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

DANIEL DENARDO, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00011
WH SMITH USA TRAVEL, Respondent	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(*July 25, 2002*)

I. *INTRODUCTION*

On March 14, 2002, WH Smith USA Travel (Respondent) filed a Motion for Summary Decision. Respondent's motion is supported by affidavits and other supporting documentation, and contends there are no genuine issues of material fact. The motion has now been pending for more than four months, and although I granted Daniel DeNardo (Complainant) a lengthy extension of time to answer the motion, he has failed to respond. This order accepts the facts established in the affidavits and supporting documentation to Respondent's motion as true, and grants Respondent's Motion for Summary Decision.

II. *BACKGROUND AND PROCEDURAL HISTORY*

On January 9, 2002, Complainant filed a *pro se* Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent rejected his expired U.S. Passport as work authorization documentation and fired him because of his U.S. citizenship status. See Complaint at 2, 4-5. Specifically, the Complaint asserts that Complainant was fired, after only two and a half weeks on the job, when Respondent decided not to accept his expired U.S. Passport as proper Form I-9 documentation. Id. at 4-5. The Complaint alleges that Respondent asked to make a copy of the expired passport immediately after Complainant's Form I-9 paperwork was completed, and again "just prior" to

his firing on December 24, 2000. Id at 4. Complainant steadfastly refused to allow Respondent to copy his passport. According to the Complaint, there was no probable cause to believe that the expired passport was not authentic, and Complainant was fired because of his U.S. citizenship status in violation of 8 U.S.C. § 1324b(a)(1). Id. at 4. The Complaint further alleges that Respondent committed a document abuse violation under 8 U.S.C. § 1324b(a)(6) by first accepting, then rejecting Complainant's passport. Id. at 5.

Respondent filed its Answer on February 21, 2002. The Answer denied that Complainant was knowingly and intentionally fired because of his citizenship status, but rather asserted that he was fired for violation of company policy and insubordination. Respondent's Answer at 1. Respondent's Answer included five affirmative defenses. First, Respondent asserted that its request to copy Complainant's passport is expressly permitted by 8 C.F.R. § 274a.2(b)(3). Id. at 3. Second, Respondent asserted that it has a written, well established, and consistently applied policy of copying the Form I-9 documents of all its employees. Id. Third, Respondent asserted that its request to copy Complainant's passport was made without discriminatory intent because the copying policy is uniformly applied. Id. at 3-4. Fourth, Respondent asserted that excepting Complainant from its copying policy would have violated Immigration and Naturalization Service (INS) regulations, that Complainant's passport was accepted for Form I-9 identity and employment eligibility purposes, and that Complainant was fired for his repeated refusals to provide the passport for copying, which constituted insubordination. Id. at 4. Fifth, and finally, Respondent asserted that it provided full and complete responses with respect to Complainant's complaint filed with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), and that OSC found insufficient evidence to support a cause of action and dismissed the complaint. Id.

Respondent's Statement of Facts as provided in its Answer is summarized as follows: Respondent hired Complainant to work at its Anchorage International bookstore on November 30, 2000, and Complainant reported for his first day of work on December 5, 2000. Id. Complainant completed Section 1 of the Form I-9 and then presented Bookstore Manager, Jana Gwynn, with his expired U.S. Passport as proof of both identity and employment eligibility. Id. at 4-5. Ms. Gwynn examined the document and then completed and signed Section 2 of the Form I-9. Id. When Ms. Gwynn asked for the passport to make a photocopy, Complainant refused. Id. Complainant's refusal was reported to the District Manager, Boyd "Bob" Walker, and Mr. Walker confirmed the uniform application of the Form I-9 document copying policy with Respondent's corporate headquarters. Id. Thereafter, on several occasions, Mr. Walker unsuccessfully requested a copy of the passport from Complainant. Id. On December 22, 2000, Mr. Walker attached a note to Complainant's timecard requiring Complainant to provide a copy of his passport before the December 26 payroll deadline. Id. Complainant called Mr. Walker at home on December 25, 2000, and stated that he would not provide a copy, nor permit Respondent to copy his passport. Id. Mr. Walker then terminated Complainant's employment. Id.

