After the RIF, Respondent still required the continuing services of an individual who specialized in the management of the Unix systems environment. JSF No. 53.

When Complainant protested his layoff to Respondent's Human Resources department, on or about March 28, 2001, human resources manager Paula Stevens consulted with Ms. Jones and then e-mailed Complainant: "[t]his was a business decision based on a number of factors and not a reflection of how we feel about you or your contributions to PMC." JSF No. 46; CX-HHHH-45. Ms. Stevens did not discuss the e-mail response that she sent to Complainant with Mr. Smith or Mr. Stazyk before sending it, nor did Geri Jones consult with Mr. Smith or Mr. Stazyk before she responded to Ms. Stevens. JSF No. 46; Tr. 832:12-833:8 (Stevens), 1121:12-20 (Jones); 1191:6-17 (Stazyk).

In April 2001, Mr. Singh arrived in the United States. JSF No. 56. Mr. Singh assumed approximately eighty-five percent of Complainant's work. Tr. 400:21-23 (Smith). As of June 25, 2003, Mr. Singh continues to work for Respondent. Tr. 896:4-5 (Singh). No new employee has been hired into Respondent's Computer Services Group worldwide since Complainant's termination, nor are there any plans to hire anyone. Tr. 565:17-22, 566:6-11 (Smith); 843:5-11 (Stevens); 1190:11-14 (Stazyk); JSF No. 55.

Any fact findings proposed by either party that have not been adopted or incorporated herein are expressly rejected.

V. DISCUSSION AND LEGAL ANALYSIS

An employer may not terminate a "protected individual" because of the individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B) (2003). 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 Bendig v. Conoco, Inc., 9 OCAHO 1077 (2001), 2001 WL 1754725, at *5 (OCAHO), Wisniewski v. Douglas County Sch. Dist., 1 OCAHO 153, 156-57 (1988); see generally Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000). Although the burdens of production shift between the complainant and the respondent, the burden always remains on the complainant to persuade the Court that the respondent intentionally discriminated against the complainant. Reeves, 530 U.S. at 143 (emphasis added).

In addition to United States Supreme Court and OCAHO precedent, 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.

A. *Prima Facie Case*

To demonstrate a prima facie case of citizenship discrimination, a complainant must introduce evidence that gives rise to an inference of unlawful discrimination. Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993). Traditionally, a complainant establishes a prima facie case of citizenship discrimination by alleging and demonstrating that: (1) he belongs to a class protected by 8 U.S.C. section 1324b, (2) he was qualified for the job, (3) he suffered an adverse employment action, and (4) there was disparate treatment from which the Court may infer a causal relationship between his protected status and the adverse employment action. See generally Lee v. Airtouch Communications, 6 OCAHO 891, 902 (1996), 1996 WL 780148, at *9 (OCAHO), Wisniewski, 1 OCAHO at 157 (1988), citing generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

However, the Ninth Circuit has developed a variation of the traditional prima facie case when a plaintiff alleges that a RIF has been carried out in a discriminatory manner. To establish a prima facie case of employment discrimination in this situation, a plaintiff must show that: (1) he belongs to a protected class; (2) he was terminated from a job for which he was qualified; and (3) others not in his protected class were treated more favorably. Washington, 10 F.3d at 1434 (race discrimination RIF case), cited in Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000) (age discrimination RIF case).

Complainant has demonstrated a prima facie case of employment discrimination because he has shown that he belongs to a protected class, he was discharged from a job for which he was qualified, and that others not in his protected class were treated more favorably.

1. Complainant Belongs to a Protected Class

Under 8 U.S.C. section 1324b, a "protected individual" means, among other things, an individual who is a citizen of the United States. 8 U.S.C. § 1324b(a)(3)(A) (2003).

The parties have stipulated that Complainant is a citizen of the United States. JSF No.1.

Thus, Complainant has satisfied the first prong of his prima facie case because he is a citizen of the United States and a protected individual within the meaning of 8 U.S.C. section 1324b.

2. Complainant Was Terminated from a Job For Which He Was Qualified

The parties have stipulated that Respondent terminated Complainant on March 26, 2001. JSF No. 44.

In the Ninth Circuit, demonstrating employment qualifications requires both a showing that a complainant had the background and experience for the job and that the complainant was performing the job in a satisfactory manner. Margolis v. Tektronics, 44 Fed. Appx. 138, 140, 2002, WL 1787999, at *1-2 (9th Cir.) (unpublished) (sex discrimination case), see also Nidds v. Schindler v. Elevator Corp., 113 F.3d 912, 917 (9th Cir. 1997) (age discrimination case), Messick v. Horizon Indus., Inc., 62 F.3d 1227, 1229 (9th Cir. 1995) (age discrimination case).

Complainant has shown that he was qualified for the job he held with Respondent because he had both the requisite background and experience for the job, and also has shown that he was performing the job in a satisfactory manner. Complainant's resume indicates that he had a Bachelor's degree in economics and a Master's degree in computer science, as well as over ten years of experience as a Unix systems administrator. Complainant was hired as a Unix systems administrator by SwitchOn because Mr. Bashteen and Mr. Iyer concluded he was qualified for the job after reviewing his resume and asking him a number of technical questions. In fact, on the basis of his education and experience, Complainant was more qualified than Mr. Singh. Mr. Iyer, the person who hired both Complainant and Mr. Singh, candidly testified that Complainant was more qualified than Mr. Singh to perform Unix systems administration based on a comparison of their resumes.

Additionally, Complainant was performing his job with Respondent in a satisfactory manner. Complainant was not given an official employment performance evaluation during his employment with either SwitchOn or Respondent. Nor was Complainant given any sort of written, documented performance warning, discipline, assessment, or appraisal while employed by SwitchOn or Respondent. Complainant was not placed on probation or a performance improvement plan while working for SwitchOn or Respondent. Although Complainant was not performing as Mr. Iyer or Mr. Smith had expected based on the credentials listed on his resume, Complainant would not have been fired on March 26, 2001, but for Respondent's RIF. There is enough evidence for me to conclude that, although there were some concerns

about Complainant's performance, and although he was not performing his job in an exemplary manner, Complainant was performing his job satisfactorily at the time of the RIF. Complainant has shown that he was qualified for his job with Respondent by establishing that he had the requisite background and experience and he was performing the job in a satisfactory manner.

In its post-hearing brief, Respondent argues that Complainant has not demonstrated that he was qualified for the job because he failed to show that he was "satisfying PMC-Sierra's performance expectations." Resp't's Brief at 1. However, according to Ninth Circuit case law, Complainant does not have to establish that he was meeting the employer's expectations to satisfy the second prong of his prima facie case. As part of demonstrating that he was qualified, Complainant must show that he was performing satisfactorily. One way to demonstrate that a complainant was performing satisfactorily is to show that he was meeting an employer's expectations, however the Ninth Circuit has not prescribed that as the singular way a complainant may show he was performing his job in a satisfactory manner. See Messick, 62 F.3d at 1229, Margolis, 2002WL 1787999, at *2. Thus, it is not necessary that Complainant show that he was meeting Respondent's expectations to satisfy the second prong of his prima facie case.

