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

JOHN R. ALVAREZ, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 91200149
INTERSTATE HIGHWAY CONSTRUCTION, Respondent.	)	

Errata

The following change shall be incorporated by reference into my "Final Decision and Order Granting Respondent's Motion for Summary Decision" of June 1, 1992:

Page 4, third paragraph, which reads "On the same date, I issued an Order allowing Respondent until April 3, 1992, to complete discovery . . ." shall be changed to read "On the same date, I issued an Order allowing Complainant until April 3, 1992, to complete discovery . . ."

SO ORDERED this 22nd day of June, 1992.

ROBERT B. SCHNEIDER
Administrative Law Judge

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JOHN R. ALVAREZ, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding CASE NO. 91200149
INTERSTATE HIGHWAY CONSTRUCTION, Respondent.	)	

Appearances:

John R. Alvarez
Complainant Pro Se

Mountain States Employers Council, Inc.
For the Respondent

Before: Robert B. Schneider
Administrative Law Judge

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. *Statutory and Regulatory Background*

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324b, which provides that it is an "unfair immigration-related employment practice" to discriminate against any individual other than an unauthorized alien, with respect to hiring, recruitment, referral for a fee, or discharge from employment because of that individual's national origin or citizenship status. The statute covers a "protected individual," defined at section 1324(a)(3) as one who is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, or an individual admitted as a refugee, or one who has been granted asylum.

Protected individuals alleging discriminatory treatment on the basis of national origin or citizenship must file their charges with the Office of Special Counsel for Immigration Unfair Employment Practices (OSC). In turn, OSC is authorized to file complaints on behalf of complainants before administrative law judges (ALJs) designated by the Attorney General. 8 U.S.C. § 1324b(e)(2).

Congress established this new cause of action in 1986 due to concern that the employer sanctions program, codified at 8 U.S.C. § 1325b, might lead to employment discrimination against those who appear "foreign," including those who, although not citizens of the United States, are lawfully present in the country. "Joint Explanatory Statement of the Committee of Conference," H.R. CONF. REP. NO. 99-1000, 99th Cong., 2d. Sess. 87 (1986).

IRCA permits private actions in the event that OSC does not file a complaint before an ALJ within 90 days of the private party's receipt of notice from OSC that it will not prosecute the case.

This case involves a private action brought by John R. Alvarez, Complainant herein, against Interstate Highway Construction (IHC) alleging national origin and citizenship discrimination which resulted in his discharge from employment and his failure to be recalled to work.

II. *Procedural History*

On January 22, 1991, Complainant filed a charge with OSC alleging discrimination on the basis of national origin and citizenship status against IHC.

In a letter dated May 8, 1991, OSC advised Complainant, inter alia, that it would not file a Complaint regarding his national origin claim because it determined that IHC had 45 employees on the date of the alleged discrimination and, therefore, OSC did not have jurisdiction over his claim. OSC also advised Complainant that it would not file a claim regarding his citizenship discrimination claim because it did not "believe that he was the victim of citizenship discrimination."

On August 5, 1991, Complainant, acting pro se, filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against IHC (hereinafter "Respondent") alleging, inter alia, that he was a United States citizen of Mexican-American national origin who was knowingly and intentionally fired from his job on June 29, 1990, by Respondent because of Complainant's citizenship status and/or

Mexican-American national origin, in violation of 8 U.S.C. § 1324b. The Complaint further alleges that after Complainant was fired from his job, the position remained open and Respondent continued to seek applications from individuals with Complainant's qualifications, but who had either a different citizenship status or national origin than Complainant's. The remedies or relief sought in the Complaint include a request that the Colorado Department of Highway (CDOH) and IHC cease and desist from the discriminatory practices and that IHC be required to rehire or reemploy Complainant as a laborer, with backpay from March 21, 1990.

