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

November 29, 2007

DINKO SEFIC, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 06B00014
MARCONI WIRELESS, Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

Dinko Sefic filed a pro se complaint in which he alleged that he was fired from his job as a senior consultant at Marconi Wireless (Marconi or the company) in violation of the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006). The company filed an answer, and discovery was subsequently undertaken, which proved to be a protracted and contentious process. Still pending is Sefic's motion for sanctions, in response to which Marconi filed a memorandum in opposition and a request for a protective order. Sefic responded both to the memorandum and to the request.

Each of the parties also moved for a summary decision with supporting exhibits, and each has filed a response to the opposing party's motion, as well as a reply to the opposing party's response to the party's own motion. All these pending motions are ripe for adjudication.

II. BACKGROUND FACTS

At all times relevant to the events complained of, Marconi Wireless was engaged in the business of wireless communications, designing, manufacturing, and supplying telecommunications and

information technology equipment to various business customers.[1] According to a press release dated October 25, 2005, the majority of Marconi's operations were located in the United Kingdom, Italy, Germany, and the United States. Its headquarters was in London. Sefic worked for the company for almost eight years. He was initially hired in the spring of 1997[2] as a consultant in the London office, and in 1998 he moved to the United States where he continued as a consultant in the Wireless Professional Services (WPS) group in Marconi's Richardson, Texas office.

The WPS group was responsible for providing radio frequency (RF) engineering consulting services to various customers in the wireless telecommunications industry, usually on the customer's premises. For this purpose Marconi employed several different classifications of consulting RF engineers; it advertised jobs at various levels for intern, staff, associate, senior, and principal RF engineers. Shortly after his relocation to Richardson, Sefic was promoted to the position of senior consultant, a position he continued to hold for the remainder of his tenure. Although Sefic was hoping for another promotion in March of 2004, he never attained the position of principal consultant and Marconi terminated him from his senior consultant position in January, 2005.

Lane Wooldridge, Director of Operations, was the person who recommended Sefic's discharge and signed Sefic's termination letter. Sefic's manager at the time of the events in question was Simon Leicester, Professional Services Manager, whose own boss was Brian White, Vice President of Professional Services. Cathy Woodson was at all relevant times the manager or director of Human Resources (HR). Sefic was informed of his discharge at a meeting in White's office at which Sefic, Wooldridge and White were present, together with Paul Gregory from Human Resources. A memo from Wooldridge dated January 10, 2005 and addressed to White, Gregory, and Paula Sobczak[3] elaborated on the reasons for Sefic's termination, and concluded that,

> Dinko has clearly illustrated that he is often inflexible and uncooperative regarding his assignments. As a result we can no longer rely on Dinko to meet his job requirements, accept appropriate job opportunities or to perform professionally when on customer

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[1] Since the events in issue, the assets of Marconi Corporation PLC worldwide were bought by Telefonaktiebolaget LM Ericsson, a Swedish corporation.

[2] Sefic was actually hired initially by MSI (Mobile Systems International), also known as Metapath Software International in the United States. Metapath did business in the name of Marconi Wireless until Ericsson bought out Marconi Corporation PLC.

[3] Sobczak is identified in Sefic's deposition as a Personnel Manager. Sefic also refers to her as a Resource Manager in the attachments to his complaint. Marconi identified her as an HR Manager. Her own emails state that she is a Resource Manager.

> assignments. He has repeatedly shown that he is not willing to perform the leadership role expected of a Senior RF Consultant nor that of traveling/mobile consultant. He has made it clear he will not accept East Coast engagements for longer than 3 months and in those cases, reluctantly. His behavior is not acceptable and has not improved despite several encouragements and warnings via verbal discussions with his managers and executives in the PS group held over the past 6 months (i.e., Lane W., Simon L., Brian W.). **Therefore, it is our recommendation that the termination process be implemented effective <u>immediately</u>** so we can search for a suitable backfill RFE that is willing to go on assignments suited for his/her skills.

The memo set out particulars under four general headings: 1) Team Work, 2) Accountability, 3) Appropriate Behavior and Professional Conduct, and 4) Management, Operational Performance and Leadership Skills.

Sefic thereafter filed a charge of employment discrimination with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on July 1, 2005, and a charge with Equal Employment Opportunity Commission (EEOC) in October, 2005. OSC sent him a letter on January 12, 2006 authorizing him to file a complaint with this office, which he did on April 12, 2006. All conditions precedent to the institution of this proceeding have been satisfied.

III. EVIDENCE CONSIDERED

Sefic's exhibits are identified numerically, in each case with the preceding character "C" (for complainant), and are sequentially numbered irrespective of whether the exhibit is filed in support of his own motion for summary decision or in opposition to the respondent's motion. Marconi's exhibits in contrast are labelled alphabetically and are independently identified; thus exhibits in support of Marconi's own summary decision motion are identified as A through D (with subparts), and the exhibit in response to Sefic's motion is also designated as exhibit A (with subparts). For ease of reference the letter "R" (for respondent) is used to precede identification of all Marconi's exhibits; the letter is used twice in the case of the exhibit filed in response to Sefic's motion in order to distinguish that exhibit from the ones Marconi filed in support of its own motion.

Exhibits accompanying Sefic's motion include: C1) Sefic's Passport; C2) Sefic's Termination letter dated January 11, 2005, and a two-page memo dated January 10, 2005 from Lane Wooldridge to Paul Gregory, Brian White, and Paula Sobczak; C3) a document captioned List of New Hires October 1, 2004 to October 30, 2004; C4) an undated portion of an e-mail from Lane Wooldridge; C5) e-mails dated November 7 and November 9; C6) Respondent's amended responses to requests for admissions; C7) an e-mail from Brian White to Dinko Sefic dated August 26, 2004; C8) a handwritten page dated January 6, 2005 purporting to be notes from

Lane Wooldridge's journal; C9) pages 52-53 and 73-74 from the deposition of Lane Wooldridge; C10) e-mails dated December 20, 2004, December 28, 2004, and January 4, 2005 on the subject: "Terminating Employee;" C11A) e-mail dated December 16, 2004 on the subject: "No charge for Ken for the month of December;" C11B) e-mail dated June 11, 2004 on the subject: "Nextel Billing;" C12) e-mails from Paula Sobczak November 1, 2004 on subject: "New Per Diem Policy," with copy of Expense and Per-diem Policy; C13) Travel and Entertainment Policy; C14) Ethics Policy; C15) pages numbered 3 and 4 containing questions and answers numbered 6-16; C16) the affidavit of Olufunso Teniola; C17) e-mails dated November 15, 2004 on the subject: "AWS FOA-111204;" C18A) e-mail and customer feedback form; C18B e-mail dated June 23, 2003; C18C e-mail dated June 6, 2001; C19) excerpts from the deposition of Edgar Fajardo; C20) e-mails dated June 9, 2004 and June 30, 2004 between Susan Hanna and Joseph Verna; C21) e-mail June 10, 2004 from Brian White; C22) e-mails from Simon Leicester dated May 25, 2004 and June 28, 2004, and a template for monthly reports; C23) e-mails July 14 and 15, 2004 on subject: "Write up on what you did in NY;" C24) excerpts from the deposition of Svemir Polchert; C25) excerpts from the deposition of Pablo Garcia; C26) e-mail from Cathy Woodson dated June 22, 2004 on the subject: "FY04 Performance Review;" C27) Department of Labor Form ETA 9035E; C28) Progressive Discipline Policy; C29) Performance Improvement Plan dated March 12, 2004 from Walter White (2 pages), and two e-mails, the first dated June 16, 2004 from Peter Ayag to Walter White, and the second dated July 7, 2004 from John Callahan to Cathy Woodson, together with 4 additional pages bearing Bates Numbers M_012097-M012099 and M012115; C30) e-mail dated September 14, 2004 from John Callahan, Program Manager E911/LBS Services to Shawn Harris, and additional pages bearing Bates Numbers M_010127-29 and M_010140; C31) five pages of e-mails bearing Bates Numbers M_008792, M_008797-99, and M_008803; C32) an e-mail from Jennifer Corley to Norman Green dated January 31, 2002 and 3 additional pages bearing Bates Numbers M_009511-12 and M_009515; C33) e-mails dated February 10, 2004 and February 16, 2004 on the subject: "PTO Balance;" C34) a PTO summary; C35) e-mails dated July 8 and 9, 2004 on the subject "PTO & PRPT Hours;" C36) e-mails dated August 18 and 19, 2004 on the subject "PTO Balance Reconciliation," and "PTO Balance Reconciliation Report As of July 31, 2004;" C37) e-mail dated August 26, 2004 from Brian White to Dinko Sefic; and C38) excerpts from the deposition of Pablo Garcia. Marconi filed objections to Sefic's Exhibits C10, C11A, C11B, C15, C16, C20, and C27 as inadmissible hearsay, and to C16 on the additional grounds that it lacks foundation, contains speculation, reflects a lack of personal knowledge, and is irrelevant to any issue in this case.

