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

TEMITOPE OGUNRINU, Complainant, v. LAW RESOURCES & ARNOLD & PORTER KAYE SCHOLER LLP, Respondent	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 19B00032

AMENDED ORDER ON MOTIONS FOR SUMMARY DECISION

An Order on Motions for Summary Decision was initially issued in the above-captioned case on June 25, 2021. Pursuant to 28 C.F.R. § 68.52(f), this Amended Order on Motions for Summary Decision amends the order previously issued.

This action arises under the unfair immigration-related employment practices provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b. Complainant alleged that Respondents Law Resources and Arnold and Porter discriminated against her and retaliated against her based on her national origin and citizenship status; she also alleged that they engaged in document abuse. All three parties moved for summary decision — Complainant moved for a finding of liability and for an award of damages and injunctive relief; Respondents Law Resources and Arnold and Porter cross-moved for a finding of no liability or damages.

I. PROCEDURAL HISTORY

As a natural born citizen, Complainant is within the jurisdiction of 8 U.S.C. § 1324b. On October 2, 2020, the Court issued an Order in which it found Respondents liable for citizenship status discrimination; the Court dismissed the national origin discrimination claims against both Respondents. Order Liability 7, Oct. 2, 2020.

On December 23, 2020, Complainant filed a motion for summary decision against both Respondents.[1] On the same date, Respondents Law Resources and Arnold and Porter filed

[1] On December 30, 2020, Complainant filed a motion seeking to have the court take judicial notice of eight exhibits and several statements filed pursuant to 28 C.F.R. § 68.41. Respondent Arnold and Porter opposed the motion. Complainant appears to intend these submissions to supplement her motion for summary decision. Pursuant to the

cross-motions for summary decision. On January 13, 2021, Complainant filed oppositions to Respondents' motions. That same day, Respondents filed their separate oppositions to Complainant's motion. In Law Resources' Opposition, it cross-moved to strike several of the exhibits from Complainant's motion. On January 25, 2021, Complainant replied in support of her motion and in opposition to the motion to strike. This matter being fully (perhaps exhaustively) briefed, it is ripe for a decision.

II. FINDINGS OF FACT

The parties have cross-moved for summary decision. Pursuant to OCAHO precedent, Rule 56, Celotex v. Catrett, 477 U.S. 317 (1986), and its' progeny, the Court construes the facts in the light most favorable to the non-moving party and crafts findings of facts in a manner that reflects these presumptions. Fed. R. Civ. P. 56;[2] United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp., 477 U.S. at 323).[3] This, of course, is more difficult when attempting to resolve several motions by several parties, all seeking objectives which are at cross purposes with one another. The Court will begin with a statement of facts drawn exclusively from the Complainant's motion,[4] and later supplement with facts (to the extent that they vary or are otherwise relevant) from the Respondents' motions.

court's prior order of November 20, 2020, the deadline for motions for summary decision and all supporting documents was December 23, 2020. Complainant's motion offers no good cause for an extension of the deadline. *See generally* Fed. R. Civ. P. 16(b)(4). Accordingly, Complainant's motion for judicial notice is DENIED.

[2] "The Federal Rules of Civil Procedure may be used as a guideline" in proceedings under this forum. 28 C.F.R. § 68.1.

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

[4] Complainant's Motion for Summary Decision includes a statement of undisputed material facts. Complainant Mot. Summ. Decision 3–4. Complainant also includes an affidavit from herself in support of the motion. Complainant Mot. Summ. Decision Ex. Complainant Aff. Complainant's statement of facts are brief and often without citation to the record. In light of Complainant's *pro se* status, the Court interprets Complainant's motion as intending to incorporate by reference all of the statements in the affidavit to support the motion. *See generally* Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010) ("it is well established that a court is ordinarily obligated to afford a special solicitude to *pro se* litigants."); Belton v. Shinseki, 637 F.Supp. 2d 20, 23 (D.D.C. 2009) (pleadings of pro se litigants should be liberally construed); Zu v. Avalan Valley Rehab. Ctr., 14 OCAHO no. 1376, 9 (2020) (citation omitted) (generally, courts liberally construe pro se motions).

a. Facts Not In Dispute From Complainant's Motion for Summary Decision

Complainant Temitope Ogunrinu is an attorney; she was born in the United States[5] and is licensed in the District of Columbia. Complainant Mot. Summ. Decision Ex. Complainant Aff. 1. Complainant has for several years worked as a contract attorney. Id. Her work in that vein involves partnering with law firms for projects of a finite duration. Id. at 1–2. Contract attorneys are often employed for document review projects — instances where a law firm requires a large number of documents in its possession to be reviewed for relevance, or to prevent the inadvertent disclosure of attorney-client or other privileged materials. Id. at 2.

Law Resources is a staffing agency that operates in the District of Columbia; it recruits contract attorneys for projects with other legal employers. Id. Complainant worked with Law Resources at points in the past beginning in 2010. Id. Law Resources uses a mass email list to advertise for vacant positions. The parties state that this mass email (or list serve) was called the "posse list." Id. at 2. Complainant asserts that she has seen Law Resources' advertisements through various means, including emails from the company directly, and through internet bulletin boards such as Craigslist.com. Id.

On September 20, 2018, Complainant learned from a colleague about a document review project for which Law Resources and other legal staffing organizations were recruiting. Id. at 3. The same day, Complainant emailed Law Resources seeking employment for the project; she included her resume and information from which Law Resources (or its employer) could determine if she had a conflict of interest which would disqualify her for the position. Id.

The next day, Law Resources sent Complainant a form from Arnold and Porter that inquired about possible conflicts of interest, what Complainant described as a "no concurrent employment form," and requested that she produce an updated resume. Id. at 3. Complainant completed the form and returned the information later that day. Id.

On September 24, 2018, Katherine McClaine Tuite emailed Complainant to identify herself as a representative of Law Resources, and to inform Complainant that Law Resources had submitted Complainant's contact information for the project. On September 27, 2018, Tuite emailed Complainant asking her to reconfirm that she was a U.S. Citizen and that she had no allegiance to any other country. Id. at 4. Complainant asked about the necessity of providing this information; Tuite responded that she was making the request because Arnold and Porter required it. Complainant ultimately told Tuite that she would not produce the information because she believed it was not required by any law or regulation that she was aware of. Id. On September 27, Tuite told Complainant that Law Resources would be removing her name from consideration for the Arnold and Porter project, but that the organization would keep Complainant in mind for future vacancies.[6] Id. at 11.

[5] As a person born in the United States, Ogunrinu is a citizen and therefore a "protected individual" within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

[6] According to Complainant, Tuite's last email stated: "We'll keep you in mind for our next project. Thank you!" Id. at 11.

Complainant's fact section and the accompanying affidavit offer no statement concerning persons at Law Resources placing Complainant on a "do not use" list.

Complainant's facts section and her affidavit offer no statement concerning whether she ever contacted either Respondents after September 27, 2018 to seek employment, or whether either Respondent ever contacted her concerning future employment. Complainant's motion and the affidavit similarly contain no information concerning the rate of pay at the Arnold and Porter job, the length of time that the job occurred, any statements from Complainant concerning back pay mitigation, the amounts of any interim earnings, the nature and rate of pay of any subsequent work at either respondent, the prior protected activity of any persons selected for those subsequent jobs, or any wages Complainant earned from 2018 to present.

b. Facts Not In Dispute from Arnold and Porter's Motion[7]

Respondent Arnold and Porter is a law firm operating in Washington D.C. Respondent Arnold & Porter Mot. Summ. Decision Ex. Stmnt. Uncontested Facts 1. In 2010, it entered into an agreement with Law Resources such that Law Resources would provide temporary contract attorneys for document review projects. Id. at 1. The agreement provided that Law Resources would be solely responsible for recruiting, hiring, and employing contract attorneys, paying them, providing tax documents reflecting their wages, and maintaining payroll and other records for their employment. Arnold & Porter Mot. Summ. Decision Ex. Alloy Decl. Ex. 1. The agreement expressly disclaimed that any persons employed by Law Resources would be considered employees of Arnold and Porter. Id.

Concerning the contract project at the center of this litigation, Arnold and Porter referred to it as the International Trade in Arms Regulations project, or the "ITAR" project. Respondent Arnold & Porter Mot. Summ. Decision Ex. Stmnt. Uncontested Facts 1.