On September 27, 1991, Respondent filed its Answer to the allegations of the Complaint.[1]

In its Answer, Respondent: (1) admitted this court's jurisdiction over the citizenship status claim, but denied this court's jurisdiction with respect to the unfair immigration-related employment practice claim because a similar charge is pending with the Equal Employment Opportunity Commission (EEOC); (2) neither admitted nor denied the following: that John R. Alvarez was a United States citizen as defined by 8 U.S.C. § 1324b(a), that Complainant was authorized to be employed by IHC at all times relevant hereto, and that Complainant was of Mexican-American national origin: (3) admitted that Complainant worked for the company as a laborer from May 23, 1990 until July 2, 1990: (4) admitted that Complainant was qualified for the position of laborer and was "laid off: (not dismissed) because the project he was working on was completed; and (5) denied that Complainant was fired because of his citizenship status or national origin.

On October 15, 1991, I ordered Complainant to provide me, on or before November 15, 1991, with his statement and/or the statements of others, preferably under oath, stating with specificity the facts that supported his allegations.

On November 18, 1991, Complainant filed a Motion for an Extension of Time to file its response to my October 15th Order. On November 27, 1990, I granted Complainant's Motion. On December 18, 1991, Complainant filed his response, a two page unsworn hand-written statement with attached documents. Complainant's statement, which

[1] On October 15, 1991, I accepted the Answer filed on September 27th as timely, based on the fact that I was permitting Mountain States Employers Council (MSEC), an association of employers who advise employers on employee relationship matters, to represent the Respondent because I held that MSEC had both been authorized by Respondent to represent it in these proceedings and shown evidence of competency.

is poorly written and difficult to comprehend, is not responsive to my October 15th Order. Instead, Complainant's response is argumentative and conclusory, alleging that he was harassed on the job, that he was denied benefits, that he was not provided with adequate toilet facilities on the job, and that he was treated differently than other employees because his personnel file had contained derogatory information.

On January 14, 1992, I issued an Order directing the parties to submit additional information to the court and to complete discovery. On January 28, 1992, Respondent filed its response to this Order and included affidavits from a number of its employees including John Medberry, corporate Equal Employment Opportunity Officer; William Brilhart, foreman; Thomas Rutkosi, paving foreman; Randy Hardman, paving operator; and Gregg McAlexander, project manager. Respondent also submitted, with its response, corporate business records including Alvarez's Employee Master File Update, a Warning Notice to Alvarez dated June 4, 1990, regarding his tardiness to work, and an IHC inhouse document setting forth its "Equal Employment Opportunity Policy."

On February 18, 1992, Complainant filed a Motion to Terminate or Limit Respondent's Examination by Interrogatories which I denied on February 25, 1992. On March 6, 1992 Respondent filed a Motion for Summary Decision, arguing that Complainant had not provided evidence in this proceeding to establish either that he was qualified for the job he was performing, that he was satisfying the normal requirements of his work or that after his discharge, he was replaced by an employee who was not a U.S. citizen. On the same date, I issued an Order allowing Respondent until April 3, 1992, to complete discovery and until April 17, 1992, to file a response to Respondent's Motion for Summary Decision.

On April 8, 1992, Complainant filed motions for "Assistance of the ALJ in obtaining necessary information from Respondent and from the Colorado Department of Transportation" (sic). I denied both motions.

At the same time, Complainant also filed a lengthy hand-written "response to the case . . ." with attached documentation which consisted, inter-alia, of a portion of IHC's Employment Policies and Job Work Rules, the state of Colorado's Response date March 20, 1992, to Complainant's Open Records Request, and affidavit of Gregg McAlexander, IHC's memorandum to all of its employees on the topic of its commitment to safety, and MSEC's position statement and

answers to the charge of discrimination, dated November 14, 1990, which it had submitted to the EEOC.

On April 20, 1992, Complainant filed his Response to Respondent's Motion for Summary Decision. Although there were no affidavits attached to the Response, Complainant did include his own statement in response to the motion and a list of the "Plant/Paving Crew" which consisted of the names of Respondent's employees, their race, gender, position, the date they were laid off and the date they returned to employment. His own data was included.