Marconi's response to Sefic's motion was accompanied by Exhibit RRA, the affidavit of Lauren Johnson, together with attachments RRA1) excerpts from the deposition of Svemir Polchert, RRA2) excerpts from the deposition of Cathy Woodson, and RRA3) excerpts from the deposition of Pablo Garcia.

Sefic's reply in support of his motion was accompanied by exhibits: C45) an e-mail to Sefic from Lauren Johnson dated November 21, 2006; C46) e-mails dated January 8 and 9, 2007 between Sefic and Lauren Johnson; C47) e-mail dated June 16, 2004 from Sefic to Ralf Mueller

with a travel request form dated June 16, 2004; C48) e-mails dated November 5, 2004, November 7 and 8, 2004 and a travel request form dated November 8, 2004; C49) a passport page; C50) e-mails dated November 8, 2004, November 5, 2004, and October 22, 2004 on the subject: "Expense Report;" C51) e-mails dated September 28, 2004 on the subject: "TAF;" C52) a two-page expense report for Edgar Fajardo; C53A) a form captioned Project Kick-off Package, Project Set up ATT19 Tri-state Planet Support; C53B) a form captioned Project Kick-off Package, ATT20 Tri-state RF Support; C53C) e-mails dated November 19 and December 1, 2004 on the subject "Yebi and Harry, Cingular Blue;" C54) Project Report, AT&T Wireless, dated July 12, 2004; C55) excerpts from the deposition of Cathy Woodson; C56) Application for Alien Labor Certification dated April 14, 2004.

In support of its own motion for summary decision, Marconi filed an appendix consisting of Exhibits RA through RD, each of which has numbered subparts. Exhibit RA is the affidavit of Patricia Hoffman, with nine attachments: RA1) a list of employees terminated between October 1, 2004 and November 11, 2005; RA2) a list of employees hired between October 1, 2004 and November 11, 2005; RA3) a list of positions open between October 1, 2004 and November 11, 2005 and the names of persons filling the positions; RA4) copies of I-9 forms for senior consultants involuntarily terminated between October 1, 2004 and November 11, 2005; RA5) copies of I-9 forms for senior consultants hired between October 1, 2004 and November 11, 2005; RA6) Employee Handbook; RA7) copies of internal communications; RA8) various termination letters and forms; RA9) Sefic's personnel file.

Exhibit RB, the affidavit of Lauren Johnson, also has nine attachments: RB1) excerpts from Sefic's deposition and related exhibits; RB2) excerpts from Sefic's response to Marconi's first interrogatories; RB3) excerpts from Sefic's responses to Marconi's second interrogatories and request for production; RB4) copies of claims Sefic filed with various state and federal agencies; RB5) copies of correspondence and documents related to claims filed by Sefic; RB6) excerpts from the deposition of Lane Wooldridge and related exhibits; RB7) excerpts from the deposition of Edgar Fajardo and related exhibits; RB8) excerpts from the deposition of John Lockhart and related exhibits; and RB9) excerpts from the deposition of Pablo Garcia and related exhibits.

Exhibit RC is the affidavit of Brian White, with one attachment: RC1) certain e-mails to and from Brian White; while Exhibit RD is a subpoena to obtain documents responsive to Sefic's request for production of documents from Monster.com, with one attachment: RD1) copies of advertisements for Marconi RF Engineers.

Sefic also filed exhibits in response to Marconi's motion, including C39) two pages printed from the website of the Employment & Training Administration (ETA) of the Department of Labor; C40) e-mails dated May 2, 2001 and May 7, 2001 on the subject: "Personnel Issue;" C41) a cover sheet dated January 1, 1999 and captioned "Mobile Software International, Inc., Two Month Notice Period for Consultants;" C42) a letter dated July 2, 2004 from Chip Wagner to Edgar Fajardo; C43) two pages captioned "Consultant Forum, August 6, 2004;" and C44) page 2

of ETA Form 9035E.

Marconi's reply to Sefic's response was not accompanied by exhibits.

In addition to the materials submitted by the parties in connection with the pending motions, I have also considered the record as a whole, including attachments to the complaint and answer, as well as all the other pleadings, exhibits, and materials of record.

IV. STANDARDS TO BE APPLIED

A. Summary Decision

The rules[4] of the Office of the Chief Administrative Hearing Officer (OCAHO) provide that summary decision as to all or part of a complaint may issue 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 moving party is entitled to a summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[5]

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 because a failure of proof on any element upon which the nonmoving party bears the burden necessarily renders all other facts immaterial. *Humphries v. Palm, Inc*., 9 OCAHO no. 1112, 6 (2004) (citing *Bendig v. Conoco, Inc*., 9 OCAHO no. 1077, 5 (2001)). Thus to withstand a properly supported motion, the nonmoving party who bears the burden of proof at trial must come forward with sufficient competent evidence to support all the essential elements of the

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[4] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (2006).

[5] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

claim. While 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) (citations omitted), a summary decision may nevertheless issue if there are no specific facts shown which raise a contested material factual issue. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

A fact is material if it might affect the outcome of a case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine only if it has a real basis in the record. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary resolution requires determining first whether there are material issues of fact, and, if there are none, whether the moving party is entitled to judgment as a matter of law. Both are legal issues (questions of law); neither is a finding of fact. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d 1415, 1423 n.11 (5th Cir. 1996). Factual controversies are resolved in favor of the nonmoving party only where an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999) (citing *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)). In the absence of any proof it will not be assumed that the nonmoving party could or would prove the necessary facts. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

B. Burdens of Proof

The traditional 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 articulated reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., *Jones v. DeWitt Nursing Home*, 1 OCAHO no. 189, 1235, 1251 (1990), case law developed under that statute has long been held to be persuasive in interpreting § 1324b, *see, e.g.*, *Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO no. 624, 308, 322 (1994). The triparte *McDonnell Douglas* scheme provides the analytical framework for a § 1324b case as well.

The initial 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 either replaced by a person not in the his protected class, or was otherwise discharged because of his protected status. *Machinchick v. PB Power*, Inc., 398 F.3d 345, 350 (5th Cir. 2005). A discharged employee may also establish the fourth prong of a disparate treatment case

by a showing "that others similarly situated were treated more favorably." *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 513 (5th Cir. 2001) (quoting *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999)). For purposes of a disparate treatment analysis, another person is similarly situated to the plaintiff only if different treatment occurs under "nearly identical" circumstances. *Little*, 924 F.2d at 97 (citations omitted).

A prima facie case of retaliation is established by showing that the employee engaged in protected activity, the employee suffered adverse treatment, and there is a causal connection between the protected activity and the adverse treatment. *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 754 (5th Cir. 2005) (citations omitted). In order to qualify as protected conduct in this forum, the claim must implicate a right or privilege secured under § 1324b, or a proceeding under that section. *Harris v. Haw. Gov't Employees Assoc.*, 7 OCAHO no. 937, 291, 295 (1997).