Respondent filed a Motion for Summary Decision on March 14, 2002. Respondent's Motion for Summary Decision argues that Respondent never sought to re-verify the authenticity of the passport. Rather, Respondent argues that its company policy is to copy all Form I-9 documents, and that

Complainant was fired for violating company policy and insubordination. See Respondent's Motion at 1-2. Respondent contends that its request to copy the passport is expressly permitted by law, and the facts provide no evidence of discrimination. Id. at 5. Respondent's motion is supported by the following documents:

1. Exhibit A, Affidavit of Boyd "Bob" Walker (Respondent's District Manager, Anchorage International Airport, October 1998 - October 2001, currently Operations Manager at Denver International Airport);

2. Exhibit A-1, Daniel DeNardo's Application For Employment with W.H. Smith;

3. Exhibit A-2, Daniel DeNardo's Associate Exit Form from W.H. Smith;

4. Exhibit B, Affidavit of Jana Gwynn (Respondent's Bookstore Manager, Anchorage International Airport, November 1997 - present);

5. Exhibit B-1, Daniel DeNardo's Form I-9;

6. Exhibit B-2, Daniel DeNardo's Time Sheet;

7. Exhibit C, Affidavit of Stephanie Mapp (Respondent's Regional Human Resources Manager for the West, February 2000 - October 2000; Respondent's Director of Human Resources, October 2000 - present);

8. Exhibit C-1, *The Manager's Smart Book* by W.H. Smith USA Travel;

9. Exhibit C-2, Memorandum dated September 15, 2000 from the Home Office Resource Team to All Store Managers; District Manager & Regional Vice Presidents regarding Sample New Hire Paperwork; and

10. Exhibit C-3, Check Sheet for New Hires.

According to the certificate of service, Respondent's Motion for Summary Decision was served on Complainant by "Federal Express or Express Mail on March 13, 2002." As provided by 28 C.F.R. §§ 68.11(b) and 68.8(c)(2), Complainant had ten (10) days after the date of service to file his response to the motion. Instead of filing a response to the motion, however, Complainant filed a motion for discovery on March 27, 2002. (The motion was mailed on March 22, but was not received by this office until March 27). In the motion for discovery, Complainant requested that the Court allow discovery to proceed before Complainant had to file his reply because of the importance of discovery to respond to Respondent's motion. In an order issued on April 9, 2002, I noted that where the movant demonstrates how additional discovery will prevent summary decision, Ninth Circuit Court of Appeals (Ninth Circuit)

law allows for limited discovery to answer a motion for summary decision. See Order Regarding Complainant's Motion For Discovery To Answer Respondent's Motion For Summary Decision (April 9, 2002) (citing Bank of America v. Pengwin, 175 F.3d 1109, 1118 (9th Cir. 1999); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1997); Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir. 1994); and TMJ Hawaii, Inc. v. Nippon Trust Bank, No. 99-1586, 2001 WL 925622, at *1 (9th Cir. Aug. 15, 2001)). Despite the fact that Complainant had not offered an affidavit or any other evidence suggesting how additional discovery time would prevent summary decision, I granted Complainant's request in light of his *pro se* status and the early stage of the case at that point. Complainant was granted until May 1, 2002, to serve his discovery requests on Respondent. In a pleading dated April 15, 2002, and received by the Court on April 19, 2002, Complainant attached requests for admissions, interrogatories, and requests for production which he asserted already had been served on Respondent on March 25, 2002. Respondent served its response to the various discovery requests on May 16, 2002.

In an order dated June 4, 2002, I determined it was appropriate to set a date for the submission of Complainant's response to the Motion for Summary Decision, and ordered Complainant to serve and file his response to the Motion for Summary Decision not later than June 24, 2002.

On June 11, 2002, Complainant filed a Motion to Compel Production of Evidence. The motion sought discovery of documents withheld by Respondent under either the attorney-client privilege or the attorney work product doctrine. Complainant argued that Respondent had waived any objection to the withheld documents by failing to provide a privilege log at the time of the objection. See C's Mot. to Compel at 2. In an order dated June 26, 2002, I found that the parties had not satisfied the OCAHO Rules of Practice regarding a discovery conference, see 28 C.F..R. § 68.23(b)(4) (2001), and did not, therefore, rule on the merits of Complainant's motion. I noted, however, that while an initial failure to provide a privilege log does not necessarily waive the asserted privilege, see, e.g., Jackson v. County of Sacramento, 175 F.R.D. 653, 656 (E.D. Cal. 1997), that a party's continued failure to produce a privilege log can result in waiver of the privilege, see Eureka Fin. Corp. v. Hartford Accident & Indemnity Co., 136 F.R.D. 179 (E.D. Cal. 1991). The parties were ordered to confer in an effort to either resolve the discovery dispute in its entirety or to narrow the focus of the dispute. To facilitate a meaningful discussion, Respondent was ordered to serve Complainant, and file with the court, a privilege log specifically identifying the documents being withheld pursuant to its claim of privilege. The motion to compel was held in abeyance until the parties notified me as to the results of the discovery conference. Complainant acknowledged in a pleading served on July 16, 2002, entitled, "Notice of Compliance and Completion of Discovery," that disputes concerning discovery had been resolved and Respondent had produced further information on June 28, 2002.

