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

December 15, 2004

NATASHA DIONNE HUMPHRIES, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 04B00042
PALM, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Palm, Inc. (Palm or the company)[1], the respondent in this matter, has its headquarters in Milpitas, California and is engaged in the business of distributing mobile and wireless Internet solutions, as well as hand-held computers. Natasha Humphries (Humphries), a United States citizen, filed a complaint in which she alleged that she was fired from her job as a Software Quality Assurance (SQA) Test Lead at Palm's headquarters facility because of her citizenship status. Palm filed an answer denying the material allegations, and also filed a motion to dismiss the complaint for failure to state a claim, or alternatively a motion for summary decision, accompanied by 14 exhibits. Humphries responded to the motion and Palm filed a reply.

I took Palm's motion under advisement pending production of responses to some of Humphries' document requests and I also set forth a schedule for additional submissions. Palm produced the documents and the time periods established in that order have elapsed without further submissions from Humphries. The motion is ripe for decision.

[1] In October, 2003, shortly after the events in issue here, Palm acquired Handspring, Inc., and the resulting company is now known as palmOne. I have used the name Palm except where a more recent document specifically identifies the respondent as palmOne.

II. MATERIALS CONSIDERED

For the purpose of deciding this motion, I have considered the pleadings and all other materials of record, including attachments to the complaint and responses to discovery requests to the extent they have been made part of the record. Palm's exhibits are identified as follows: RXA) a Statement of Work for Software Quality Assurance and Test dated October 1, 2003 consisting of 15 pages; RXB) a Job Posting for Senior Software Quality Engineer consisting of 3 pages; RXC) a 3-page Application for Employment for Natasha Humphries; RXD) a 2-page letter dated August 3, 2000 from Palm to Natasha Humphries; RXE) a resume for Natasha Humphries; RXF) an Employee Agreement between Palm and Humphries consisting of 5 pages; RXG) an I-9 form for Humphries with a photocopy of her driver's license and social security card; RXH) Code of Conduct for Palm Computing, Inc. consisting of 5 pages; RXI) a 5-page Performance Appraisal for Humphries for the period June 1, 2001 to May 31, 2002; RXJ) Palm internal e-mails dated August 18, 2003; RXK) a Palm internal e-mail dated August 21, 2003; RXL) Palm's "U.S. Employee Notification Package" consisting of 24 pages and two attached booklets captioned respectively: "deciding what to do with your retirement plan savings" and "Employee Assistance Program;" RXM) I-9 forms and resumes for six individuals consisting of 21 pages in all (a duplicate set of these documents was also included, together with a copy of a 3 page letter to Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) and a duplicate of RXB); RXN) a letter from OSC to Palm's counsel dated February 19, 2004. Palm subsequently filed the Declaration of Alan J. Gordee and RXO, a copy of Humphries' underlying OSC charge.

While Humphries presented no evidentiary materials as such, Palm responded to her document requests for a list of employees, contractors, vendors hired in Software Quality Assurance since August 2003, a copy of any tools or documents used to assess technical skill and qualification of the employees for the August 2003 layoff, and a copy of the Palm Employee Handbook for 2003. The materials produced are also part of the record and will be identified respectively as DX1, DX2, and DX3.

III. BACKGROUND INFORMATION

The record reflects that on August 3, 2000 Palm offered Humphries a job as a Client Server Quality Assurance Lead (QA Engr[2] 3/Grade level 17B), reporting to Palm's Quality Assurance

[2] Modern computer programmers typically have the title "software engineer" although they do not necessarily do "engineering" in the traditional sense of work involving the use of

(continued...)

Manager, at that time David Kampschafer (RXD). Humphries accepted. According to her resume, Humphries at the time had been working as a Quality Assurance Test Lead for The Learning Company, Inc., a division of Mattel Interactive, and she was also a candidate for a B.A. degree in German Studies from Stanford University (RXE). Humphries' performance appraisal at Palm for the period June 1, 2001 to May 31, 2002 reflects that she met or exceeded the goals and objectives for all the elements of her position, but areas for improvement were identified, including a better understanding of some of the new networking technologies (RXI). It also reflected that she had some ups and downs and that she needed to be available on-site more often (RXI). There was apparently no performance appraisal completed for the following year. Humphries' brief contended that had such a review been done, it would have captured additional technical skills she had developed during the period.

