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

MARTHA DIAZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 03B00026
PACIFIC MARITIME ASSOCIATION, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(*August 26, 2004*)

I. SUMMARY

In separate Orders, dated February 13, 2004, and March 19, 2004, respectively, I dismissed Counts 1, 2, 3, and 5 of a Complaint that Martha Diaz (Complainant or Diaz) filed with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 23, 2003, alleging that Pacific Maritime Association (Respondent or PMA) had committed immigration-related unfair employment practices. On April 13, 2004, Respondent filed a Motion to Dismiss or for Summary Decision in the Alternative (Motion), seeking dismissal or summary decision on the remaining Counts 4 and 6 of the Complaint. For the following reasons, Respondent's motion for summary decision is GRANTED.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The factual background and procedural history of this case is recounted in my Order Granting in Part Respondent's Motion to Dismiss in Part and for Summary Decision in Part, dated February 13, 2004. The following is a summary of relevant filings since the entry of that Order.

On April 13, 2004, Respondent filed the Motion currently sub judice, incorporating by reference the exhibits attached to its Motion to Dismiss in Part and for Summary Decision in Part, filed on January 12, 2004 (cited in this Order as RX-A, RX-B, etc.). On May 14, 2004, Complainant filed an Opposition to Respondent's Motion to Dismiss or for Summary Judgment (Response), and

then on May 17, 2004, a pleading entitled Errata Complainant's Opposition to Respondent's Motion to Dismiss or for Summary Judgment (Amended Response),which amended the original Response to include page numbering, change references from "plaintiff and defendant" to "complainant and respondent," and provided an original and two copies of the Amended Response, as required by the OCAHO rules of practice. See 28 C.F.R. § 68.6(a) (2003).

Respondent also filed, on May 25, 2004, a Request for Leave to File a Reply and Objection to Admissibility of Evidence, in which it moves the exclusion of several paragraphs of the Declaration of Martha Diaz (Diaz Declaration), which is attached to Complainant's Response. After I granted leave to file, Respondent filed its Reply on June 25, 2004.

On August 2, 2004, I ordered each party to serve and file, by August 16, 2004, an additional pleading addressing the issue of whether there are any genuine issues of material fact. Respondent filed its Statement of Undisputed Facts in Support of Respondent Pacific Maritime Association's Motion for Summary Decision (RSUF) on August 16, 2004. On August 17, 2004, Complainant filed an untimely Complainant's Statement of Disputed Material Facts (CSDF). Although Complainant filed her CSDF one day late, I have accepted it for filing.

The facts identified by Complainant in the CSDF as "disputed facts" either are actually not in dispute, or are not material, or are not factual issues but rather legal contentions. For example, many of the alleged disputed facts included in Complainant's statements are acknowledged by Respondent as not being in dispute; ergo, if Complainant asserts that they are true, and Respondent has admitted them, they are undisputed. Specifically, CSDF ¶ 3, which provides that Diaz was a legal resident of the United States since 1990 at the latest, is not in dispute. See RSUF at ¶ 1. The portions of CSDF ¶ 7 stating that Diaz applied for TABE benefits on August 10, 2000, received notification that her request was denied, and submitted an appeal of this denial to the Joint Party Labor Relations Committee for the Ports of Long Beach and Los Angeles (JPLRC), are also not disputed by Respondent. See RSUF at ¶¶ 21 and 23-24. Likewise, there is no dispute over the entirety of CSDF ¶ 9, which provides that when Diaz delivered her TABE appeal, a PMA employee explained to Diaz that her 1997 application had been denied on the basis of a restricted Social Security card, that Diaz volunteered a copy of her naturalization certificate and filing receipt for her naturalization application, and that the PMA employee told Diaz that nothing could be done to cure the 1997 application. See RSUF at ¶ 27. The first and third sentences of CSDF ¶ 13, which set forth the composition of the JPLRC and allege Mr. Joe Rodriguez's membership in that body at the time of Diaz's grievance, are similarly not in dispute. See RX-S at ¶ 5 (Affidavit of Ms. Jacqueline Ferneau, Respondent's Labor Relations Assistant from July 10, 1995 until January of 1999, and Labor Relations Administrator from January of 1999 to the present (Ferneau Affidavit)). The first sentences of CSDF ¶¶ 22 and 23, which state that Diaz received a letter from the JPLRC approving her appeal and granting her casual status, are also not in dispute. See RSUF at ¶ 31. Lastly, the first sentence of CSDF ¶24 and all of ¶ 26, which collectively provide that Diaz passed testing for qualification as a casual worker after the approval of her TABE appeal as a non-class member, are not disputed by Respondent. See RSUF at ¶ 32.