Despite the fact that the discovery dispute has been resolved, and discovery has been completed, Complainant has neither filed his response to the Motion for Summary Decision nor motioned the Court to extend the deadline to allow for further time to respond to the motion. Complainant has not responded to a Motion for Summary Decision that was filed more than four months ago, and the extended deadline for filing a response is long past due. Therefore, the Motion for Summary Decision is ripe for adjudication.

III. *STANDARDS GOVERNING MOTIONS FOR SUMMARY DECISION*

The OCAHO Rules of Practice and Procedure (OCAHO Rules) permit me to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." See 28 C.F.R. § 68.38(c) (2001). OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure (FRCP) 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, FRCP 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. See United States v. Aid Maintenance Company, Inc., 6 OCAHO no. 893, 810, at 813 (1996), 1996 WL 73594, at *3; United States v. Tri Component Product Corp., 5 OCAHO no. 821, 765, at 767 (1995), 1995 WL 813122, at *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the case are deemed "material." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, 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). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. at 587.

The party requesting summary decision bears the initial burden of asserting the absence of any genuine issues of material fact by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting in part FRCP 56(c)). After the moving party has met its initial burden, the nonmoving party must then come forward with "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587. In seeking to satisfy this burden, the nonmoving party may not rely on mere conclusory allegations or denials contained in its pleadings; however, the nonmoving party's evidence need not be produced "in a form that would be admissible at trial. . . ." Celotex Corp., 477 U.S. at 324. To show there is a genuine issue of material fact, Complainant cannot just rely upon his pleadings; he must provide affidavits or other documents evidencing a factual dispute. See FRCP 56(e).

IV. *ANALYSIS*

A. Factual Issues

Complainant asserts that Respondent rejected his expired U.S. Passport as work authorization documentation and fired him because of his U.S. citizenship status. Respondent's Answer and its Motion for Summary Decision, dispute that allegation. As described, supra, Respondent's Motion for Summary Decision is supported by affidavits and other supporting documents. Complainant has not filed any counter affidavits or documents. It is well established that when a party moves for summary decision and supports that motion with an affidavit and other supporting documentation, the adverse party may not rest upon mere

allegations or denials in its pleadings. White v. Roper, 901 F.2d 1501, 1503 (9th Cir. 1990). Rather, the adverse party must set forth specific facts, supported by an affidavit or other similar documents, showing that there is a genuine issue as to the facts asserted in the motion. See 28 C.F.R. § 68.38(b) (2001); FRCP 56(e); United States v. Flores-Martinez, 5 OCAHO no. 733, 74,at 81-82, 1995 WL 265084 (1995). If the adverse party fails to do so, then the facts set forth in the uncontradicted affidavit will be considered as true. See King v. Idaho Funeral Service Association, 862 F.2d 744, 746 (9th Cir. 1988); Mosher v. Saalfeld, 589 F.2d 438, 442 (9th Cir. 1978); Jones v. Halekulani Hotel, Inc., 557 F.2d 1308, 1310 (9th Cir. 1977).

On June 4, 2002, I ordered Complainant to file a response to the Motion For Summary Decision not later than June 24, 2002. Complainant did not do so, and he did not file a request for an extension of time. Consequently, pursuant to the OCAHO Rules of Practice and the pertinent case law cited above, because the assertions in Respondent's affidavits and supporting documents are uncontradicted, I therefore accept the assertions as true. Id. Having accepted the affidavits and supporting documents as true, I find that they establish three material facts.