According to Palm, it hired Steve Glaiser as Director of Software Quality Assurance Testing in March, 2003. Internal Palm communications reflect that on August 18, 2003 Glaiser sent an e-mail to various individuals, including Humphries, confirming that a short meeting had been held at Milpitas about certain changes to be made to the Quality Assurance team there (RXJ). The e-mail said the plan was to change the skill set and core competency of the team and that the new way would require different skills (RXJ). Steve Manser[3] sent a follow up message the same day to "Palm Manser staff" noting the need to re-balance skills pertaining to increased technical awareness and automation (RXJ). He said the plan was to eliminate some members of that team and hire back "virtually the same number of people, but with a much more technical background" (RXJ).

Subsequently on August 21, 2003 Manser sent an e-mail to "SG CEO Staff" about the plan to upgrade the Software Quality Assurance team in order to migrate from "ad hoc" testing to "a more repeatable, efficient, and thorough testing methodology using 'automation' and some continued 'ad hoc' testing" (RXK). The e-mail said that approximately a dozen people had been notified about the impact on their future employment (RXK). The e-mail concluded by observing that "[t]he timing of this was based on completion of Fall product so that we can re-staff the team with the appropriate skills for Spring launch" (RXK). Humphries was given a "U.S. Employee Notification Package" (RXL) with a letter dated August 20, 2003 stating that her employment was terminated as of that day.

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[2](...continued)
mathematics or physics. Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer Related Occupations*, 36 U. Mich. J. L. Reform 815, 832-33 (Summer 2003). *See also Id.* at 830 n.83.

[3] Manser is identified in Palm's motion as the company's Senior Vice President of Product Development.

On October 1, 2003 Palm entered an agreement[4] with RelQ Software, Inc. pursuant to which RelQ was to perform certain automation and testing services in Bangalore, India, to be carried out within a six month period. The agreement (RXA) reflects that in carrying out the work RelQ's responsibilities included providing a Test Automation Team, a project lead, and the required number of team members. Section E and Appendix B reflect that RelQ was to employ Test Leads and Test Engineers. RelQ also was to provide other resources, as well as the facilities. The total contract price was $982,800, payable in monthly installments. The work was characterized as Software Quality Assurance and Test Automation of Device Testing for spring 2004 Product Cycle (Simba and Bengal).

Palm submitted an undated Job Posting for a position identified as Senior Software Quality Engineer (RXB). The educational requirements called for degrees in computer science or engineering as follows: BSCS/MSCS, BSEE/MSEE, BSME/MSME, BSIE/MSIE or BS/MS in Physics, Statistics, or Math or equivalent experience. The qualifications also called inter alia for four to eight years experience in quality assurance, quality engineering, or development of embedded applications (RXB). Palm identified the replacement workers for the QA Team at Milpitas as Larry Marrs, Moni Mathur, Thomas Costales, David Farrell, Scott Glaser and Fumi Myers. Their I-9 forms (RXM) reflect that Marrs and Costales began on November 11, 2003 and Farrell on December 1, 2003. All three are United States citizens. Mathur, a work authorized alien, Glaser, a United States citizen, and Myers, a lawful permanent resident, evidently were already employed by the company at the time of Humphries' layoff in August, 2003. Marrs has a bachelor's degree in Computer Science and 15 years of professional experience (RXM). Costales has a master's degree in Computer Science, an associate's degree in Engineering and a decade of professional experience (RXM). Farrell has a bachelor's degree in Mechanical Engineering and over 30 years experience in software development (RXM). Mathur has a bachelor's degree in Engineering and a master's in Computer Engineering (RXM). Glaser's undergraduate degree was in Physics and was a candidate for a master's in Electrical Engineering. He had more than a decade of professional experience (RXM). Fumi Myers has a bachelor's degree in Electronics Engineering Technology and a master's in Computer Science. She too had more than ten years of professional experience (RXM).