Moreover, several paragraphs of Complainant's CSDF are not material to Complainant's claims of citizenship status discrimination, national origin discrimination, or document abuse relating to events in the year 2000. For example, CSDF ¶¶ 1-2, 4-5, and 8 relate to the 1997 hiring process and counts of the complaint that have already been dismissed. The second sentence of CSDF ¶ 3 stating that Diaz is married and has worked steadily from 1994 to the present, except for when she gave birth to her three children, and all of CSDF ¶ 6, providing that Diaz learned from an Equal Employment Opportunity Commission (EEOC) employee that a lawsuit was pending against PMA, do nothing to establish a prima facie case of Respondent's liability under § 1324b. Similarly, CSDF ¶ 12, which discusses the disparate treatment of Caucasian and male applicants relative to Complainant, supports only a claim of race or gender discrimination over which this Court lacks jurisdiction. CSDF ¶ 18, discussing Diaz's conversation with an Immigration and Naturalization Service (INS) officer about IRCA law, has no nexus to Respondent's allegedly discriminatory conduct towards Diaz. The first two sentences of CSDF ¶ 19, which describe comments of Rodriguez to Diaz about the INS's intentions in providing assistance to Diaz, also do not support a claim of citizenship status discrimination, national origin discrimination, or document abuse. Likewise, CSDF ¶¶ 20-21, recounting, among other things, Diaz's conversation with Rodriguez about her intention of filing a complaint with the Department of Justice, is unsupportive of Complainant's § 1324b claim. Any portions of the CSDF not specifically discussed in this paragraph are not material to establishing a prima facie case of liability under 8 U.S.C. § 1324b.

In addition, some of the alleged disputed facts listed in the CSDF actually are disputed legal contentions. The second sentence of CSDF ¶ 23 states that Diaz was deprived of casual status for over a year. CSDF ¶ 27 provides, in relevant part, that Diaz should be credited with the same amount of hours per year, seniority, or pay as 1997 applicants for employment with Respondent. This is a legal contention, not a factual issue. These disputed legal conclusions are not the appropriate subject of a statement of disputed facts.

In her CSDF, Complainant also asserts that pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP) and the local rules, she has the right to respond to Respondent's RSUF. However, this case is not governed by the FRCP or local rules of the United States district court. The FRCP only are used as a general guideline in any situation not controlled by the OCAHO rules, the Administrative Procedure Act (APA), or by another applicable statute, executive order, or regulation. 28 C.F.R. § 68.1 (2003). The OCAHO rules of practice, 28 C.F.R. § 68.1, et. seq. (2003), which do govern this proceeding, do not give a party a right to respond in such situations. Therefore, I deny Complainant's request to respond to Respondent's RSUF.

Also, on June 15, 2004, Complainant filed a Request for Permission to Respond to Respondent's Reply Brief. The OCAHO rules provide that there is no right to file a counter-response to a reply. 28 C.F.R. § 68.11(b) (2003). Although the judge may permit a response to a reply, that is solely within the judge's discretion, and I do not see the need here, especially since Complainant was permitted to file a statement as to the disputed issues.

III. RESPONDENT'S OBJECTION TO THE ADMISSIBILITY OF THE DIAZ DECLARATION

In Respondent's Request for Leave to File a Reply and Objection to Admissibility of Evidence, Respondent argues that Complainant's Response and the attached Diaz Declaration resurrect claims that have been dismissed, misconstrue legal authority, make unsubstantiated assertions, misrepresent Respondent's positions, and ignore pending issues of law. Respondent's Request at 2. Respondent further objects to certain paragraphs of the Diaz Declaration and requests that they be excluded because they are not relevant, not reliable, unduly repetitious, contain statements about which Complainant lacks personal knowledge, and their probative value is substantially outweighed by unfair prejudice or confusion of the issues. Id. at 3-8.

