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

April 12, 1994

OLATUNJI MOSHOOD FAKUNMOJU, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 92B00078
CLAIMS ADMINISTRATION CORP., Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

On September 23, 1991, Olatunji Moshood Fakunmoju (complainant), commenced this action by filing a charge with the Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in which he asserted that Claims Administration Corporation (CAC or respondent), a corporation employing more than 15 individuals, had discriminated against him on the basis of his citizenship status and national origin, in violation of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. § 1324b.

On April 6, 1992, complainant filed a Complaint with this Office, alleging therein that he is a citizen of Nigeria, and had applied pursuant to section 245A of IRCA for adjustment of his citizenship status to that of alien authorized to work in the United States. On May 1, 1988, complainant contended, the Immigration and Naturalization Service (INS) adjusted his citizenship status to that of legalization applicant, since which time he has been authorized to work in the United States.

Complainant asserted that on August 8, 1988, he was hired by respondent, and was promoted to claims examiner grade four in November 1988. Thereafter, complainant contended, he was reviewed twice, at which times he received a superior rating.

On July 17, 1991, complainant asserted, respondent's personnel office informed him that his work authorization had expired, and ordered him to provide proof of citizenship or a "green card."

On July 18, 1991, complainant alleged, he completed a Form I-695 at the INS office in Baltimore, Maryland, at which time he was informed that his application would be sent to Vermont for processing. In the interim, complainant asserted he was told, he was to show his stamped application for authorization to respondent as proof that he had applied for authorization.

Complainant alleged that he returned to work and presented the documents he had been given by INS, in addition to his Social Security card, driver's license, and passport, all of which were retained by respondent pending review.

After this review, complainant alleged, he was terminated by respondent. Complainant asserted that he was told at that time that he would get his job back if he could obtain documents indicating that he was authorized for employment within a month.

On August 6, 1991, complainant asserted, he received his work authorization, which he then presented to respondent. At that time, complainant asserted, he was told that he needed to complete additional forms before he could return to work, and was also told that respondent would again check his references.

Thereafter, complainant asserted, respondent told him that it was having a problem verifying his references.

Complainant contended that he next contacted Victor Cabral, an attorney for OSC, who, complainant alleged, was investigating a complaint against respondent similar to complainant's.

After that meeting, complainant asserted, he was contacted by respondent, and told that he would not be rehired because he had falsified his employment application.

Complainant concluded that respondent knowingly and intentionally discriminated, wrongfully discharged, refused to hire, and retaliated against complainant, by discharging him and refusing to rehire him on the basis of his citizenship status, in violation of IRCA, 8 U.S.C. § 1324b.

On May 26, 1992, respondent filed its Answer, denying therein complainant's allegations of discrimination.

On September 4, 1992, the undersigned held a prehearing telephonic conference with the parties, at which time it was decided that discovery activities in this matter would be concluded by December 15, 1992, and a hearing in this matter held on Tuesday, January 19, 1993 in Rockville, Maryland.

On November 11, 1992, respondent filed an Agreed Motion to Continue Trial Date, and Extend Discovery Cutoff, and Respondent's Motion to Compel Complainant to Respond to Discovery and for Costs, asserting therein that complainant had failed to properly respond to its discovery requests and had failed to appear as scheduled for his deposition.

For these reasons, respondent requested an order extending the discovery cutoff date to February 15, 1993, rescheduling the trial to a date after March 31, 1993, requiring complainant to respond to respondent's outstanding written discovery requests, and awarding respondent the fees it incurred in attending the scheduled deposition.

On November 14, 1992, the undersigned held a telephonic prehearing conference with the parties. At that time, it was decided that complainant's deposition would be taken in Silver Spring, Maryland, on December 18, 1992, and this matter was set for hearing to begin at 9:00 a.m. on April 14, 1993 in Rockville, Maryland.

On February 16, 1993, the undersigned held a third prehearing conference with the parties, at which time complainant's counsel requested that he be allowed to withdraw, asserting that complainant no longer wanted him to participate in any manner. The undersigned told complainant's counsel to forward a request to withdraw, and extended the hearing date to June 16, 1993, to allow complainant to prepare for hearing pro se.

On February 17, 1993, complainant's counsel formally filed a request to withdraw as counsel in this matter, which was granted on February 19, 1993.

On March 30, 1993, the undersigned held a fourth prehearing conference, at which time the hearing date in this matter was reset for July 28, 1993.

On June 17, 1993, respondent filed a Motion to Continue Hearing Date. In support of its motion, respondent's counsel stated that respondent was unable to contact complainant to schedule complainant's continued deposition because complainant had moved and left no forwarding address.

On June 22, 1993, complainant filed a letter with this Office, asserting therein that he had forwarded a change of address to respondent and its counsel by letter dated April 20, 1993, but that respondent had failed contact complainant to continue complainant's deposition.

On June 22, 1993, the undersigned held a prehearing conference with the parties. At that conference, the parties agreed that complainant's deposition would taken at a date to be decided upon by the parties, and the hearing date was reset for October 6, 1993.

On August 12, 1993, respondent filed a Motion to Continue Hearing Date, in which it asserted that respondent had agreed, at complainant's request, to reschedule complainant's deposition to September 18, 1993. For this reason, respondent asserted, it requested a postponement of the hearing date until after December 1, 1993.