IV. PALM'S MOTION

Palm's motion asserted that Humphries' complaint is based on the theory that Palm "offshored" her job to India and that, because the outsourcing of jobs is not a practice prohibited by 8 U.S.C. § 1324b (2004), the complaint must be dismissed. The motion noted that while Humphries' complaint made a general allegation of discriminatory discharge, her underlying OSC charge

[4] The agreement reflects that it is made pursuant to a Master Services Agreement entered on April 10, 2003. The Master Services Agreement itself is not contained in the record.

(attached to the complaint) explicitly states that she was denied training in automation and at the same time she "learned that automation work was already being offshored to two test vendors in India (HPS and Real Q)." The charge says she was terminated on August 20, 2003, along with about 40 percent of Palm's Software Quality Assurance Group, all United States citizens. An addendum stated that the terminated Quality Assurance workers commanded considerably higher salaries "in comparison to our Indian counterparts earning less than $5/hr."

Palm's motion went on to state, however, that the factual premise upon which Humphries' charge was based was erroneous because Humphries' job, like those of her colleagues, was not outsourced as she contends. Palm says instead that it laid off 12 of its Quality Assurance employees, including Humphries, when it decided to automate many of their job functions and that it replaced them in Milpitas with six employees who had the requisite technical skills needed for automation.

Humphries filed a brief in response, which argued that Palm did not provide a legitimate nondiscriminatory reason for firing her and that Palm's proffered explanation is pretextual. She said that in 2002-2003 she and other Software Quality Assurance Leads were required to train non-citizens to do their work in Bangalore, India, and that different performance standards were applied to those offshore workers than to the Americans.

She also stated that Palm's Software Quality Assurance Director, Steve Glaiser, and her immediate supervisor, Software Quality Assurance Manager Brian Estes, denied her requests for training in automation. She argued that the alleged Software Quality Assurance Engineer replacements did not have the superior skill sets as Palm alleged, and that they were not even hired until almost three months after her termination, one month after the OSC investigation and two weeks after she testified before Congress with significant media coverage. She contended that Palm hired only three, not six individuals at Milpitas, and said that her burden at this stage is only to state a prima facie case.

Palm filed a reply brief accompanied by the Declaration of Alan J. Gordee and Exhibit O (RXO), a copy of Humphries' OSC charge. The reply pointed to certain ambiguities and internal inconsistencies in Humphries' response and said that she was unable to present a prima facie case. It said that the six replacement engineers were either hired by Palm or redeployed from other areas of the company, that they did have higher technical skills and that all were located in Milpitas, California.

V. APPLICABLE LAW

A. Standards for Summary Decision

OCAHO Rules[5] provide that summary decision on all or part of a complaint may issue only 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 the party is entitled to summary decision. 28 C.F.R. § 68.38(c) (2004). Only facts that might affect the outcome of the proceedings are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).[6] Doubts are resolved in favor of the party opposing summary decision. *Id.*

The party seeking a summary disposition bears the initial burden of demonstrating an absence of a material factual issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, when the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1077, 5 (2001). OCAHO case law is in accord that a failure of proof on any element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000).

B. Relative Burdens of Proof

The familiar burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's proffered reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*,

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[5] 28 C.F.R. Pt. 68 (2004).

[6] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation.

450 U.S. 248, 252-53 (1981).

A prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *See, e.g., Jones v. Los Angeles Cmty. Coll. Dist.*, 702 F.2d 203, 205 (9th Cir. 1983). Alternatively, a plaintiff may establish the fourth element of a disparate treatment case by a showing that others similarly situated but outside the plaintiff's protected group were treated more favorably. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002).

Once the employer responds to the prima facie case with support for a facially valid reason for the employment decision, any presumption created by the prima facie case drops out of the picture. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). The burden then reverts to the employee to discredit the employer's reasons by presenting sufficient evidence to permit a rational fact finder to find that the employer's explanation is pretextual. *Wallis*, 26 F.3d at 890. The plaintiff's evidence must be "both specific and substantial" to overcome an employer's legitimate reasons and to create a triable issue. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002) (*citing cases*). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (*citation omitted*).