III. *Discussion, Findings and Conclusions*

A. Factual Background

Complainant is a Mexican-American who was born in Colorado and spent four years in the United States Marine Corps. He has had training as an aviation mechanic, but his major work experience has been as a laborer in highway construction. Respondent, Interstate Highway Construction, is a Colorado corporation engaged in heavy highway construction.

Mr. Alvarez was employed as a laborer by IHC on a construction project located at I-76 near Sterling, Colorado, from May 22, 1990 until July 2, 1990, when IHC terminated his employment. Sometime in August of 1990, IHC recalled some of its former employees to perform labor work on the Sterling Project site. However, Complainant was not one of the former employees recalled. Complainant alleges that he was discharged and not recalled to work by Respondent because of his national origin and U.S. citizenship.

B. Jurisdiction Over the Claims

Respondent does not dispute that I have jurisdiction over the allega-tions of citizenship discrimination in this case. It argues, however, that I do not have jurisdiction as to the allegations of national origin discrimination because this matter is pending before the EEOC. I agree with Respondent that I do not have jurisdiction over Complainant's allegations of national origin discrimination, but for different reasons.

Title 8 U.S.C. § 1324b makes plain at subsection (a)(2) that administrative law judges are not empowered to adjudicate national origin employment discrimination claims which are within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). IRCA

excludes from the definition of an unfair immigration-related employment practice "discrimination because of an individual's national origin if the discrimination . . . is covered under section 703 of the Civil Rights Act of 1964," 8 U.S.C. § 1324b(a)(B). The Civil Rights Act, codified at 42 U.S.C. §§ 2000e, et seq., generally covers national origin discrimination by employers of fifteen (15) or more employees, conferring enforcement jurisdiction on EEOC and the district courts.

The logic of the exception is clear as stated in Diaz v. Canteen Corporation, 2 OCAHO 332 (5/22/91):

IRCA empowered administrative law judges to adjudicate claims arising out of enlarged national origin jurisdiction, i.e., of employers with more than three employees and fewer than fifteen. Jurisdiction over national origin discrimination claims established before enactment of IRCA on November 6, 1986 was not clearly so understood. (Citations omitted) Id. at 4.

My jurisdiction over claims of national origin discrimination prescribed by 8 U.S.C. § 1324b (a)(1)(A) is statutorily limited to claims against employers employing between four and fourteen employees. The record in this case shows that I do not have jurisdiction to determine whether or not Complainant was a victim of national origin discrimination.

Mr. Medberry's affidavit states that "during the summer of 1990 IHC had approximately 125 employees on its payroll and had approximately fifty employees on the job site where Mr. Alvarez worked." OSC, in its investigation, learned that IHC had forty-five employees on the date of May 8, 1991. Complainant does not dispute that there were more than fourteen employees employed by Respondent on the date he was terminated from his job or when the company failed to recall him in August of 1990.

Since it is undisputed in this case that on the date Mr. Alvarez was laid off, IHC employed more than fifteen employees, I find that Complainant is excluded from IRCA coverage with regard to national origin claims. I further find that I do not have jurisdiction to determine the merits of Complainant's allegations that he was laid off from employment because of national origin discrimination.

As to Complainant's charge that he was not recalled by Complainant in August 1990 because of his national origin, the record clearly shows that Respondent employed more than fourteen employees at the time

of the August recall. Therefore, I also find that I do not have jurisdiction to determine whether or not Respondent discriminated against Complainant at that time by not recalling him because of his national origin.

Complainant, as a person born in the United States, is a citizen of the United States by birth. 8 U.S.C. § 1401(a). As such, he is protected by IRCA against unfair immigration-related employment practices. 8 U.S.C. § 1324b(a)(1)(B). U.S. citizens can challenge discriminatory hiring practices based on citizenship or non-citizenship status. House Committee on the Judiciary, Immigration Control and Legalization Amendments Act of 1986, H.R. Rep. No. 682, 99th Cong., 2nd Sess., pt., at 70 (1986), reprinted in 1986, U.S. CODE CONG. and ADMIN. NEWS 5674; United States v. Marcel Watch Corp., 1 OCAHO 143 (3/22/90), as amended, 1 OCAHO 169 (5/10/90). Accordingly, I have jurisdiction of Complainant's claims of citizenship discrimination, since Respondent employed more than three individuals on the date it laid off Complainant and in August when he was not recalled to work. 8 U.S.C. § 1324b(2)(A).