Thus, Complainant has met the second prong of his prima facie case because he has demonstrated that he was terminated for a job for which he was qualified.

3. Others Not in Complainant's Protected Class Were Treated More Favorably

H-1B visa holders are not citizens of the United States, nor are they protected by 8 U.S.C. section 1324b. 8 U.S.C. § 1324b(a)(3)(A-B) (2002).

A complainant who was terminated may show that persons outside his protected class were treated more favorably because they were retained by the employer. Washington, 10 F.3d at 1434 (finding favorable treatment when a white manager was retained to take over a terminated African American plaintiff's position), see also Margolis, 2002 WL 1787999, at *2 (unpublished) (finding favorable treatment when male managers at female plaintiff's level were retained while she was terminated).

Complainant, a citizen of the United States and member of a protected class under 8 U.S.C. section 1324b, was terminated on March 26, 2001. Complainant was a Systems Administrator for Respondent, whose duties included performing Unix systems administration. Three members of the computer services group who were not United States citizens were not terminated by Respondent: Nigel Turner, a citizen of the United Kingdom, Rick Smith, a Canadian citizen, and Ravinder Singh, an Indian citizen and H-1B visa holder. At the time of Complainant's termination, Mr. Turner and Mr. Smith held the position of Systems Administrator, and Mr. Singh held the position of Unix Systems Administrator. In fact, Mr. Singh continues to work as a Unix Systems Administrator for Respondent and he assumed about eighty-five percent of Complainant's work after his termination. Thus, three other employees, not in

Complainant's protected class, who performed the same or very similar job functions as Complainant, were retained, while Complainant was terminated.

Further, Respondent admitted that Mr. Smith analyzed the relative scope and experience for Complainant and Mr. Singh prior to Complainant's termination, and ultimately decided to terminate Complainant. Answer at 4-5; CX-NNNN-2, 3, 6. Thus, not only was Mr. Singh treated more favorably than Complainant, but Mr. Smith consciously chose to retain Mr. Singh, an H-1B visa holder, over Complainant, a U.S. citizen.

Complainant has established the third prong of his prima facie case by showing that others not in Complainant's protected class were treated more favorably.

Because Complainant has shown that he was a member of a protected class, was terminated for a position for which he was qualified, and others not in his protected class were treated more favorably, he has demonstrated a prima facie case of citizenship status discrimination.

B. *Legitimate Nondiscriminatory Reason*

Because Complainant has demonstrated a prima facie case of citizenship discrimination, the burden of production shifts to Respondent to articulate a legitimate nondiscriminatory reason for Complainant's discharge. Wisniewski, 1 OCAHO at 153, 156-157, Reeves, 530 U.S. at 142. Respondent bears the burden of production, not persuasion, and this burden can involve no credibility assessment. Reeves, 530 U.S. at 142.

Respondent has articulated a general RIF and Complainant's performance as the reasons for Complainant's termination. A general RIF and an employee's performance are legitimate nondiscriminatory reasons for terminating an employee. Coleman, 232 F.3d 1271, 1282, see also Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660-661 (9th Cir. 2002) (holding that both seasonal downturn and an employee's performance problems are legitimate nondiscriminatory reasons for termination); Nidds, 113 F.3d at 918 (holding that a downturn in work requiring layoffs is a legitimate nondiscriminatory reason for terminating an employee).

The parties have stipulated that Complainant was terminated as part of a RIF that Respondent implemented on March 26, 2001. JSF No. 44. The parties have further stipulated that this was a widespread and general RIF, in which Respondent laid off ten percent of its employee population, amounting to 205 employees. Id. Additionally, Mr. Smith, Mr. Stazyk, and Mr. Iyer testified that they believed that Complainant had some employment performance deficiencies. Mr. Smith testified that he did not have any performance issues with the other employees of his group, including Mr. Singh. Tr. 533:24-534:1, 542:19-543:22, 553:14-554:5. Mr. Smith considered the performance of the other members of

his Computer Services Group above satisfactory. Tr. 543:17-19. Thus, Respondent has produced sufficient evidence to support its assertion that Complainant was terminated because of a general RIF and because of concerns about his work performance. In its post-hearing brief, Complainant does not dispute that Respondent articulated a legitimate nondiscriminatory reason.

Respondent has met its burden of production and has articulated legitimate nondiscriminatory reasons for Complainant's termination.

C. *Pretext*

Because Respondent has met its burden of production and asserted a legitimate nondiscriminatory reason for Complainant's termination, a presumption of discrimination drops away. Nidds, 113 F.3d at 917. The burden of production is now shifted to Complainant to show, by a preponderance of the evidence, that Respondent's proffered reason for the discharge is pretext for intentional discrimination. Id. at 918; see also Reeves, 530 U.S. at 2106.

Complainant may show pretext either directly, by demonstrating that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d 1115, 1123-24 (9th Cir. 2000). Fundamentally different justifications for an employer's action may suggest that neither of the reasons proffered was the true reason. Washington, 10 F.3d at 1434. A complainant may rely on circumstantial evidence when showing pretext, however it must be specific and substantial. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002).

However, disproof of respondent's proffered justification does not compel judgment for complainant. Reeves, 530 U.S. at 146-47. The factfinder must believe complainant's explanation of intentional discrimination, even if a complainant disproves a respondent's proffered justification. Id. There are instances when, although a complainant has satisfied his prima facie case and "set forth sufficient evidence to reject the [respondent]'s explanation, no rational factfinder could conclude that the action was discriminatory." Id. at 147.

1. Complainant Has Not Directly Shown Pretext Because He Has Not Demonstrated That a Discriminatory Reason More Likely Motivated Respondent

Complainant has not produced any direct evidence of Respondent's discriminatory motive, or any direct evidence that a discriminatory reason more likely motivated Respondent to terminate Complainant than its proffered reasons. Complainant has not shown that Respondent or any of its employees held any animus or prejudice against American citizens. See infra Findings of Fact pp. 14-15. Nor has Complainant demonstrated that Respondent or any of its employees behaved in such a manner that would suggest that

they favored citizens of other countries over American citizens. See Goberman v. Washington County, 2001 WL 34045881, at *6 (D. Or.) (holding that no direct evidence of pretext was shown because there was no evidence that the employer's decision-makers "made any comments, however remote, that might evidence discrimination...."); see, e.g., Chuang, 225 F.3d at 1128-29 (holding there was direct evidence of pretext for national origin discrimination when a decision-maker referred to the plaintiffs as "two Chinks" and told them they "should pray to their Buddha for help" because it plainly showed discriminatory motive). Thus, Complainant has not directly shown pretext. Moreover, in his post-hearing brief, Complainant does not argue that he has produced any direct evidence of pretext. Complainant's Brief at 42.