By order issued August 16, 1993, respondent's Motion to Continue Hearing Date was granted.

On October 19, 1993, respondent requested, and the undersigned issued, a subpoena directing the Baltimore District Director of INS to produce any and all documents pertaining to any and all applications for adjustment of status, temporary resident status, or permanent resident status regarding complainant.

On November 11, 1993, complainant filed an objection to respondent's subpoena request, asserting therein that the information requested therein is confidential and has no bearing on this matter, and alleging

that respondent's request violated complainant's "privacy rights." (Letter from Fakunmoju to McGuire of 11/5/93, at 2).

On December 13, 1993, complainant requested that the undersigned issue a subpoena to be served upon respondent for the following documents:

1. All (INS Forms I-9) collected by (respondent) from 08/08/88 through in 1991, including copies of all attachments to the I-9s.

2. Copies of the personnel file of every employee laid-off or terminated and rehired by respondent from 08/08/88 through 12/31/91 for failing not presenting appropriate work authorization and falsification on employment application.

3. List and copies of the personnel file of all employees hired on 08/08/88, either terminated or rehired and still actively working until the present.

4. Copies of the personnel files regarding the audits of I-9 files carried out in compliance with IRCA's requirements conducted and carried out in July, 1991.

5. List and identify all persons who investigated the facts of this complaint in regards to a) the date it was made; b) a description of each matter investigated; c) the reason it was made; d) whether any record or report was made and, if so, the name and address of the person who has custody of such record or report.

6. Records of (respondent's) total number of both Medical and Dental Claims received each month from 01/01/88 through 12/31/91 and total number of both Medical and Dental Claims processed during the afore-mentioned periods.

7. ALL documents relating to Complainants work performance review conducted and signed by Messrs Patricia Tucker, Carol Robinson, Floris Johnson, and Deanna Tucker effecting a new Salary increase on 07/14/91.

8. ALL documents in regards to policies and procedures relevant to discipline, discharge and re-hire during these relevant periods from 01/01/91 through 12/31/93, if any execution of such rules and regulations for any employee: a) identify such employee; b) date of discharge; c) reason(s) of discharge; e) person(s) recommending the

discharge, including name, position held, and citizenship; f) person(s) making the final decision to discharge including name, position held, and country of citizenship; g) consideration for re-hire.

That subpoena was issued on December 14, 1993.

On December 28, 1993, respondent filed a Petition to Revoke Subpoena, requesting therein that complainant's subpoena be revoked because it is duplicative of previous discovery requests by complainant, provides an unreasonable time for response, and is an untimely effort to circumvent the discovery process, which, respondent argued, has been closed since February 15, 1993.

On January 18, 1994, complainant filed a letter requesting that he be given additional time to respond to respondent's Petition to Revoke because of business conflicts.

On February 3, 1994, respondent filed a Motion to Compel Complainant to Authorize Disclosure of His Immigration and Naturalization Service Records or, in the Alternative, Motion to Enforce Subpoena, which was granted by the undersigned on February 25, 1994.

On February 15, 1994, respondent filed a Motion for Summary Decision, asserting therein that it is entitled to summary decision on two separate grounds.

First, respondent asserts, it is entitled to decision because complainant is not a "protected individual," as that term is defined for citizenship status discrimination purposes under IRCA, 8 U.S.C. § 1324b(a)(3).

Alternatively, respondent contends, even if complainant is a "protected individual," summary decision is still warranted because complainant made misrepresentations on his August 1991 job application precluding his reemployment, and because complainant made false representations on his 1988 application that, although not discovered until 1991, bar his claims in accordance with the after-acquired evidence doctrine.

On the certificate of service attached to respondent's motion, respondent indicates that on February 11, 1994, it served complainant with a copy of Respondent's Motion for Summary Decision and Memorandum in Support of Respondent's Motion for Summary

Decision via Express United States Mail at his home address, and via Federal Express Priority Overnight Service at the Radisson Hotel in New London, Connecticut.

Complainant therefore had fifteen days from that date, or until February 26, 1994, to have responded to respondent's Motion for Summary Decision. 28 C.F.R. §§ 68.8(c); 68.11(b). To date, however, no response to that motion has been received. Therefore, only respondent's motion is under consideration.

Standards of Decision

The rules of practice and procedure governing these proceedings provide for the entry of summary decision if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact. 28 C.F.R. §68.38(c).

Because 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 court cases, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (6/1/92).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986); Hensel v. Oklahoma City Veterans Affairs Medical Ctr., 3 OCAHO 532, at 7 (6/25/93).

A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Hensel, 3 OCAHO 532, at 7.

In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (1986); Wells v. General Elec. Co., 807 F. Supp. 1202, 1204 (D. Md. 1992); Sepahpour v. Unisys, Inc., 3 OCAHO 500, at 3 (3/23/93); U.S. v. Lamont St. Grill, 3 OCAHO 441, at 3 (7/21/92); Egal v. Sears Roebuck & Co., 3 OCAHO 442, at 9 (6/23/90).

