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

SEIDOU DIARRASSOUBA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 01B00027
MEDALLION FINANCIAL CORP.,	)	
Respondent.	)	Marvin H. Morse
		Administrative Law Judge

ORDER DENYING MOTION TO DISMISS
(November 28, 2001)

I. Introduction and Procedural Background

This case arises under 8 U.S.C. § 1324b(a)(5), which prohibits an employer from retaliating against an employee who asserts his right to be free from workplace discrimination on the basis of citizenship or national origin.

On June 23, 2000, Seidou Diarrassouba (Diarrassouba or Complainant), a legal permanent resident and national of the Ivory Coast, filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) alleging that Medallion Financial Corporation (Medallion or Respondent), retaliated against him for asserting rights protected under 8 U.S.C. § 1324b(a)(5). Complainant attached a statement to the charge alleging that: (1) he recommended his friend Simms Efua, a Ghanaian lawfully entitled to work in the US, for a position as a technician; (2) after Efua's interview, Mike Sam (Sam), Medallion's vice president of operations, and Traore Moussa, the night manager, informed Diarrassouba that Efua would not be hired because Efua did not speak French or Mandingo; (3) Diarrassouba later learned that Respondent hired Sanzan Coulibaly (Coulibaly), whom Complainant alleges was an undocumented alien from the Ivory Coast; (4) on April 5, 2000, Complainant told Mike Liebe, Senior Vice President, and Alex Gonzalez, head of Human Resources, that it was wrong to prefer Coulibaly over Efua since Coulibaly was not legally entitled to work in the US; (5) on April 5, 2000, Sam discharged the Complainant for alleged poor performance. Diarrassouba claims that Respondent had not previously advised him of any performance problems or subjected him to any discipline.

By letter dated July 11, 2000, OSC informed Diarrassouba that OSC would investigate his discrimination charge against Medallion. By letter dated November 3, 2000, OSC informed Complainant that the 120-day period to investigate had expired and "to date, we have not determined that there is reasonable cause to believe the charge is true, nor to file a complaint before an administrative law judge based on the charge. However, we have not completed our investigation of your charge, and will continue to investigate for an additional 90 days." OSC informed Diarrassouba that he could file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

By letter dated January 30, 2001, OSC informed Diarrassouba that it had investigated the charge against Medallion and concluded there was insufficient evidence of reasonable cause to believe that Medallion committed citizenship status discrimination in violation of 8 U.S.C. § 1324b.

On February 14, 2001, Diarrassouba filed his OCAHO complaint, alleging that Respondent discriminated against him on the basis of citizenship status. Specifically, Diarrassouba alleged that Medallion retaliated against him by firing him after he complained that Medallion was hiring illegal aliens over job applicants with valid work papers. OCAHO issued its Notice of Hearing on February 28, 2001.

On April 9, 2001, Medallion timely filed an Answer to the Complaint, together with a Notice of Appearance of Willkie Farr & Gallagher as attorneys of record for Respondent. Respondent denies that Complainant was fired, stating that Complainant voluntarily terminated his employment on or about April 3, 2000.

The Answer also sets forth the following affirmative defenses:

First: The complaint fails to state a claim for which relief can be granted. On April 3, 2000, Complainant informed his supervisor that Coulibaly was not authorized to work in the United States. Respondent agreed to investigate. Complainant failed to report to work on the nights of April 3 and April 4, 2000. On April 5, 2000, Complainant demanded that the president of Medallion terminate Coulibaly's employment. Respondent informed Complainant that there was no reason to terminate Coulibaly because Coulibaly had proper employment documentation. Respondent asked Complainant to return to work, but Complainant refused to do so.

Second: The Respondent's conduct was based on legitimate nondiscriminatory business reasons. Respondent investigated the claim that Coulibaly was unauthorized, found it baseless, and informed Complainant that there was no cause to terminate Coulibaly's employment.

On May 7, 2001, a Notice of Appearance was entered by Lawrence Banigan, Esq. as counsel for Complainant.