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[7] Complainant's oppositions to both Respondents' motions for summary decisions' statements of facts not in dispute offer general denials to their factual claims, rather than citing to admissible evidence to support the existence of a fact in dispute. *See, e.g.,* Complainant Opp'n Law Resources' Mot. Summ. J. 4–8, 10, 19–20, 25–40; Complainant Opp'n Arnold & Porter Mot. Summ. Decision 13. Per Rule 56(c) of the Federal Rules of Civil Procedure, a party asserting that a fact is in genuine dispute must support that claim by citing to the particular parts of the material in the record. Per Rule 56(e)(2), when a party fails to "properly support an assertion of fact or fails to properly address another party's assertion of fact, as required by Rule 56(c)" the court may "consider the fact undisputed for the purposes of the motion[.]"

Complainant's oppositions suffers from two related deficiencies — in opposing the proposed statement of facts, Complainant often denies the statement by stating that she disagrees with the evidence, rather than citing to contrary evidence which might create a question of fact. *See, e.g.,* Complainant Opp'n Arnold & Porter Mot. Summ. Decision p. 16, ¶ 27; p. 18, ¶ 31; p. 20, ¶ 34. In other instances, Complainant cites to exhibits but fails to submit them with the motion or otherwise unambiguously identify their location in the record. For instance, Complainant cites to Exhibit C-42 of her opposition to Arnold and Porter's motion for summary decision to argue that the rate of pay for contract attorneys on the ITAR project was $45 per hour, rather than $31 per hour. Complainant Opp'n Arnold & Porter Mot. Summ. Decision 14. Complainant fails to submit a copy of the exhibit with the brief. Complainant appears to argue that the exhibit was at some point previous to this motion filed with the Court as an exhibit either in support of or in opposition to an unidentified motion. This Court cannot engage in a fishing expedition to uncover information which might aid Complainant in her case. The parties are obliged to unambiguously cite to relevant evidence. Complainant's submission often fails to do so.

Arnold and Porter believed that the ITAR project required contract attorneys to exclusively hold U.S. citizenship, rather than dual citizenship or some other immigration status. Id. at 3. Arnold and Porter personnel conveyed this requirement to Law Resources. Id. Arnold and Porter had no contact with Complainant concerning the ITAR project. Id. at 4. The work on the ITAR project was performed by five attorneys, from October 3, 2018 to October 12, 2018. No work was performed on the ITAR project by contract attorneys after October 12, 2018. Id.

Arnold and Porter never placed Complainant on a "do not use" list, or any equivalent list which restricted her employment with the firm or any other company. Id. at 6. Arnold and Porter was also unaware that Law Crossing had restricted Complainant's ability to work until January 2020, when the information came to light during an U.S. Department of Justice investigation into the circumstances of Complainant's application for work on the ITAR project. Id. at 6. Subsequent to the ITAR project, Complainant has never applied either directly or indirectly to Arnold and Porter for any position. Id. at 7. Complainant has never been told that she was rejected for a document review project with Arnold and Porter following ITAR. Id. at 6.

c. Facts Not in Dispute from Law Resources' Motion

Complainant originally applied to work at Law Resources in 2010. Respondent Law Resources Mot. Summ. J. Stmt. Undisputed Facts 2. During the application process, Law Resources informs candidates that they should contact the company when they are interested and available for work. Id. at 3. During the intake process, Complainant was added to the talent pool, and consequently received notices when work became available. Id.

From 2012 to 2018, Complainant did not work with Law Resources. Id. During that time period, she would have received regular notices about potential vacancies. Id. Law Resources generally advertises vacant contract positions by sending a mass email to all members of the candidate pool, and/or placing an advertisement on the posse list listserv. Id.

On September 20, 2018, Complainant contacted Law Resources indicating that she was interested in working. At the time, Complainant had agreed to work with Special Counsel, a different legal staffing agency. Id. at 5. Arnold and Porter does not permit contract attorneys to work on other projects while they are doing work for the firm. Id. at 6. Complainant did not disclose her prior engagement to Law Resources. Id.

Lisa Caruso, the Director of Legal Support Services at Arnold and Porter, asked Law Resources to restrict its hiring of contract employees for the ITAR project to persons with only U.S. citizenship. Caruso directed that attorneys with dual citizenship should not be hired. Id. at 8. Law Resources complied. Id. at 8–9.

The advertisement for the ITAR project stated that the project will last several weeks, and the "pay is $31/hour plus time and one half for any overtime." Id. at 12.

Five persons staffed the ITAR project. Id. The project lasted eight days and did not lead to any subsequent document review projects. Id. The highest number of hours worked by any of

the five employees was 67.5 hours, including 2.5 hours of overtime. That person was paid $2,208.75 in total. Id.

Complainant performed document review work for Special Counsel from September 24, 2018 to November 4, 2018. The hourly rate for the work was $31 per hour. She worked 281.8 hours during that time period. Id. at 17.

Complainant did not subsequently contact Law Resources seeking work after the ITAR project. Id. at 13–14.

In November 2018, shortly after Complainant's interaction with Law Resources on the ITAR project, a staff person at Law Resources placed Complainant's resume on an internal "do not use" list; the person also put Complainant's application in the "do not use" folder. Id. at 15. Law Resources asserts that the person acted without instruction from her managers or other persons in a position of authority with the company. Id. at 16.

III. SUMMARY DECISION STANDARD

Under the OCAHO rules, the administrative law judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." Hajiani v. ESHA USA, Inc., 10 OCAHO no. 1212, 6 (2014).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" United States v. 3679 Commerce Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

IV. ORDER DENYING LAW RESOURCES' MOTION TO STRIKE COMPLAINANT'S EXHIBITS

In its opposition to Complainant's motion for summary decision, Law Resources sought to have the Court strike Complainant's exhibits C-63, 66, 67, 69, and 70. Law Resources' Opp'n Mot. Summ. Decision 22–23. Law Resources' request is unaccompanied by a motion as required by 28 C.F.R. § 68.11(a). Nonetheless, Law Resources' objective in its pleading is clear, and Complainant raises no procedural objection to it being resolved by the Court; accordingly, the Court will address it. Law Resources argues that C-63, 66, 69, 70 (hereinafter, the "Rule 37 documents") should be stricken because they were not produced in discovery. It argues that C-67 and 68 (hereinafter, the "Rule 901 documents") should be stricken because they contain redactions that make them not true and accurate copies of Law Resources' discovery responses.

Concerning the Rule 37 documents, Law Resources argues that its discovery requests encompassed the cited documents, which Complainant failed to produce until her dispositive motion; pursuant to Federal Rule of Civil Procedure 7(c)(1) the typical sanction for documents which were unreasonably withheld is that they are stricken. Fed. R. Civ. P. 37(c)(1). Law Resources cites to both Rule 37 and Elion v. Jackson, No. 05-0992, 2006 U.S. Dist. WL 2583694, at *1–*2 (D.D.C. Sept. 8, 2006), a case from the District of Columbia, in support of its argument. In Elion, the moving party provided the underlying discovery requests and the responses, identifying with specificity the discovery requests which were not faithfully adhered to. Id. In the case presently before the Court, Law Resources has failed to do the same; this prevents the Court from fairly evaluating Respondent's arguments and determining whether a Rule 37(c) sanction is appropriate. Accordingly, the Court DENIES Law Resources' informal motion to strike on this basis.[8]

Addressing the Rule 901 documents, 28 C.F.R. § 68.45 permits minor alterations to "designate the matter so offered, segregating and excluding insofar as practicable the immaterial or irrelevant parts." Law Resources provides no evidence that the redactions are anything other than the standard fare redactions of a party who, in dispositive motions practice, seeks to focus the Court's attention to the information most relevant to their argument. Law Resources' motion to strike is therefore DENIED.

V. DOCUMENT ABUSE CLAIMS

Complainant has alleged that Respondents engaged in document abuse. Section 1324b(a)(6) provides that it is an unfair immigration practice for an employer to request, for the purposes of satisfying § 1324a(b) (dealing with the I-9 system of employee identification and eligibility for employment) "more or different documents than are required under [§ 1324a(b)] or refusing to honor documents tendered that on their face reasonably appear to be genuine [. . .] if made for the purpose or with the intent of discriminating against any individual [because of such individual's national origin or citizenship status]." 8 U.S.C. § 1324b(a)(6).

[8] OCAHO's regulations do not require initial disclosures, *see* 28 C.F.R. pt. 68, and the parties were not ordered to do so. Accordingly, Complainant did not have an initial or subsequent obligation to disclose the evidence and her exhibits will not be stricken for this reason.

To state a claim of document abuse under § 1324a(b)(6), an employee must at minimum assert that their purported or actual employer requested that they produce documents to satisfy their I-9 requirements. Jarvis v. AK Steel, 7 OCAHO no. 930, 111, 117 (1997).