Once the employer sets forth and supports a facially valid reason for the employment decision, any presumption created by the prima facie case disappears and the burden reverts to the employee to show that the employer's reason is pretextual and that the real reason is discrimination. *Stults v. Conoco, Inc.*, 76 F.3d 651, 656-57 (5th Cir. 1996) (citation omitted); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 376-77 (5th Cir. 1991) (citation omitted). To create a factual issue as to pretext, the employee must present sufficient evidence to create an inference that the proffered reason has no basis in fact, did not actually motivate the employer, or was insufficient to motivate the decision. *Ipina v. Mich. Jobs Comm'n*, 8 OCAHO no. 1036, 559, 574 (1999) (citations omitted).

Courts have recognized that an employment decision may be based on a mixture of legal and illegal motives. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309-10 (5th Cir. 2004) (citations omitted). Since *Desert Palace*, courts have differed as to whether that case implicitly altered the *McDonnell Douglas* burden-shifting framework, and that question is not entirely resolved in the Fifth Circuit. *See Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651-52 (5th Cir. 2004) (discussing unsettled state of current law). It is nevertheless clear that when an employment decision is based on both a legitimate motive and an illegitimate motive, relief should be denied only if the employer would have made the same decision in the absence of the illegitimate motive. *Machinchick*, 398 F.3d at 355. OCAHO cases are in accord. *E.g., Martinez v. Ray's Bar-B-Que*, 9 OCAHO no. 1120, 5 (2005).

V. SEFIC'S MOTION

For purposes of ruling on Sefic's motion I construe, as I must, all the factual information in the light most favorable to Marconi as the nonmoving party, and I resolve all reasonable doubts about the facts in the company's favor. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*,

504 U.S. 451, 456 (1992); *Baker*, 430 F.3d at 753.

A. Citizenship Status Discrimination

1. Sefic's Termination

Much of Sefic's submission in support of his motion is concentrated on explaining why he considers the reasons outlined in the Wooldridge memo to be untrue, and why he thinks the criticisms made of his behavior are wrong. For purposes of a complainant's motion for summary decision however, Sefic's first order of business must be to establish each of the elements of his prima facie case; he cannot shift the burden of production to Marconi until he points to evidence sufficient to make this prima facie showing. *See Fields v. J.C. Penney Co., Inc.*, 968 F.2d 533, 536 (5th Cir. 1992) (discussing plaintiff's ability to meet prima facie factors under the Age Discrimination in Employment Act).

It is undisputed that, as to his termination, Sefic meets the first and third elements of a prima facie case: as a United States citizen he is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3), and the parties agree that he suffered an adverse employment action when he was fired. Marconi contends, however, that Sefic cannot satisfy the second element because, as Wooldridge's memo explains, he was uncooperative, insubordinate, and unwilling to travel as his job required, so he was not meeting Marconi's legitimate expectations and was accordingly not qualified for his job. The Affidavit of Brian White states in addition to insubordination and unwillingness to travel, that,

> During Mr. Sefic's employment with Marconi, there were several instances where Marconi practice managers were reluctant to place Mr. Sefic in key-customer-facing roles because they were concerned about the image of Marconi products and services Mr. Sefic would convey to customers. Further, Mr. Sefic's performance also presented problems in the Marconi workplace in that he openly and repeatedly communicated displeasure and disagreements with respect to Marconi policies and products.

Marconi contends that these facts too, prevent Sefic from meeting the second element. Even construing the facts most favorably to Marconi as the nonmoving party however, these assertions do not establish that Sefic was unqualified for his job.

Notwithstanding Marconi's characterization of Sefic's problems as being performance related, the context makes clear that it is chiefly his conduct or behavior that is the issue, not his job skills. Sefic wasn't fired for being unable to do his job, and Marconi has never faulted his technical skills; indeed the company acknowledged that for one of the projects his managers wanted Sefic to undertake, he had skills possessed by only a few RF engineers in the company. Sefic's performance review for 2003, conducted in March of 2004, reflects that his performance was rated at 70% out of 100, and that his technical skills were described as excellent.

Sefic had the same job skills when he was fired as he did when the company promoted him to the position of senior consultant. That upper management had become frustrated or fed up with his attitude, or his complaints about company policies, or his unwillingness to travel, may articulate a reason to fire him, but it does not suffice to show a lack of basic job qualifications, and such a conclusion appears to be foreclosed by precedent in the circuit. *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 350 (5th Cir. 2007) (citing *Bienkowski v. Am. Airlines, Inc*., 851 F.2d 1503, 1504-05 (5th Cir. 1988)).

Sefic's claim nevertheless still falters at the threshold because the fourth element of a prima facie case remains unsatisfied. While there is no single route for establishing a prima facie case, *see Keelan v. Majesco Software, Inc*., 407 F.3d 332, 340 (5th Cir. 2005) (citation omitted), there must be some minimal evidence from which an inference can be drawn that Sefic's firing had some connection to his citizenship status. To begin with, the individuals who made the decision to terminate Sefic were also all United States citizens, thus members of his same protected class, and no evidence has been identified suggesting that they necessarily even knew what Sefic's citizenship status was.

Second, although Sefic argues that he was replaced with a "non-U.S. worker,"[6] the evidence does not support this assertion, and does not, in fact support a finding that Sefic was replaced at all. It is clear that Marconi continued during the ten months following Sefic's discharge to advertise for and to hire RF Engineers at all levels, including senior consultants. Five senior engineers were hired during the period, two of whom were citizens of the United States, and there still remained in addition four open positions being advertised at the senior level ten months after Sefic's discharge. An e-mail dated October 18, 2005 from Todd Bartz to Lane Wooldridge indicates that "no PAF[7] Form that I have contains any reference to a backfill for Dinko Sefic." Thus no specific replacement for Sefic has been or can be identified on this record.

Sefic argues that because Marconi hired "non-U.S. workers" both before and after they fired him, and because some of these "non-U.S. workers" were hired for the same or similar positions, this supports his conclusion that Marconi "preferred" H-1B or "non-U.S." workers. Although it appears to be accurate that Marconi hired H-1B workers both before and after they fired Sefic, it

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[6] A "non-U.S. worker" as Sefic employs the term appears to refer to an H-1B visa holder. But this is a case in which Sefic says he was discriminated against on the basis of his United States citizenship status; comparisons of "U.S. workers" to "non-U.S. workers" are thus inapposite. A "U.S. worker" may or may not be a United States citizen; the category includes U.S. citizens, but also includes aliens lawfully admitted for permanent residence, aliens admitted as refugees or asylees, and certain other categories of persons otherwise authorized to work in the United States, regardless of their citizenship status. *See* 20 C.F.R. § 655.715. While a non-U.S. worker is always a non-citizen, a "U.S. worker" may or may not be.

[7] The term PAF refers to a personnel authorization form.

is equally true that the company hired United States citizens as well as other "U.S. workers" during the same period, and notwithstanding Sefic's claim that "[i]t is hard to rebuff [sic] the fact that Respondent preferred H-1B or F1 employees," there is simply no competent evidence which would suggest that any one group was preferred over another.[8]

While the fourth element of a prima facie case may be established in a reduction-in-force (RIF) case by a showing that others not in the plaintiff's same protected group remained in similar positions after the RIF, *see Meinecke v. H&R Block*, 66 F.3d 77, 84 (5th Cir. 1995), the same is not necessarily true in a traditional discharge case. Here, unlike the situation after a RIF, there were still several vacant positions which remained open for months after Sefic's discharge; no inference of discrimination can arise when no identifiable employee can be described as having either replaced Sefic or having been retained in the same job at Sefic's expense after a workforce reduction.

Sefic alternatively seeks to establish the fourth prong of a prima facie case by contending that other similarly situated employees not in his protected class were more favorably treated than he was. Significantly, he does not identify any specific nonmember of his protected class who engaged in the same conduct as he did but who was not fired. Neither does he contend there was any such individual. Rather, Sefic says that two Marconi employees received the benefit of the company's progressive discipline policy, while he received no warnings before being fired and was not given the opportunity to improve his performance, and that two other employees who did not have the benefit of improvement plans were also more favorably treated than he was.