The Federal Rules of Evidence (FRE) do not apply automatically to cases before federal agencies governed by the APA, 5 U.S.C. § 556, et. seq.. Hsieh v. PMC-Sierra, Inc., 9 OCAHO Ref. No. 1093, 7, 2003 WL 1190042, *7. In relevant part, the APA provides that in hearings governed by the APA, any oral or documentary evidence may be received, but irrelevant, immaterial, or unduly repetitious evidence may be excluded. 5 U.S.C. § 556(d) (2003). The OCAHO rules of practice similarly provide that while the FRE may be used as a "general guide," 28 C.F.R. § 68.40(a), all relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues of by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence. 28 C.F.R. § 68.40(b) (2003). It is proper for a party to cite the FRE as persuasive authority, and evidence that would be admissible under the FRE clearly will be accepted in an OCAHO case. Hsieh, supra, at 7, *7. However the converse is not necessarily true; i.e., evidence will not necessarily be excluded in an OCAHO proceeding simply because it does not meet the standards established by the FRE. Id.

The OCAHO rules governing what may be received in evidence are in accord with the APA, and they must be read in conjunction with the rules governing affidavits. The OCAHO rules provide that affidavits submitted in connection with a motion for summary decision shall set forth facts as would be admissible in evidence in an APA proceeding. Some of Respondent's objections to the Diaz affidavit are founded on hearsay principles. Hearsay evidence is not necessarily excluded in an APA or OCAHO proceeding, even if the proponent cannot show that the proffered evidence would come within one of the hearsay exceptions covered by FRE 803 and 804. Id. Thus, reliable, relevant hearsay evidence may be admitted. Id. (emphasis in the original) (citing Flores v. Logan Foods Co., 6 OCAHO 545, 551, 1996 WL 525690, *5; Lardy v. United Airlines, Inc., 3 OCAHO 555, 574-575, 1992 WL 535604, *14; United States v. O'Brien, 1 OCAHO 1144, 1145, 1990 WL 512216, *3).

The OCAHO rules do not exclude the use of hearsay evidence at trial, and it would be anomalous to apply a stricter rule to affidavits. Indeed, because the OCAHO rules specifically state

that any affidavits submitted with a motion for summary decision shall set forth facts as would be admissible in evidence in a proceeding subject to §§ 556 and 557 of the APA, 28 C.F.R. § 68.38(b) (2003), hearsay evidence may be included in an affidavit.

However, the affiant must be competent to testify to the matters stated in the affidavit. 28 C.F.R. § 68.38(b) (2003). Affidavits must be factual and based on personal knowledge of the affiant, and the affiant must be competent to testify to the matters stated therein. See Fed. R. Civ. Proc. 56(e). Affidavits must not be made on speculation, conjecture, or personal feelings. See e.g., Stagman v. Ryan, 176 F.3d 986, 997 (7th Cir. 1999). Affidavits that merely state conclusions, rather than facts, are insufficient, and affidavits that contain legal conclusions are thus substantively deficient. See e.g., Orsini v. O/S Seabrook O.N., 247 F.3d 953, 960 n.4 (9th Cir. 2001); Howard v. Columbia Public School District, 363 F.3d 797, 801 (8th Cir. 2004), rehearing and rehearing en banc denied (2004); Christiansen v. City of Tulsa, 332 F.3d 1270, 1283 (10th Cir. 2003). Therefore, if the affidavit addresses matters that are outside the personal knowledge or competence of the affiant, such matters will be given no weight.

Applying these principles, I address seriatim Respondent's objections to the Diaz Declaration. Respondent argues that the references to the 1997 hiring process in paragraphs, 3, 4, 5, 7, 8, and 9 of the Diaz Declaration should be excluded because they are irrelevant and serve to confuse the issues currently sub judice. Request for Leave to File a Reply and Objection to Admissibility of Evidence at 3-4. As I have ruled previously in my February 13, 2004 Order granting dismissal in part, any alleged illegal acts that occurred in 1997 are barred by the statute of limitations. Thus, Counts 1, 2, and 3, relating to the 1997 hiring process have been dismissed and that ruling is not under reconsideration. Therefore, to the extent that Complainant seeks to resurrect claims on which I already have ruled, any such attempt will be rejected. For example, Complainant may not rely on the statements in paragraphs 3- 4 of her affidavit, referencing the 1997 application, as a basis for her complaint that Respondent has violated § 1324b. Her assertion in paragraph 4 that the "JPLRC hiring checklist is illegal on its face (Exhibit A)" is rejected, both because it is a legal contention and because Exhibit A is dated August 1997.