It is wholly unclear whether Complainant has moved for summary decision on the document abuse claims. Complainant's motion appears to reference her complaint citing Respondents for document abuse; Complainant Mot. Summ. Decision. 6, 14, 15; Am. Compl. 8; but the motion itself is devoid of arguments or facts which would support a liability ruling. To the extent that Complainant has moved for summary decision on her document abuse claims, the motion is DENIED.

Respondents cross-moved for summary decision on the document abuse claim; Arnold and Porter argues on pages seven through twelve of its motion that the sole predicate for Complainant's document abuse claims are the emailed communications between her and Law Resources representative Katherine McClaine Tuite, in which Tuite asked Complainant to confirm that she was a citizen of the United States and no other country. In that communication, Tuite does not ask Respondent to produce documents related to her citizenship or nationality.[9]

Respondents assert that no liability can accrue for a document abuse claim when no documents were requested. Complainant offers no legal argument to the contrary; she cites to no facts to create a material question of fact. Complainant asserts in response to Arnold and Porter's motion that she volunteered to produce her I-9s, as she had last submitted the forms to Law Resources in 2010. Complainant Opp'n. Arnold & Porter Mot. Summ. Decision 11. Even if true, it is undisputed that neither Respondent requested citizenship documents from her. As such, her document abuse claims cannot survive. The Court therefore GRANTS Respondents' motions concerning the document abuse claims.

VI. ANALYSIS OF COMPLAINANT'S MOTION FOR SUMMARY DECISION – RETALIATION CLAIMS

Complainant's motion for summary decision seeks a ruling of liability against both Respondents on the retaliation claims.

a. INA § 1324b Anti-Retaliation Provisions Generally

Section 1324b of the Immigration and Nationality Act prohibits intimidation and retaliation "against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] 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." 8 U.S.C. § 1324b(a)(5). "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." Chellouf v. Inter Am. Univ. of P.R., 12 OCAHO no. 1269, 5 (2016).

[9] Law Resources makes the same argument on pages two and five of its motion.

b. Prima Facie Anti-Retaliation Case—Direct Proof Scheme

Complainant alleges that there is direct evidence that Respondents engaged discrimination. "Direct evidence is evidence that proves the fact at issue without the aid of any inference or presumption." Breda v. Kindred Braintree Hospital, LLC, 11 OCAHO no. 1225, 17 (2014). In the context of an employment discrimination or retaliation claim, direct evidence is often described as "conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Burgess v. JHM Hotels, LLC, 2010 U.S. Dist. WL 1493129, at n.10 (D.S.C. March 18, 2010). For example, "[d]irect evidence of retaliation may be an employer policy that is retaliatory on its face, or an employer statement that explicitly mentions an employee's protected activity." Wang v. Wash. Metro. Area Transit Auth., 206 F. Supp. 3d 46, 86 (D.D.C. 2016). In Breda, 10 OCAHO no. 1202 at 17, the ALJ found there was direct evidence of retaliation when the respondent stated he would file a counterclaim against the complainant for filing a charge with the Immigrant and Employee Rights Section, Civil Rights Division, U.S. Department of Justice (IER). In both cases, the inquiry was to the intentions of the decision maker — whether that person chose to engage in discriminatory or retaliatory acts because of the protected basis. Barry v. U.S. Capital Guide Bd., 636 F.Supp. 2d 95, 104 (D.D.C. 2009) (rejecting a claim of direct evidence retaliation because "proof of the alleged breach sheds no light on the minds of the board members."). The courts have generally looked to City of Los Angeles Department of Water and Power v. Manhart as a quintessential example of a case implicating the direct proof scheme. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 705 (1978). In Manhart, the Department's explicit written policy was to require women to make higher contributions to their defined benefits plans than men. Id. In Manhart, as with Breda, the Court made an initial determination that there was conduct or statements that both reflect directly the alleged discriminatory or retaliatory attitude and that bear directly on the contested employment decision.

Mere knowledge of the protected basis in connection with the adverse employment action is insufficient to establish a direct proof scheme. Barry, 636 F. Supp. 2d at 106.

The high court has made clear that when a party presents direct evidence of discrimination, the indirect proof scheme (more often called the "McDonnell Douglass" proof scheme) is generally unnecessary. Trans World Airline v. Thurston, 461 U.S. 111, 105 (1985). In both proof schemes should the moving party establish the prima facie case the traditional burden shifting structure of legitimate non-discriminatory reasons and offers of pretext apply.

Complainant argues that the same should apply in the case presently before this Court. Complainant presents her placement on Law Resources' "do not use" list in support of her argument for a finding of direct evidence of retaliation. There are many problems with this argument, but the most fundamental of them is one alluded to in the recitation of facts: Complainant has not pled that her placement on the "do not use" list is a fact not in dispute. Moreover, she has not cited to facts in the record in support of that proposition.

Rule 56(c)(1)(A) requires any party who files a motion for summary decision (a motion for summary judgment in their parlance) based upon facts not in dispute to support each factual assertion by:

> Citing to the particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials;

Fed. R. Civ. P. 56(c)(1)(A). This is no mere formalist exercise. Requiring parties to assert which facts they believe are not in dispute with citations to the record to support those facts places the opposing parties on notice as to the predicate for potentially granting or denying the motion. It informs the court concerning the scope and posture of the case. Further, as stated previously, OCAHO and federal court jurisprudence requires that the facts pled are construed by the Court in the light most favorable to the non-moving party. Complainant's failure to identify which facts she believes are the basis of her claim imperils her motion.

Complainant has, in her legal arguments section, cited to Law Resources' statement in its prior pleading that she was placed on a "do not use" list. She argues, without factual support, as follows: "[the] do not use list prevents a temporary employee from returning back to the initial company that caused the employee's name to be placed on the list. A do not use list also prevents a temporary employee from working for other employers for whom the staffing agency provides staffing." Complainant Mot. Summ. Decision 7. There is nothing in the cited record which supports any of those conclusions. Indeed, there is nothing in the cited record to define what function, if any, the "do not use" list serves. Questions abound from this statement. For instance, does Law Resources' staff rely on the do not use list in making hiring or referral decisions? When have they done so? Who has done so? For which clients? Did Law Resources' management authorize the list's creation? Complainant cites to no affidavits or deposition transcripts or discovery responses articulating what function that list had in general, or what function it had in Complainant's case in specific. Respondent Law Resources' opposition to the motion posits a very different meaning for Complainant's presence on the list, but the Court's first obligation in evaluating any dispositive motion is to determine whether the claims in the motion on their own are sufficiently clear and supported by the record to permit further inquiry. The Court finds in the present case that they do not.

This fundamental problem informs the Court's determination that Complainant has not established sufficient facts to access the direct evidence proof structure. Complainant has pled no clear facts in support of her claim, well below the standard of facts which "on their face" show that the decision-maker held clear retaliatory intent in effecting the employment action. Accordingly, the direct evidence proof scheme is not available to Complainant in her motion.

c. Prima Facie Case – Indirect Proof Scheme

To establish a prima facie case of retaliation for the indirect proof scheme, the complainant must present evidence that: "1) an individual engaged in conduct protected by 8 U.S.C. § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action." R.O. v. Crossmark, Inc., 11 OCAHO no. 1236, 6 (2014) (citations omitted). Once the complainant makes such a showing, the burden shifts to the

employer to provide a legitimate, non retaliatory reason for the challenged employment action. Id. (citations omitted).

Concerning the first element, Complainant argues that her refusal to respond to Law Resources' questions concerning her citizenship is evidence of her opposition to discriminatory practices. Oppositional activity is term of art largely developed in the context of Title VII of the Civil Rights Act of 1964; it is specifically defined in Title VII as discrimination by an employer or union against an employee who has "opposed any practice made an unlawful employment practice by this subchapter[.]" 42 U.S.C. § 2000e-3(a). Opposition is generally described as distinct from the participation clause of Title VII's anti-retaliation provisions, which prohibit an employer or union from discrimination against an employee because they have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Id.