The movant bears the initial responsibility of demonstrating the absence of any issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991); Hodge v. Carroll County Dep't of Social Servs., 812 F. Supp. 593, 596 (D. Md. 1992); Morales v. Cromwell's Tavern Restaurant, 3 OCAHO 524, at 4 (6/4/91).

Once the movant has carried its burden, the burden shifts to the party opposing the motion to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). See Anderson, 477 U.S. at 250, 106 S. Ct. at 2511; Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356; Temkin, 945 F.2d at 719; Hensel, 3 OCAHO 532, at 8; Morales, 3 OCAHO 524, at 4; Sepahpour, 3 OCAHO 500, at 3.

Summary of Respondent's Arguments

In support of its motion, respondent asserts the following facts:

Respondent provides claims administration services to group health insurance plans. Its claims examiners, like complainant, review claims for benefits made by and on behalf of insured. Claims examiners are responsible for determining whether benefits claimed should be paid, and, if so, for authorizing disbursement of funds to the insureds and their health care providers. For this reason, respondent asserts, employee fidelity is a serious concern.

On August 8, 1988, respondent hired complainant as a Claims Examiner Trainee. Respondent submitted as an attachment to its motion the job application that complainant completed at that time. Fakunmoju Dep. Exh. 5.

At the time he was hired, complainant presented respondent with an Alien Registration Card (Form I-688A) with an expiration date of August 10, 1989 to demonstrate his work authorization.

Complainant was subsequently promoted to Claims Examiner I on January 13, 1989, Claims Examiner II on May 8, 1989, and Claims Examiner III on July 14, 1990.

In July 1991, respondent's Employee Relations Department completed a routine audit of respondent's I-9 files to ensure that they were in compliance with IRCA. At that time, respondent discovered that complainant's Form I-688A had expired. Shortly thereafter, respondent contends, its Employee Relations Manager, John Tate

(Tate) advised complainant that in order for him to remain employed, complainant would have to provide respondent with current documentation.

In his affidavit, submitted with respondent's motion, Tate avers that "several days" later, he asked complainant whether he had the necessary documentation. At that time, Tate asserts, complainant responded that he would obtain a new Form I-688. Tate Aff., at 3. Complainant subsequently gave Tate a copy of a Form I-695, "Application for Replacement of Form I-688A," but, Tate asserts, no other documentation. Id.

After consulting with his superiors, Tate determined that the Form I-695 was not a valid employment authorization document because it did not show an extension of employment eligibility or a new grant of work authorization. Id.

Because complainant failed to provide proper documentation, and "to avoid a violation of law," Tate avers, on July 19, 1991, he informed complainant that he was terminated. Id. At that time, Tate asserts, he informed complainant that he could apply to be rehired as soon as he obtained current documentation, but that he would have to go through the normal employment process and submit a new employment application. Id. at 3-4.

After receiving his new work authorization card, complainant contacted Tate, who told complainant to come to respondent's place of business and fill out a new employment application, which complainant did on August 6, 1991. Id., at 4.

In late 1988, respondent asserts it experienced an embezzlement problem, as a result of which it established a policy of vigorously checking and verifying the employment and educational history of its job applicants. When complainant submitted his new application in August 1991, respondent argues, his references were reviewed in accordance with that policy.

Respondent asserts that in comparing complainant's 1991 application with his 1988 application, it discovered serious discrepancies between the information complainant provided with respect to education, prior employers and employment dates, and wages. In addition, respondent asserts, it was unable to verify some of the information contained in the 1991 application at that time.

Respondent contends that additional misrepresentations were revealed in the course of discovery in this proceeding.

With respect to complainant's education history, respondent asserts that it discovered the following misrepresentations and discrepancies:

On his 1988 application, complainant stated that he attended the Cynthia Warner School from January 1977 to January 1981, but he did not list this school on his August 1991 application. Respondent contends that it was unable to locate this school, and was therefore unable to verify his attendance. In complainant's response to its First and Second Sets of Interrogatories, respondent asserts, complainant admitted that he did not attend this school.

On his August 1991 application, complainant stated that he attended Widener University from January 1981 to July 1983, receiving an A.A. degree in "Business Administration," but did not state that he attended that school on his July 1988 application. Respondent asserts that its investigation revealed that complainant attended Widener from January 1981 until he withdrew in December 1982, receiving an A.A. degree in "Science," facts confirmed by Widener records respondent obtained during discovery.

On both his August 1991 application and his 1988 application, complainant stated that he attended Bowie State University from September 1985 until May 1987. On his 1988 application, complainant indicated that he received a B.S. degree in "Business Administration," and on his August 1991 application, he indicated that he received B.S. degree in "Finance/Economics." Respondent asserts that its inquiry indicated that complainant actually attended Bowie State as an undergraduate from fall 1984 until spring 1987, at which time he received a B.S. degree in "Business Administration," facts which respondent states were confirmed in the course of discovery.

On his 1988 application, dated July 28, 1988, complainant stated that he attended the graduate school at Bowie State from September 1987 to "Present." His August 1991 application, however, indicated that complainant attended graduate school at Bowie State from September 1987 to May 1988. On both of his applications, complainant stated that he had a "4.0" grade point average. Respondent asserts, however, that an inquiry to Bowie State revealed that complainant had never enrolled in the graduate school at Bowie State, a fact that respondent verified in the course of discovery.