The remaining allegations, designated as Counts 4 and 6, reference activities that took place in 2000. However, although the facts that occurred in 1997 are barred by the statute of limitations, the contested paragraphs of the Diaz Declaration, which relate to events in 1997, serve as useful background information describing Complainant's interactions with Respondent, which date back to 1997. Accordingly, the references in the Diaz Declaration to the 1997 hiring process are not stricken.

Respondent next claims that the references to statements made by Mr. Joe Rodriguez in paragraphs 10, 13, 15, 18, 20, and 21 of the Diaz Declaration should be excluded as unreliable hearsay. Respondent's Request at 4. The statements in these paragraphs are hearsay because Respondent has offered the statement of a non-party to prove the truth of the matter asserted. As

discussed above, hearsay evidence is not necessarily excluded in an OCAHO proceeding, even when the proponent cannot show that the proffered evidence would come within a hearsay exception under the FRE. Hsieh, supra, at 7, *7. Rather, both the APA and the OCAHO rules permit reliable and relevant hearsay. See id. (internal citations omitted). The statements in these paragraphs of the Diaz affidavit are relevant because they speak to the allegations of discrimination at issue. I further conclude that they are reliable because they are apparently within Diaz's personal knowledge, Diaz submitted her Declaration under oath and penalty of perjury, and Respondent could test their validity by cross examining Ms. Diaz at a hearing or by calling Mr. Rodriguez as a witness. Therefore, the references in the Diaz Declaration to statements by Mr. Rodriguez are not excluded.

Respondent also challenges as unreliable and inflammatory the statement in paragraph 11 of the Diaz Declaration that "[w]hile I was asked for numerous pieces of identification, many Caucasian applicants including Michael Dazzel and Mike Sullivan only had to show their drivers licenses, or their social security cards." Request for Leave to File a Reply and Objection to Admissibility of Evidence at 5. The portion of this statement providing that Diaz was asked for numerous pieces of identification is apparently within her personal knowledge. In contrast, Complainant has laid no foundation for her asserted knowledge that many Caucasian applicants, including Mr. Dazzel and Mr. Sullivan, were required to show fewer documents of identification. Moreover, this allegation is irrelevant because this tribunal has jurisdiction over complaints of discrimination based on citizenship or national origin, but not race or gender. Hence, that portion of paragraph 11 ("many Caucasian applicants including Michael Dazzel and Mike Sullivan only had to show their drivers licences, or their social security cards") is given no weight.

Respondent next argues that paragraph 12, concerning the composition of the JPLRC and Mr. Rodriguez's membership status in the organization, should be excluded because Respondent has laid no foundation for her statements. Complainant has failed to establish a foundation for the first sentence of paragraph 12. Diaz has adduced no foundation for her knowledge of the JPLRC's structure and that statement will not be given weight. Also, to the extent that legal contentions are included, they will be given no weight. In contrast, Exhibit F (Minutes of a JPLRC Meeting, dated December 5, 2000) does show that Rodriguez was a member of the JPLRC when Complainant's appeal was considered in December 2000.

Respondent also asserts that the statements in paragraph 24 attributed to Mr. Benjamin P. Mamaril of the EEOC, should be excluded as hearsay. Request for Leave to File a Reply and Objection to Admissibility of Evidence at 5. As discussed with respect to the hearsay statements of Mr. Rodriguez, hearsay evidence may be allowed in an OCAHO proceeding when it is reliable and relevant. Hsieh, supra, at 7, *7. The statements of Mr. Mamaril are relevant because they relate to the allegations of discrimination at issue, and they are reliable because they are apparently within Diaz's personal knowledge. Moreover, Diaz submitted her Declaration under oath and penalty of perjury, and Respondent could test the validity of these paragraphs by examining Ms. Diaz and Mr. Mamaril at trial. Therefore, no part of paragraph 24 is excluded.