Opposition includes "a broad range of informal actions or statements that employees make in resistance to actions they reasonably perceive to be discriminatory." Wang, 206 F. Supp. 3d at 76 (citations omitted). The Supreme Court in Crawford v. Metropolitan Government of Nashville and Davidson County, asserted that the term "opposition" has the normal dictionary meaning of resisting or contending against. Crawford v. Metro Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 276 (2009). The Court further directed that opposition does not require the plaintiff to instigate or initiate the encounter which forms the basis of the protected activity. Id. at 277. Indeed, an employee may engage in oppositional behavior by answering questions from the employer, as the litigant did in Crawford. Id. at 277–78. Arnold and Porter largely concedes the protected activity for the purposes of its motion, while Law Resources contests this point, arguing that opposition to discrimination is not a cognizable form of protected activity under the statute. Respondent Law Resources Opp'n Mot. Summ. Decision 3–4. Law Resources makes two arguments on this point: first, that § 1324b does not include "opposition" language similar to Title VII, accordingly the statute does not provide for a cause of action for oppositional activities. Second, Law Resources argues that, assuming that § 1324b encompasses opposition activities, Complainant's communications do not as a matter of law meet that standard.

Addressing the first issue, the Court finds that the statute's plain terms include opposition to discrimination; the statute outlaws retaliation "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." Section 1324b(a)(5) (emphasis added). Included in the rights protected under section 1324b is "the right to oppose an employer's alleged discriminatory hiring practices." Diarrassouba v. Medallion Fin. Corp., 9 OCAHO no. 1076, 9 (2001). Section 1324b does indeed protect opposition activity. Id. at 8–9 (holding "that, if proved, [the r]espondent's alleged termination of [the c]omplainant for opposing the [r]espondent's discriminatory hiring practices would constitute an attempt to interfere with a right or privilege secured under § 1324b"); *see also* United States v. Hotel Martha Wash. Corp., 5 OCAHO no. 786, 533, 537 (1995); Yefremov v. NYC Dep't of Transp., 3 OCAHO no. 562, 1556, 1603–04 (1993); Zu v. Avalon Valley Rehab. Ctr., 14 OCAHO no. 1376, 15 (2020).

Public policy also warrants protection of opposition activity; protecting participation activity but not opposition activity would frustrate the purpose of Section 1324b. *Cf.* Crawford, 555 U.S. at 279 (warning that "[i]f it were clear law that an employee who reported discrimination . . . could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."). As the court further advised in Diarrassouba, "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 [who engage in opposition activity] deters employers from engaging in discriminatory employment practices." Diarrassouba, 9 OCAHO no. 1076 at 9.

Concerning Law Resources' second argument, that Complainant's discussions concerning her citizenship status do not rise to the level of oppositional activity, the Court agrees with Complainant in this as well, finding that Complainant through her emailed conversation with Law Resources made clear that she opposed the requirement which Law Resources imposed on her to affirm that she was only a citizen of the United States. Complainant made clear that she believed this requirement was not lawful. Even in the light most favorable to the nonmoving party, the intent of Complainant's objection was unmistakable, and the Court therefore finds that Complainant has established this element of her prima facie case.

Complainant has also argued that she engaged in protected activity through her complaint to IER, prompting an investigation of Law Resources and Arnold and Porter. This is paradigmatic "participation" activity, also cognizable as prior protected activity. Complainant's difficulty with this element is not legal, but evidentiary — as stated in the facts section. Complainant offers no statement of facts or citation to the record reflecting Law Resources or Arnold and Porter's awareness of the IER investigation. Complainant's statement of facts ends with her nonselection for the ITAR project; Complainant has argued (but offered no evidence to substantiate the argument) that she contacted IER several months thereafter, and that IER at some point following informed Respondents that they were the targets of an investigation. Complainant's failure to offer evidence to establish that, in the light most favorable to the nonmoving party, there is the absence of a material question of fact prevents the Court from granting this element of her motion for either respondent.

Moving to the second element, Complainant establishes that Law Resources was aware of the protected activity by dint of her emailed communications with Law Resources' staff about the citizenship question.

i. Complainant Fails to Establish Joint Employer Liability for Arnold and Porter

Complainant fails, however, to establish the knowledge element with regard to Arnold and Porter. Arnold and Porter maintains, without contradiction from Complainant, that it was not aware that Complainant had opposed the single citizenship requirement. Complainant argues that this is immaterial because (she asserts) Arnold and Porter were joint employers with Law Resources, because Arnold and Porter had also engaged in a principal-agent relationship with Law Resources, and as a consequence of this relationship Arnold and Porter is vicariously liable

for Law Resources' actions. Complainant cites no case law for this position. Complainant does cite to the 2010 agreement between Law Resources and Arnold and Porter; however, the agreement expressly disclaims any sort of principal-agent relationship between the two organizations. It affirms in blunt language that the contract employees recruited by Law Resources for Arnold and Porter projects remain Law Resources' employees, and that Law Resources remains responsible for all aspects of their employment, including pay, taxes, and benefits. Under either the common law formulation of agent-principal relations articulated in NLRB v. Browning-Ferris, or under the multi-part test announced in Spirides v. Reinhardt, Complainant has failed to articulate sufficient facts to establish that there is no material question of fact on the joint employer theory, or on the imputation of knowledge between the two Respondents assuming that they were a joint employer. NLRB v. Browning-Ferris, 691 F.2d 1117, 1123 (3d Cir. 1982); Spirides v. Reinhardt, 613 F.2d 826, 813 (D.C. Cir. 1979); Clayton v. District of Columbia, 117 F. Supp. 3d 68, 82–83 (2015) (discussing the Browning-Ferris and Spirides tests for joint employer); EEOC v. Global Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019) (discussing a negligence and failure to correct standard to establish vicarious liability with joint employers in an employment discrimination claim).

Complainant's lack of factual and legal arguments imperils her claim, and accordingly the Court finds that Complainant has not established this element of her case. As Complainant must establish each element of her prima facie case in order for the Court to grant her motion, Complainant's motion for a liability ruling on all of her retaliation claims cannot be granted with regard to Arnold and Porter. Accordingly, the Court DENIES Complainant's motion for summary decision with regard to Arnold and Porter's liability for her retaliation claims. The liability analysis which follows addresses only Law Resources, and only Complainant's claims of retaliation stemming from her initial opposition to the citizenship requirement.

ii. Law Resources' Adverse Employment Actions as Articulated in Complainant's Motion

Moving to the third element of the prima facie case, adverse employment action, Complainant asserts that the adverse employment actions at issue in this case are: 1) Law Resources' failure to hire her for the ITAR project, 2) Law Resources' failure to hire her for subsequent jobs, and 3) Law Resources' interference with Complainant obtaining work with other law firms.[10] Complainant establishes the adverse employment action element with regard to (1) the ITAR project — there is no genuine dispute of fact that she was not hired for that project. Concerning (2), Law Resources fails to establish that there is no material question of fact concerning this claim. As discussed above, Complainant's statement of facts not in dispute does not provide any information concerning Complainant's interactions with Law Resources after the ITAR project. Complainant's affidavit in support of her motion does not assert, for instance, that she has reviewed Law Resources' advertisements and other communications

[10] Complainant has also argued that Arnold and Porter's refusal to hire Complainant for the ITAR project, and Arnold and Porter's alleged refusal to hire Complainant for subsequent jobs, are adverse employment actions. However, as discussed above, Complainant's failure to establish that she engaged in prior protected activity with regard to the IER investigation, and her failure to establish that Arnold and Porter was ever aware of her protected activity, prevents Complainant from succeeding on her retaliation claims against Arnold and Porter. The Court therefore dispenses with an analysis of Complainant's arguments concerning adverse employment actions as it relates to Arnold and Porter.

subsequent to the ITAR project. The affidavit does not identify the particular emails which she believes she should have received but did not. Complainant rests her arguments for subsequent nonselections on the claim that Law Resources' practice in general or its obligation in her specific case was to send her an individual communication about new work. Complainant fails to plead sufficient facts to resolve this issue in her favor. Law Resources provides evidence that its standard operating practice is to not individually contact employees and prospective employees about new positions. It cites to (among other things) Complainant's own experiences with Law Resources surrounding the ITAR project. The record is not in dispute that Complainant began working with Law Resources in 2010; however, she had not worked with them in the immediate past prior to the ITAR project. Complainant affirmatively reached out to Law Resources, not the other way around, concerning the prospective work. Based on the present record, the Court cannot conclude that Complainant has established that Law Resources' engaged in an adverse employment action through its failure to communicate with her about new jobs.