VI. DISCUSSION

Humphries' brief is somewhat ambiguous as to the theory upon which her complaint is based. While she complained on the one hand that she and others "were singled out for replacement by a group of non-citizens in Bangalore, India" who were paid less, she also argued on the other hand that she and her laid off co-workers had sufficient technical skills to perform the automation work as well as their alleged Software Quality Assurance Engineer replacements in Milpitas. Both theories will accordingly be addressed.

I view the facts presented, as I must for purposes of the pending motion, in the light most favorable to Humphries as the nonmoving party. *Primera Enters., Inc.*, 4 OCAHO No. 615 at 261. As a United States citizen, Humphries is an individual protected by 8 U.S.C. § 1324b(a)(3)(A) (2004). That she was qualified for the position she was performing is established by her most recent performance review which was generally favorable (RXI). It is undisputed that she was one of 12 Quality Assurance Test Leads whose employment Palm terminated in August, 2003. Palm then hired or transferred six individuals with technical backgrounds and degrees to the Software Quality Assurance Team. I conclude that on these facts Humphries failed to establish the fourth element of a prima facie case with respect to her first theory. She did satisfy this burden with respect to the second theory, but was unable to show that Palm's explanation was pretextual.

A. Outsourcing of Quality Assurance Jobs to India

There is no evidence that Humphries' specific job duties were offshored to RelQ Systems in Bangalore. Assuming arguendo for purposes of this motion that they had been, this would not constitute a showing sufficient to establish the fourth element of a prima facie case because an employer who terminates an employee and contracts out that employee's duties to another company has not "replaced" that worker within the meaning of *McDonnell Douglas*. In *Meachum v. Temple Univ.*, 42 F.Supp. 2d 533, 536 (E.D. Pa. 1999), where the university elected to contract out its litigation responsibilities from its own general counsel's staff to outside counsel thereby eliminating the plaintiff's job, that court observed that "counsel has not pointed to any case that has held that an employer's termination of an employee followed by a transfer of the former employee's work to an outside contractor should be read as a replacement of that employee. Nor has this court found such a case."

Similarly here, Humphries has not cited, and I do not find, any case which holds that the fourth element of a prima facie showing can be made simply by establishing that an employer eliminated a category of jobs from its own workforce and outsourced the work to an independent contractor or third party corporation, whether foreign or domestic, and the prevailing view appears to be to the contrary. In *Mitchell v. Worldwide Underwriter Ins. Co.*, 967 F.2d 565 (11th Cir. 1992), for example, the defendant company had contracted the plaintiff's appraisal duties out to an independent contractor and abolished his job. The court held that the *McDonnell Douglas* requirements were not satisfied where the plaintiff's job was outsourced to another company because the plaintiff was not replaced by an *employee* outside his protected group. *Id*. at 566-67. The panel majority in *Wilson v. AAA Plumbing Pottery Corp.*, 34 F.3d 1024 (11th Cir. 1994) (*AAA Plumbing I*), subsequently purported to follow the rule in *Mitchell* but nevertheless suggested that the company might have had a duty to the employee whose job was eliminated. Judge Edmonson pointed out in a vigorous dissent that the majority was not following *Mitchell* and was ignoring the fact that there is no requirement for an employer to create a new job or accommodate a discharged employee when it contracts out work to an independent contractor. He noted that,

> Whether a company will staff itself with full-time employees, part-time employees, independent contractors or some mix is a core business decision. Nothing in Title VII obligates a company to choose one work force or another; and the different kinds of work forces present different advantages and disadvantages for business management. In this case, AAA Plumbing decided to contract out its need for janitorial service as opposed to having the work done, as it had been done, by a full time employee. *Id.* at 1029.

Evidently other members of the circuit agreed with Judge Edmonson because the panel opinion was subsequently vacated and rehearing en banc was granted in *Wilson v. AAA Plumbing Pottery*

Corp., 60 F.3d 744 (11th Cir. 1995) (*AAA Plumbing II*). No subsequent resolution has been reported, however.