Finally, Complainant states in paragraph 6 of the Diaz Declaration, "[o]n October 13, 2000 PMA answered me, and said that I never applied (Exhibit B) or that I had been disqualified. They gave me fifteen (15) days to appeal. On October 25, 2000 I filled out an appeal (Exhibit B) and on August 26, 2000 I took it to the office of the PMA which was processing these appeals." However, the first two (2) quoted statements are not supported by Exhibit B, a letter that Complainant herself sent to Respondent. Moreover, the third quoted statement is a non sequitur because Complainant could not possibly have taken her appeal to the office of PMA on August 26, 2000 if she filled out the appeal on October 25, 2000. Therefore, these statements are afforded no weight.

IV. STANDARDS GOVERNING A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM / MOTION FOR SUMMARY DECISION

A. Motion to Dismiss for Failure to State a Claim

The OCAHO rules expressly provide for motions to dismiss for failure to state a claim upon which relief may be granted at 28 C.F.R. § 68.10 (2003). A motion to dismiss under § 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See e.g., Reyes-Martinon v. Swift and Company, 9 OCAHO Ref. No. 1068, 9, 2001 WL 909276, *7 (citing Bunn v. USX/US Steel, 7 OCAHO 996, 999-1000, 1998 WL 745990, *3; United States v. Tinoco-Medina, 6 OCAHO 720, 728, 1996 WL 670175, *6). In considering such a motion, the court must assume the truth of all facts alleged in the complaint and must allow the nonmoving party the benefit of all inferences that can be derived from the alleged facts. Reyes-Martinon, supra, at 9, *7 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). A respondent's motion to dismiss should be granted only if it appears that under any reasonable reading of the complaint, the complainant will be unable to prove any set of facts that would justify relief. Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

B. Motion for Summary Decision

The OCAHO rules of practice permit the entry of "summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (2003). Section 68.38(c) is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. See United States v. Aid Maintenance Company, Inc., 6 OCAHO 810, 813 (1996), 1996 WL 735954, *3; United States v. Tri Component Product Corp., 5 OCAHO 765, 767 (1995), 1995 WL 813122, *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the case are deemed "material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, an issue of material fact must be "genuine." Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 586-87 (1986). Thus, disputed facts that are not material do not preclude granting summary judgment. There are no genuine issues of fact for trial when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. at 587. In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id.

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

Moreover, because both parties are situated in California, the case law of the United States Ninth Circuit Court of Appeals (Ninth Circuit) is authoritative. See 28 C.F.R. § 68.57 (2003). In the Ninth Circuit, "a plaintiff in an employment discrimination case need produce very little evidence in order to overcome an employer's motion for summary judgment." Chuang v. University of California Davis, Board of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000). A low evidentiary burden is placed on the plaintiff because factual inquires should most appropriately be conducted by the fact finder on the basis of a full record. Id.

C. Citizenship Status Discrimination and Document Abuse

A complainant in an employment discrimination case must establish a prima facie case of discrimination. Hsieh, supra, at 11, *10 (internal citations omitted). A complainant establishes a prima facie case of citizenship discrimination by alleging and demonstrating that: (1) she belongs to a class protected by 8 U.S.C. § 1324b; (2) she suffered an adverse employment action; and (3) there was disparate treatment from which the court may infer a causal relationship between her protected status and the adverse employment action. Id. (citing, inter alia, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). To establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show that, in connection with the employment verification process, an employer has requested from the employee more or different documents than those required by the employment eligibility provisions established by § 1324a, for the purpose or with the intent to discriminate against the employee on account of the employee's national origin or citizenship status. Simon v. Ingram Micro, Inc., 9 OCAHO Ref. No. 1088, 17, 2003 WL 634572, *15 (internal citation omitted); Robison Fruit Ranch, Inc. v. U.S., 147 F.3d 798, 801-802 (9th Cir. 1998). The employee also may establish a violation of § 1324b(a)(6) by showing that an employer refused to honor a document tendered by the employee that on its face reasonably appears to be genuine, for the purpose or with the intent of discriminating against the employee on account of the

employee's national origin or citizenship status. Simon, supra, at 17, *15.