1. Respondent accepted Complainant's expired passport for employment eligibility purposes

Complainant alleges that he was fired because Respondent "would not accept my expired passport as I-9 documentation." Complaint at 4, ¶ 7. Respondent's Motion For Summary Decision presents evidence to the contrary. On November 30, 2000, Respondent interviewed Complainant and offered him employment at its Anchorage International Airport bookstore. Exhibit A, Walker Affidavit ¶ 3. On December 5, 2000, Complainant reported for his first day of work and was asked by Bookstore Manager Jana Gwynn to complete the INS Employment Eligibility Form I-9 (Form I-9). Exhibit B, Gwynn Affidavit ¶ 2. Complainant presented an expired U.S. Passport as both proof of his identity and employment eligibility. Id. ¶ 3. Ms. Gwynn accepted the document and transcribed the passport's document number and expiration date onto the Form I-9. Id. and Exhibit B-1, Daniel DeNardo's Form I-9. Although Complainant refused to allow Ms. Gwynn to copy his passport, she considered him employed and started training him for employment. Id. ¶ 4. Complainant worked for Respondent from December 5, 2000, until December 24, 2000. Id. and Exhibit B-2, Daniel DeNardo's Time Sheet. The uncontested affidavits and supporting documents establish that Complainant's expired passport was properly accepted for identification and employment eligibility purposes. See 8 C.F.R. § 274.2(b)(1)(v)(A)(1) (2002) (an unexpired or expired passport is acceptable to evidence both identity and employment eligibility).

2. Respondent has a uniform policy of copying documents provided in support of the Form I-9

At the time of Complainant's application and employment, Respondent had in effect an established, written, and well-documented policy of copying the documents that employees submit for Form I-9 attestation, and then retaining the copies with the Form I-9's. Exhibit B, Gwynn Affidavit ¶¶ 3, 6; Exhibit

A, Walker Affidavit ¶¶ 2, 8. This policy was documented in at least two sources available to Respondent's employees at Anchorage International Airport. First, in September 2000, a booklet entitled *The Manager's Smart Book* was distributed to all store managers as a reference tool for, among other things, new employee hiring. Exhibit C, Mapp Affidavit ¶¶ 5- 6. The booklet includes pre-employment policies and procedures, and sample forms, including the Form I-9, completed in the name of a fictitious employee. Id. ¶ 6. Page 7 of the booklet sets forth a uniform company policy of copying documents provided in support of the Form I-9. Exhibit C-1, *The Manager's Smart Book* at 7. Second, a memorandum entitled "Subject: Sample New Hire Paperwork," dated September 15, 2002, was also distributed to all store managers, district managers, and regional vice presidents. Exhibit C, Mapp Affidavit ¶ 8. The "Check Sheet for New Hires," which is the first page of the packet of sample forms accompanying the one-page memorandum, directs managers "to ensure you have copies" of documents provided in support of the Form I-9. Exhibit C-2, Memorandum dated September 15, 2000. Both *The Manager's Smart Book* and the September 15, 2002, memorandum were in effect during Complainant's application, employment, and dismissal, see Exhibit C, Mapp Affidavit ¶ 8, and both establish a uniform policy of copying documents provided in support of the Form I-9.

3. Respondent's copying policy was communicated to Complainant, and Complainant was fired after his repeated refusals to allow Respondent to copy his passport

On December 5, 2000, at the time of his Form I-9 attestation, Complainant refused to allow Ms. Gwynn to copy his passport, and Ms. Gwynn told him that it was Respondent's company policy to make copies of the employee's Form I-9 documents. Exhibit B, Gwynn Affidavit ¶ 3. Although she allowed him to start working, she reported the refusal to the District Manager, Boyd "Bob" Walker. Exhibit B, Gwynn Affidavit ¶ 3. On December 11, 2000, Mr. Walker spoke with Complainant and renewed the request for a copy of the passport. Exhibit A, Walker Affidavit ¶ 8. Complainant refused and advised Mr. Walker to "check the law." Id. On December 18, 2000, Mr. Walker consulted with Respondent's corporate Human Resources Department and was instructed that the copying policy was to be uniformly applied. Id. Afterwards, on December 18, 2000, Mr. Walker again requested a copy of the passport. Id. ¶ 9. On December 22, 2000, Mr. Walker attached a note to Complainant's timecard insisting that he provide a copy of the passport. Id. ¶ 11. On December 25, 2000, Complainant called Mr. Walker at home and explained that he would not provide a copy of his passport and that "there was no such law." Id. ¶ 12. Mr. Walker then instructed Complainant that he could not return to work until the copy was provided, and that Complainant's continued refusal to supply the copy would result in his termination. Id. ¶¶ 12, 13. Complainant replied that he definitely was not going to provide a copy, or allow his passport to be copied by Respondent. Id. ¶ 13. At that point, Mr. Walker told
Complainant that he was terminated. Id. Complainant was terminated because he refused to allow his I-9 documentation to be copied and thus he failed to comply with company policy. Id. ¶ 14; see also Exhibit A-2, Daniel DeNardo's Associate Exit Form.