Sefic first points to VS, an H-1B visa holder from India, and to SH, a United States citizen, both of whom were counseled about performance deficiencies and placed on performance improvement plans. He pointed to no evidence, however, that would establish that either VS or SA was similarly situated to him, or that their circumstances were "nearly identical"to his, and the record fails to establish that these two employees were similarly situated.

In order for another employee to be considered similarly situated to a plaintiff, the plaintiff must show "nearly identical" circumstances. *Berquist*, 500 F.3d at 353 (quoting *Perez v. Tex. Dep't of Criminal Justice*, 395 F.3d 206, 210 (5th Cir. 2004)). The standard is strictly construed in the Fifth Circuit. *See, e.g.*, *Wallace v. Methodist Hosp.*, 271 F.3d 212, 221 (5th Cir. 2001); *Okoye*, 245 F.3d at 514-15. Employees who have different responsibilities, different supervisors, or different capabilities, or who violate different work rules or have different disciplinary records are not "nearly identical" to a plaintiff. *See id.* Even the fact that two employees engaged in similar misconduct is not enough where all the circumstances are not identical. *Perez*, 395 F.3d at 213 (noting that despite similarity in the degree of seriousness of the crimes committed, this

[8] Applicable law permits, but does not require, an employer to prefer an equally qualified citizen over an alien. 8 U.S.C. § 1324b(a)(4).

similarity alone was insufficient to find that Perez made out a prima facie case).

VS was not in the WPS group; he was based in Dallas and was evidently in a different work group. VS was issued a memo from Walter White on March 12, 2004 which observed that VS did not complete his February report and was not performing assigned work according to expectations. VS was told that White and Peter Ayag would review his progress weekly for three months. A subsequent e-mail dated July 7, 2004 from John Callahan (identified in Pablo Garcia's deposition as the Director of Location Based Services based in North Carolina) addressed to Cathy Woodson notes that VS met his objectives and could be removed from the improvement program. Other evidence nevertheless reflects that Callahan terminated VS on January 20, 2005, stating in the termination letter that VS was reluctant to travel and made serious mistakes on customer reports. Callahan (identified on an e-mail dated September 14, 2004 as Program Manager E911/LBS Services) was also the person who issued a memo to SH, the other employee on an improvement plan, advising him that his progress on the plan was unsatisfactory and that absent immediate improvement his employment would be terminated. It appears that SH failed to submit timesheets or expense reports, or to acknowledge communications in a timely manner. SH was terminated from his workstation in Grass Lake, Michigan on November 2, 2004.

Sefic does not explain why these two employees should be considered similarly situated to him when they evidently worked in different locations under different supervisors and engaged in different conduct; different people, moreover, made the decisions about what discipline was appropriate for them. Sefic concedes that the comparison he offers reflects that both a "non-U.S. worker" (VS, an H-1B visa holder), and a "U.S. worker" (SH, a United States citizen), received the benefit of being put on an improvement plan. He questions why he wasn't placed under a similar plan, and draws an inference that the reason must be because there really were no performance issues with respect to him. Although the conclusion does not necessarily follow from the premise, Sefic infers that the reasons given in his termination letter must be false because progressive discipline was not used in his case.

Sefic also identified two other terminated employees, LF, a United States citizen, and TA, a "non-U.S. worker," neither of whom had the benefit of being placed on an improvement plan, but whose personnel files Sefic identifies as reflecting "documentation pertaining to performance issues." It appears that LF was counseled in 2001 for excessive socializing and personal phone usage, for wasting time, and for not completing her assigned work. She was in the accounting group where her chain of command included Jennifer Corley, Norman Green, James Hajek (Director of Accounting), and Frank Henson. It is not clear whether LF was terminated, but it is readily apparent that she was in an altogether different department from Sefic's, she did not engage in conduct similar to Sefic's, the respective managers involved were different, and the same persons did not make decisions about their discipline. There is thus not the slightest suggestion that she was similarly situated to Sefic in any way.

TA was more nearly comparable to Sefic in that he was a senior engineer based in Plano, Texas, who was fired at about the same time Sefic was. Sefic points to a series of e-mails about TA during the period September 9, 2004 to January 3, 2005. Other exhibits reflect that TA's termination letter was dated January 6, 2005, prior to Sefic's. The letter stated that termination was effective that same day "due to unacceptable behavior and the fact that you've not consistently met any of your performance requirements as detailed in the attached memo." The attached memo is addressed to TA from Paula Sobczak and is dated January 6, 2005. The memo notes that TA had been told to provide a cell phone so he could be contacted, to report to the office daily between 8 and 5 and to enter his time records, to meet project deadlines and complete interviews, but that his performance was below requirements. TA was also described as being MIA (missing in action) much of the time, not returning phone calls, and struggling with personal issues. He did not qualify for a credit card because of a bankruptcy he had failed to disclose, and in December two employees reported a perception of an alcohol odor about him and suggested that he was intoxicated. E-mails reflect that TA was "unavailable" for an assignment in September and that he had a number of problems in November and December of 2004.

Contrary to what Sefic's motion appears to suggest, the record does not relect that "a variety of measures" was used to correct TA's performance problems. It reflects, rather, that the employee was told what management's expectations were, and that he was terminated when he didn't satisfy them. A P.S. to Paula Sobczak's e-mail of January 2, 2005 states,

> Oh, Tom (Read) called me late Friday and wanted to know if I would consider putting [TA] on leave for a few months to get things straighten [sic] out. We all know that he can't this [sic] straighten out in a few months. I do not think this is the answer. I do not understand tom. But Something to consideration [sic]."

TA was terminated without any period of leave and it appears that Read's suggestion that he be given time to straighten things out was not acted upon. The record thus reflects that Marconi also fired this employee under what appear to be somewhat similar, but not "nearly identical," circumstances to those under which Sefic was terminated.

Wooldridge's memo recommending Sefic's discharge states that Sefic's behavior did not improve despite "several encouragements and warnings via verbal discussions with managers and executives in the PS (professional services) group over the past six months," and identifies Lane W[ooldridge], Simon L[eicester], and Brian W[hite] as the persons who either encouraged and/or warned him. While Sefic apparently intends to suggest that, in contrast to TA's, his record does not contain "documentation pertaining to performance issues," this characterization is not entirely accurate except in the limited sense that Sefic's issues were related to his behavior rather than strictly to his job performance as such. The record indicates that Sefic was talked to or admonished over a six month period; so far as the record shows, TA was similarly talked to or admonished over a five month period.

While Marconi's company policy does set out procedures for progressive discipline, it also makes clear that "[t]ermination may also occur based on an extremely serious single offense or based on a combination or sequence of less serious offenses which when taken together justify termination action," and that the company's corrective discipline "is not intended to restrict its right to terminate the employment relationship at any time with or without notice, and the Company expressly reserves the right to determine the method of proceeding in each individual case." Given this reservation, it cannot be concluded that Marconi did not comply with its disciplinary policy, even though both TA and Sefic were fired without the benefit of progressive discipline.

No inference of discrimination arises from comparing TA to Sefic because they were not similarly situated, but even if they were, it does not appear from this record that TA was any more favorably treated than Sefic was. Neither is there any other evidence that suggests that Sefic was discharged because of his United States citizenship or that the decisionmakers were otherwise biased against United States citizens. I conclude therefore that Sefic did not establish a prima facie case of citizenship status discrimination with respect to his discharge.

2. Allegedly Discriminatory Policies

Sefic also suggests that Marconi maintained certain discriminatory policies or that its policies were applied to him in a discriminatory manner. He asserts in particular that Marconi's per diem policy was "aimed at the consulting group, a group with proportionately higher number of non-U.S. workers compared to other groups," and was unfair because it treated consultants less favorably than other employees. Marconi's per diem policy set different weekly rates for travel reimbursements depending upon the duration of the project. For trips lasting 1 to 30 days, actual expenses were paid; for trips of 31 to 90 days, a lower flat rate was established; and a still lower flat rate was paid for travel in excess of 91 days. Consultants routinely engaged in longer-term travel.