The respondent then must articulate some legitimate, nondiscriminatory reason for the challenged employment action. Id. 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. Id.

V. FINDINGS OF FACT

After reviewing the record, I make the following fact-findings:

1. Complainant has been a legal resident of the United States since October of 1990. CSDF at ¶ 3; RSUF at ¶ 1; Diaz Declaration at ¶ 2; RX-A (Complainant's Deposition).

2. Complainant applied for naturalization as a United States citizen on May 6, 1997. CSDF at ¶ 9; RSUF at ¶ 3; RX-B (Complainant's Application for Naturalization).

3. Complainant was naturalized as a United States Citizen on September 7, 2000. CSDF at ¶ 9; RSUF at ¶ 3; RX-C (Incomplete Copy of Complainant's Certificate of Naturalization); Complainant's Exhibit C attached to Response (Complete Copy of Complainant's Certificate of Naturalization).

4. The JPLRC is comprised of representatives from the union ILWU Local 13, the union ILWU Local 63, and the PMA. CSDF at ¶ 13; RSUF at ¶ 4; RX-S at ¶ 5 (Ferneau Affidavit).

5. On June 8, 2000, Respondent and the union members of the JPLRC entered into a Consent Decree to resolve the EEOC's claim that Respondent's use of the McGraw-Hill Standardized Test of Adult Basic Education (TABE) in its casual applicant screening had a disparate impact on Blacks, Hispanics and Asians. Under the Consent Decree, Respondent and the unions agreed to discontinue use of the TABE and to compensate members of a class of workers adversely affected by prior administrations of the TABE. RSUF at ¶ 20; RX-G (Consent Decree).

6. Complainant applied for class member benefits under the TABE Consent Decree on August 10, 2000. CSDF at ¶ 7; RSUF at ¶ 21; Diaz Declaration at ¶ 7; RX-H (Complainant's Application for Class Member Benefits).

7. On October 12, 2000, the JPLRC, of which Respondent is a member, denied Complainant's application for TABE class benefits because she had not taken the TABE and her 1997

application for casual work had been rejected. CSDF at ¶ 7 ; RSUF at ¶ 23; RX-I (Class Benefits Rejection Letter from JPLRC to Complainant, dated October 12, 2000).

8. On October 26, 2000, Complainant submitted an appeal to the JPLRC, dated October 25, 2000, in which she contested the JPLRC's denial of TABE class benefits. CSDF at ¶ 7 (erroneously stating that Diaz submitted her appeal on August 26, 2000); RSUF at ¶ 24; RX-J (Complainant's Appeal).

9. While at the JPLRC office on October 26, 2000, Complainant inquired about the disposition of her August 1997 application. A PMA employee explained to her that the 1997 application had been disqualified because she submitted a restricted Social Security card and there was nothing else to be done. Complainant volunteered a copy of her naturalization certificate and the PMA employee told her that the naturalization certificate did not cure the defective 1997 application because it was dated September 7, 2000, and Complainant's defective application was submitted in 1997. Complainant was further told that the filing receipt for her naturalization application, dated May 6, 1997, did not cure her 1997 application, and that the Social Security card that she submitted with her 1997 application containing the restriction "valid to work only with INS authorization" did not meet the documentation requirements of the 1997 application. CSDF at ¶¶ 9-10; RSUF at ¶ 27; Diaz Declaration at ¶¶ 7-8.

10. On November 10, 2000, Diaz received a telephone call from Mr. J. Rodriguez of the JPLRC, who offered to assist Complainant with her appeal. CSDF at ¶ 11; RSUF at ¶ 28; RX-C (Complainant's Deposition).

11. Rodriguez was a member of the JPLRC at the time of Complainant's appeal. CSDF at ¶ 13; Complainant's Exhibit F attached to Response (Minutes of a JPLRC meeting, dated December 5, 2000).