At a May 31, 2001 telephonic prehearing conference, it was understood that Respondent would file a dispositive motion.

On June 29, 2001, Respondent filed a Notice of Motion with attachments and a memorandum of law in support of its motion to dismiss the complaint, pursuant to 28 C.F.R. § 68.10.

Respondent filed, *inter alia*, an affidavit of Mario M. Cuomo in support of its motion, and:

• a New York State Department of Labor Notice of Determination to Claimant, dated June 14, 2000 (Exhibit C), finding that Diarrassouba "quit (his) job without cause. . . . The credible evidence suggests that you quit your job with Medallion, and that you did so because you were dissatisfied with a particular hire they intended to make."

• a New York State Unemployment Insurance Appeal Board Ruling, dated August 3, 2000 (Exhibit D) before an administrative law judge (ALJ) sustained the initial determinations, stating that:

> (1) the claimant would be disqualified from receiving benefits, effective April 11, 1999, until he worked and earned remuneration at least equal to five times his weekly benefit rate;
> (2) claimant's wages from Medallion Financial Corp. paid prior to April 11, 2000, would not count toward the establishment of any claim for benefits the claimant may file; (3) claimant was overpaid $1,344 in benefits, all of which was recoverable; and (4) claimant would forfeit benefits for 8 effective days.

•a New York State Unemployment Insurance Appeal Board Ruling, dated December 29, 2000 (Exhibit B), in which the ALJ found that Diarrassouba "left his employment because he was dissatisfied with the employer's new hire and because he did not want to work with the individual. The claimant did not have good cause to leave his job. He is disqualified from receiving benefits. Therefore, the claimant was not entitled to the benefits he received."[1]

[1] According to Diarrassouba's affidavit, two administrative hearings were held because "crucial sections" of the first hearing were unrecorded and therefore the New York State Unemployment Insurance Appeal Board vacated the first ALJ decision.

•a New York State Unemployment Insurance Appeal Board Ruling, dated February 22, 2001 (Exhibit E): "It appears that no errors of fact or law have been made. The findings of fact and the opinion of the ALJ are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board."

Respondent's memorandum argues in favor of dismissal for failure to state a claim for which relief may be granted under § 1324b(a)(5) of the Immigration Reform and Control Act of 1986 (IRCA), and that even if Complainant properly states a § 1324b(a)(5) claim, he is barred by the collateral estoppel doctrine.

Respondent asserts that the only factual allegation in the Complaint is that Medallion terminated Diarrassouba in retaliation for his complaints about Medallion's alleged hiring practices. However, according to the Respondent, such conduct could not support a § 1324b(a)(5) claim as a matter of law because §1324b(a)(5) is not an anti-whistle blower statute and does not confer a cause of action on employees terminated in retaliation for informing the INS of the alleged illegal hiring practices, *citing Adame v. Dunkin Donuts*, 5 OCAHO no. 722, at 4 (1995).

On July 11, 2001, OSC filed a Motion For Leave to File Brief as Amicus Curiae to address two issues raised by Respondent: (1) whether opposing citizenship status discrimination constitutes protected activity under the retaliation provision of 8 U.S.C. § 1324b(a)(5); and (2) whether determinations made by a state unemployment compensation board are entitled to collateral estoppel effect in cases alleging violations of the § 1324b antidiscrimination prohibition.

On July 19, 2001, counsel for Complainant requested an extension of time to respond to the Respondent's motion. By letter/pleading on July 20, 2001, counsel for Respondent objected to Complainant's request for an extension of time.

By order dated July 20, 2001, I granted OSC's motion to file brief as Amicus Curiae and granted Complainant's request for an extension of time. That order characterized OSC's interest in the case as (1) whether assumed opposition by an employee to alleged citizenship status discrimination by the employer against another individual is protected activity within the scope of the 8 U.S.C. § 1324b(a)(5) prohibition against retaliation, and (2) whether a state unemployment compensation board determination is entitled to collateral estoppel effect in a § 1324b case. OSC was given until August 3, 2001, to file its amicus brief.