Sefic was vigorous and vocal in his opposition to this policy. In his response to Marconi's motion, he argued that Brian White was behind the per diem policy, and that the policy violated Marconi's overall Travel and Entertainment Policy, so "[r]espondent's employees who created policy for consultant's [sic] only were the insubordinate ones, not me." He argued that it was "my duty to address these issues with my coworkers and managers." Sefic also protested about changes in the policy for accruing vacation hours, which resulted in a loss of paid time off for him. He complained as well about a lowered salary structure which he attributed to the presence of H-1B visa holders in the workforce. He said that "[i]t is a [sic] well recognized that because of 'indentured servitude,' H-1B workers are attractive to employers."

Section 1324b prohibits an employer from discriminating with respect to the hiring, recruitment, or referral of an individual for employment, or the discharging of an individual from employment. Unlike Title VII, § 1324b(a)(1) does not speak to compensation, terms, conditions,

or privileges of employment other than hiring, recruitment, or firing. Thus complaints based on salary differentials, assignment of work, vacation policies, or travel policies are not independently actionable under § 1324b(a)(1) because there is thus nothing in § 1324b which precludes an employer from adopting separate reimbursement policies for consultants than for other categories of employees who travel only occasionally or on a short term basis. Neither does § 1324b preclude salary differentials or changes in vacation accrual policies. These claims are simply not cognizable under § 1324b. Sefic was accordingly unable to present a prima facie case of citizenship status discrimination as to Marconi's employment policies.

B. Retaliation

With respect to his claim for retaliation, Sefic's complaint asserts, "I firmly believe Marconi Wireless thought I was about to contact the US DOJ and/or DOL regarding what I perceive, some unfair immigration related employment practices, and potential misrepresentations of material facts in the labor condition." In explaining the basis for this belief, Sefic points to events which occurred at a meeting which took place on July 14, 2004. He says that after his 2003 performance review was conducted in March of 2004, he tried to get Brian White to make changes to it.[9] After White declined several times to do that, Sefic made a request to HR to act as an arbitrator, and a meeting was set up between Sefic and White, with Paul Gregory and Cathy Woodson from HR also in attendance, for the purpose of addressing issues about that review. Sefic says that at the end of that meeting he raised questions about his salary because it was lower than the "prevailing wage" for H-1B workers which he saw on a form (Form ETA 9035E, Labor Condition Application) that was posted on Marconi's premises.

Sefic thought the meeting went badly and said that after the meeting Marconi embarked upon a retaliatory course of conduct that started the very next day with overscrutiny of one of his reports by Brian White, a cap on his paid time off (PTO) hours/carryover vacation, false accusations of "forgetting" a vacation, and other retaliatory acts, all of which ultimately led to his termination. He suggests that but for his comments about the prevailing wage at the end of the meeting the retaliatory acts would not have occurred.

His motion does not, however, elaborate or explain what right or privilege specifically secured under § 1324b is implicated either by his concerns about whatever factual representations Marconi might have made to the Department of Labor, or by his complaints about salary differentials. Because salary differentials are not prohibited under § 1324b, it follows that complaints about such differentials are not among the rights and privileges secured by the section. Similarly, complaints about noncompliance with Department of Labor regulations do

[9] Sefic's review is mostly positive. It is not clear exactly which portions of the review he wanted changed. The review gave Sefic a score of 70, which, on a scale of 100, is not a bad rating.

not trigger the protection of § 1324b(a)(5) either.

In order to state a prima facie case of retaliation under § 1324b, Sefic's first obligation is to identify some conduct on his part that is specifically protected under that section. The statute prohibits retaliation against any individual "for the purpose of interfering with any right or privilege *secured under this section*" (emphasis added). Section 1324b(a)(5) was not enacted as a catch-all whistleblower statute, but as one designed specifically to protect the rights and privileges protected by the particular provision. The weight of authority in OCAHO jurisprudence is that absent interference with rights or privileges secured specifically under § 1324b, an allegation of retaliation fails to state a claim. *See Adame v. Dunkin Donuts*, 5 OCAHO no. 722, 1, 6-7 (1995); *Palacio v. Seaside Custom Harvesting*, 4 OCAHO no. 675, 744, 756 (1994). It does not appear that Sefic has established the first prong of a prima facie case.

The second element Sefic must show is that he subsequently suffered from an adverse action. Some of the acts which Sefic identifies as retaliatory do not qualify for that designation under the law of the circuit. The specific incidents Sefic identifies as retaliatory are 1) overscrutiny of a project report, 2) reduction of accrued time off by capping his PTO hours/carryover vacation, 3) falsely accusing him of "forgetting" a vacation, and 4) firing him without using progressive discipline procedures. While termination is clearly an adverse action, overscrutiny of a report, or accusations of forgetting a vacation do not rise to that level.

The traditional standard in the Fifth Circuit is that only an ultimate employment decision can form the basis for a claim of retaliation. *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir. 2003) (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997)). A tangible employment action is a significant change in employment status. An act must accordingly "have more than a 'mere tangential effect on a possible future employment decision'" to establish a prima facie case. *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 191 (5th Cir. 2001) (quoting *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (2001)); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) for the proposition that examples of ultimate employment decisions include hiring, granting leave, discharge, promotion, and compensation). Overscrutiny of a report, being accused of forgetting a vacation, or refusing to make changes in a satisfactory performance appraisal would not constitute a sufficiently adverse action under that standard.

The Supreme Court has in a different context articulated a somewhat different standard for an adverse action, but the level of seriousness required is still specifically related to the level or degree of injury or harm. *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). Under this standard, not all workplace irritants are prohibited, but only acts that a reasonable employee would have found to be materially adverse; that is, acts which in the context might deter a reasonable employee from making or supporting a charge. *Id.* The significance of any specific act thus depends upon the surrounding circumstances. *Id*. Sefic

does not address this subject at all. It is nevertheless clear that termination is a materially adverse action under any standard, and that a loss of vacation time probably is as well. Sefic thus satisfied the second element of a prima facie claim of retaliation, at least as to his discharge and the loss of his vacation hours.

The third element Sefic must establish is a causal connection between his allegedly protected conduct and the adverse action. In order to establish the causation prong of a retaliation claim, the employee must first show that the decisionmaker knew about his alleged protected activity. *Ipina*, 8 OCAHO no. 1036 at 576*; see Manning v. Chevron Chem. Co.*, 332 F.3d 874, 883 (5th Cir. 2003). The record here is devoid of any evidence that Lane Wooldridge knew of any alleged protected activity on Sefic's part and Sefic does not contend that he did. Neither does Sefic contend that he actually ever told anyone at the July 14 meeting or afterward that he intended to file a charge with OSC or invoke the jurisdiction of any other government agency. He said at his deposition that there "was no discussion like a face-to-face saying 'I'm going to do this, this, this. But there were hints." It is not at all apparent from the record, however, that anyone except Sefic took note of or attached much significance to those "hints" or to whatever it was that Sefic said at the meeting about the prevailing wage. Wooldridge wasn't even at the meeting, and Cathy Woodson said in her deposition that she had no recollection of the meeting.

Brian White's affidavit says that,

> The decision to terminate Mr. Sefic was not based in whole or in part on any complaint by Mr. Sefic related to the "prevailing wage" for senior consultants . . . Prior to his termination, Mr. Sefic expressed dissatisfaction with his salary. His complaint was based on his assertion that he was paid below the "prevailing wage" for senior consultants. At no time during his employment did Mr. Sefic inform me that he intended to make or file any claim or complaint with, nor alert any, governmental agency regarding the "prevailing wage" issue or any other alleged act or omission of Marconi in its employment practices.

When a fact is established by sworn testimony in an affidavit, it takes more than an unsworn denial of that fact to create a factual issue. It does not appear that White had any specific knowledge of protected activity on Sefic's part and Sefic's subjective beliefs are not sufficient to create a causal connection between his salary complaints and his termination.