With respect to complainant's employment history, respondent asserts that it discovered the following misrepresentations and discrepancies:

On both job applications, complainant stated that he had worked for Litigation Systems, Inc. from January to July 1988. On his 1988 application, complainant indicated that he was paid $7.50 per hour by Litigation Systems, but on his August 1991 application, he indicated that he was paid $6.50 per hour. Respondent asserts that its preemployment inquiry revealed that complainant had only been employed by Litigation Systems for only one month, from May 16, 1988 to June 15, 1988, at a rate of only $6.00 per hour. Respondent contends that this fact was confirmed in the course of discovery, and was conceded by complainant.

On his 1988 application, complainant indicated that he had been employed by Bowie State as a tutor from September 1985 to May 1987, at a rate of $7.00 per hour. Complainant's August 1991 application indicated that he was so employed from January 1985 to July 1988 and received $8.50 per hour. In the course of its preemployment inquiry, respondent asserts, it was unable to confirm these facts. Respondent contends that in his response to interrogatories, complainant stated that he was paid $6.00 per hour and received $9.00 per hour "in (his) spare time." Respondent asserts, however, that through discovery it was learned that complainant was never employed by Bowie State.

On his 1988 application, complainant indicated that he was employed by Intercontinental Grocery Store from January 1983 until May 1985 at a rate of $7.15 per hour. Complainant's August 1991 application, however, indicates that complainant was employed by Intercontinental from January 1981 to December 1984 at a rate of $7.50 per hour. Respondent asserts that it was unable to locate Intercontinental to verify whether any of the information submitted by complainant was correct, but indicates that complainant stated in response to interrogatories that the dates on his August 1991 application for employment were incorrect, and that he was employed by Intercontinental from January 1983 through May 1985 at a final rate of $7.15 per hour.

On complainant's August 1991 application, he indicated that he was employed by Tabs Sys, Inc. from January 1987 to May 1988, but did not include this employer in his employment history on his 1988 application. Respondent asserts that it was unable to locate this employer to verify complainant's employment.

Finally, respondent asserts that on his 1988 application, complainant did not indicate that he had any "professional credentials." However, respondent asserts, on his August 1991 application, complainant indicated an affiliation with the "Association of Institute of Bankers (AIB) London, England." Respondent asserts that in response to its interrogatories, complainant conceded that that representation was incorrect, and that he was never affiliated with that organization.

Respondent further asserts that its investigation of complainant's job applications revealed significant gaps in complainant's educational and employment history.

On September 16, 1991, Tate avers, he called complainant and told him that as a result of misrepresentations on his employment application, he would not be rehired. Tate further avers that Florence Johnson, respondent's Senior Manager Personnel, sent complainant a letter in response to complainant's contention that he had documentation to explain those misrepresentations, to which complainant failed to respond.

Respondent asserts that it is company policy to refuse to hire any applicant, and to discharge any employee, who is discovered to have made a misrepresentation on an application.

Furthermore, respondent argues, its company policy precludes the hiring of applicants whose applications reveal significant, unexplained gaps in their educational and employment history.

Finally, respondent asserts that in the course of his deposition, complainant testified that his application for temporary resident status had been denied, a decision that complainant asserted he had appealed.

Decision

Respondent asserts that because complainant admitted in the course of his deposition that his application for temporary resident status was denied, and because complainant does not fall into any of the other classifications in 8 U.S.C. § 1324b(a)(3), the Complaint in this matter must be dismissed.

In his charge, complainant alleged that he has the status of an alien lawfully admitted for temporary residence under 8 U.S.C. §§ 1255a(a)(1), 1160(a), 1161(a). Charge, para. 5.

In the Complaint, however, complainant asserted:

> 5. Pursuant to the Immigration Reform and Control Act of 1986 section 245A complainant applied for adjustment of his citizenship status to that of an alien authorized to work in the United States.
>
> 6. On May 1, 1988 the United States Immigration and Naturalization Service adjusted complainant's citizenship status to that of a legalization applicant.

Complaint, p. 2. (emphasis added)

Similarly, at his deposition, complainant indicated that his application for temporary resident status was "still pending." Fakunmoju Dep., at 208.

In order to maintain a citizenship status discrimination claim under IRCA, 8 U.S.C. § 1324b(a)(1)(B), the alleged subject of the discrimination must be a "protected individual", as that term is defined in 8 U.S.C. § 1324b(a)(3). Brooks v. KNK Textile, 3 OCAHO 545, at 1 (8/3/93).

The term "protected individual" in this context means an individual who:

> (A) is a citizen or national of the United States, or
>
> (B) an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 210(a), 210A(a), or 245A(a) (of the Immigration and Nationality Act (INA)), is admitted as a refugee under section 207 (of the INA), or is granted asylum under section 208 (of the INA).

8 U.S.C. § 1324b(a)(3) (emphasis added).

There is no indication in the record that complainant is a citizen or national of the United States, or a refugee or asylee. While complainant did assert in his charge that he was a temporary resident under 8 U.S.C. §§ 1160 and 1161 (sections 210 and 210A of the INA, respectively) complainant did not assert that fact in the Complaint, and nothing in the evidence or pleadings in this matter indicates that that is the case.