On August 3, 2001, OSC filed a brief entitled United States' Opposition to Respondent's Motion to Dismiss. OSC argues: (1) an employee's opposition to citizenship status discrimination by an employer against others constitutes protected activity under § 1324b(a)(5)'s retaliation provision; (2) the retaliation provision of 8 U.S.C. § 1324b(a)(5) is not limited to the filing of complaints; (3)

opposition to citizenship status discrimination constitutes protected activity; (4) opposition by an employee to citizenship status discrimination against others constitutes protected activity; (5) even if the Court were to find that Respondent's employment decision did not constitute citizenship status discrimination, the retaliation claim should not be dismissed if Complainant had a reasonable, good faith belief that Respondent violated IRCA; (5) determinations made during state unemployment compensation proceedings should not be entitled to collateral estoppel effect in cases alleging violations of § 1324b; and (6) case law holds that an unreviewed administrative determination should not be given collateral estoppel effect in a subsequent employment discrimination case.

By facsimile transmission dated August 22, 2001, counsel for Respondent advised that Medallion would not file a reply brief, explaining that its opening brief clearly supported dismissal of the case.

On August 24, 2001, counsel for Complainant filed an opposition to dismissal of Complaint, with an Affidavit of Seidou Diarassouba, adopting OSC's arguments in their entirety. Complainant argues that the dispositive issue under § 1324b is not the same as the issue in the New York proceeding. Counsel contends that Complainant was initially unrepresented at the NYSUI hearings and "the poorly educated Complainant let the sophisticated Respondent present the issue as being the Complainant quitting his job in a huff over the Respondent hiring one Sanzan Coulibaly, with whom the Complainant had past personal differences." Counsel argues that Complainant did not have the opportunity to fully litigate the discrimination and retaliation issue because he was precluded from inquiring into Respondent's employment practices.

Diarrasouba's affidavit recites that after Respondent hired Complainant, Complainant noticed that his employer had a pattern of employing aliens without employment authorization. Respondent hired Coulibaly, who Complainant alleges lacked proper work authorization, while rejecting the application of Efua, a legal permanent resident. Complainant admits that although he has some personal animus towards Coulibaly, Efua had the same or superior qualifications for Respondent's vacant position. When the Complainant objected to Respondent's decision not to hire Efua, Respondent allegedly warned him to stop pressing the issue. Complainant alleges that he was fired for continuing to press the issue. Diarrassouba maintains that he was unrepresented during the crucial stages of his hearings, that the issues were confined to whether or not he refused to report to work, and that he was not permitted to inquire into Respondent's hiring practices at those hearings.

Complainant states: "I did **not** demand that the Respondent accept my word without question and fire Mr. Coulibaly. I reminded Messrs. Liebe and Sam that all they had to do was what the Immigration Law requires: make Mr. Coulibaly produce his employment authorization card. No inquiry was made as to whether or not Respondent actually verified Coulibaly's status." Because the NYS Labor Department did not address this issue, Complainant requests that he be permitted to pursue his

discrimination complaint.

II. Discussion

A. *Standards for Summary Decision*

Similar to Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal courts, OCAHO Rules authorize the ALJ to enter summary decision in favor of a moving party where the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c).

Only facts that might affect the outcome of the proceedings are deemed material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact must have a "real basis in the record" to be considered genuine. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986).

Title 28 C.F.R. § 68.38(c) also assigns the relative burdens of production on a motion for summary decision. The moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." *United States v. Davis Nursery, Inc*., 4 OCAHO no. 694, 932 (1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-35 (1986)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. *Id*. The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.

The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and judicially-noticed matters. *Celotex* at 323. However, "[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for evidentiary hearing." 28 C.F.R. § 68.38(e); *United States v. Valenca Bar & Liquors*, 7 OCAHO no. 995, 1104 (1998). As summarized in *Valenca Bar & Liquors*, on assessing the existence of genuine issues of material fact, all reasonable inferences should be drawn in favor of the non-moving party and if a genuine issue of material fact is gleaned from this analysis, summary decision is not appropriate. *Id*.