C. Complainant's Layoff and Respondent's Subsequent Failure to Rehire Him

1. Standards for Summary Decision

The regulations authorize an ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material facts and that a party is entitled to summary decision." 28 C.F.R. § 68.38. This regulation is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure which provides for summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Federal case law interpreting Rule 56(c) is instructive to this court in setting out the burdens of proof and requirements that are needed to determine whether or not I can grant summary decision in this case. In testing whether the movant has met this burden, federal courts have resolved all ambiguities against the movant. Lopez v. S. B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir. 1987) (citing United States v. Diebold, Inc., 399 U.S. 654, 655 (1962). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S. H. Kress and Co., 398 U.S. 144, 157 (1970).

The movant may discharge this burden by demonstrating to the court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party may rely on the evidence of genuine issues of material fact. Id. The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (interpreting the "genuineness" requirement).

2. Burdens of Proof in an Unfair Immigration-Related Employment Practice

The principles for the order and allocation of proof which have been applied to Title VII claims of disparate treatment because of race, color, religion, sex or national origin are also applicable to disparate treatment claims if unfair immigration-related employment practices (national origin or citizenship discrimination) brought pursuant to 8 U.S.C. § 1324b. Ipina v. Michigan Department of Labor, 2 OCAHO 386 (10/17/91); Huang v. Queens Hotel, OCAHO Case No. 91200021 (8/29/91); Williams v. Lucas and Associates, OCAHO Case No. 89200552 (7/24/91); United States v. Lasa Marketing Firms, 1 OCAHO 141 (3/14/90).

In a Title VII case, plaintiff must establish discriminatory treatment by proof that plaintiff was "treated less favorably than others because of his race, color, religion, sex or national origin." Zahorick v. Cornell University, 729 F.2d 85, 91 (2nd Cir. 1984). In the case at bar, Complainant must establish discriminatory treatment by proof that he was treated less favorably than others because of his U.S. citizenship.

Under the standard developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), plaintiff has the initial evidentiary burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Id. at 802; see also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). In McDonnell Douglas, the Supreme Court described a typical model that would establish a prima facie case of discriminatory treatment. Plaintiff must show that (1) he belonged to a racial minority; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position

remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802.

The formula is not flexible as it necessarily varies in different factual situations. Id. at n.13. The burden then shifts to the employer to clearly explain the nondiscriminatory reasons for its actions. The employer is required to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext; that is, plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. Id. at 256. Plaintiff may succeed directly by persuading the Court that a discriminatory reason more likely motivated the employer, or showing that the employer's proffered explanation is unworthy of credence. Id.

3. Establishment of a Prima Facie Case.

In order to establish a prima facie case of citizenship discrimination for his discharge and the subsequent failure to rehire him, Complainant must demonstrate that (1) he belonged to a protected class; (2) he satisfied the normal job requirements for the job he was performing, and has reapplied; (3) he was discharged and not rehired; and (4) after his discharge and the failure to rehire him, the employer continued to employ or seek to employ persons with Complainant's qualifications. Id. Kenyatta v. Bookey Packing Co., 649 F.2d 552 (8th Cir. 1981); see McDonnell Douglas, 411 U.S. at 802.

As to the first element, it is undisputed in this case that Complainant was a United States citizen. U.S. citizens are a "protected" class under the applicable statute herein. See 8 U.S.C. § 1324b(a)(1)(B)(3). Therefore, I find that Complainant has satisfied his burden of proof as to this element of the case.