Humphries furnished no evidence and made no contention that either RelQ Systems or H. Ross Perot Systems, RelQ's predecessor which had also performed work for Palm in India, is other than an independent third party company. The Statement of Work (SOW) for the RelQ agreement (RXA) reflects that palmOne was to pay installments to RelQ totaling $982,800 for testing services and that RelQ would in turn employ Test Leads and Engineers to do the work. Humphries made no suggestion and furnished no basis to conclude either that RelQ's workers, whether Test Leads or Engineers, could be considered to be employees of Palm or palmOne, or that Palm had any role in their selection or in the selection of Perot Systems' employees either. She thus made no showing that she was replaced by a Palm employee.

The protected status of RelQ's employees is, moreover, immaterial to this case. In *May v. Shuttle, Inc.*, 129 F.3d 165, 172-73 (D.C. Cir. 1998), where the employer furloughed its fleet service workers and subcontracted their work out to Hudson General Corp., the plaintiffs were able to show that the average age of Hudson General's workers was younger than the average age of the furloughed Shuttle group. The court held that no prima facie age discrimination case was shown because Shuttle had no role in deciding who Hudson General would hire, and it was therefore irrelevant whether or not the *contractor's* employees belonged to May's protected class. The same is true here. Just as when a company sells off a division to another company in a divestiture, the employees of the second company are not employees of the first. *See Warford v. Champion Int'l Corp.*, No. 91 Civ. 6338, 1993 WL 97265 at *2 (S.D.N.Y. March 31, 1993), *aff'd* 19 F.3d 8 (2d Cir. 1994) (*table*) (where Champion sold some of its divisions to the Waldorf Corporation which then hired some, but not all, of Champion's former employees, the question of whether or not Waldorf discriminated against the plaintiff failing to hire her because of her sex was not relevant to her allegations against Champion because Champion was a separate entity with no control over Waldorf's hiring decisions).

While Humphries' complaint alleges that "other workers in my situation with different citizenship were not fired," she identified no similarly situated *Palm* employee. Employees of RelQ or of Ross Perot Systems are not similarly situated to Humphries precisely because they are not Palm's employees. Although the burden of showing that another person is "similarly situated" to the plaintiff is not onerous, *Villiarimo*, 281 F.3d at 1062, (degree of proof "does not even need to rise to the level of a preponderance of the evidence") (*quoting Wallis*, 26 F.3d at 889), it is still a burden and it still must be met. It was not. *Cf. Gaydos v. Moore U.S.A. Inc.*, No. 97 C. 4810, 1998 WL 341822 at *5-6 (N.D. Ill. June 17, 1998) (no prima facie age discrimination case where plaintiff's duties were either outsourced, abandoned or absorbed by other employees; she was not replaced and she failed to show that any younger worker was similarly situated to her). Humphries' assertion that offshore workers in Bangalore were not subject to the same performance criteria as she was is not relevant where Palm never employed those workers.

B. Replacement of the Test Leads with Engineers in Milpitas

The record reflects that after Humphries' termination, Palm hired or reassigned six individuals in Milpitas with backgrounds and degrees in engineering or computer science. It is not clear that they were true "replacements" because the nature of the job itself appears to have changed. I nevertheless assume for purposes of this motion that they were replacement workers. As previously observed, Humphries readily established the first three elements of her prima facie case. The record reflects that two of the six engineers who replaced the terminated test leads in Milpitas were citizens of countries other than the United States. This is sufficient to satisfy the fourth element of Humphries' prima facie case: Humphries was arguably replaced by someone not in her protected class. Palm then carried its production burden by putting forth a management decision to replace the test leads with workers having the more technical background and skill sets the company said it needed for automation, and by tendering evidence that the alleged replacement workers all had computer science or engineering degrees.

It appears from the record that Palm made the initial selection of which of the test leads to lay off by a process of ranking them on the basis of their performance, their behavioral skills, and their skill portfolio (DX2). Those with the lowest rankings were terminated. Unlike the plaintiffs in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000), Humphries did not attack the rating system Palm used, nor did she contend that Palm picked the wrong people to lay off. Rather, she contended that Palm was mistaken about her skill level and that she and the other laid off test leads were as capable of performing the automation work as the alleged replacement workers.