B. *The Complainant has a cause of action under the retaliation provision of § 1324b(a)(5).*[2]

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[2] Section 1324b(a)(5) provides:

In the typical § 1324b(a)(5) case, the complainant's claim is based on allegations of workplace discrimination against the complainant that result in retaliatory discharge. The novel issue in this case is whether a complainant has standing to bring a § 1324b(a)(5) action when the alleged discriminatory conduct targets someone other than the complainant. Diarrassouba does not claim that Medallion discriminated against *him* on the basis of his citizenship or national origin. Rather, he claims that his employer discriminated against *other* persons lawfully entitled to work in the US and against citizens. As discussed below, I conclude that Diarrassouba has standing to pursue a § 1324b(a)(5) claim.

To have standing, a complainant must meet both constitutional and prudential standing requirements. Constitutional standing requires a complainant to demonstrate injury, redressability, and a causal connection between the alleged unlawful act and the harm inflicted. *Warth v. Seldin*, 422 U.S. 490 (1975); *accord Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Assuming arguendo that Medallion terminated Diarrassouba,[3] Diarrassouba suffered a distinct and palpable injury in the form of lost wages. That loss, which arguably resulted from his termination, could be redressed through back pay.

Prudential standing depends on whether the statutory provision on which the claim rests can be construed to grant persons in the Complainant's position a right to relief. *Warth*, at 500. In *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837 (1996), this forum considered the question of standing in the context of § 1324b(a)(5) claims. The issue in *Cruz* was whether an employee who was fired for distributing literature informing other employees of their immigration related employment rights had a cause of action under § 1324b(a)(5). Relying on Title VII case law for guidance,[4] the ALJ in

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> **(5) Prohibition of intimidation or retaliation.** It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g), to have been discriminated against.

[3]The effect of the state unemployment insurance appeal board decision will be addressed in II C of this order.

[4] It is appropriate to consider Title VII precedent because the Immigration and Control Act of 1986 was modeled on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. See*

Cruz found that the anti-retaliation provision must be broadly construed to further the underlying purpose of the statute. Indeed, courts have consistently found that Title VII anti-retaliation provisions should be construed broadly. See, *e.g.*, *Sumner v. United States Postal Serv*., 899 F.2d 203 (2nd Cir. 1990) (informal protests of discriminatory treatment–although not specifically mentioned in Title VII–are nevertheless protected activities because Congress intended that anti-retaliation provisions be liberally construed). The ALJ in *Cruz* dismissed the argument that the Complainant lacked standing because the language of § 1324b did not specifically refer to dissemination of literature as protected activity. Likewise, for purposes of determining whether Diarrassouba has standing, it is irrelevant that § 1324b does not specifically grant a cause of action to those who claim retaliatory discharge based on third-party discrimination. Broad construction of the provision dictates that Diarrassouba not be denied standing merely because the statute does not specifically grant a right of action to indirect victims of discrimination.

Several cases in the Title VII context support the principle that a person who is the indirect victim of discriminatory conduct has standing to sue. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (white tenants of apartment complex had standing to sue for landlord's discrimination against non-whites); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2nd Cir. 1975) (white employee forced into early retirement because he sold house in predominantly white neighborhood to black fellow employee had standing to sue for violation of equal rights), *see also Gavenda v. Orleans County*, 1998 WL 136122 (W.D.N.Y) (granting standing to white male who claimed he was harmed by employer's pattern of refusing to hire minorities). Recently, in *Leibovitz v. New York Transit Auth.*, 252 F.3d 179 (2nd Cir. 2001), the Second Circuit held that when a plaintiff was a member of a protected class, the plaintiff's argument for standing was much stronger, even if the plaintiff was not directly impacted by the employer's discriminatory practices. I therefore conclude that Diarrassouba, as a member of the protected class against whom the discriminatory conduct allegedly occurred– persons lawfully entitled to work in the United States–has standing.