2. Complainant Has Not Indirectly Shown Pretext Because He Has Not Shown That Respondent's Proffered Explanations Are Unworthy of Credence

Complainant argues that he has shown pretext indirectly by demonstrating the Respondent's proffered explanations for Complainant's termination are unworthy of credence. Complainant argues that Respondent gave "several unsubstantiated reasons for selecting Complainant for lay off" and "shifted explanations during the course of this trial." Complainant's Brief at 42.

Fundamentally different justifications for an employer's action may suggest that neither of the reasons proffered was the true reason. Washington, 10 F.3d at 1434. In judging whether a respondent's proffered reasons are "false," a court must determine whether a respondent honestly believed the reasons for its actions, not whether the justifications are objectively false. Villiarimo, 281 F.3d at 1063 (holding that, for pretext purposes, a court must determine whether the employer truly believed that the plaintiff was dishonest, not whether the employee was actually dishonest). Terminating an employee because of an economic downturn and job performance are not inconsistent reasons, per se. Aragon, 292 F.3d at 661-62 (holding that it is not inconsistent that an economic downturn necessitated a layoff , and in choosing who to terminate, the employer examined past job performance), see also Nidds, 113 F.3d 912, 918 (holding that lack of work and seniority and poor performance relative to other employees were not inconsistent reasons for terminating an employee). A court does not necessarily imply pretext for discrimination when an employee is terminated pursuant to a RIF and is not told of the selection process until subsequently. Coleman, 232 F.3d 1271. Pretext is not inferred from two different, although consistent, reasons for termination. Aragon, 292 F.3d at 661.

When deciding who to terminate, the employer does not have to retain the "best" employee; however the decision must be free from impermissible discrimination. Casillas v. United States Navy, 735 F.2d 338, 344 (9th Cir. 1984). Further, a court must determine whether the complainant was more qualified with respect to the selection criteria used by the respondent, not whether the complainant was objectively better qualified than other employees. Coleman, 232 F.3d at 1287.

Pretext for discrimination is not inferred because an employer made an imprudent business decision.

Id. at 1285. Employment discrimination laws were not intended to abridge managerial discretion or allow courts to restructure business practices. Casillas, 735 F.2d at 344, see also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

Complainant argues that he has demonstrated pretext indirectly by showing that Respondent gave "several unsubstantiated reasons for selecting Complainant for lay off" and "shifted explanations during the course of this trial." Complainant's Brief at 42. Respondent proffered two justifications for terminating Complainant. First, economic factors necessitated a company-wide reduction in force, and second, that Complainant was selected because he was the only employee in his group to have performance issues. Resp't's Brief at 8. Complainant challenges both of Respondent's proffered justifications.

Complainant argues that, during the course of the litigation, some of the details surrounding Complainant's employment and termination were conflicting. In his brief, Complainant points to five inconsistencies in the details surrounding Respondent's RIF as evidence of pretext. First, Complainant argues that Respondent's claim that it needed to reduce the number of Unix administrators has no basis in fact. Id. at 43. Second, Complainant argues Respondent's claim that it needed to reduce Unix administrators because of the elimination or reduction in scale of various programs and projects has no basis in fact. Id. at 46. Third, Complainant argues that Respondent's claim that it compared the relative scope and experience of Complainant and Mr. Singh has no basis in fact. Id. at 47. Fourth, Complainant argues that Respondent's claim that it decided to conduct a RIF on March 18, 2001, has no basis in fact. Id. at 51. Fifth, Complainant argues that he did not have any performance problems that would justify his selection for termination. Id. at 56-60.

a. Respondent's Assertion That It Had to Reduce the Number of Unix Administrators

On July 12, 2001, Respondent wrote a position statement to the EEOC, in which it states that Complainant was terminated because "reduction was necessary in the position of Unix Administrator." CX-C-2. Additionally, in its Fourth Affirmative Defense, Respondent again asserts that Complainant was terminated because a "reduction was necessary in the position of Unix administrator." Answer at 4.

However, during trial, Respondent told a different story. Mr. Smith testified that, due to the company-wide RIF, Mr. Stazyk told him to reduce his headcount in the Computer Services Group by one, and did not mention or suggest a specific position that should be terminated.

During the course of litigation, Respondent has said both that, because of the reduction in force, it needed to reduce a Unix administrator and that it merely needed to reduce the Computer Services Group by one employee. I agree with Complainant that this is an inconsistency in Respondent's recitation of the events leading up to the RIF; however I do not find that this inconsistency demonstrates that Respondent's

proffered explanations for Complainant's termination-a RIF and Complainant's performance- are unworthy of credence.

Complainant has agreed that he was terminated pursuant to a RIF, JSF No. 44, and has produced no evidence that this RIF was a smokescreen or pretext for intentional citizenship status discrimination. Thus, despite the inconsistency in Respondent's recitation of the events leading up to the RIF, I do not find that this renders Respondent's proffered justifications for Complainant's termination unworthy of credence and evidence of pretext.

b. Respondent's Claim That It Needed to Reduce the Number of Uniix Administrators Because of the Elimination or Reduction in Scale of Programs and Projects

In its July 12, 2001, position statement to the EEOC, Respondent stated: "[f]ollowing this decision [to engage in a RIF], each business unit of the Company conducted reviews of existing programs and projects and prioritized them in relation to the Company's strategic plan. Once the decision was made regarding the programs and projects which were to be scaled back and/or eliminated, each business unit reviewed the employees who supported the affected programs and projects." CX-C-2. In its Answer, Respondent used the same language verbatim. Answer at 4.

During the trial, there was testimony that sales were down and certain areas of the Respondent's company would need to be cut back, such as certain product lines that were not selling any longer. Tr. 1105:8-1106:3 (Jones), 1211:12-23 (Stazyk). The employees that were working on the product lines that were eliminated were laid off. Tr. 1106:5-8 (Jones). The groups that supported the eliminated product lines were reduced as well, such as research and design groups, human resources, information technology, administration, and finance. Tr. 1107:12-23 (Jones). The
support staff in San Jose was particularly hit hard in the RIF because the deepest job cuts were made in San Jose. Tr. 1109:21-1110:8 (Jones), 1174:15-23 (Stazyk).

I do not find an inconsistency between Respondent's position at trial and the position taken in its EEOC position statement and Answer. Although Mr. Smith believed that his unit was understaffed because of its heavy work load, as is reflected in my Findings of Fact, Respondent's executive team decided that certain areas of Respondent's business were not economically lucrative and needed to be reduced or eliminated for financial viability. Support staff cuts followed proportionately with the termination of the employees working for the unsuccessful product lines, and Computer Services was one of many support groups that the executive team decided to reduce. Respondent's executive team relayed their decision to the managers. Indeed, Mr. Stazyk initially was told by his supervisors, Greg Aasen and Ken Huckell, that he needed to reduce ten percent of his full-time employees and all of his contractors, but he proposed an alternative plan for a more limited reduction. Tr. 1172:4-18. Thus, while neither Mr. Stazyk nor

Mr. Smith may have liked or agreed with the proposed reduction in staff for the computer support functions, they were required to carry out the directives of the company's executive team.