Because complainant has not been granted the status of an alien lawfully admitted for temporary residence under sections 210, 210A, or 245A of the INA (8 U.S.C. §§ 1160, 1161, and 1255a, respectively), but is merely an applicant for adjustment of his alien status to that of an alien lawfully admitted for temporary residence under section 245A of

the INA, I find that complainant is not a "protected individual" for the purpose of citizenship status discrimination.

For this reason, respondent's Motion for Summary Decision is granted as it pertains to complainant's claim that he was discriminated against because of his citizenship status, in violation of IRCA, 8 U.S.C. § 1324b(a)(1)(B).

The fact that complainant is not a "protected individual" for citizenship status discrimination purposes, however, does not forestall complainant's retaliation claim under IRCA, 8 U.S.C. § 1324b(a)(5).

Coverage under the retaliation provision of IRCA requires a finding that the particular cause of action implicates rights and privileges secured under, or involves proceedings under, 8 U.S.C. §1324b. Yohan v. Central State Hosp., 4 OCAHO 593, at 9 (1/11/94).

For this reason, this Office does not have jurisdiction over a claim of retaliation for asserting a right or privilege that is not secured under 8 U.S.C. §1324b, or for filing or planning to file a charge with an entity other than OSC or a complaint with an entity other than this Office. See Millan v. Smithfield Packing Co., OCAHO Case No. 93B00086 (Order Granting Respondent Smithfield Packing Company's Motion to Dismiss), at 3 (9/2/93).

This Office does, however, have jurisdiction over a claim that an employer retaliated against an individual for filing or intending to file a charge or complaint under 8 U.S.C. § 1324b, even if it is subsequently discovered that this Office does not have jurisdiction over the claim of discrimination on which the charge or complaint is based. Yohan, 4 OCAHO 593, at 10. That is the case here.

In his Complaint, complainant alleged that he was fired and/or not rehired by respondent because he contacted Victor Cabral, attorney for OSC, to discuss with Cabral respondent's alleged discrimination against complainant, wrongful discharge of complainant, and failure to rehire complainant, as a prelude to filing a charge with OSC. Complaint, paras. 98, 106.

In essence, then, complainant's remaining claim is twofold. First, complainant alleges that he was fired by respondent in retaliation for contacting Cabral as a prelude to filing a charge. Second, complainant alleges that he was not rehired by respondent because he contacted Cabral as a prelude to filing a charge.

The unfair immigration-related employment practices provisions of IRCA, 8 U.S.C. § 1324b, are similar to the provisions of Title VII of the Civil Rights Act of 1964, as amended. In particular, the retaliation provision of IRCA, 8 U.S.C. § 1324b(a)(5), is similar to section 704(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a).

For this reason, decisions from federal courts in actions brought under Title VII, 42 U.S.C. §2000e et seq., provide a proper guide to use in determining the respective burdens of producing evidence in cases brought under the anti-discrimination provisions of IRCA, 8 U.S.C. §1324b. Hensel, 3 OCAHO 532, at 9; Ortega v. Vermont Bread, 3 OCAHO 475, at 7 (11/18/92); Tovar v. A.P. Esteve Sales, Inc., 3 OCAHO 458, at 5 (9/21/92).

The Supreme Court established the order and allocation of proof to be used in disparate treatment cases under Title VII in McDonnell Douglas Corp. v. Green, 411 U.S. 192 (1973). The Court held that an individual alleging discrimination in employment must first establish a prima facie case of discrimination by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Id. at 802.

A prima facie case of discrimination creates a presumption of unlawful discrimination. St. Mary's Honor Center v. Hicks, _ U.S. __, 113 S. Ct. 2742, 2747 (1993). Once an individual alleging discrimination establishes a prima facie case, the burden of production shifts to the employer to assert legitimate, nondiscriminatory reasons for its employment decision. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-255 (1981).

As the Court noted in Hicks:

> (T)he McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case, i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason."

Hicks, 113 S. Ct. at 2747.

Because the ultimate burden of persuasion rests with the employee, the employer does not need to prove that the reasons it offered actually

motivated it, but rather only needs to introduce evidence of those nondiscriminatory reasons which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse employment action. Id., at 2748.

Once the employer has met this burden, the McDonnell Douglas framework, with its presumptions and burdens, is no longer relevant. Id. at 2749. At this point, the party alleging discrimination must prove by a preponderance of the evidence that the employer's articulated reason was not the real reason, but rather was a pretext for discrimination. Id.; McDonnell Douglas, 411 U.S. at 804.

To show that the reason asserted was a pretext for discrimination, the individual alleging discrimination must prove both that the reason asserted was false, and that discrimination was the real reason for the employment decision. Hicks, 113 S. Ct. at 2752.

The three-part allocation of the burden of proof articulated in McDonnell Douglas, Burdine, and Hicks applies with equal force in retaliation suits. Blizzard v. Newport News Redev. & Hous., 670 F. Supp. 1337, 1343 (E.D. Va. 1984); Yefremov v. NYC Dep't of Transp., 3 OCAHO 562, at 47 (9/21/93).