VI. ANALYSIS OF RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY DECISION

Respondent argues that it is entitled to summary disposition on Counts 4 and 6 because paragraphs 27 and 28 of the Ferneau Affidavit, RX-S, show that Mr. Rodriguez was neither an employee, nor an agent of Respondent. Respondent further argues that it is entitled to summary disposition on Count 4 because Respondent has proffered a reasonable and legitimate explanation for its actions, and Complainant has not rebutted this explanation. Specifically, Respondent claims that Complainant was not eligible for TABE class member benefits, there was no casual hiring process when Complainant filed her appeal, and the TABE appeal submitted by Complainant was not an application for employment. Motion at 10-11; Reply at 2-3. Respondent has supported its contentions with citations to the record.

In response, Complainant asserts that the Complaint, the Diaz Declaration, and other evidence proffered by Complainant are sufficient to show citizenship discrimination in 2000. Amended Response at 1-5. Complainant further contends that she has adduced sufficient proof to show document abuse under 8 U.S.C. § 1324b(a)(6). Id. at 6-10.

In my Order Granting in Part Respondent's Motion to Dismiss in Part and for Summary Decision in Part, dated February 13, 2004, I denied Respondent's motion to dismiss Counts 4 and 6 of the Complaint. Although Respondent styled its January 12, 2004 Motion as seeking dismissal in part and summary decision in part, the January Motion was primarily a motion to dismiss; Respondent moved for summary decision only on Count 3, and only in the alternative should I deny its motion to dismiss that Count. I dismissed Count 3 in part because Complainant was not a "protected individual" under 8 U.S.C. § 1324b(a)(3) in 1997, and in part because Count 3 is barred by the statue of limitation at 8 U.S.C. § 1324b(d)(3). Thus, I never applied the summary decision standard in the February Order. See February 13, 2004 Order at 12-16.

In dicta, I also examined the record outside of the Complaint, and posited that Complainant could reasonably believe that her August 10, 2000 request for TABE class benefits constituted a second application for employment with Respondent. See id. at 13. I also stated that even though Complainant was hired, Respondent might have discriminated against her by delaying the processing of her application or by hiring her to fill a different position than the one that she sought. Id. Similarly, applying the broad standard for adjudicating a motion to dismiss, I concluded that the presentation of documents by Complainant to Respondent in the year 2000 might support a prima facie case of liability with respect to Count 6. Id. at 16. I noted that liability for violating 8 U.S.C. § 1324b(a)(6) is not limited to document requests or refusals by an employer to honor documents tendered by an employee occurring after an employer has formally hired an individual, because an employer may utilize such requests or refusals to "pre-screen" applicants on the basis of their citizenship status or national origin. Id. at 14. I also rejected Respondent's argument that Complainant's failure to show Respondent's discriminatory intent rendered dismissal of Count 6 appropriate, because the Complaint sufficiently alleged a set of facts that would justify relief. Id.

Because the more rigorous summary decision standard applies in this case and because Respondent has supported its Motion by an affidavit as well as other extrinsic evidence, the burden is now on Complainant to come forward with evidence of specific facts showing there is an issue for trial. See Matsushita, supra, at 587. Thus, Complainant must adduce evidence colorably demonstrating that she did in fact apply for employment with Respondent on August 10, 2000, and that Respondent discriminated against her during this process. Complainant also must show that Respondent committed document abuse by requesting or rejecting documents from her for the purpose or with the intent to discriminate against her on account of her national origin or citizenship status. In other words, to withstand Respondent's Motion, Complainant must make out a prima facie case of Respondent's liability on Counts 4 and 6.

A. Summary Decision on Count 4 (Citizenship Status Discrimination)

To survive summary decision on Count 4, Complainant must allege and demonstrate that: (1) she belongs to a class protected by 8 U.S.C. § 1324b; (2) she suffered an adverse employment action; and (3) there was disparate treatment from which the court may infer a causal relationship between her protected status and the adverse employment action. Hsieh, supra, at 11, *10 (citing, inter alia, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). However, Complainant has neither alleged, nor adduced a scintilla of evidence, showing disparate treatment in favor of or against United States citizens. The only evidence even arguably showing any form of disparate treatment by Respondent during the 2000 hiring process is Complainant's own statement that "many Caucasian applicants including Michael Dazzel and Mike Sullivan only had to show their driver's licenses, or their social security cards." Diaz Declaration at ¶ 11. I have already ruled that this statement will be afforded no weight because Complainant has laid no foundation for her asserted knowledge. Yet, even if the statement were accepted as true, it would only support a finding of racial or gender discrimination, over which this Court lacks jurisdiction.