The evidence on the third form of adverse employment action, Law Resources' alleged interference with Complainant's employment with other companies, is devoid of facts and legal arguments to support it. This argument is not articulated with specificity; it is well below the standard of establishing that there is no material question of fact on this claim. Accordingly, the Court DENIES Complainant's motion for summary decision on adverse employment actions two and three.

iii. Complainant's Arguments of Causal Nexus Between Law Resources Adverse Employment Actions and Her Protected Activity

The fourth and final element of the prima facie case is the nexus between the protected activity and the adverse employment action. Complainant argues that Law Resources' placement of her on the "do not use" list is indicia of a retaliatory motive. She further argues that the closeness in time between the adverse employment action and her placement on the "do not use" list create temporal proximity. However, as discussed in the section addressing the direct proof scheme, Complainant has not pled facts supporting this claim. For the same reasons as articulated above, Complainant has failed to establish that the action is a fact not in genuine dispute, and accordingly she fails to establish this element. Complainant's failure to establish the fourth element of the prima facie case on the remaining claim of retaliation means that Complainant has not met her burden of establishing entitlement to a liability ruling on the retaliation claims, and the Court therefore DENIES Complainant's motion for a liability ruling on retaliation against Law Resources and Arnold and Porter.

VII. ARNOLD AND PORTER'S MOTION FOR SUMMARY DECISION CONCERNING THE RETALIATION CLAIMS

i. Protected Activity

Having disposed of Complainant's motion for summary decision for a liability ruling on the retaliation claims, the Court now turns to Respondents' motions. The Court begins with the

portion of Arnold and Porter's motion seeking a ruling against Complainant on her retaliation claims.

For similar reasons as discussed above, Complainant establishes the first element of the prima facie case. Arnold and Porter concedes Complainant's opposition to discrimination through her emailed communication with Law Resources. It also concedes that Complainant participated in protected activity through her complaints of discrimination to IER.

ii. Employer's Awareness of Complainant's Protected Activity

Arnold and Porter concedes the second element of the prima facie case, it's awareness of Complainant's protected activity, with regard to the IER complaint and investigation initiated in November 2018.

The firm contests the second element of the prima facie case with regard to its awareness of Complainant's opposition to Law Resources' statement concerning the single citizenship requirement. In support of this, it cites to an affidavit from a Lisa Caruso; Caruso asserts that Law Resources only learned that Complainant was the person who filed an IER in late November 2018. It also cites to its Requests for Admission 2, 3, and 5, which direct Complainant to admit that Arnold and Porter has had no contact with her concerning the IER project. Complainant admits this fact. *See* Complainant Opp'n Arnold & Porter Mot. Summ. Decision 11. Complainant argues in her opposition that Arnold and Porter was constructively aware of all of the actions of Law Resources, but as discussed above there is no legal or factual support for that conclusion. Accordingly, Arnold and Porter's motion is GRANTED with regard to Complainant's retaliation claims stemming from Complainant's opposition activities.

iii. Adverse Employment Action

Moving to the third element of the prima facie case, the adverse employment action, Arnold and Porter argues that Complainant never applied for a position with the law firm, either through the ITAR project or subsequent to the project. Respondent Arnold & Porter Mot. Summ. Decision Stmt. Facts Not in Dispute 7. Complainant contests this assertion, arguing that Arnold and Porter only hires for contract positions through independent vendors, such as Law Resources. Complainant Opp'n Arnold & Porter Mot. Summ. Decision 19. Complainant's opposition largely avoids the issue, however — Arnold and Porter provides evidence that Complainant did not directly apply to the company for any vacancy, and Complainant presents no evidence that this claim is untrue or otherwise unworthy of credence. Insofar as Complainant argues that Arnold and Porter has interfered with her opportunities for employment at any of the legal vendors that work with Arnold and Porter, the law firm again asserts that it has not done so, and Complainant presents no evidence to the contrary. Respondent Arnold & Porter Mot. Summ. Decision Stmt. Facts Not in Dispute 6.

iv. Causal Nexus

Arnold and Porter has established that Complainant fails to meet the third element of the prima facie case, therefore its motion must be granted with regard to the retaliation claims.

Assuming *arguendo* that Complainant had established this element, the analysis would turn to the fourth element, the causal nexus between the protected activity and the adverse employment action. Here, too, Complainant's arguments are deficient. Complainant relies on Law Resources' placement of Complainant on the "do not use" list as evidence of a retaliatory intent. However, the evidence in this matter is undisputed that Arnold and Porter did not place Complainant on the "do not use" list, and it was unaware that Law Resources had placed Complainant on the list. Complainant presents no evidence refuting these contentions, or otherwise creating a material question of fact as to their veracity.

Therefore, the Court GRANTS Arnold and Porter's motion for summary decision regarding Complainant's retaliation claim against it.

VIII. LAW RESOURCES MOTION FOR SUMMARY DECISION ON RETALIATION CLAIMS

i. Prima Facie Case

Addressing now Law Resources' motion for summary decision, the Court evaluates the claim using the familiar McDonnell Douglas shifting proof scheme. Addressing the first element of the prima facie case, Complainant's engagement in protected activity, Law Resources contests that Complainant engaged in opposition activity through the email exchange concerning the citizenship requirement, but as the Court made clear in the legal analysis addressing Complainant's motion for summary decision, by the statute's very terms § 1324b encompasses opposition and participation activity. Law Resources also argues that there is a material question of fact as to whether its staff person was aware of Complainant's opposition to the citizenship requirement, but as the Court previously held there is no genuine dispute of fact on this question — the nature of the email exchange made clear that Complainant believed Law Resources' demand that she state whether she was a dual citizen was an unlawful request, and she asserted as much. Complainant's lodging a complaint with IER is definitional participation activity, and on those bases Complainant establishes the first element of the prima facie case.

Complainant establishes the second element of the prima facie case — again, there is no debate but that Law Resources was aware of Complainant's opposition and participation activities.[11] It engaged with Complainant by email concerning the citizenship requirement, and the company does not contest that it became aware that Complainant had lodged a charge with IER concerning its citizenship requirement.

Moving to the third element of the prima facie case, the adverse employment action, Complainant was not selected for the ITAR project. This is not in dispute. Concerning the Complainant's allegation that Law Resources failed to hire her for future jobs, Law Resources asserts in its facts not in dispute section that its standard procedure is to require applicants for

[11] The Court is of course aware that it had previously asserted that Law Resources was unaware of Complainant's participation activity (more specifically, the IER complaint). *Supra*, Section VI(c). This statement was in the context of deciding Complainant's motion for summary decision, in which Complainant cited to no facts which would establish Law Resources' knowledge. By contrast, Law Resources' motion pled facts sufficient to conclude that it was in fact aware that Complainant had engaged in participation activity.

positions to contact the company in response to its email blast messages to inform the company that they are ready and available to work. Law Resources cites to Complainant's own conduct for the ITAR project, in which she engaged in just this course of action to be considered for the vacancy. Complainant's argument to the contrary is that a Law Resources representative asserted that they would keep Complainant in mind for future vacancies. This is not sufficient to demonstrate a material question of fact. Even in the light most favorable to the non-moving party, the statement that Complainant draws the Court's attention to is a generic parting greeting, not a statement which (either on its face or in the context of other evidence Complainant presents in this case) demonstrates that the company had any specific intent to vary from its standard practice of making general announcements about potential vacancies and waiting for applicants to express availability and interest in working.

Addressing the fourth element of the prima facie case, the causation element or nexus, Complainant cites Law Resources' placement of her on the "do not use" list as evidence of retaliatory animus. Unlike Complainant's motion, Law Resources pleads facts supporting the conclusion that it did place Complainant on the "do not use" list, as recounted above. Law Resources asserts that it is not responsible for the consequences of this action, as (it argues) the person who placed Complainant's name and resume on the list was not a partner of the company, and was not authorized to bar applicants for employment. Complainant vigorously contests this characterization of the administrative person's scope of authority. On a motion for summary judgment the inferences are construed in the light most favorable to the nonmoving party, and the Court therefore concludes that the facts as presented in the motion do not establish that Complainant has failed to establish the causation element.

ii. Law Resources' Legitimate Non Retaliatory Reason for Challenged Actions and Complainant's Offer of Pretext

To recap, Arnold and Porter has demonstrated that Complainant cannot establish the second or fourth elements of the prima facie case, accordingly the Court has granted Arnold and Porter's motion concerning the retaliation claims.

The retaliation analysis which proceeds applies solely to Law Resources' motion. Law Resources has prevailed on some of its motion — it has established that Complainant cannot prevail on her claims that Law Resources denied her employment opportunities subsequent to the ITAR project. However, Complainant has survived on the allegation that Law Resources retaliated against her for her complaints of employment discrimination by denying her the ITAR project.