As to the second element, Complainant states he was hired by IHC as an unskilled laborer. Complainant further states that his job duties consisted of "loading a re-bar in the re-bar rack to be pushed into the cement every foot plus labor duties," including "cleaning up." Although Respondent states that Complainant was qualified for the job at the start, it contends he did not perform his work satisfactorily during the approximately six weeks of his employment. However, Respondent's Answer and Mr. Medberry's affidavit state unequivocally that Complainant was qualified for his job as an unskilled laborer. Respondent further states in its pleadings that "Alvarez barely satisfied the normal requirements for his job," he was given a written warning for tardiness on June 4, 1990, and he was not considered a

good worker by his co-workers and supervisors, one of whom stated that Complainant "did not pull his weight on the crew." Respondent, however, also admits that Complainant was "never written up for poor performance" nor was he fired from his job because of incompetence or inability to perform his work in a satisfactory manner. Although the record clearly shows that Complainant was not as efficient as other workers and had problems with learning new tasks, I find from the record that Complainant satisfied the minimum and normal requirements of his job assignments. If he had not been able to perform his job duties in a satisfactory manner, Respondent would have fired him prior to the completion of the job. This was not done.

It is also undisputed from the record, that after Complainant's job was completed, he asked to be recalled when additional unskilled laborers would be needed to complete the construction of the highway. Although he did not fill out a written application for a job, this was not necessary for him to satisfy this element of a prima facie case. See McDonnell Douglas, 411 U.S. 792. A verbal inquiry or request for work has been held adequate to satisfy the prima facie case requirements where a defendant has turned an applicant away without permitting him to file an application or where other evidence shows that the plaintiff expressed an interest in a position and should have been considered for it. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). I find, based upon Complainant's statements about his efforts at performing his job and the admissions of Respondent, that Complainant has met his burden of proving that he remained qualified for the job of unskilled laborer, that he satisfied the normal requirements of the job and that he reapplied for a similar position with Respondent.

The third element that Complainant must prove in order to make a prima facie case is that he was discharged and not rehired. The fact that Complainant was discharged and not recalled to work by Respondent is not in dispute. Although Respondent is careful to point out that Complainant was laid off not discharged, this is a difference over semantics not of material facts. Thus Complainant has satisfied the third element of the prima facie case.

As to the last element of the prima facie case, Respondent states that Complainant was hired to work as a laborer on a highway construction project. It is undisputed that Complainant worked on the paving crew and when this crew was finished with their section of the work, Complainant and all the other employees on his crew were laid off. The undisputed record shows that five of the employees who were laid off were Caucasian and two others, besides Complainant, were

Hispanic. There is no evidence in the record to suggest that Respondent laid off any of the employees because they were U.S. citizens.

After the layoff, the total workforce never returned to the level it had reached during the peak period of work which was approximately 45 employees. It is also undisputed from the record that sometime in August of 1990 Respondent recalled five of the eight former employees who were laid off. These employees were no more qualified to perform unskilled labor work than Complainant. Based upon these undisputed facts, I find that Complainant has established the fourth element to establish a prima facie case of discrimination.

4. Failure to Show Employer's Reasons for Discharge or Subse quent Failure to Rehire Complainant was a Pretext for Discrimination

In view of the fact that Complainant has demonstrated that all four elements of a prima facie case have been met, the burden shifts to Respondent "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802; see also Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978). The employer need not prove by a preponderance of the evidence that the reasons for his actions were not discriminatory, but may simply, "present clear and specific reasons for the action." Neale v. Dillon, 534 F. Supp. 1381, 1387 (E.D. N.Y. 1982) (citing Burdine, 450 U.S. at 254-58.

Respondent has submitted in this case by affidavits, pleadings and documentation that Complainant was laid off from his job because the project he was working on was completed. Respondent also states in its pleadings that Complainant was not recalled to work in August of 1990 because of the short duration of his prior employment with the company and his poor work performance. I find that these reasons for Complainant's discharge and Respondent's failure to recall him satisfy Respondent's burden of "enunciating some legitimate, non-discrim-inatory reasons for the alleged acts of discrimination."