Complainant stated, "none of Respondents [sic] witnesses were able to identify any programs or projects that Complainant supported warranted a reduction of any systems administrators at all." Complainant's Brief at 47. However at the hearing, Complainant did not ask Ms. Jones, the one witness who was part of the executive team and involved in the planning of the RIF, any questions regarding specific programs or projects reduced or eliminated because during the RIF. Complainant only posed questions to Mr. Stazyk and Mr. Smith, who were instrumental in implementing the RIF, but who were not part of the business decision to engage in the RIF or to reduce or eliminate certain projects or programs company-wide. Further, although Mr. Stazyk could not name specific programs or projects eliminated by Respondent, Mr. Stazyk testified that "there was a general headcount reduction across multiple projects." Tr. 1211:12-20. Mr. Smith could not name specific projects that were reduced or eliminated either, but stated "[t]here were engineering programs that were cut back, and the head count was reduced....[t]hat would have justified a systems administrator being terminated from our group." Tr. 405:9-15.

Because I do not find an inconsistency in Respondent's positions with regard to the reduction of certain programs and projects necessitating the termination of a Unix administrator, Complainant's argument does not demonstrate that Respondent's proffered reasons for terminating Complainant are pretext for intentional citizenship status discrimination.

c. Respondent's Statement That It Compared the Relative Scope and Experience of Complainant and Mr. Singh

On July 12 and 23, 2001, Respondent wrote position statements to the EEOC, in which it stated: "[u]ltimately the Company decided that Mr. Hsieh was not performing up to the Company's expectations and that his scope and experience was not as extensive as Mr. Singh." CX-C-2, CX-K-2. In addition, in Respondent's Answer to the Complaint, it stated: "[u]ltimately, the Company decided that the Complainant was not performing up to the Company's expectations and that his scope and experience was not as extensive as the other employee." Answer at 4-5. Respondent subsequently augmented its pleadings and identified the "other employee" mentioned in its Answer as Mr. Singh. CX-NNNN-2-3, 6.

However, during trial, the Respondent changed its position about how it selected Complainant for lay off. Mr. Smith testified that he considered all of the employees in his Computer Services Group and their skills, including Mr. Singh, and Complainant was the only employee with any performance problems, thus he selected Complainant for termination. Mr. Smith testified that he had Mr. Singh's resume at this time, but did not have Complainant's resume. Additionally, at trial, Respondent's counsel stated that Mr. Smith's version of the selection process was the accurate version and it was typographical errors that

caused the confusion. Respondent never amended its Answer.

Thus, during the course of litigation, Respondent has said both that it compared Complainant with Mr. Singh, and that it compared Complainant with all other employees in the Computer Services group. I agree with Complainant that this is an inconsistency in Respondent's recitation of its selection process in choosing Complainant for termination. Although this inconsistency reflects badly on Respondent's counsel, see infra Part VI), I do not find that this inconsistency demonstrates that Respondent's proffered explanations for Complainant's termination, a RIF and performance problems, are unworthy of credence. There is no nexus between this inconsistency and Respondent's intent to discriminate on the basis of Complainant's citizenship.

As stated in the Findings of Fact, I find that Mr. Smith compared Complainant and Mr. Singh when deciding who to terminate in the RIF, and chose to terminate Complainant because he had some performance problems, and Mr. Singh did not. I find further that citizenship status was not a factor in the termination decision. Complainant has agreed that he was terminated pursuant to a RIF, JSF No. 44, and has produced no evidence that this RIF was pretext for intentional citizenship status discrimination. Thus, despite the inconsistency in Respondent's recitation of the events leading up to the RIF, I do not find that this renders Respondent's proffered justifications for Complainant's termination unworthy of credence or constitutes evidence of pretext for intentional citizenship status discrimination.

d. Respondent's Assertion That It Decided to Conduct a RIF on March 18, 2001

In its position statements submitted by Respondent to the EEOC dated July 12 and 23, 2001, as well as its Answer to the Complaint, it stated that "[o]n March 18, 2001, PMC-Sierra executives, during a business review meeting, discussed and agreed that a Company-wide layoff would be implemented, effective March 26, 2001." CX-C-2, CX-K-2, Answer at 4. In Ms. Jones's deposition, she stated that the earliest she remembered meeting about possible reductions in force was after the first week in March. CX-HHHH-7. In her deposition, she stated that there were about three meetings before March 18. CX-HHHH-10-11. Ms. Jones testified that the layoff list was in process throughout March and she thought it was released to Mr. Mauro and Ms. Stevens three or four days prior to the layoff. CX-HHHH-16. At Mr. Stazyk's deposition, he said that he learned of the RIF in mid-March. CX-KKKK-21-22. At Mr. Smith's deposition, he conjectured that he found out about the impending RIF on or about March 5, 2001. Tr. 398:12-22.

At trial, Ms. Jones testified that Respondent's executive team had discussions about a RIF in early March. Tr. 1103:10-18. She then testified that March 15, 2001 was the date the executive team made the decision to engage in a RIF. Id. However, later in her direct examination, she said that the executive team met on Tuesday, March 13, 2001, and decided to engage in the RIF. Tr. 1134: 8-14, 1146:16-25.

Ms. Jones testified that the date of March 18, 2001, mentioned in the EEOC position statement and the Answer, was incorrect. Tr. 1131:8-21. Mr. Mauro and Ms. Stevens testified that they did not receive the list of names for lay off until March 25, 2001. Tr. 256:14-17 (Mauro); 820: 17-821:3 (Stevens); Mr. Stazyk testified that he learned of the planned RIF on March 15, 2001, and informed Mr. Smith on March 16, 2001. Tr. 1170:1-25. Mr. Smith testified that he found out about the RIF on March 16, 2001. Tr. 508:14-20.

While there is confusion and some inconsistency about the date that the executive team planned the RIF and when Mr. Smith found out about the RIF, I do not find these contradictions to be evidence of intentional employment discrimination or evidence that Respondent's proffered reasons for terminating Complainant are pretext for discrimination. Respondent had been discussing a possible RIF since early March, in mid-March the final decision to engage in a RIF occurred, and soon thereafter, Mr. Smith learned of the RIF and the need to reduce one employee in his group. Whether the executive team made that decision on March 13 or March 18, or whether Mr. Mauro and Ms. Stevens found out about the RIF one day prior or three days prior to the RIF, does not change the fact that these events took place. The testimony of Respondent's employees has not been wholly inconsistent, and there has been no evidence that these minor inconsistencies demonstrate Respondent's intent to engage in citizenship status discrimination. I do not find that Respondent's inconsistent testimony about when the decision to engage in the RIF occurred to be evidence of pretext for intentional citizenship status discrimination.

e. Complainant's Performance

Complainant argues that Respondent's claim that it selected Complainant because of poor performance either has no basis in fact or was not a motivating factor. Complainant's Brief at 52. He makes five arguments in favor of this position.

i. Respondent Pre-Selected Mr. Singh to Fill the Unix Administrator Position and Hired Complainant to Fill the Slot Until the Visa Could Go Through

Complainant argues that the record supports that conclusion that Respondent pre-selected Mr. Singh to fill the Unix Administrator position, and intended to hire Complainant temporarily until Mr. Singh received his visa approval. Complainant's Brief at 52.