Establishing a prima facie case of retaliation requires the party alleging the violation to show:

1. He or she engaged in protected participation or opposition;

2. The employer was aware of this activity;

3. The party alleging the violation suffered adverse employment treatment following the participation or opposition; and

4. A causal connection exists between the protected activity and the action, i.e., that a retaliatory motive played a part in the adverse employment action.

Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985); Lewis v. AT&T Technologies, Inc., 691 F. Supp. 915 (D. Md. 1988); Blizzard, 670 F. Supp. at 1343; Yefremov, 3 OCAHO 562, at 47.

In response to and as a defense to complainant's allegations of retaliation, respondent alleges that complainant's false representations on his August 1991 job application precluded his reemployment with respondent, and complainant's false representations on his 1988 application, though not discovered until 1991, bar his claims in accordance with the after-acquired evidence doctrine.

In alleging that complainant's false representations on his 1991 job application precluded his reemployment with respondent, respondent is offering a legitimate reason for its employment decisions rather than attempting to disprove an element of complainant's prima facie case.

In alleging that complainant's false representations on his 1988 application bar complainant's claims in accordance with the after-acquired evidence theory, respondent is asserting an affirmative defense to complainant's claims of retaliatory discharge and failure to hire. See Cheryl Krause Zemelman, The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility, 46 Stan. L. Rev. 175 (1993); Gian Brown, Note, Employee Misconduct and the Affirmative Defense of "After-Acquired Evidence", 62 Fordham L. Rev. 381, 392 (1993).

Analysis of these two grounds for summary decision differ, and will be addressed separately.

The Supreme Court has held that summary judgment is mandated:

> "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.
>
> (emphasis added)

Celotex, 477 U.S. at 322-323, 106 S. Ct. at 2552 (quoting Anderson, 477 U.S. at 242, 106 S. Ct. at 2511). Accord Lujan v. National Wildlife Fed'n, 479 U.S. 871, 110 S.Ct. 3177, 3186 (1990).

Accordingly, an employer may prove that it is entitled to summary decision by showing the absence of an element of complainant's prima facie case, "an element essential to that party's case."

Alternatively, however, the employer may also show that it is entitled to summary decision by offering evidence to show a legitimate reason for its employment decision. See McClain v. Mack Trucks, Inc., 532 F. Supp. 486, 489 (E.D. Pa. 1982), aff'd 707 F.2d 1393 (3d Cir.), cert. denied, 462 U.S. 1137 (1983). In this situation, the trial court assumes for purposes of considering the employer's motion that the individual alleging the violation has established a prima facie case. Id.

Respondent has offered several examples of what it describes as "false representations" on the August 1991 job application that complainant submitted to respondent, including misrepresentations of complainant's educational history, employment history, and professional affiliations.

On his August 1991 employment application, submitted by respondent as an attachment to its motion, complainant certified that the information contained therein was "true and correct," and stated that he understood that "any misstatement (contained therein) may result in termination from CAC at any time." Fakunmoju Dep. Exh. 7.

Respondent's personnel manual, also submitted by respondent as an attachment to its motion, states that job offers are extended after verification of the candidate's employment and academic history, and professional achievements. Tate Aff. Exh. 6.

That manual further provides that:

> differences between representations made by the candidate and the information obtained during the background verification process should be resolved before a job offer is extended.

Id. In his affidavit, Tate averred that at all times relevant to these proceedings, it has been respondent's policy to refuse to hire an employee discovered to have made a misrepresentation on a job application. Tate Aff., at 5.

Respondent also notes that its verification of complainant's August 1991 application revealed significant gaps in complainant's employment and education history. In his affidavit, Tate averred that such significant, unexplained gaps in his employment and educational history would have made complainant ineligible for hire by respondent even if complainant had not made false statements on his job application. Id.

In its motion, respondent asserts that its refusal to hire complainant in September 1991 resulted from false statements that complainant made on his August 1991 job application, and was not done for an unlawful purpose.

At this point, the burden is on complainant to prove that respondent's explanation is a pretext for unlawful retaliation. Hicks, 113 S. Ct. at 2752. Complainant, in failing to timely respond to respondent's motion, has failed to do so.

Because respondent has asserted a legitimate reason for its refusal to hire complainant in September 1991, and because complainant has failed to prove that the proffered reason is false and not the true reason for respondent's actions, but rather is a pretext for discrimination, respondent is entitled to summary decision on complainant's claim that respondent refused to hire him in retaliation for filing or intending to file a charge or complaint under 8 U.S.C. § 1324b. Accordingly, respondent's motion is granted as it pertains to that claim.

Finally, respondent asserts that complainant's false representations on his 1988 application, although not discovered until 1991, bar his claims in accordance with the after-acquired evidence doctrine. In particular, respondent argues that regardless of the merit of complainant's discharge claims, complainant suffered no legal damage by being terminated because respondent would either not have hired or would have immediately terminated complainant because of false statements on complainant's 1988 job application.

Complainant's only remaining claim charges respondent with having discharged him in retaliation for filing or intending to file a charge or complaint under 8 U.S.C. § 1324b. Respondent's after-acquired evidence defense will therefore be applied to that claim.