The burden then shifts to Complainant who must establish that the employer's stated reasons are merely a pretext for discrimination. Complainant may do so by showing that the discriminatory reason Complainant suggests is more likely true or that the reasons given by Respondent are unworthy of belief. Burdine, 450 U.S. at 256. Proof of pretext may include discriminatory statements of admissions, statistics regarding the mix of the workforce, evidence of an atmosphere of discrimination, or evidence as to the employer's general practices. Ottavina v. SUNY at New Paltz, 679 F. Supp. 288, 298

(S.D.N.Y. 1988) (citing Penk v. Oregon State Bd. of Higher Education, 816 F.2d 458, 462-63 (9th Cir. 1987), cert. denied, 484 U.S. 853 (1987), re'hg den. 487 U.S. 971 (1981). The ultimate burden remains with Complainant throughout this case. Burdine, 450 U.S. at 253.

The undisputed record in this case shows that IHC hired Alvarez on or about May 22, 1990, as an "at will" employee, to work as an unskilled laborer earning $10.87 per hour on the Iliff job in Logan County, Colorado. The project he was hired to work on involved reconstruction of Highway I-76 near Sterling, Colorado. At the time he was hired, Alvarez was told that:

> This application is limited to the work on the referenced project being performed by our Company. This is not a contract of employment and is employment at will so that you can be terminated at any time. You are subject to periodic layoffs
> when work requiring your skills are (sic) not available during this project. Your employment can not (sic)be expected to extend beyond the end of this project.

Affidavit of John D. Medberry (1/24/92).

It is also undisputed that Alvarez was assigned to work with the paving crew and when this paving phase of the construction project was completed, he was laid off along with seven other employees.[2] Five of these employees were Caucasian and two were Hispanic. Complainant alleges that two of these workers were not U.S. citizens, but offers no proof thereof. Moreover, if true, this argument would defeat Complainant's assertion that he was terminated because he was a U.S. citizen. Complainant does not contest that he was "laid off" from his job because the job he was working on was completed. He merely makes the general conclusionary statement that he was discriminatorily discharged because he was a U.S. citizen. Complainant offers no evidence to show that only U.S. citizens were discharged from the project he was working on or that Respondent had a policy of hiring non-U.S citizens or illegal aliens as laborers or that Respondent or its agents made statements suggesting that they were only interested in hiring non-U.S. citizens. In fact, it is undisputed that the reason why Complainant and others were laid off is because the project they were working on was completed. There is no evidence in the record to suggest that the reasons for Complainant's discharge was a pretext for

[2] According to Alvarez, he was fired in a bar by the foreman, Tom Riverton, who was drunk. He further states that his pink slip and payroll check were not received until a week later. Although Respondent concedes that the circumstances of Alvarez learning about his layoff from the job were not the best, these circumstances do not support the allegation that he was fired because of his U.S. citizenship.

citizenship discrimination rather than because the job he was hired to perform was completed.

Respondent states that it did not rehire Complainant to work in August to complete the highway's construction because of the brief time he was employed by the company and his poor work performance. Complainant contends that he was not recalled to work because of his U.S. citizenship.

Respondent has submitted to this court substantial and probative evidence to support its reasons for not rehiring Complainant. More specifically, Respondent has submitted the affidavits of an EEO officer for IHC, from two former supervisors of Complainant, and from a co-worker.

According to these affidavits, Complainant was originally hired as a general laborer and worked for Mr. Brilhart. Mr. Brilhart described Complainant's work performance compared to other members of his crew as "at the bottom of the list." Affidavit of Mr. Brilhart, dated January 23, 1992. Other members of the crew stated that Complainant "would not perform the more difficult tasks assigned to him." They further stated that instructions on how to perform various tasks had to be constantly repeated to him because of his inability to understand or follow prior instructions. Due to these facts, after working for two weeks with Brilhart's crew, Complainant was reassigned to Rutlowski's crew to ride on the paver and jam rebars into the concrete. Mr. Rutlowski states in his affidavit that Complainant showed up "late for work on several occasions," had difficulty understanding what to do on the job, and "showed no incentive to help other members of his crew" with the work.