As is reflected in the Findings of Fact, the evidence does not support this theory. Preliminarily, Respondent (PMC-Sierra) did not hire Mr. Singh or Complainant; they were originally hired by SwitchOn. There is no evidence in the record that demonstrates that SwitchOn hired Complainant temporarily until Mr. Singh's visa was approved. Indeed, because it found Complainant through a recruiter, SwitchOn paid $25,000 to the recruiting company. This action is inconsistent with hiring an employee temporarily.

Additionally, there is no evidence that SwitchOn asked Respondent to terminate Complainant when Mr. Singh's visa was approved, or that Respondent had the intent to lay Complainant off after Mr. Singh arrived in the United States. In fact, there are pre-termination documents that suggest that Respondent intended that Complainant and Mr. Singh would work side-by-side for Respondent when Mr. Singh arrived in the United States. CX-RR.

I do not find that either SwitchOn or Respondent pre-selected Mr. Singh to fill the Unix Administrator position and merely hired Complainant temporarily.

ii. Complainant Received No Oral or Written Notice of Any Problems

Complainant argues that because Complainant did not receive written or oral notice of performance problems, performance was not the true reason he was terminated. Complainant's Brief at 53.

As is reflected in the Findings of Fact, I find that Complainant did receive oral notice of his performance issues on numerous occasions. Although Respondent was unwise in failing to keep contemporaneous written documentation of performance problems, and in failing to provide written notice to Complainant, the evidence does not support Complainant's argument that Respondent's failure to document performance issues demonstrates pretext for intentional citizenship discrimination and that concerns about Complainant's performance were not part of the reason he was terminated in the RIF. Complainant's supervisor, Mr. Smith, testified that because he was a new manager, he did not understand the significance of documenting performance problems and giving written notice of performance problems. The Findings of Fact show many performance issues that support Respondent's legitimate nondiscriminatory reason, and lack of a written record or written notice does not render Respondent's proffered reason unworthy of credence.

iii. If Complainant's Performance Was the Reason for His Termination, Respondent Would Have Fired Him and Recouped the Finders Fee from the Recruiter

Complainant argues that if Complainant's performance was the reason for his termination, Respondent would have terminated him earlier and recouped the $25,000 finders fee from the recruiting company. Complainant's Brief at 54.

This argument is unpersuasive. First, Respondent could never have recouped the finders fee because it could only be recovered if Complainant left SwitchOn within the first ninety days of his employment. Complainant commenced employment on September 11, 2000, and ninety days after the start of his employment would have been December 9, 2000. The merger did not occur until December

31, 2000, and thus Respondent did not employ Complainant until January 1, 2001, after the time period expired to recover the fee. Further, Complainant would not have been terminated, but for the RIF, and obviously on March 26, 2001, Respondent could not have recouped the finders fee from the recruiting company.

The fact that neither SwitchOn nor Respondent collected the finders fee from the recruiting company does not support Complainant's argument that Complainant's performance issues were pretext for intentional citizenship discrimination.

iv. Respondent's Statements in Complainant's Termination Letter and Subsequent E-mail Demonstrate That Performance Was Not the Real Reason for Complainant's Termination

Complainant argues that Respondent's statements in Complainant's termination letter and subsequent e-mail from human resources show that performance was not the true reason for Complainant's termination. Complainant's Brief at 55-56. Complainant's termination letter states: "termination of your employment is solely the result of business needs and it is not related to any dissatisfaction with your work." When Complainant protested his termination in an e-mail to Paula Stevens, she responded by saying "this was a business decision based on a number of factors and not a reflection of how we feel about you or your contributions to PMC."

Complainant's termination letter was a form letter sent to all employees terminated in the March 26, 2001 RIF. JSF No. 47. Ms. Jones testified that Respondent chose to tell laid off employees that their termination was a result of business needs to facilitate their future job searches. Ms. Jones further testified that the letter was not meant to address the reason that each employee was terminated. Further, at the time the termination letter was drafted and distributed, Ms. Jones did not know whether there were any concerns about Complainant's performance.

At the time Ms. Stevens wrote the e-mail response to Complainant, neither she nor Ms. Jones knew whether Complainant's performance played any role in his inclusion in the RIF. Neither Ms. Stevens nor Ms. Jones consulted with Mr. Smith or Mr. Stazyk prior to sending the e-mail. Ms. Stevens and Ms. Jones both testified that the purpose of the e-mail was to explain Complainant's termination in kind terms.

Complainant was terminated pursuant to a RIF and selected for inclusion in the RIF based on his performance. Simply because Respondent did not share that information with Complainant after his termination does not mean that these proffered reasons are unworthy of credence. See, e.g., Coleman,232 F.3d 1271 (holding that a court does not necessarily imply pretext for discrimination when an employee is terminated pursuant to a RIF and not told of the selection process until subsequently). The termination letter and the e-mail from Ms. Stevens are not untrue because Complainant was terminated pursuant to a

RIF, would not have been fired but for the RIF, and his inclusion in the RIF was based on a number of factors. I do not find that the statements in Complainant's termination letter and Ms. Stevens e-mail show that Respondent's proffered explanations are pretext for intentional citizenship status discrimination.

v. Complainant's Performance Problems Have No Basis in Fact, Did Not Actually Motivate Respondent's Conduct, or Were Insufficient to Warrant the Challenged Conduct

Complainant argues that Respondent's assertion of Complainant's performance problems have no basis in fact, did not actually motivate Respondent's conduct, or were insufficient to warrant the challenged conduct. Complainant's Brief at 56-60. Complainant points to specific performance issues brought up at trial and attempts to create doubt that Complainant was responsible for these problems.

As is reflected in my Findings of Fact, I find that Respondent had legitimate, good faith concerns about Complainant's work performance during his employment. Therefore, I do not need to assess the seriousness of those concerns or to decide whether Complainant objectively had performance problems or not. If Respondent believed in good faith that there were performance problems, and selected him for inclusion in the RIF based on that belief, then Respondent's action was a legitimate nondiscriminatory reason for his termination. Villiarimo, 281 F.3d at 1063. Because I find that Respondent, in good faith, believed that Complainant had performance problems and included him in the RIF based on this belief, Complainant's argument that his performance problems had no basis in fact or were insufficient to warrant the conduct is unpersuasive.