The seminal case addressing the effect that misrepresentations have on a later suit brought by an employee where those misrepresentations are made during or after the hiring process, but are not discovered until the suit is filed, is Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700 (10th Cir. 1988).

In Summers, an employee of defendant insurance company alleged that he had been fired from his job as a field claims representative because of his age and religion. In the course of discovery, defendant learned that while employed by defendant, plaintiff had falsified business records in over 150 instances. Id., at 703. On the basis of that evidence, which would have been grounds for plaintiff's discharge, defendant moved for summary judgment.

In support of its motion for summary judgment, defendant argued that although the after-acquired evidence was not the "cause" or the "reason" for plaintiff's discharge (those instances being unknown to defendant at the time of plaintiff's discharge), that evidence should be considered in determining the relief that plaintiff was due. Id., at 704. Because plaintiff was not entitled to any relief under the

circumstances, defendant argued that it was entitled to summary judgment. Id.

The Court of Appeals for the Tenth Circuit affirmed the district court's entry of summary judgment, holding that while the after-acquired evidence was clearly not the cause of plaintiff's discharge or relevant thereto, it was relevant to plaintiff's injury claim, and precluded "the grant of any relief or remedy to plaintiff." Id., at 708.

The Summers court offered the following analogy:

> The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor."

Id.

As noted in Redd v. Fischer Controls, 814 F. Supp. 547 (W.D. Tex. 1992), the majority of courts adopting Summers have done so in so-called "resume fraud" or "application fraud" cases, in which an employee charges an employer with discriminatory discharge, and the employer discovers after the discharge that the employee had made material misstatements or omissions on his or her job application or resume, which, if known by the employer prior to or at the time of discharge, would caused the employer to not hire or to discharge the employee. Id., at 552. See O'Driscoll v. Hercules, Inc., 63 EPD ¶ 42,806 (10th Cir. 1994); Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992); Reed v. AMEX Coal Co., 971 F.2d 1295 (7th Cir. 1992); Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., 955 F.2d 250 (6th Cir. 1992); Smith v. General Scanning, Inc., 876 F.2d 1315 (7th Cir. 1989); Kemp v. Packaging Corp. of America, 63 EPD ¶ 42,810 (N.D. Ill. 1993); Agbor v. Mountain Fuel Supply, 810 F. Supp. 1247 (D. Utah 1993); Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992); Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 521 (D. Kan. 1991); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989). See also Note, The After Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992), 72 Neb. L. Rev. 330, 331 (1993), and the cases cited therein.

While the Federal Court of Appeals for the Fourth Circuit has never addressed the issue of whether "resume" or "application fraud" precludes a cause of action for discrimination, the logic of Summers and its "application fraud" progeny was adopted by the Federal District

Court for the District of Maryland in Rich v. Westland Printers, 1993 U.S. Dist. LEXIS 8526 (D. Md. 1993), and by the Federal District Court for the Eastern District of Virginia in Russell v. Microdyne Corp., 830 F. Supp. 305 (E.D. Va. 1993);

In Rich, an employee brought suit against defendant printing company, alleging therein sex-based discrimination in promotion and termination from employment.

When she was hired by defendant, plaintiff submitted a resume stating that she had been awarded an associates degree in graphic communication from Brooklyn College in New York. In the course of litigation, it was determined that plaintiff's assertion that she had received that degree was false, and known by her to be false at the time the assertion was made, facts conceded by plaintiff.

The court rejected plaintiff's contention that defendant's after-acquired evidence was relevant to the question of available remedies and not liability, finding:

> (P)laintiff's attempt to utilize the distinction between remedy and liability fails. The Courts have held summary judgment is granted when after-acquired evidence of fraud nullifies any remedies, thereby rendering any determination of liability moot.

Id., at 16.

The court also rejected plaintiff's argument that the misrepresentation at issue should be disregarded because the subject of that misrepresentation was not a qualification necessary to her position with defendant, holding:

> The relevance of the fraud to the instant action stems from the fact that the plaintiff willfully and knowingly misrepresented information to the defendant and that if the defendant had known that Rich committed a fraud, Rich would have been terminated.

Id., at 17.

The court, accepting defendant's assertion that it would have rejected any applicant or would have fired any employee known to have fraudulently represented facts on his or her employment application, granted defendant's summary judgment motion. Id., at 17-18.

In Russell, plaintiff sued defendant corporation for sexual discrimination, sexual harassment, and retaliation.

In the course of discovery, defendant learned that on her application and resume, plaintiff had falsely asserted that she was employed by Management Engineers (MEI) as a Marketing Manager at the time she applied, when in fact she had been laid off ten months earlier. Russell, 830 F. Supp. at 307. In addition, defendant learned in the course of discovery that plaintiff had overstated her salary at MEI and at various consulting jobs during the ten months since she had left MEI, and had misstated her reasons for leaving MEI. Id.

The court held:

> Under the "after-acquired evidence" doctrine in civil rights suits, discrimination claims are barred and summary judgment is proper if the plaintiff made material misrepresentations during the employment application process. If an employee would never have been hired or would have been discharged due to fraudulent statements, no recovery is warranted, regardless of any alleged adverse employment actions against plaintiff.