An employer has broad discretion in defining the expectations for employees' performance, *Yefremov v. NYC Dep't of Transp.*, 3 OCAHO no. 562, 1559, 1584 (1993), and a plaintiff's subjective evaluation of her own performance does not ordinarily suffice to create a factual issue. *Quaker Oats*, 232 F.3d at 1287. The salient question here is whether Humphries provided any evidence which would permit a reasonable fact finder to believe that the reasons Palm gave for terminating her are false or that the true reason was discrimination on the basis of her United States citizenship status. Humphries suggests that the timing of the replacements is suspicious because Marrs, Costales and Farrell were not hired until after her Congressional testimony and the OSC investigation. In light, however, of the e-mail dated August 21, 2003 (RXK) which reflects the contemporaneous stated intention to "re-staff the team with the appropriate skills *for Spring launch*" (emphasis added), I do not find the timing of their dates of hiring the replacements sufficient to give rise to an inference of discrimination.

Humphries pointed to no specific evidence in support of the contention that her skills were equal to those of the replacements, beyond her bare assertion that she had excellent technical skills and could have completed a training course in automation by the time the alleged replacements were hired. She said that her supervisor enrolled in such a course but denied her the opportunity to do so. The record reflects that Humphries' degree was in German Studies while the replacements

had degrees in Engineering or Computer Science. While I credit that there are some unusual individuals who have the ability to perform highly skilled scientific or technical work without the benefit of a degree in science or engineering (Bill Gates, after all, does not have such a degree[7]), it does not necessarily follow that Palm is not entitled to make its own assessment of her skill level and to require a more technical background or a specific kind of degree so long as the assessments are not tainted by a discriminatory motive.

In order to create a triable issue at the pretext stage, there must be "substantial" evidence of pretext. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221-22 (9th Cir. 1998). The question here is not whether Palm's expectations and assessment of Humphries' performance are fair or even objectively "correct." *Cf. Villiarimo*, 281 F.3d at 1063. It is whether there is any factual basis in the record from which a rational trier of fact could conclude that Palm did not really believe those reasons and used them as a cover up for citizenship status discrimination. The record is wholly devoid of evidence showing any indicia of discrimination or any nexus between Humphries' United States citizenship and her termination.

Where a party fails to set forth specific facts or identify with reasonable particularity the evidence precluding summary decision, the motion must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). While the nonmoving party is entitled to all the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation.

VII. FINDINGS OF FACT

1. Palm, Inc. has its headquarters in Milpitas, California.

2. On August 3, 2000 Palm, Inc. offered Natasha Humphries employment in Milpitas as a Quality Assurance Test Lead, which Humphries accepted.

3. Palm, Inc. terminated Humphries and eleven other Test Leads in Milpitas on or about August 20, 2003.

4. Palm Inc. subsequently acquired Handspring, Inc. and the resultant company is now known as palmOne, Incorporated.

5. Palm's stated reason for terminating the Test Leads was to replace them with workers who had a more technical background as well as degrees in computer science or

[7] Zachary M. Seward, *Dropout Gates Drops In To Talk*, The Harvard Crimson Online, February 27, 2004, *available at* http://www.thecrimson.com/article.aspx?ref=357844.

engineering.

6. Natasha Humphries' degree was in German Studies.

7. Palm replaced the Test Leads with Engineers who had degrees in computer science or engineering.

8. Natasha Humphries filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices on September 23, 2003.

9. The Office of Special Counsel for Immigration Related Unfair Employment Practices investigated Humphries' charge and sent Humphries a letter dated January 16, 2004 advising her that she had the right to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of her receipt of the letter.

10. Natasha Humphries filed a complaint with OCAHO on April 19, 2004.

VIII. CONCLUSIONS OF LAW

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

2. Natasha Humphries is and has been at all relevant times a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A) (2004).

3. At all relevant times Palm, Inc. has been an entity within the meaning of 8 U.S.C. § 1324b(a)(1) (2004).

4. Palm, Inc.'s successor, palmOne, Inc., is an entity within the meaning of 8 U.S.C. § 1324b(a)(1)(2004).

5. Palm, Inc. demonstrated that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law.

6. Natasha Humphries failed to identify a genuine issue of material fact requiring a hearing.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 15th day of December, 2004.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1)(2004), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i)(2004), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.