In summary, Complainant has not shown by direct or indirect evidence that a discriminatory reason more likely motivated Respondent or that Respondent's proffered reasons are unworthy of credence. Respondent engaged in a company-wide, general RIF and needed to reduce its employee population because of a downturn in the economy and waning sales. Despite the Computer Services Group's need for Unix systems administrators, the company decided to downsize and the Computer Services Group was one of many that was affected by the RIF. When Mr. Stazyk told Mr. Smith of the RIF and the need to terminate one employee, he suggested laying off Complainant because of his past performance issues. When deciding who to lay off, Mr. Smith compared Complainant and Mr. Singh and chose to terminate Complainant because he had performance problems in the past, and Mr. Singh had not. There is no evidence that citizenship status played any factor in Mr. Stazyk's suggestion or Mr. Smith's selection of Complainant. Complainant has failed to show any intent on the part of Respondent to engage in citizenship status discrimination or that he was terminated because of his citizenship status, as is required by 8 U.S.C. section 1324b.

Thus, I find that Complainant has not demonstrated by a preponderance of the evidence that Respondent's legitimate nondiscriminatory reasons for terminating Complainant are pretext for intentional

citizenship status discrimination.

VI. RESPONDENT'S COUNSEL'S CONDUCT

Apart from the merits of this case, some comment is warranted regarding the conduct during this case of Respondent's counsel at Wilson, Sonsini, Goodrich & Rosati (Wilson Sonsini). Counsel's conduct, particularly that of lead counsel, Marina Tsatalis, Esquire, was not compliant with the high ethical and professional standards required of attorneys practicing before this tribunal. See 28 C.F.R. § 68.35(a) (2002) ("[a]ll persons appearing before an Administrative Law Judge are expected to act with integrity, and in an ethical manner."). The objectionable conduct is described below and consisted, among other things, of unsupported and bad faith pleadings, failure to correct misstatements in pleadings (such as the affirmative defenses in the Answer to the Complaint), frivolous assertions of privilege, and disobedience of orders. Indeed, counsel's efforts to thwart and frustrate Complainant's discovery efforts lent an aura of legitimacy to Complainant's assertions of discrimination that ultimately proved to be unfounded. Respondent's counsel did not serve its client's interests by engaging in such conduct.

A. Prehearing Conduct

With respect to discovery, I find that Respondent's counsel engaged in a deliberate pattern of obfuscation and delay intended to frustrate Complainant's discovery efforts. The full scope of Respondent counsel's misconduct is detailed in the various discovery orders issued during the prehearing phase of this case. For example, in the Prehearing Conference Report issued on October 21, 2002, at page 7, I noted that blanket assertions of privilege, such as those asserted by Respondent, are extremely disfavored, and that the party asserting attorney client privilege must properly identify the documents being withheld. I noted that Respondent had failed to identify the documents being withheld, and thus its objection to the subpoena duces tecum was procedurally deficient.

Unfortunately, Respondent's counsel persisted in this conduct. In orders issued on December 24, 2002, January 7, 2003, and February 4, 2003, I concluded that Respondent utterly had failed to establish any basis for the attorney client privilege that was asserted as a basis for withholding documents. Much of the information was not confidential, because it was anticipated that it would be provided to a government agency. Many of the documents involved routine business matters and not the rendering of legal advice. Further, to the extent that any confidential advice was provided, the privilege had been waived because counsel failed to produce a privilege log. In the Addendum to the December 24 Order, which addressed Respondent's belated privilege log, I rejected the privilege claim. Moreover, with respect to four of the documents withheld by Respondent, I concluded that Respondent's assertion of privilege was either "frivolous" or "particularly frivolous." Because assertions of privilege involve legal judgments, I hold Respondent's counsel responsible for these frivolous assertions.

As I stated in the December 24 Order, I was extremely troubled by the conduct of Respondent's counsel with respect to the assertion of attorney client privilege. In that Order, I concluded that Respondent, through its litigation counsel Wilson Sonsini, had ignored the procedures set forth in the Federal Rules, the OCAHO rules, and my orders. I stated as follows:

> Instead of following the procedure set forth in the OCAHO Rules of Practice, the Federal Rules of Civil Procedure, and my orders in this case, Respondent, through its litigation counsel Wilson Sonsini, interceded, had Ryan Swanson submit the documents to Respondent, and then proceeded unilaterally, without seeking court intervention, to decide which documents would be produced and which would be withheld. Respondent did not file a procedurally proper petition to revoke or modify the subpoena, nor a motion for protective order, nor a privilege log or other similar document expressly describing the nature of the documents or communications not produced. Apparently Respondent's counsel has the quaint notion that, without seeking judicial relief, it may unilaterally decide which documents to withhold pursuant to a claim of privilege. This notion is contrary to the rules of practice, the case law, and my orders in this case.

Id. at 6 (emphasis added).

With respect to the privilege log, I concluded that it did not comply with my procedural orders issued previously in the case. After reviewing in camera thirty of the documents withheld on the basis of privilege, I ruled that only a small portion (a total of nineteen sentences in three documents) were potentially privileged communications. Almost all of the documents were void of communications rendering or seeking legal advice. I stated as follows:

> I am extremely troubled by the behavior of Respondent's counsel with respect to the assertion of the attorney-client privilege in this case. First, I am disturbed by the fact that Respondent waited almost seven months to produce a privilege log, produced the privilege log only after noticing in a deposition that a document given in discovery contained communications from a paralegal, and then mysteriously found fifty-nine "privileged" documents in the course of twenty-nine days. Second, I am baffled and appalled at the assertion of privilege for twenty-seven documents that are not even remotely privileged.

Id. at 10.

In another order, issued on February 4, 2003, I stated as follows:

> I specifically reject Respondent's argument that it did not act unreasonably or vexatiously in withholding the documents pertaining to Complainant's two motions to compel under a claim of privilege or that it was acting with "due diligence" when it claimed attorney-client privilege as to the documents that are the subject of these motions. In the Addendum to the Order of December 24, 2002, I addressed the privilege claim with respect to each of the documents. Not only did I reject the claim with respect to almost all of the documents, in several instances I concluded that the assertion of the privilege was particularly frivolous. With respect to most of the documents listed on the privilege log, no competent counsel could conclude that these documents could be withheld pursuant to a claim of attorney-client privilege. Thus, I find that Respondent and its counsel have behaved egregiously and in bad faith.

Id. at 6 (emphasis added).