Id.

Finding that the plaintiff had made material misrepresentations to defendant upon her employment application, the court held that those misrepresentations satisfied the requirements of the after-acquired evidence doctrine, barring her claims. Id., at 308.

Respondent identifies five (5) separate misrepresentations on complainant's 1988 job application that it asserts were discovered or verified in the course of discovery in this action.

On his 1988 job application, complainant indicated that he attended Cynthia Warner school. Fakunmoju Dep. Exh. 5. In response to Interrogatory No. 10, Respondent's First Set of Interrogatories, complainant admitted that he did not attend that school. Interrogatory Answer No. 10.

On his 1988 job application, complainant stated that he attended Bowie State University from September 1985 to May 1987. Fakunmoju Dep. Exh. 5. At his deposition, Dharmi C. Chaudhari (Chaudhari), associate registrar at Bowie State, testified that complainant enrolled as a full-time day student at Bowie State in September 1984, one year earlier than complainant stated on his 1988 application. Chaudhari Dep., at 10.

On his 1988 application, complainant stated that he attended the graduate school at Bowie State from September 1987 to "Present," and

that he had a 4.0 grade point average in that program. Fakunmoju Dep. Exh. 5. At his deposition, Chaudhari testified that complainant never registered for any graduate courses at Bowie State. Chaudhari Dep., at 13.

On his 1988 application, complainant stated that he worked for Litigation Systems, Inc. from January to July 1988, at a rate of $7.50 per hour. Fakunmoju Dep. Exh. 5. At her deposition, Catherine Ann Fleury (Fleury), office manager for Litigation Systems, testified that complainant was hired by that employer on May 16, 1988 and was terminated one month later, on June 15, 1988. (Fleury Dep., at 13). Fleury also testified that complainant was paid by Litigation Systems at a rate of only $6.00 per hour. Id.

On his 1988 application, complainant stated that he was employed by Bowie State as a tutor from September 1985 to May 1987, at a rate of $7.00 per hour. In response to Interrogatory No. 10, Respondent's First Set of Interrogatories, complainant stated that he was paid $6.00 per hour by Bowie State, "$9.00 in my spare time." Interrogatory Answer No. 10. At his deposition, Russell A. Davis (Davis), Acting Vice President for Student Affairs at Bowie State, testified that, while a W-2 on record for complainant indicated that complainant had been offered a contractual position by Bowie State, there was no evidence that complainant was ever actually employed by that institution. Davis Dep., at 9-13.

Respondent argues that it would not have hired complainant had it known of those misrepresentations at the time he was hired, and would have fired him upon learning of those misrepresentations.

In his affidavit, Tate avers:

> If CAC had known of Fakunmoju's misrepresentations, on... his July 1988 application, he would either not have been hired or would have been immediately discharged.

Tate Aff., at 6.

Respondent's personnel manual contains the following caveat:

> Any evident differences between representations made by the candidate and the information obtained during the background verification process should be resolved before a job offer is extended. At times, with the approval of the personnel manager, the company may extend an offer contingent upon successful completion of the background verification. If any differences arise the company may retract the offer and terminate the employee. The final determination should be made by the Personnel Manager.

> Falsification of an employment application is grounds for termination regardless of when the company becomes aware of the falsification.

Tate Aff. Exh. 6, at 3 (emphasis added).

On his 1988 application, complainant attested that he understood that "any falsification or concealment is cause for termination from CAC," estopping complainant from asserting otherwise. Fakunmoju Dep. Exh. 5, at 2.

Respondent has offered uncontested evidence to establish that complainant misrepresented his employment and educational history on his 1988 job application, and to establish that complainant would have been terminated prior to or at the time of his discharge had respondent known about those misrepresentations.

Accordingly, I find that under the pertinent law in this action, the after-acquired evidence doctrine applies to bar complainant's claim that he was discharged because he filed or intended to file a charge or complaint under IRCA, 8 U.S.C. § 1324b. For this reason, respondent's Motion for Summary Decision is granted, as it pertains to that claim.

Order

In summary, respondent's motion is granted as it pertains to complainant's claim that he was discriminated against in hiring and in discharge because of his citizenship status, in violation of IRCA, 8 U.S.C. § 1324b(a)(1)(B), on the ground that complainant is not a protected individual, as that term is defined for citizenship status discrimination purposes in 8 U.S.C. § 1324b(a)(3).

Respondent's motion is granted as it pertains to complainant's claim that respondent refused to hire him because he filed or intended to file a charge or a complaint under 8 U.S.C § 1324b, in violation of IRCA, 8 U.S.C. § 1324b(a)(5), on the ground that respondent has offered a legitimate reason for that employment decision which complainant has failed to demonstrate is false and a pretext for unlawful conduct.

Respondent's motion is granted as it pertains to complainant's claim that he was discharged because he filed or intended to file a charge or a complaint under 8 U.S.C. § 1324b, in violation of IRCA, 8 U.S.C. § 1324b(a)(5), on the ground that that claim is barred under the after-acquired evidence doctrine.

All pending motions in this action are denied, in accordance with this Order.

JOSEPH E. MCGUIRE
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 a timely review of this 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 this Order.