Randy Hardman, the paving operator on the project, stated that Complainant was "not safety conscious, went to areas he was not supposed to be at and did not show any interest in helping others." Affidavit of Randy Hardman, dated January 23, 1992.

Complainant does not deny any of these allegations. He states, however, that the mechanics who worked with him on the job would call him a "dumb Mexican" because he would cause the re-bar machine to "jamm and stop." (sic) Apparently Complainant was unable to work the re-bar machine or its braking down occurred on a frequent basis. As a result of Complainant operating the machine, he would have to call the mechanics to help him readjust the computer on the device which pushes the re-bar into the cement. Although I find the above racial comments to be highly improper, they do not support a finding

that Respondent's reasons for not recalling Complainant were a pretext for citizenship discrimination.

Complainant's assertions that he was discriminated against because he was harassed on the job, denied benefits, not provided adequate toilet facilities, and his personnel file had derogatory information in it is conclusory and speculative. Even if true, these facts relate to conditions of employment and do not support a finding of citizenship discrimination.

As I have stated previously, the affidavits and statements of knowledgeable officials of Respondent state that Complainant was not recalled to work in August of 1990 because of his prior unsatisfactory work performance and the short time he worked on the project. I do not find that there are any material facts in dispute regarding Respondent's decision not to recall Complainant.

Respondent's reasons for not recalling Complainant because of his prior poor work performance have been held by federal courts to be le-gitimate business reasons for not rehiring a former employee. See, e.g., Huff v. N.D. Cass Co. of Alabama, 468 F.2d 172 (5th Cir. 1972); aff'd, 485 F.2d 710 (5th Cir. 1973) (There was no basis for overturning determination that a former Afro-American employee was passed over in selecting employees for recall because of his record of poor workmanship during his preceding employment); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975) (Hiring of five male employees before rehire of laid off probationary female employees with more seniority did not amount to unlawful sex discrimination, where female employee's job performance had been marginal).

The record clearly shows that Respondent did not have a policy of hiring non-U.S. citizens rather than U.S. citizens; rather the record shows just the opposite. It is undisputed that all of the employees who were recalled to work on the construction phase of the contract were U.S. citizens. Moreover, the undisputed record in this case also shows that Respondent had a policy to comply with IRCA and to hire U.S. citizens and others who were authorized for employment in the United States.[3]

[3] It is noteworthy and commendable that the record also shows that IHC is an Equal Opportunity Employer that does not have a policy regarding the hiring or non-hiring of U.S. citizens and is a government contractor who takes affirmative action to recruit and hire qualified women and minorities.

Based upon my careful study of the extensive record in this case, I find that Complainant has presented insufficient evidence of discriminatory intent on the part of Respondent. Moreover, Complainant has not provided evidence to the court to create a factual issue that but for his U.S. citizenship, Respondent would have not laid him off or would have rehired him. It is clear from the record before me that Respondent had legitimate business reasons for laying off Complainant and not rehiring him which Complainant has failed to show a pretext for U.S. citizenship discrimination. Complainant's failure to rebut Respon-dent's proffered legitimate reasons, that is, Complainant's inability to suggest to this court that he could possibly prove at trial that he was discharged or not rehired for illegitimate, discriminatory reasons, is fatal to his § 1324b claim. The Court concludes that Complainant has not presented sufficient evidence for summary judgment purposes to rebut as pretextual respondent's stated reasons for his discharge and denial of his application for recall.

ACCORDINGLY, the Court grants Respondent's Motion for Summary Decision on this claim.

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Decision and Order shall become final upon issuance and service upon 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 that Order in the United States Court of Appeals for the Tenth Circuit, 1929 Stout Street, Denver, CO 80294, and does so no later that 60 days after the entry of this Order.

SO ORDERED AND ADJUDGED.

ROBERT B. SCHNEIDER
Administrative Law Judge

DATED: June 1, 1992