Even after I ruled in my February 4, 2003 Order that I did not have authority to grant monetary sanctions for discovery abuses, on the eve of trial, and in what was undoubtedly an effort to disrupt Complainant's trial preparations, Respondent's counsel filed a motion for sanctions. In the motion Respondent sought, among other things, attorney fees totaling $2,990. In the motion, Respondent did not even discuss or cite my February 4, 2003 Order expressly finding that I did not have the authority to grant attorney fees for discovery abuses. In my order denying Respondent's motion, I concluded that the motion for sanctions was both untimely and was made in bad faith:

> Respondent's request for sanctions is untimely. Respondent could have brought a motion to compel discovery in May 2002, pursuant to 28 C.F.R. section 68.23(a), after discovering in a deposition that Complainant was covered by his wife's insurance plan. Instead, Respondent has waited over thirteen months, and only three weeks before trial, to raise this issue.

Id. at 6.

With respect to the request for attorneys fees, I stated as follows:

> Respondent's request for attorney's fees does not discuss and willfully ignores my prior ruling in this case. Given that ruling, I conclude that

> Respondent's request for attorney's fees is not warranted by existing law, and indeed was made in bad faith.

Id. at 7 (emphasis added).

Respondent's lead counsel, Ms. Tsatalis, defended the deposition of Joel Paget, Esquire, an attorney with Ryan, Swanson and Cleveland, a law firm in Seattle, which had performed some immigration work for SwitchOn and PMC, including handling the LCA application and H-1B visa for Mr. Singh. In his proposed prehearing exhibits, Complainant included excerpts form the Paget deposition as CX-LLLL. Although the exhibit was not received in evidence because Mr. Paget appeared as a witness, and thus it is not part of the record for the substantive issues in this case, it is pertinent to the questions of counsel's conduct.

The deposition originally commenced on November 7, 2002, but was continued by Complainant's counsel so he could present some discovery motions to the Court. I granted Complainant's motion and ordered that the deposition be resumed because of improper privilege objections during the first phase of the deposition. When the deposition was resumed, almost immediately, Ms. Tsatalis instructed the witness not to answer a question. She stated the basis of her instruction was that the sole purpose of the February deposition was to ask about additional documents that were produced after the first phase of the deposition and she unilaterally concluded, without applying for a protective order, that the scope of the deposition was limited to such questions. CX-LLLL-26. Her objection clearly was improper for two reasons. First, it is only proper to instruct a deponent to refuse to answer when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion for protective order. See Fed. R. Civ. P. 30(d)(1). I had not imposed any such limitation and thus it was improper for Respondent's counsel to interpose this objection and to instruct the witness (who was not even an employee of Respondent) to refuse to answer.

Counsel's behavior continued throughout the deposition. Ms. Tsatalis stated at another point in the deposition as follows:

> Since we have no disagreement that this was one of the documents that was produced to Mr. Griego [Complainant's counsel] prior to the first day of Mr. Paget's deposition, and hence Mr. Griego had the opportunity to question Mr. Paget about this document in the first day of his deposition and elected not to, it is not the proper subject of this day of his deposition and therefore we will not allow it to be introduced as an exhibit, and will not allow Mr. Paget to be questioned about this document.

CX-LLLL-29. On several other occasions during the deposition she objected and instructed the witness to refuse to answer other questions for the same reason. CX-LLLL-27, 32-33, 42-45, 47, 48.

As shown by the last seven pages of the deposition, Ms. Tsatalis continually disrupted the questioning, and threatened several times to terminate the deposition. She stated "[w]e are going to call the deposition" (CX-LLLL-42); "[s]o this is the end of the deposition unless there is some other question you want to ask him about the documents that he actually has" (CX-LLLL-43); "[w]e are just about to conclude here....[t]his is sort of a final warning." (CX-LLLL-45); "[a]nd I'm instructing the witness not to answer....if you have no further questions about the new documents, we will call it a day" (CX-LLLL-47); [w]e are going to go ahead and terminate the deposition" (CX-LLLL-48); "[w]e are going to end it and we are going to take the witness with us." Id. Finally, in utter frustration, Complainant's counsel adjourned deposition until he could get a court ruling.

In a later order, I concluded that Ms. Tsatalis improperly obstructed and interfered with the deposition. On page 3 of an April 24, 2003 Order I stated as follows:

> Respondent's counsel instructed the witness not to answer questions about documents that were in Complainant's possession during the first phase of the hearing on November 7, 2002. See, e.g., CX-LLLL-26, 29, 32, 42, 43, 44-45, and 47. In fact, Respondent's counsel threatened to terminate the deposition if Complainant's counsel persisted in asking such questions. CX-LLLL-43, 45, and 47-48. Respondent, through its counsel, improperly obstructed and interfered with the questioning during the deposition.

(Emphasis added). If Ms. Tsatalis believed that there were some limitations imposed by the Court on the deposition, or believed that the questioning was improper, Respondent should have moved for a protective order, either immediately by telephone or in writing. She did not do so. Instead, she unilaterally obstructed the deposition by improperly instructing the witness to refuse to answer the questions.

Subsequently, Complainant listed Mr. Paget as a proposed witness. Respondent objected on several grounds, including arguing that Complainant had the opportunity to depose Mr. Paget on two separate occasions. Rejecting Respondent's objection, I ordered that Mr. Paget appear as a witness at the hearing. Complainant asserted that he was calling Mr. Paget as a witness because, although Complainant attempted to extract enough testimony from Mr. Paget's deposition to avoid calling him as a witness, Respondent's counsel interposed many unfounded objections, and obstructed the deposition by instructing the witness not to answer, so that critical testimony could not be obtained. The second phase of the deposition mirrored that of the first phase and lasted only a little longer. I reviewed the deposition transcript pages, and agreed with Complainant's assertion. During the February 2003

deposition, Ms. Tsatalis instructed the witness not to answer questions about documents that were in Complainant's possession during the first phase of the deposition on November 7, 2002. See, e.g. CX-LLLL-26, 29, 32, 42, 43, 44-45, 47. In fact, Respondent's counsel threatened to terminate the deposition if Complainant's counsel persisted in asking such questions. CX-LLLL-43, 45, 47-48. I concluded in the April 24 Order that Ms. Tsatalis had improperly obstructed and interfered with the questioning during the deposition, and therefore I rejected Respondent's objections to having Mr. Paget appear as a witness at the hearing. Id.

Counsel's improper conduct was not limited to discovery matters. Only a few weeks before the hearing, Respondent's counsel filed a motion to stay the proceeding and to compel arbitration. This motion was not supported by the facts or law. In the background and procedural history of the April 25, 2003 Order denying the motion to compel arbitration, I provided a lengthy discussion of the various steps Respondent had taken to litigate the case and had not sought to enforce arbitration. In the April 25 order I observed that counsel's arguments were not well founded, as follows:

> All of the cases cited by Respondent are wholly distinguishable from the present case. None of the cases cited by Respondent regarding a party's acts that are inconsistent with litigation are analogous to the facts of this litigation. Respondent's actions throughout this proceeding are inconsistent with invoking the right to arbitrate.

Id. at 12.