Law Resources bears the burden of articulating a legitimate non retaliatory reason for the challenged action. The respondent need not prove that their rationale is correct at this stage, but it must articulate the rationale in sufficient detail for the complainant to potentially argue that the rationale is a pretext for retaliation. *See* Nurriddin v. Bolden, 40 F. Supp. 3d 104, 117 (D.D.C. 2014), (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000)), *aff'd*, 818 F.3d 751 (D.C. Cir. 2016).

Once the respondent provides a legitimate, non retaliatory reason for its decision, "the 'one central inquiry' on summary judgment is 'whether the [complainant] produced sufficient evidence for a reasonable jury to find that the employer's asserted non-[retaliatory] reason was not the actual reason and that the employer intentionally [retaliated] against the [complainant] on a prohibited basis.'" Hamilton v. Geithner, 666 F.3d 1344, 1351 (D.C. Cir. 2012) (citation omitted). A court should consider the totality of circumstances and determine whether a factfinder could infer retaliation based on "(1) the [complainant's] prima facie case; (2) any evidence the [complainant] presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of [retaliation] that may be available to the [complainant] . . . or any contrary evidence that may be available to the employer." Id. (citation omitted).

> A plaintiff may support an inference that the employer's stated reasons were pretextual, and the real reasons were prohibited discrimination or retaliation, by citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group, its inconsistent or dishonest explanations, its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employees in the same protected group as the plaintiff, or other relevant evidence that a jury could reasonably conclude evinces an illicit motive.

Walker v. Johnson, 798 F.3d 1085, 1092 (D.C. Cir. 2015) (citation omitted).

Law Resources asserts that its legitimate non retaliatory reason is that on the advice of its client, Arnold and Porter, it used an employment standard which was later found to be discriminatory — specifically, the requirement that its ITAR employees only have citizenship with the United States. This rationale is somewhat unique — it is the central fact underpinning the Court's liability ruling on Complainant's citizenship discrimination claim. While this explanation does Respondent no favors in that regard, it is (for all of its other problems) a distinct and facially non retaliatory reason for its decision not to employ Complainant.

To this, Complainant offers no argument or evidence of pretext. Complainant does not address this issue at all; her opposition to Law Resources' motion only references pretext with regard to the discrimination, and only in a conclusory manner; she asserts in her conclusion that Law Resources "does not have a viable defense because the evidence has shown that its non-discriminatory reasons proffered are pretextual." Complainant Opp'n Law Resources Mot. Summ. J. 48. However, Complainant fails to identify what the offer of pretext is with regard to the retaliation claims and what in the record supports it. As Complainant has the burden to cite evidence supporting pretext, and she has failed to do so, the Court GRANTS Law Resources' motion on the remaining retaliation claims.

IX. DAMAGES FOLLOWING LIABILITY RULING ON DISCRIMINATION

The Court had previously ruled that Respondents are liable for Complainant's § 1324b claims of discrimination related to her non selection for the ITAR project. Order Liability 3, Oct. 2, 2020. Complainant's motion for summary decision seeks a ruling in its favor on damages. Complainant requests compensatory damages in the amount of $50,000; back pay of $14,075; front pay of $80,269.25; prejudgment interest; injunctive relief; administrative costs in the amount of $1,725; legal research costs (post state of emergency) amounting to $4,095; lost wages for legal research pre-state of emergency of $13,935; and legal research lost wages and parking fees of $2,958. Both Law Resources and Arnold and Porter cross-moved for summary judgment; they seek a ruling that all forms of relief be denied.

As the Court noted in its October 15, 2020 Order, "the types of monetary awards an ALJ may award is limited under § 1324b to back pay front pay, attorney's fees[.]" Ogunrinu v. Law Resources, 13 OCAHO no. 1332h, 17 (2020). Notably, such awards are discretionary. *See* Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 696 (1997) (citing 8 U.S.C. § 1324b(g)(2)(B)). Although damages do not need to be proven with mathematical certainty, there needs to be a reasonable basis for the amount because "[d]amages cannot be awarded on the basis of mere speculation or guesswork." Window Specialists, Inc. v. Forney Enters., Inc., 106 F. Supp. 3d 64, 92 (D.D.C. 2015) (citations omitted).

a. Lost Wages for Legal Research Not Compensable with a Pro Se Litigant

Complainant's request for "lost wages for legal research costs;" and "legal research lost wages" are indistinguishable from attorney's fees. Notwithstanding the fact that Complainant is an attorney, as the Court previously noted "it is well-settled law that a pro se litigant in the federal system is not entitled to claim attorney's fees for representing [herself], and that this is true even when the pro se litigant is [herself] a lawyer." Ogunrinu, 13 OCAHO no. 1332h at 17 (citing Ojeda-Ojeda v. Booth Farms, 9 OCAHO no. 1121, 4 (2006)). Complainant offers no argument or legal support to the contrary, nor does she move for reconsideration of the Court's prior Order. Accordingly, the Court DENIES Complainant's demand for:

- $4,095 in legal research costs (post state of emergency);
- $13,935 in lost wages for legal research pre-state of emergency;
- $2,958 in legal research and parking fees

The Court further GRANTS Respondents' cross-motions for denial of those forms of relief.

b. Compensatory Damages and Administrative Costs Are Not Available as Forms of Relief

Complainant seeks $50,000 in compensatory damages, however § 1324b does not identify compensatory damages as a form of available relief. Breda, 11 OCAHO no. 1225, 5. Moreover, Complainant identifies no facts or case law in support of her demand; Complainant does not, for instance, state in her affidavit what pecuniary or non-pecuniary harm she suffered,

nor does she cite to decisions of this court (or any other) awarding $50,000 for those alleged harms. In short, the demand is not sanctioned by the statute, and not supported by the facts of the case.

Similar to the compensatory damages, incidental (or administrative) costs of litigation are not an approved form of relief under the statute. *See* Breda, 11 OCAHO no. 1225, 4–5 ("Absent any statutory or regulatory authority for an award of costs, each party must be responsible for its own incidental expenses."). *See generally* United States v. Great Earth Cos., Inc., 9 OCAHO no. 1070, 7 (2001); United States v. Zabala Vineyards, 6 OCAHO no. 844, 205, 207 (1996); Touissant v. Tekwood Assocs., Inc., 6 OCAHO no. 892, 784, 808 (1996). *But see* Hamilton v. Recorder, 7 OCAHO no. 978, 925, 935 (1997); Austin v. Jitney Jungle Stores of Am., Inc., 7 OCAHO no. 969, 763, 772 (1997); Lareau v. US Airways, Inc., 7 OCAHO no. 963, 619, 630–31 (1997).

"Unlike the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (b)(1)(A), which provides for the award of fees and other expenses, and unlike Rule 54(d) of the Federal Rules of Civil Procedure, which provides for an award of costs as well as fees," neither the governing statute nor OCAHO's regulations provide for incidental costs or expenses of litigation. Breda, 11 OCAHO no. 1225 at 4 (citing 8 U.S.C. § 1324b, and 28 C.F.R. § 68.52(d)(6)). Accordingly the Court DENIES:

- $50,000 in compensatory damages;
- $1,725 in administrative costs;
- To the extent not addressed previously, the parking fees related to legal research

The Court further GRANTS Respondents' cross-motions for denial of those forms of relief.

c. Complainant's Demand for Back Pay

Complainant seeks $14,075 in back pay. Back pay is a measure of damages which § 1324b explicitly allows; the act provides that the court may order a company found to be in violation to "hire individuals directly and adversely affected, with or without backpay." 8 U.S.C. § 1324b(g)(2)(B)(iii). As the court noted in United States v. Southwest Marine Corporation, although the language of section provides that the court may grant back pay as a form of relief, back pay is the usual remedy in OCAHO cases as well as their analogues in Title VII and violations of the NLRA; applications for back pay should not be denied except in exceptional circumstances. United States v. S.W. Marine Corp., 3 OCAHO no. 429, 29 (1992) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 521 (1975)).

The statute provides that back pay is subject to some limitations, however. Section 1324b(g)(2)(C) articulates the most commonly cited limit, both in OCAHO and in Title VII cases — the back pay earnings are diminished by any "interim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against[.]" 8 U.S.C. § 1324b(g)(2)(C).

When calculating back pay, the ALJ should consider "the appropriate time period, the items to be included in the gross award, and the amounts by which an award may be reduced." Iron Workers Local 455, 7 OCAHO no. 964, 696. While the aggrieved party has a duty to mitigate its damages using a honest, good faith effort, the employer has the burden to prove "whether an employee/discriminatee mitigated damages sufficient to reduce an amount of back pay award[.]" United States v. Laa Marketing Firms, 1 OCAHO no. 141, 950, 974 (1990) (citing Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978)); *accord* Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1134 (D.C. Cir. 1999) (citations omitted).