The plain language of the statute also supports granting Diarrassouba a right of action. The Respondent's argument that the statute only protects employees who file or threaten to file a discrimination claim is patently erroneous. The statute provides a cause of action if (1) the employer attempts to interfere with "any right or privilege secured under this section" *or* (2) an individual intends to file or has filed a charge. The problem with the Respondent's argument is that it disregards altogether the first clause of the statute. I agree with the OSC argument that, if proved, Respondent's alleged termination of Complainant for opposing the Respondent's discriminatory hiring practices would constitute an attempt to interfere with a right or privilege secured under § 1324b. Specifically, the employer's retaliatory discharge could constitute an attempt to prevent Diarrassouba from expressing

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United States v. Mesa Airlines, 1 OCAHO 74 at 22 (1989), *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991).

his opposition to Medallion's alleged hiring practices.

I am not persuaded that *Adame v. Dunkin Donuts*, 5 OCAHO 722 (1995) or *Palacio v. Seaside Custom Harvesting*, 4 OCAHO no. 675 (1994) compel a different result. The Respondent cites those cases for the proposition that § 1324b(a)(5) does not provide a cause of action when an employer discharges an employee for reporting the employer to INS for violating the paperwork requirements of § 1324a. The Respondent's argument overlooks the fact that Diarrassouba–unlike the complainants in *Adame* and *Palacio*–does not allege that his retaliatory discharge resulted from the employer's violation of § 1324a. Instead, Diarrassouba claims that Medallion terminated him for asserting his § 1324b rights; specifically, the right to oppose an employer's alleged discriminatory hiring practices.

In addition, acknowledging that Diarrassouba has a right of action furthers the public policy underlying the statute. Congress enacted § 1324b(a)(5) to prevent employers from retaliating against workers who exercise their right to be free from discrimination on the basis of citizenship and national origin. Granting standing to those in Diarrassouba's position deters employers from engaging in discriminatory employment practices. Although § 1324b(a)(5) is not explicitly a whistle blower statute, construing it in that manner furthers congressional intent.

C. *The state unemployment board's determination is not entitled to collateral estoppel effect.*

In prior proceedings, ALJs at the New York State Department of Labor concluded that Diarrassouba had not been terminated but had voluntarily left his employment. The Respondent claims that these administrative decisions should be granted collateral estoppel effect and should preclude the Complainant from bringing a § 1324b claim. I reject the Respondent's argument and decline to give collateral estoppel effect to the prior rulings.

Collateral estoppel bars a complainant from litigating an issue that has already been decided in a former proceeding when there is identity of parties, identity of issues between the former and subsequent proceedings, and when the party opposing collateral judgment had a full and fair opportunity to litigate the issue at the prior proceeding. *United States v. Power Operating Co. Inc.*, 3 OCAHO no. 580 *at* 27 (1993)*; see also Iron Workers Local 455 v. Lake Constr. Corp.*, 7 OCAHO no. 964, 632, 658 (1997) (doctrine held applicable to administrative adjudications in which "[t]he proponent of collateral estoppel has the burden of showing that the issue in the prior proceeding was identical and decisive").

In the instant case, there is no question that the identity of parties requirement is satisfied. The party against whom collateral estoppel is being asserted was also a party in the prior adjudication. However, the issue decided by the New York State Unemployment Insurance Board–whether Diarrassouba qualified for unemployment benefits–is not the same as the issue before this forum. Furthermore, I find that the Complainant did not have a full and fair opportunity to litigate the discrimination claim before the state board.

The issue addressed in the unemployment compensation proceedings was whether Diarrassouba's discharge was based on good cause. Respondent argues that the issue adjudicated by the unemployment board was identical to the issue before this forum. The Respondent supports that contention by arguing that the circumstances surrounding Diarrassouba's departure from Medallion are central to whether he has a valid retaliatory discrimination forum are identical to the issues before the state unemployment board. However, there is no indication that the state board took any testimony or evidence regarding the discrimination claim. Indeed, neither the findings of fact nor the opinions issued as a result of those proceedings mention the discrimination claim.