Moreover, although Sefic told EEOC he was "positive it was Brian White and HR behind the decision" to fire him, and White acknowledged participating in that decision, Sefic points to no evidence which would suggest that Wooldridge was not exercising his own independent judgment in recommending Sefic's discharge. Sefic did not identify any specific person from HR whom he believed was behind the decision; neither did he point to any concrete evidence that White or anyone in HR had an animus against him. In order to impute a discriminatory or retaliatory intent from White and someone in HR to Wooldridge under the so called "cat's paw" theory, Sefic would have to show 1) that White and some specific person in HR exhibited a

discriminatory animus towards him, and 2) that White and some specific person in HR possessed some leverage or exerted some influence over Wooldridge, the titular decisionmaker. *See Roberson*, 373 F.3d at 653 (citations omitted); *Laxton v. Gap, Inc.*, 333 F.3d 572, 583-84 (5th Cir. 2003). Neither showing was made. Cathy Woodson said she relied on Wooldridge's recommendations. Although Sefic said that White had a grudge against him, no evidence suggests that White or anyone in HR had a controlling role in the decision to fire Sefic.

Moreover, while Sefic says his problems with Brian White began right after the meeting on July 14, this assertion is undercut by other documents which suggest, at least from Sefic's point of view, a strained relationship with White which started before that meeting ever occurred. Sefic sent OSC a list captioned "Types of retaliation I received," which states that,

> It all started with my requests to complete performance review for 2002. My former managers Roger Smith . . . and Mark Delongis . . . did not complete the 2002 review and it passed on to Brian White . . . Brian White repeatedly refused/avoided to complete that review, leaving me to be the only consultant who did not receive performance review for that year. I have expressed my dissatisfaction with Brian's action as I was hoping to receive pay rise and promotion. March 2004.
>
> It became obvious to me that Brian held a grudge against me for my insistence on 2002 performance review. I noticed it for the first time when Brian allowed a damaging, untrue statement in my 2003 performance review, while omitting to add excellent feedbacks from the clients.

Sefic states after he asked several times that his 2003 review be changed, Brian White refused, "asking me not to bother him with that any more," and it was only then that Sefic made his request to HR to be an arbitrator, "trying to mend the issues Brian and I had." After he made the request, Cathy Woodson sent an e-mail on June 22, 2004 stating that the meeting would be held on July 14. So Sefic evidently already had issues with White before the July meeting ever occurred, and he evidently already believed that White had a grudge against him before he ever raised his concerns about the prevailing wage. Other than his subjective beliefs, Sefic presented no substantial probative evidence which would support his allegations of retaliation for conduct protected under § 1324b. He was unable to establish either the first or the third element of a prima facie case of retaliation as to his discharge.

Similarly, there is no evidence which implies any connection between Sefic's comments about the prevailing wage and his loss of accrued vacation hours. The reduction of accrued vacation hours which took place in 2004 was not really a new policy but rather a return to an older policy from which the WPS consulting group had departed for a period of time. The official policy set out in the Employee Handbook states that an employee can carry over one week of vacation on December 31 to use in the first quarter, and anything in excess of one week will be forfeited. A memo from Cathy Woodson dated November 13, 2002 states however, that the policy was that

employees were encouraged to use vacation in the year earned, but that up to twenty days could be accrued and carried over into the next calendar year. Informally, consultants in the WPS group had nevertheless been allowed for a period of time to accrue amounts well in excess of twenty days.

According to Brian White's affidavit, the proposal to abandon the informal policy allowing excess accrual of hours for consultants was drafted well before Sefic ever mentioned the prevailing wage. An e-mail from White addressed to Chip Wagner and Paul Gregory dated July 6, 2004 explains the reason for capping the number of hours allowed to be accrued, and says that a memo will be issued on Monday, July 12, 2004 reminding personnel of the limit on accruing more vacation than permitted for their years of service. White's affidavit reflects that Marconi's reason for the change was to save money, that the capping and/or loss of hours in excess of 160 was not limited to Sefic, and that the policy was applied to all affected employees. The affidavit also states that some top performers received a bonus to offset the negative impact of their loss of hours, but that Sefic did not receive a bonus because he was not considered a top performer. While Sefic complains about the fact that exceptions were made, he does not contend that he was eligible for such an exception.

There is thus no evidence which suggests a causal relationship between Sefic's loss of accrued vacation and his complaints about the prevailing wage either. Although Sefic was able to show the second prong of a prima facie case of retaliation, he was unable to establish the first or the third prong.

C. Conclusion

Because Sefic did not show the elements necessary for a prima facie case either of citizenship status discrimination or of retaliation, his motion for summary decision must be denied.

VI. MARCONI'S MOTION FOR SUMMARY DECISION

For purposes of reviewing Marconi's motion, I construe the evidence, and make whatever reasonable inferences can be drawn from that evidence in Sefic's favor. For purposes of this motion, I will therefore assume that Sefic put forth a prima facie case. Marconi then met its burden of production by articulating nondiscriminatory reasons for its decisions, which in turn shifted the burden back to Sefic to identify sufficient evidence to create a genuine issue as to whether Marconi's reasons are pretextual.

While Sefic argues that Marconi did not prove that its reasons for terminating him were true, he misapprehends the burden shifting process. The only burden on Marconi at this stage is one of production, not of proof or persuasion, and no assessment of credibility is involved. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (citation omitted); *Sandstad v.*

CB Richard Ellis, Inc., 309 F.3d 893, 898 (5th Cir. 2002) (citations omitted). Once a legitimate nondiscriminatory reason has been articulated, it is instead up to Sefic, as the opposing employee, to set forth specific facts and present affirmative evidence sufficient to create a genuine issue of material fact as to whether Marconi's reasons are the real motive for its conduct or whether they are simply a pretext for discrimination on the basis of Sefic's status as a United States citizen, or for retaliation against him because he engaged in activity protected under § 1324b.

Summary decision in favor of Marconi can thus be avoided at this stage only if Sefic presents sufficient competent evidence of pretext to permit a rational fact finder to find that the company discriminated or retaliated on the basis alleged. *Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir. 2001) (citation omitted). Evidence of pretext must be "substantial." *Laxton*, 333 F.3d at 579. Evidence is substantial if it is "of such quality and weight that reasonable and fair-minded men (sic) in the exercise of impartial judgment might reach different conclusions." *Id.* (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996)). Self-serving, subjective or speculative allegations thus do not serve to establish pretext, *Eugene v. Rumsfeld*, 168 F.Supp. 2d 655, 677 (S.D. Tex. 2001) (citations omitted), and conclusory or unsubstantiated allegations do not create a genuine issue of material fact, *Little*, 37 F.3d at 1075. Sefic disputes each of Marconi's criticisms of him, and says that he has evidence to disprove "most" of those reasons. His obligation, however, is to produce some competent evidence negating each of the proffered reasons. *Machinchick*, 398 F.3d at 351.

Under the heading "Team Work," Woodridge's memo makes reference to two specific consulting projects for Nextel in New York. The first of these projects (Nextel I), is also addressed under the heading "Accountability," and is related to the larger issue of Sefic's reluctance to travel to the east coast. The specific incident arose because Sefic was scheduled to take a vacation for Thanksgiving week in 2004; that is, his vacation was scheduled to last from Monday, November 22, until Friday, November 26. He was also scheduled to be the consultant for the Nextel I project in New York for the previous week, that is, from Monday, November 15, through Friday, November 19. Theoretically there should have been no conflict, but practically speaking there was, because Sefic was ticketed on a flight from Dallas to London on Friday, November 19 and he planned to return to Texas at the end of the week preceding his vacation in order to be on that flight.