Notwithstanding Complainant's arguments to the contrary, the sole consideration in determining the appropriate amount of back pay is the aggrieved party's wages lost due to discrimination or retaliation reduced by their interim earnings, adjusted for interest. Complainant's reference to considerations of prior agreements between IER and Respondents, or deterrence, or more generally "compensation," are not helpful in determining what amount of back pay is appropriate. Complainant's motion for summary decision offers no evidence supporting what wages she would have made had she worked on the ITAR project; neither describing them by amount nor length of time worked. Complainant has therefore failed to meet her burden of establishing that there are no material facts in dispute with regard to the back pay calculations, and her motion for a damages award with regard to back pay is DENIED.

d. Respondents' Cross-Motions for Denial of Back Pay

The length of time for which back pay accrues is usually keyed to the length of the job which the complainant was denied. In this case, the ITAR project was announced as having a relatively short duration. Law Resources' asserts in its motion that the maximum length of time that any person worked on the ITAR project was from October 3 to October 12, 2019. Law Resources Mot. Summ. J. 7. It further asserts that the pay rate was $31 per hour, or $46.50 per hour for overtime. Id. The highest paid person working on the ITAR project made $2,208.75. Id. Complainant asserts in her affidavit in support of her opposition to Law Resources' motion that she has a "good faith belief that [she] would have continued to work for both Law Resources and Arnold and Porter if not for the unlawful discriminatory conduct by both companies," Complainant Opp'n Mot Summ. Decision Ex. 1, p. 3, but her beliefs are insufficient to create a triable issue of fact. Complainant cites to no evidence in the record which countenances in the other direction, or otherwise suggests that the ITAR project held the potential for continuation of employment, or the prospect of future employment, with either employer.

The employer bears the burden of demonstrating interim earnings. In this case, Law Resources presents evidence that during the period of time that Complainant would have been working on the ITAR project, she was working at a different employer, Special Counsel. Law Resources Mot. Summ. J. 7. Further Law Resources cites to Complainant's response to Arnold and Porter's discovery admission that she earned more than the highest paid ITAR employee during that time period. Id. Law Resources also cites to Complainant's pay stubs, which also indicate that she worked at Special Counsel, Inc. for the time period 9/24/18 — 11/11/18, earning $31 per hour. Id. at Ex. 6. During the time period 10/1/18-10/14/18, Complainant worked 96.2 hours and her wages were $2,989.20 — more than what the highest paid person

earned on the ITAR project. Complainant presents no material question of fact on the question of her interim earnings exceeding her back pay. Accordingly, Law Resources and Arnold and Porter's motions for summary decision are GRANTED with regard to Complainant's back pay.

e. Complainant's Motion for Front Pay

Turning to the front pay calculations, front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001); Iron Workers Local 455, 7 OCAHO no. 964 at 704 (front pay is appropriate in lieu of reinstatement). As with back pay, front pay is a form of equitable relief. Barbour v. Medatlantic Mgmt. Corp., 952 F. Supp.857, 863 (D.D.C. 1997). "It is necessary only so long as the discriminatee must wait for the next available opening." Ogunrinu, 13 OCAHO no. 1332h at 18 (citing Iron Workers Local 455, 7 OCAHO no. 964 at 704). Front pay is make whole relief; its object is to place the aggrieved party at the position that they would have been but for the discrimination. Barbour v. Merrill, 48 F.3d 1270, 1279 (D.C. Cir. 1995). While some speculation concerning front pay is essential, in that the court is making assumptions about future earnings, an award of front pay cannot be unduly speculative. Peyton v. DiMario, 287 F.3d 1121, 1128–29 (D.C. Cir. 2002) (citing McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1373 (7th Cir. 1992)). Considerations of front pay often involve the nature of the wages made at the job lost due to the discriminatory action, the aggrieved person's age and health, the earnings of a comparable person in the same labor market, the type of job held, and the education and vocational background of the aggrieved person, among other factors. *See, e.g.,* Peyton, 287 F.3d at 1128–30 (wages, comparison of wages with market rate, nature of employment, length of employment, education and vocational background); Gotthard v. Nat'l RR Passenger Corp., 191 F.3d 1148, 1157 (9th Cir. 1999) (age, educational background, health); Downes v. Volkswagen of Am., Inc., 41 F.3d 1132, 1142–43 (7th Cir. 1994) (short duration of work and/or employer's financial difficulties prompting restructuring); Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 871 (5th Cir. 1991) (length of prior employment, permanency of position held, nature of the work, age and physical condition of the employee, possible consolidation of jobs, other factors).

Complainant seeks $80,269.25 in front pay for the period of May 8, 2019 to December 23, 2020. Complainant's Mot. Summ. Decision 32. Similar to her request for back pay, Complainant fails to explain how she arrived at that amount. Complainant has not provided sufficient justification for her entitlement to front pay and her motion is DENIED as it relates to that claim.

f. Respondents' Cross-Motions for Denial of Front Pay

Respondents cross-move for an order denying any form of front pay; they argue principally that front pay is inappropriate in this case because Law Resources' business model is to provide staffing for legal projects of a limited scope and duration, and that Law Resources remains open to hire Respondent for any future vacancy. Law Resources Mot. Summ. J. 29; Arnold & Porter Mot. Summ. Decision 23–24.

In order to determine that front pay is available as a form of relief, the courts often consider whether the relationship between the aggrieved party and their potential or past employer has become so fractious as to make reinstatement unfeasible. In re Charge of Rosita Martinez United State of Am., 1 OCAHO no. 169, 1157 (1990). Upon a review of the pleadings in this case, the Court determines that while reinstatement is a form of relief which the Court may provide, it is not reasonable in this instance. This determination is informed by several factors: first, the motions practice in this matter was acrimonious, even by the rough and tumble standards of parties engaging in zealous advocacy in civil litigation. Complainant at one point accused Respondent Law Resources of engaging in the unauthorized practice of law. Complainant Mot. Summ. Decision 3. This suggests to the Court that the professional relationship between Complainant and Respondents has become severely strained. Second, as the ITAR project concluded several years ago, there is no present vacancy in which to place Complainant. While the parties submissions on this question is less than fully clear, the Court understands from the record that the work of being a contract attorney requires a client (such as Arnold and Porter), a project, some review of Complainant's prior work commitments to determine if she has a conflict with the prospective client, and presumably some basic familiarity with the subject matter of the project. These practical difficulties, as well as Complainant's poor relations with Law Resources and Arnold and Porter, inform the Court's decision that reinstatement is not a viable option.

The Court similarly denies front pay as a form of relief. The difficulties with providing front pay are principally a matter of feasibility and exactitude — it is not clear to the Court that the nature of the work between Law Resources and Arnold and Porter lend to any form of normalized analysis, and therefore the Court would be hamstrung in stating with any level of certainty that any figure it might award would fairly represent the future damage. Separating the Respondents does not help in terms of fairly assessing front pay; the uncontradicted evidence is that Law Resources relies on its clients to supply the projects which its employees staff, and each client presumably comes with their own list of needs and requirements for each project. It would be impossible to know (or estimate with any level of certainty) what amount of time would pass or money would be fairly owing to Complainant between the date of the order and the date that she obtained a similar contract worker position which matched her qualifications and experience. These arguments apply with additional force concerning Arnold and Porter — there is no evidence in the record that the law firm ever directly hires contract attorneys, or that it contracts work out with sufficient regularity to fairly assess future damages. Simply put, the work of a contract attorney is often filled with uncertainty about when the next project will come, whether they will survive the conflicts check, and how long the work will be for. The Court is persuaded that based on this record that Complainant's work is too speculative to award front pay, accordingly the Court GRANTS Respondents' cross-motions for summary decision denying front pay.

g. Injunctive Relief

"If an employer is found upon the preponderance of the evidence to have engaged in an unfair immigration-related employment practice, IRCA mandates that the administrative law judge shall issue a cease and desist order." Iron Workers Local 455, 7 OCAHO no. 964 at 696 (citing 8 U.S.C. § 1324b(g)(2)(A)). Given the Court's previous finding that both Respondents

are liable for citizenship status discrimination, an order for injunctive relief is required. Respondent Law Resources has argued that an injunction is unnecessary because it has previously entered into a settlement agreement with IRC. The Court disagrees — the nature of Respondents' actions, the Court's independent authority to impose injunctive relief, and the Court's prior ruling that there has been a violation of 1324b militate towards the imposition of an injunction.