The record of the prior proceeding does not indicate that Diarrassouba had a full and fair opportunity to litigate the discrimination claim. Rather, the findings of fact suggest that the discrimination issue was barely touched upon at all. *See* New York State Unempl. Ins. App. Bd. Rulings dated Aug. 3, 2000 and Dec. 29, 2000. In *Hill v. Coca Cola Bottling Co. of New York*, 786 F.2d 550 (2nd Cir. 1986), the Second Circuit considered a similar scenario. In that case, an employee sued his employer for race-based discrimination. In a prior proceeding before the New York State Department of Labor, an ALJ determined that the employee had been fired for just cause. The employer argued that collateral estoppel should have applied to preclude the federal court from considering the discrimination claim. Refusing to apply collateral estoppel, the Second Circuit found that the two actions presented distinctly different issues. The court concluded that "a finding of termination for just cause does not necessarily negate a subsequent finding of discrimination." *Id.* at 552.

The *Hill* court, citing *Bd. of Educ. of the Manhasset Union Free School Dist. v. New York State Human Rights App. Bd.*, 482 N.Y.S.2d 495 (Sup. Ct. 1984), set forth a number of factors to determine whether a plaintiff had been afforded a full and fair opportunity to litigate in a former proceeding. Those factors include: the competence and experience of counsel during the former proceeding, the differences in applicable law, and the Complainant's ability to foresee that collateral estoppel would bar future related lawsuits. *Id.* at 497. The record shows that although Diarrassouba was represented by counsel at his December 2000 hearing, the law applied by the state unemployment board and the law applicable in a § 1324b case are entirely different. The former requires the adjudicator to consider only whether the particular termination was for just cause, while the latter requires broader inquiries into the employer's employment practices. Finally, it would be unreasonable to expect the Complainant to have anticipated that despite the vast differences in the types of

proceedings, the state board's decision could preclude this forum from a finding of discrimination.

In a seminal case on collateral estoppel in Title VII actions, the Supreme Court ruled that Congress did not intend state administrative decisions to have preclusive effect on Title VII claims. *See Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986). Numerous cases have reiterated the proposition that federal courts are not bound by the findings of state administrative agencies in Title VII cases. *See Desiderio v. National Ass'n of Securities Dealers, Inc.*, 191 F.3d 198 (2nd Cir. 1999) *and Arakawa v. Japan Network Group*, 56 F. Supp.2d 349 (S.D.N.Y. 1999), *Caspi v. Triglid Corp.*, 7 OCAHO no. 991 (1998).

The analysis might be different if the state unemployment board's decision had been reviewed by a state court. In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), the Court held that collateral estoppel did apply to preclude an employment discrimination claim where the decision had been upheld on administrative appeal and by the state supreme court. However, no such review took place in the present situation. In any event, however, the issue before the New York forum was not the issue before me. *See* discussion rejecting collateral estoppel in *McNier v. Wallace*, 9 OCAHO no. 1075 (2001) at 5-10.

Finally, there are compelling public policy reasons to deny collateral estoppel effect in the present case. If collateral estoppel applied to state unemployment proceedings, aggrieved employees might choose to forego unemployment benefits altogether so as to preserve their federal discrimination claim. Furthermore, giving state unemployment proceedings collateral estoppel effect could cause more employees to fully litigate their discrimination claims before state unemployment boards, which have neither the time nor the specialization such adjudications would require.

For all of these reasons, I am unable to conclude that there is no genuine issue of material fact and, accordingly, deny the Respondent's motion to dismiss. However, nothing contained in this order should be construed as suggesting that an issue of fact is proven to establish that Medallion violated 8 U.S.C. § 1324b(a)(5).

Absent advice of an agreed disposition of the dispute, my office will schedule a second telephonic prehearing conference within the next several weeks.

SO ORDERED.

Dated and entered this 28th day of November, 2001.

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Marvin H. Morse
Administrative Law Judge