B. Legal Issues

The material facts of the case having been established, two legal issues arise: (1) does Respondent's policy of copying documents provided in support of the Form I-9 violate Section 1324b?; and (2) did Respondent discriminate against Complainant under Section 1324b(a)(1) or (a)(6) by terminating Complainant for refusing to allow Respondent to copy his I-9 documentation?

1. A uniform policy of copying documents provided in support of the Form I-9 does not violate 8 U.S.C. § 1324b

Respondent's affidavits and supporting documents make clear that its company policy is to copy all the documents an employee provides for the purpose of completing the Form I-9. While the law and accompanying regulations do not require employers to copy the documents their employees provide, it certainly is not prohibited. In fact, the statute and regulations expressly provide that employers may make such copies. Section 1324a(b) entitled, "Employment Verification System," establishes an employer's duty to document the identity and U.S. employment eligibility of its workers. Subsection (1)(A) of that section, which forms the statutory basis for the Form I-9, outlines the documents that are acceptable to establish a person's identity and employment eligibility. See 8 U.S.C. § 1324a(b)(1)(a). Subsection (4) provides that "[n]otwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted by law) for the purpose of complying with the requirements of this subsection." 8 U.S.C. 1324a(b)(4). Similarly, INS regulations state that an employer may "copy a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy is made, it must be retained with the Form I-9." 8 C.F.R. § 274a.2(b)(3) (2002).

Copying and retaining an employee's Form I-9 document(s) protects the employer from any human error in the transcription of the information from the documents to the Form I-9, and is therefore a means of ensuring compliance with the law. A copying policy helps insulate an employer from any "technical or procedural failure" in its compliance with the law by evidencing a good faith attempt to comply. Under Section 1324a(b)(6), as amended by section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an employer shall be deemed to have complied with the employment-eligibility-verification requirements of Section 1324a(b) *notwithstanding a technical or procedural failure to do so*, if the employer made a good faith attempt to comply.

Although five years have passed since IIRIRA was enacted, the INS has not yet promulgated a final agency rule specifying precisely which verification failures should be considered "technical or procedural," although a proposed rule has been pending since 1998. See 63 Fed. Reg. 16,909-16,913 (April 7, 1998). In the meantime, implementation is governed by Interim Guidelines, issued in March 1997, by the INS Office of Programs. These guidelines are binding upon the INS. See United States of America v. WSC Plumbing, Inc., 9 OCAHO no. 1071, at 12, 2001 WL 909279 (OCAHO 2001). In relevant part, a "technical or procedural" verification failure includes an employer's failure to transcribe the

"document title, identification number(s) and/or expirations date(s)" of the Form I-9 documentation, "*but only if a legible copy of the document(s) is retained with the form I-9* and presented at the I-9 inspection . . . ." (emphasis added). Thus, an employer is protected from inadvertently violating the law by implementing a policy of copying its employees' Form I-9 documents. Therefore, I hold that Respondent's uniformly applied copying and retention policy does not violate Section 1324b, but rather helps it comply with Section 1324a.

2. Respondent has not discriminated against Complainant under Section 1324b(a)(1) or (a)(6)

a. Firing

Complainant alleges that Respondent fired him based on citizenship status discrimination in violation of Section 1324b(a)(1). As a U.S. citizen, Complainant is a "protected individual" under Section 1324b(a)(3) who may bring such a claim. Complainant has the burden to prove discrimination on the basis of his citizenship status. See Toussaint v. Tekwood Assoc., Inc., 6 OCAHO no. 892, 784, at 801, 1996 WL 670179 (OCAHO 1996); see also Aragon v. Republic Silver State Disposal, Inc., 2002 WL 1578826, at *3 (9th Cir. July 18, 2002) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Respondent's Motion for Summary Decision is supported by affidavits and other documents establishing that Complainant was fired for failure to comply with company policy and insubordination, as opposed to discrimination based upon his citizenship status. The motion establishes that Respondent accepted Complainant's passport for identity and employment eligibility purposes and allowed him to begin to work despite his refusal to allow the passport to be copied. Further, it establishes that upon confirming the company's policy regarding the copying of Form I-9 documents, Respondent renewed its request for a copy of the passport, and when Complainant continued his refusal to comply with the policy, he was fired. These facts clearly establish a violation of company policy and insubordination as the basis for Complainant's firing.