Wooldridge found out on the Thursday before the Nextel I project was to begin that Sefic did not intend to stay in New York for the entire 5-day period. Both his journal and his e-mails reflect that Wooldridge was quite upset with Sefic because he was unwilling to devote the whole week preceding his vacation to the Nextel project. Wooldridge sent an email to Paula Sobczak and Brian White on Thursday, November 11, with copies to Simon Leicester and to Kevin Godsave, in which he said,

> Today Simon called and said Dinko was making excuses and complaining about going to

> Nextel the week of the 15th. He said he was planning vacation for the week of Thanksgiving and was planning to depart on the Friday prior. This Friday prior is one of the days he committed to being @ Nextel. In typical Dinko form he was quite bullheaded about his plans . . . To make a tiresome story short, he suggested Pablo was available and made it abundantly clear he was NOT at all interested in going to NY unless he could return Thursday (the customer has purchased 5 days of on-site support and expects Friday to be staffed).

Wooldridge says that he made the call not to force Sefic to go to New York, noting that "the last thing we need is for a recalcitrant and surly Dinko to show up in this critical and highly visible environment and poorly represent our company or in any way convey negativity." Another consultant, Pablo Garcia, was sent instead at the last minute. Wooldridge requested that a copy of his e-mail be put in Sefic's personnel file, and said he intended to talk to Sefic the following week about this incident and use it as illustration of why Sefic hadn't progressed to principal engineer as fast as he would like, and how his behavior would continue to hold him back.

Sefic sent Wooldridge an e-mail on Wednesday, November 17, in which he characterized the incident as a misunderstanding or miscommunication, and indicated regret that Wooldridge was disappointed and upset. He added "[e]van [sic] the word unprofessional was used but I don't believe you really meant it." Wooldridge responded to Sefic saying he wanted face-to-face meeting with him and Leicester about this incident.

Sefic and Wooldridge clearly took very different views of the significance and import of this matter. Sefic said in his deposition that Marconi was unwilling to make concessions or to be flexible, and that completing the work in four days instead of five would have been a reasonable solution. Sefic also said he offered to change his airline ticket to fly to Europe from New York instead of from Dallas, but that Marconi wouldn't pay for him to do that. He nevertheless acknowledged in his deposition that Wooldridge was "more or less right" that he wanted to return to Texas on the Thursday preceding his vacation. This is the same incident which Sefic characterizes as an example of retaliation against him by accusing him of "forgetting" a vacation. While Sefic casts the dispute as being over whether or not his vacation had been formally approved by management, the substance of the incident from management's point of view was Sefic's unwillingness to do what he had been asked to do and to staff a five-day project for five days, and Wooldridge's frustration over learning only two business days before the project was to begin that it would not be staffed for the agreed period.

The incident is related to an overall conflict about Sefic's general reluctance to travel to the east coast and outright unwillingness to do so for extended periods of time. According to Brian White's affidavit,

> Mr. Sefic's job duties as a senior consultant for Marconi required him to accept work assignments consistent with his job skills, work without supervision and to be willing and

> able to travel, sometimes on an extensive and extended basis, to client sites. . . In 2004 and 2005, Mr. Sefic declined several projects, and requested that Marconi place him only on projects located either in Dallas or west of Dallas. He further expressed his unwillingness to travel to assignments east of Dallas. Depending on a number of factors, including availability of suitable work for the employee in the desired location, availability of other suitable personnel to cover personnel needs in other locations, client needs, and the reason for the employee's request, Marconi would from time to time accommodate such requests if it did not negatively impact a Marconi client, and the situation was such that the request could be fulfilled. Mr. Sefic's request for geographic assignments and refusal to perform duties on certain projects during this time did not correspond to the necessary factors for Marconi to adjust the locations to which he might be assigned.

Sefic, on the other hand, asserts that everyone knew his girlfriend was recovering from cancer surgeries on the west coast, and that he "had a deal" with management that Marconi would accommodate his request not to be assigned to long-term postings east of Dallas. Thus he appears to suggest that his avoidance of or refusal to accept east coast assignments was justified because Marconi should not have been trying to send him on such assignments in the first place.

Notwithstanding Sefic's allegation that he had "a deal" about east coast assignments however, it does not appear that Brian White or Lane Wooldridge assented to such a deal. An e-mail from Simon Leicester on December 17, 2004 expressly tells Sefic that if he is to avoid east coast assignments he simply must discuss that issue with White and Wooldridge and get their approval. Leicester wrote to Sefic,

> [I]t is very difficult for me to eliminate consultants from consideration based on the geographic location of projects, especially if the consultant has not discussed these limitations personally with the senior management. I fully understand and sympathize greatly with your current situation, but I think it is definitely in your best interest to communicate this to Brian and Lane.

Although Sefic's return e-mail acknowledged Leicester's advice and purported to agree with it, he evidently did not follow that advice to discuss his travel limitations with White or Wooldridge. His response to White states instead,

> You are right; I should have informed our senior management about the issues that Sheree and I are facing and on their effect on my schedules and on possible projects. . . Following your advice I had a word with Paula, letting her know the limitations I am experiencing, and I am positive the best solution will be found.

At his deposition Sefic explained this e-mail by saying that he made a mistake when he said he should have notified senior management because management already knew about his need to stay west of Dallas, and nobody said no. Although he said he had an agreement with Paula, he

did not claim that White or Wooldridge ever approved such an agreement.

The other incident listed under "Team Work," the second consulting project for Nextel in New York (Nextel II), proposed for January, 2005, is also listed under the heading "Appropriate Behavior and Professional Conduct." Sefic observed correctly that the decision to terminate him had already been made before this project even came up. Notes in Woodridge's journal reflect an entry dated January 6, 2005 saying that Simon (Leicester) wanted to hold off on Sefic's termination because Nextel had requested someone with skills tightly matched to Sefic's for "a 3 month engagement w/ likely extention to 6 months." The journal reflects that Wooldridge met with Sefic and Leicester to discuss it later that same day, and that,

> Dinko made several comments/demands.
>
> a. he was not willing to go for more than 3 months. - I explained that his inflexibility in this regard was counter-productive to our goals of growing revenue there.
>
> b. he wanted a per diem increase/exception, claiming he was not going to take his car and if rented, the PD would be too low. - I explained that the policy would not be departed from simply because he did not want to take a car or use corporate housing. I told Simon and Dinko I was unwilling to send Dinko under the circumstances and Simon should seek 10-99 to fill slot. This will be a stretch since customer need is immediate.

Sefic nevertheless sent an e-mail to Sobczak and Woodson on January 10, 2005 with a number of questions regarding use of a personal car on company business, stating that he and Leicester were "wrapping up some fine details about the NY project." Wooldridge sent Sefic an e-mail the same day which discussed the use of personal cars and the per diem, and concluded,

> I thought we made it clear when we spoke before that you are no longer a candidate for this particular engagement with Nextel. You stated you are unwilling to go and stay for more than 3 months and the customer has clearly indicated the potential for expanding the contract beyond 3 months. We will not place you in a job where your goal (returning to Richardson within 3 months) and the goal of the business (increase revenue and delight our customer) are in apparent conflict. Also - you stated that you would require a per diem exception (increase) which is not fiscally feasible for this project or within per diem policy. Based on your statements/requirements we have concluded that offering you to our client under these situations is not in their best interests or in ours. I will be setting a meeting on Tuesday with Brian so that we can discuss this situation further.

Sefic sent Wooldridge's e-mail back to him on January 11, 2005 with interlineated comments disputing each of his points. In response to Wooldridge's comment about his willingness to go on the Nextel II assignment, Sefic said,

> I am sorry, but I do not agree. It is not my unwillingness to take on this job but it is rather a personal issue that you and others in the management team are aware of. I am proud of our company that it understands and accommodates our people when issue [sic] like this comes up.

Sefic's cover message says that if needed, "we'll discuss our thoughts further during our meeting." That meeting was evidently the one at which Sefic was fired. He argues that the Nextel II project never existed, or in the alternative that it was really only for one month, but that Wooldridge represented it as a longer project so Marconi would only have to pay the lower per diem rate applicable to long term projects.