Although I declined to dismiss Count 4 when adjudicating Respondent's January motion to dismiss, see February 13, 2004 Order at 13, the more lenient motion to dismiss standard does not apply in this case. Even though in the Ninth Circuit a plaintiff in an employment discrimination case has to produce little evidence to withstand an employer's motion for summary judgment, see Chuang, supra, at 1124, Complainant has not even met this minimal burden. Complainant has failed to adduce any facts showing there is a genuine issue for trial as to her claim of citizenship status discrimination; namely, unlawful disparate treatment in favor of or against United States citizens. See Matsushita, supra, at 587. No genuine issues of fact thus remain for trial because the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. Accordingly, Respondent's Motion for summary decision on Count 4 is GRANTED.

B. Summary Decision on Count 6 (Document Abuse)

To withstand summary decision on Count 6, Complainant must allege and demonstrate that, in connection with the employment verification process, Respondent has requested from her more or different documents than those required by the employment eligibility provisions established by 8 U.S.C. § 1324a, for the purpose or with the intent to discriminate against Complainant on account of her national origin or citizenship status. Simon, supra, at 17, *15 (internal citation omitted) (emphasis added); Robison Fruit Ranch, Inc., supra, at 801-802 (emphasis added). Alternatively, Complainant may establish a violation of § 1324b(a)(6) by showing that Respondent refused to honor a document tendered by her that on its face reasonably appeared to be genuine, for the purpose or with the intent of discriminating against her on account of the her national origin or citizenship status. Simon, supra, at 17, *15.

In this case, Complainant has neither alleged, nor shown, any request for more or different

documents based on the intent to discriminate against her based on her national origin or citizenship status during the 2000 hiring process. While Complainant might have had a strong case of document abuse with respect to the 1997 application, Counts 1, 2, and 3 have already been dismissed on jurisdictional grounds and as time-barred. As noted previously, Complainant's statement that "Caucasians" were required to produce fewer or different documents is accorded no weight, and in any event, claims of racial and gender discrimination are outside the jurisdiction of this Court. Thus, there is no evidence in the record showing that other applicants were required to produce more or different work authorization documents based on citizenship or national origin during the 2000 hiring process. If anything, Respondent seems to have afforded Complainant preferential treatment by converting her TABE appeal to an application for employment and hiring her as a casual worker. Along these lines, Complainant has not refuted Respondent's assertion that it requested documents from Diaz to determine her eligibility as a member of the TABE class, and not in connection with an application for employment. While a plaintiff in an employment discrimination case in the Ninth Circuit needs to produce little evidence to survive an employer's motion for summary judgment, see Chuang, supra, at 1124, Complainant has neither alleged nor set forth specific facts showing a prima facie case of Respondent's liability for document abuse stemming from the events of 2000. See Matsushita, supra, at 587. Hence, no genuine issues of fact remain for trial because the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Id. at 587. Respondent's Motion for summary decision on Count 6 is GRANTED.

C. Motion to Dismiss

Because I have concluded that Respondent is entitled to summary decision in its favor on Counts 4 and 6, I need not reach Respondent's argument that Counts 4 and 6 should be dismissed because they fail to state a claim upon which relief may be granted. Likewise, Respondent's and Complainant's arguments concerning the authority of Mr. Rodriguez to bind PMA and Respondent's proffered legitimate non-discriminatory reasons for its actions are not germane.

VII. CONCLUSION

Respondent's Motion for summary decision is GRANTED as to Count 4 because Complainant has neither alleged, nor adduced, specific facts showing disparate treatment based on citizenship. Respondent's Motion for summary decision is GRANTED as to Count 6, because Complainant has neither alleged, nor set forth, specific facts demonstrating that Respondent requested more or different documents than those required under § 1324a, for the purpose or with the intent to discriminate against Complainant on account of her national origin or citizenship status. Likewise, Complainant has not alleged or shown that Respondent refused to honor a document tendered by Complainant that on its face reasonably appeared to be genuine, for the purpose or with the intent of discriminating against Complainant on account of her national origin or citizenship status. Simon, supra, at 17, *15.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This Order constitutes a 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 (2003).