In Aguire v. KDI American Products, Inc., 6 OCAHO 882, 1996 WL 637474 (OCAHO 1996), I explained that an employer may make adverse employment actions within the context of the uniform application of an established company policy that is not discriminatory. Aguire, supra at 658-61. In Aguire, the employer's policy was to terminate and refuse to rehire employees who engage in dishonest actions, such as presenting false employment eligibility documents or making a false statement on the Form I-9. Id. I found that the policy was uniformly applied and held that the employer did not violate Section 1324b by refusing to rehire a former employee who had previously provided the employer with false employment eligibility documents. Id. at 661. In this case, Respondent has a uniform policy of copying the documents provided in support of the Form I-9. This policy is not discriminatory on its face, see supra, and Respondent may enforce it in a non-discriminatory manner. Respondent's motion establishes that its efforts to enforce the policy were continually met with insubordination by Complainant, and thus establishes failure to comply with company policy and insubordination as the basis for Complainant's firing. Insubordination is well established as a legitimate non-discriminatory reason for firing an employee. See

Lee v. AT&T, 1997 WL 602712 at *8 (OCAHO 1997) (unsatisfactory conduct and insubordination is a legitimate, non-discriminatory reason for firing an employee); Payne v. Norwest Corp., 113 F.3d 1079, 1080 (9th Cir. 1997) (insubordination a legitimate reason for firing an employee).

Therefore, to prevent summary decision, Complainant must show that violation of company policy and insubordination was a mere pretext for illegal discrimination, and that citizenship status discrimination was the true reason for his firing. See Bendig v. Conoco, Inc., 9 OCAHO no. 1077, at 6 (OCAHO 2001) (currently unavailable in Westlaw). Complainant's evidence must be both specific and substantial to overcome the legitimate reasons put forth by Respondent. Aragon, supra, at *3. By not responding to the motion, however, Complainant has not presented any evidence to show that Respondent applied this policy in a discriminatory or disparate manner (i.e., firing only U.S. citizens who refuse to allow their Form I-9 documents to be copied). Thus, there is no genuine issue as to the fact that Complainant was fired purely for violation of company policy and insubordination.

I hold that an employer that has a policy of copying the documents its employees provide in support of the Form I-9, and that applies that policy in a non-discriminatory manner, does not violate Section 1324b by firing an employee who refuses to allow his Form I-9 document(s) to be copied. Accordingly, I reject Complainant's assertion that Respondent unlawfully discriminated against him by firing him when he refused to allow his passport to be copied.

b. Document Abuse

Section 1324b(a)(6) provides, in pertinent part, that it is an unfair immigration-related employment practice for a person or entity, for the purposes of satisfying the requirements of Section 1324a(b), to refuse to honor documents tendered that, on their face, reasonably appear to be genuine. In this case, however, Respondent did not reject Complainant's expired passport. The uncontradicted evidence shows that Complainant's passport was accepted, and that he was even allowed to start working. Additionally, Respondent did not attempt to re-verify the passport's authenticity. The uncontradicted evidence shows that Respondent only sought to make a copy of the passport pursuant to company policy. As discussed supra, Respondent may, pursuant to a uniformly applied company policy, request a copy of Complainant's Form I-9 document(s) (in this case an expired U.S. passport). Moreover, an employer may fire an employee for his insubordination and steadfast refusal to comply with the employer's copying policy. Accordingly, I reject Complainant's assertion that Respondent unlawfully refused to honor a genuine document in violation of Section 1324b(a)(6).

V. *CONCLUSION*

For all the reasons stated above, I find that Respondent has not discriminated against Complainant based upon his citizenship status in violation of Section 1324b(a)(1) or (a)(6). The uncontradicted facts establish that Complainant's expired U.S. passport was accepted by Respondent. Further, the uncontradicted facts establish that it is Respondent's policy to copy documents offered by employees in support of the Form I-9, and that Complainant was fired for violation of company policy and insubordination after he continually refused to allow Respondent to make such a copy. Respondent has articulated a non-discriminatory reason for firing Complainant that Complainant has not refuted. Therefore, I grant Respondent's Motion for Summary Decision.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

Notice Concerning Appeal

This order constitutes the final agency decision. As provided by statute, no later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the 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. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.57 (2002).