B. Hearing Conduct

On December 6, 2001, Respondent filed its answer to the complaint in this case. The answer was signed by attorney Jennifer K. Mathe, Esquire, of Wilson Sonsini. Respondent included several affirmative defenses. In the Fourth Affirmative Defense Respondent stated, among other things, that a reduction was necessary in the position of Unix Administrator, that the business unit analyzed the relative scope and experience for the Complainant and another employee, and ultimately the Company decided that the Complainant was not performing up to the Company's expectations and that his scope and experience was not as extensive as the other employee. In answers to interrogatories, Respondent identified the "other employee" as Ravinder Singh, and asserted that the latter had greater Unix skills than Complainant. CX-NNNN-2-3, 6 (Respondent's answers to interrogatories 12 and 13 of Complainant's second set of interrogatories); Tr. 730. Respondent's counsel made no effort to correct either the Fourth Affirmative Defense or the answers to interrogatories 12 and 13 at any time prior to the hearing, or at the outset of the hearing during the opening statement. Instead, they waited until the presentation of the testimony to repudiate the Fourth Affirmative Defense and the answers to the interrogatories. Tr. 726-28, 880-884.

In addition, it was during the presentation of the case in defense that Respondent's counsel sought to repudiate statements made in response to an investigation of Complainant's charge of discrimination by the EEOC. Three letters from Respondent's counsel to the EEOC were included as Complainant's exhibits; specifically letters dated July 12, 2001 (CX-C-1-8); July 23, 2001 (CX-K-7); and December 6, 2001 (CX-U-1-4). In the first letter, Respondent's counsel stated that:

> The criteria used to determine which employees in each business unit would be affected by the layoff was the scope and experience of each employee's functional discipline. It was determined that a reduction was necessary in the position of Unix Administrator. Thus, the business unit analyzed the relative scope and experience for Mr. Hsieh and Mr. Singh. Ultimately, the Company decided that Mr. Hsieh was not performing up to the Company's expectations and that his scope and experience were not as extensive as Mr. Singh. As a result, the decision was made that Mr. Hsieh would be terminated as part of the reduction in force.

CX-C-2.

During the case-in-defense Respondent's counsel called Geraldine Jones, who is Respondent's Vice President of Human Resources to testify to repudiate these statements. Tr. 1101. In her testimony she asserted that the executive team never made a decision that a UNIX administrator had to be terminated, or that the business unit analyzed the relative scope and experience for Complainant and Mr. Singh. Tr. 1134-36. This testimony was not described in Respondent's summary of testimony in Respondent's final witness list. At the end of Respondent counsel's examination of Ms. Jones, I reprimanded Respondent's counsel, stating as follows:

> . . . I find this examination very troubling because it goes contrary factually, not only to this letter to the Equal Employment Opportunity Commission, but another paragraph in the fourth affirmative defense.
>
> The fourth affirmative defense as well as this letter to the EEOC states that the date of the meeting was March 18, 2001.
>
> Now, if that was erroneous and needed to be corrected, that's fine. . . . . But I find it extraordinarily disturbing that this date has not been corrected until we get to the Respondent's case in defense.
>
> The answer to the complaint was filed on December 6, 2001, which is over a year and a half ago. The letter to the Equal Employment

> Opportunity Commission was dated July 23, 2001. . . [t]here was nothing filed by Respondent to correct the fourth affirmative defense.

Id. at 1138-39.

I concluded by stating that "the way this has been presented does not reflect well on either Respondent PMC-Sierra as a company or Respondent's counsel, and I am very troubled by it." Id. at 1140. Although Respondent's counsel attempted to explain their failure to correct the record earlier, Tr. 1141-1143, I did not find this explanation to be convincing and indeed I concluded by stating my surprise that "the meeting dates, which appear to be so important with respect to the RIF in this case, would not have come out before, a couple of days before trial." Id. at 1144. I conclude that counsel's behavior in this respect does not meet the high ethical and professional standards expected of attorneys practicing before this tribunal.

C. Post-Hearing Conduct

Respondent's counsel's disobedience of orders even continued in the post hearing phase of this case. As noted on page 3 of this opinion, at page vi through xx of its post hearing brief, Respondent included 171 questions of fact. These pages of the brief have been stricken as improper.

In my February 27, 2003, Order Requiring Filing of Joint Proposed Final Prehearing Order, I stated in pertinent part as follows:

> The parties should include in their statements of disputed issues any factual or legal issues on which the parties will want the Court to make a ruling, including any factual or legal issues regarding the relief sought by Complainant. Both documentary and testimonial evidence will be limited to the disputed issues listed in the respective statements of disputed factual and legal issues. If a party subsequently attempts to raise an issue not listed in the Final Prehearing Order (FPO), unless the party shows that exclusion of the issue would create manifest injustice, then either upon objection of the other party or sua sponte, the party may be barred from raising such issue or introducing evidence as to such issue.

Id. at. 2.

In a separate order, entitled Notice of Final Prehearing Conference, also dated on February 27, 2003, I further stated as follows:

> In their statements of disputed issues, the parties should include any factual

> or legal issues on which the parties will want the Court to make a ruling, including any factual or legal issues regarding the relief sought by Complainant. If a party subsequently attempts to raise an issue not listed in the Final Prehearing Order (FPO), unless the party shows that exclusion of the issue would create manifest injustice, then either upon objection of the other party or sua sponte, the party may be barred from raising such issue after the FPO is issued.

Id. at 2.

In the first page of the Final Prehearing Order (FPO) issued on June 2, 2003, I reiterated again that a party would not be permitted to reference an issue not listed or referenced in the Final Prehearing Order. The Final Prehearing Order (FPO) included forty-three disputed facts submitted by the parties. FPO, Ex. C. Comparing the 171 questions of fact with the statement of disputed facts in the FPO, it appears that only 26 of the 171 questions of fact were listed in the FPO. Counsel cannot do an end run around the FPO simply by presenting such matters as questions of fact rather than as statements of disputed fact. Respondent has not even attempted to show that the factual issued in the FPO should be modified to prevent manifest injustice. Respondent's inclusion of additional fact questions in the brief is a direct violation of my prior orders in this case.

D. Summary

I have rendered a decision in Respondent's favor on the merits of this case because the facts, and the law as applied to the facts, justify such a result. Counsel's behavior, while objectionable and unprofessional, does not justify an unfavorable decision on the merits of the case. Nevertheless, I find counsel's conduct to be extremely disturbing. The Wilson Sonsini attorneys skirted on the very edge of unethical conduct in the manner in which they litigated this case. Their conduct, if not unethical, was unprofessional and does not reflect well on themselves, their law firm, or their client. Moreover, as the lead counsel, Marina Tsatalis must take primary responsibility for the manner in which this case was litigated, and this opinion stands as a written reprimand for her conduct in this case.

VII. CONCLUSION

Because I conclude that Complainant has failed to show that he was intentionally discriminated against because of his citizenship status, I conclude that Respondent did not violate 8 U.S.C. section 1324b(a)(1)(B).

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 or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).