Other issues listed under "Appropriate Behavior and Professional Conduct" include an observation that "[m]ost PS management staff and many peers notice negative and argumentative attitude from Dinko," citing examples of his complaints. Sefic contested this assertion too, and denied having a negative and combative attitude, but he acknowledged that others perceived him that way. His friend and co-worker Pablo Garcia said he too heard complaints from his bosses about Sefic's attitude.

Under the heading "Management, Operational Performance and Leadership Skills," the Wooldridge memo states that Sefic was assigned a lead RF role at his own request on the AT&T Wireless Services (also referred to as AWS) project in New York; however, he delegated most of the accountability and went missing for a week of the project, could not be reached, and did not respond to e-mails. Sefic denied that he "went missing" but acknowledged that he did return to Texas for a naturalization interview. While Sefic said the client knew all about his temporary leave, Edgar Fajardo, the other engineer on the project, reported receiving a call from the client wondering if Sefic was sick or on vacation, and Brian White said he too received a communication from someone at AT&T reporting Sefic's absence.

The Wooldridge memo states further that after completion of this project, when Sefic was asked for additional information for his report, he did not complete it. This is the report which Sefic says was overscrutinized by Brian White on July 15, 2004 in retaliation against him after he raised questions about the prevailing wage. Sefic said White also asked him for information it was impossible to quantify. A series of questions and e-mails about the report continued over an extended period of time that summer. Polchert said the report requested was to be used for a case study which he, Polchert, as product manager would have developed, but that it never came to fruition.

Sefic thus took issue with each of Marconi's characterizations of the events and circumstances set out in the Wooldridge memo, and argued in each instance that Marconi's view is wrong. While Sefic disputes each section of the memo and challenges the accuracy of Marconi's assessments of his conduct, I do not find that he has raised any genuine issues of material fact because the relevant inquiry to be made here is not whether Marconi's perceptions of Sefic's

conduct were accurate, but whether Marconi's assessments were the real reasons the company fired Sefic or whether they are simply a ruse to cover up the fact that they wanted to get rid of him because he is a United States citizen or because he made complaints about his salary being less than the prevailing wage.

How any of the disputed events actually relate to Sefic's United States citizenship or his complaints about the prevailing wage is not readily apparent, and there has been no evidence identified from which a reasonable factfinder could draw an inference based on the record as a whole either that Sefic's United States citizenship was a factor in his termination or that Marconi was motivated by retaliation for Sefic's complaints about the prevailing wage. While Sefic reasons that his may be a mixed-motive case and that none of the actions he complains of would have occurred but for his questions about the prevailing wage, the evidence does not support this view.

It is well established that disputes about an employer's assessment of an employee's work performance, even with competent evidence, will not necessarily support a finding of pretext. *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir. 2001) (citation omitted). Similarly, conflicts between the parties about Wooldridge's assessments of Sefic's conduct do not create an issue of material fact here because the issue to be decided in this proceeding is not the reasonableness of Sefic's behavior as such, it is whether the *perceptions* of his behavior by the relevant decisionmaker, accurate or not, were the real reason for the decision. *Shackelford*, 190 F.3d at 408-09.

In the Fifth Circuit as elsewhere, discrimination suits still require some evidence of discrimination. *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000). This means that there must be at minimum a sufficient factual basis to permit an inference that the protected characteristic actually played a role in the employment decision in question and that it had a determinative influence on the outcome. *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997). A genuine issue respecting pretext is not raised unless the employee adduces competent, objective evidence casting doubt on the validity of the employer's reasons, and an individual's subjective belief that he was discriminated against, however strongly held, does not suffice. *See Douglass*, 79 F.3d at 1430; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000).

VII. DISCOVERY ISSUES

Sefic contends that there may be other evidence to support his claims, but that he was prevented from obtaining it because Marconi failed to comply fully with an earlier order compelling production of documents. Sefic belatedly filed a motion for sanctions after discovery closed and after the motions for summary decision had been filed. There is some reason to believe that Marconi may have gone from initially producing nothing new at all in response to discovery

requests, *Sefic v. Marconi Wireless, Inc.*, 9 OCAHO no. 1123, 14 (2007) (noting that Marconi produced only the exact same documents already attached to its answer and also produced to OSC in the investigation), to producing a classic "document dump" consisting of thousands of documents, including additional production after Sefic filed his motion to compel.

Notwithstanding the late filing of the sanctions motion, I have reviewed the discovery requests and responses again, as well as the record as a whole. Many of Sefic's complaints involve assertions that he did not receive the electronic versions of certain documents, hard copies of which were already in his possession. Other complaints refer to evidence which lacks probative value in this case. For example, Sefic argues that if all the requests were fully complied with he would show that Marconi "paid lower wages to non-U.S. workers, thus preferring them over equally qualified U.S. workers." First, it is not self-evident how an employer "prefers" a group by paying them lower wages. Second, this case is not about salary differentials which are not in any event cognizable under § 1324b. Third, a comparison between the wages of H-1B visa holders and those of other authorized workers regardless of their citizenship has minimal probative value in a case which purports to assert a claim of discrimination on the basis of citizenship status. The appropriate comparison in a case claiming disparate treatment based on United States citizenship would have been a comparison between citizens of the United States and noncitizens of the United States, not between H-1B visa holders and other authorized workers who might be citizens of any country in the world, including, but not limited to, the United States.

Based on examination of the entire record I am not persuaded that there is any additional documentary evidence which would assist Sefic in supporting his case, and thus conclude that even if Sefic were to obtain everything he seeks, his claim would still not survive summary decision.

VIII. CONCLUSION

Where a party fails to set forth specific facts or identify with reasonable particularity any evidence precluding summary decision, a motion for summary decision must be granted. 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. Marconi's motion for summary decision will accordingly be granted.

VIX. FINDINGS OF FACT

1. Dinko Sefic is a citizen of the United States.

2. At the time of the events in issue, Marconi Wireless was engaged in the wireless

communications industry, designing, manufacturing, and supplying telecommunications and information technology equipment, including the provision of radio frequency engineering consulting services to business customers.

3. Sefic was initially hired by Marconi in the spring of 1997 as a consultant in the London office.

4. In 1998 Sefic moved to the United States where he worked as a consultant in the Wireless Professional Services group in the Richardson, Texas office.

5. Dinko Sefic was fired from his job as a Senior Consultant in the Wireless Professional Services group at Marconi Wireless on or about January 11, 2005.

6. On July 1, 2005 Dinko Sefic filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

7. In October 2005 Dinko Sefic filed a charge with the Equal Employment Opportunity Commission alleging that Marconi Wireless discriminated against him on the basis of his religion and his national origin.

8. The Office of Special Counsel for Immigration-Related Unfair Employment Practices sent Dinko Sefic a letter dated January 12, 2006 which advised him that he had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within ninety days of his receipt of the letter.

9. Dinko Sefic filed a complaint with the Office of the Chief Administrative Hearing Officer on April 12, 2006.

VX. CONCLUSIONS OF LAW

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

2. At the time of the events giving rise to this case Dinko Sefic was a protected individual within the meaning of § 1324b.

3. At the time of the events giving rise to this case Marconi Wireless was an entity within the meaning of § 1324b(a)(1).

4. At the time of the events giving rise to this case Marconi Wireless was an employer within the meaning of the Civil Rights Act of 1964 as amended (Title VII), 42 U.S.C. § 2000e(b).

5. Dinko Sefic's allegations of national origin discrimination by Marconi Wireless are covered under section 703 of the Civil Rights Act of 1964 as amended (Title VII).

6. Dinko Sefic failed to demonstrate specific facts raising a genuine contested issue of material fact with respect to his claims of citizenship status discrimination.

7. Dinko Sefic failed to demonstrate specific facts raising a genuine contested issue of material fact with respect to his claims of retaliation for engaging in activity protected by 8 U.S.C. § 1324b.

8. Marconi Wireless is entitled to judgment as a matter of law.

ORDER

The complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 29th day of November, 2007.

_____
Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order 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 sixty days after the entry of such Order.