Complainant's request for injunctive relief is quite broad; she seeks an indefinite order prohibiting Respondents from engaging in any unlawful discrimination. However, the Court's authority is limited to unfair immigration-related employment practices and § 1324b(g)(2)(A) delineates a cease and desist order pertaining to unfair immigration-related employment practices. The Court will therefore GRANT, in part Complainant's motion seeking injunctive relief. The Court ORDERS Respondents to cease and desist its unfair immigration-related employment practices. The Court determines that a one year order is appropriate in this case, and the Court therefore imposes an order directing that both Respondents shall comply with the terms of 8 U.S.C. § 1324b for a period of one year from the issuance of this Order. Respondent Law Resources' Motion for Summary Decision seeking denial of a cease and desist order is DENIED.

h. Civil Penalty

Section 1324b(g)(2)(B)(iv) provides that the Court may issue a civil penalty of between $250 and $2,000 for each person discriminated against for a respondent who has not been previously subject to a fine. "For civil penalties assessed after August 1, 2016, whose associated violations described in paragraph (d) of this section occurred after November 2, 2015, the applicable civil penalty amounts are set forth in 28 CFR [§] 85.5." 28 C.F.R. § 68.52(d)(2). Pursuant to 28 C.F.R. § 85.5, the applicable penalty range depends on the date of the violation and the date of assessment.

Neither 28 C.F.R. § 68.52 nor 28 C.F.R. § 85.5 instruct how to determine the assessment date. *Cf.* United States v. Farias Enters. LLC, 13 OCAHO no. 1338, 7 (2020) (analyzing the ambiguity in assessment dates for 8 U.S.C. § 1324a civil penalties). In Farias, the court determined that the assessment date for § 1324a cases is the date that the complainant serves the notice of intent to fine (NIF) on the respondent. Id. In a § 1324a case, the complainant, the Department of Homeland Security, has already assessed a fine prior to the filing of the OCAHO complaint. Conversely, in a § 1324b case, no fine has been assessed prior to the filing of the OCAHO complaint, or at any point until the court's order on penalties. Accordingly, the undersigned finds that the date of assessment for civil penalties in a § 1324b case is the date of the court's order imposing civil penalties because that is the first date that the court determines that a penalty is appropriate and concretely describes what the penalty will be. *See* Assess, Black's Law Dictionary (11th ed. 2019) ("1. To calculate the amount or rate of (a tax, fine, etc.). 2. To impose (a tax, fine, etc.). 3. To determine the value of (something), esp. for tax purposes. 4. To evaluate the importance, quality, or extent of (someone or something).").

In the case presently before the Court, the violations occurred after November 2, 2015. The date of assessment, which is the date this order was first issued, is June 25, 2021. 28 C.F.R.

§ 85.5, which modifies the civil penalty amount outlined in 8 U.S.C. §1324b(g)(2)(B)(iv) based on inflation, provides the range for the civil penalty. 28 C.F.R. § 68.52(d)(2). The relevant range for the civil penalty in the instant case is $481 to $3,855. 28 C.F.R. § 85.5. The Court determines that a fine of $2,000 for each respondent fairly penalizes the parties for their discriminatory acts, and the Court therefore imposes this fine on Law Resources and Arnold and Porter.

X. CONCLUSIONS OF LAW

1. As a person born in the United States, Ogunrinu is a citizen and therefore a "protected individual" within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. Law Resources and Arnold & Porter Kaye Scholer LLP are entities within the meaning of 8 U.S.C. § 1324b(a)(1).

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

4. Per Rule 56(c) of the Federal Rules of Civil Procedure, a party asserting that a fact is in genuine dispute must support that claim by citing to the particular parts of the material in the record.

5. Per Federal Rule of Civil Procedure 56(e)(2), when a party fails to "properly support an assertion of fact or fails to properly address another party's assertion of fact, as required by Rule 56(c)" the court may "consider the fact undisputed for the purposes of the motion[.]"

6. Absent court order, parties are not obligated to provide initial disclosures as OCAHO's regulations do not require initial disclosures. *See* 28 C.F.R. pt. 68.

7. To state a claim of document abuse under 8 U.S.C. § 1324a(b)(6), an employee must at minimum assert that their purported or actual employer requested that they produce documents to satisfy their I-9 requirements. Jarvis v. AK Steel, 7 OCAHO no. 930, 111, 117 (1997).

8. Section 1324b of the Immigration and Nationality Act prohibits intimidation and retaliation "against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] 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." 8 U.S.C. § 1324b(a)(5).

9. "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and other federal remedial statutes prohibiting employment discrimination." Chellouf v. Inter Am. Univ. of P.R., 12 OCAHO no. 1269, 5 (2016).

10. "Direct evidence is evidence that proves the fact at issue without the aid of any inference or presumption." Breda v. Kindred Braintree Hospital, LLC, 11 OCAHO no. 1225, 17 (2014).

11. In the context of an employment discrimination or retaliation claim, direct evidence is often described as "conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Burgess v. JHM Hotels, LLC, 2010 U.S. Dist. WL 1493129, at n.10 (D.S.C. March 18, 2010).

12. Mere knowledge of the protected basis in connection with the adverse employment action is insufficient to establish a direct proof scheme. Barry v. U.S. Capital Guide Bd., 636 F.Supp. 2d 95, 106 (D.D.C. 2009).

13. In both proof schemes should the moving party establish the prima facie case the traditional burden shifting structure of legitimate non-discriminatory reasons and offers of pretext apply.

14. Federal Rule of Civil Procedure 56(c)(1)(A) requires any party who files a motion for summary decision (a motion for summary judgment in their parlance) based upon facts not in dispute to support each factual assertion by: "[c]iting to the particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

15. At the summary decision phase, parties must assert which facts they believe are not in dispute with citations to the record to support those facts, placing the opposing parties on notice as to the predicate for potentially granting or denying the motion.

16. 8 U.S.C. § 1324b's plain terms include opposition to discrimination; the statute outlaws retaliation "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." 8 U.S.C. § 1324b(a)(5) (emphasis added).

17. Prior OCAHO cases addressing the question have also concluded that § 1324b protects opposition activity. Diarrassouba v. Medallion Fin. Corp., 9 OCAHO no. 1076, 8–9 (2001) (holding "that, if proved, [the r]espondent's alleged termination of [the c]omplainant for opposing the [r]espondent's discriminatory hiring practices would constitute an attempt to interfere with a right or privilege secured under § 1324b"); *see also* United States v. Hotel Martha Wash. Corp., 5 OCAHO no. 786, 533, 537 (1995); Yefremov v. NYC Dep't of Transp., 3 OCAHO no. 562, 1556, 1603–04 (1993); Zu v. Avalon Valley Rehab. Ctr., 14 OCAHO no. 1376, 15 (2020).

18. Public policy also warrants protection of opposition activity; protecting participation activity but not opposition activity would frustrate the purpose of 8 U.S.C. § 1324b. *Cf.* Crawford v. Metro Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 279 (2009) (warning that "[i]f it were clear law that an employee who reported discrimination . . . could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.").

19. "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 [who engage in opposition activity] deters employers from engaging in discriminatory employment practices." Diarrassouba v. Medallion Fin. Corp., 9 OCAHO no. 1076, 9 (2001).

20. Complainant engaged in protected activity through her emailed conversation with Law Resources. She made clear that she opposed the requirement which Law Resources imposed on her to affirm that she was only a citizen of the United States.

21. Under either the common law formulation of agent-principal relations articulated in NLRB v. Browning-Ferris, or under the multi-part test announced in Spirides v. Reinhardt, Complainant has failed to articulate sufficient facts to establish that there is no material question of fact on the joint employer theory, or on the imputation of knowledge between the two Respondents assuming that they were a joint employer. NLRB v. Browning-Ferris, 691 F.2d 1117, 1123 (3d Cir. 1982); Spirides v. Reinhardt, 613 F.2d 826, 813 (D.C. Cir. 1979); Clayton v. District of Columbia, 117 F. Supp. 3d 68, 82–83 (2015) (discussing the Browning-Ferris and Spirides tests for joint employer); EEOC v. Global Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019) (discussing a negligence and failure to correct standard to establish vicarious liability with joint employers in an employment discrimination claim).

22. In the context of articulating a legitimate non-retaliatory reason for the challenged action, the respondent need not prove that their rationale is correct, but they must articulate the rationale in sufficient detail for the complainant to potentially argue that the rationale is a pretext for retaliation. *See* Nurriddin v. Bolden, 40 F. Supp. 3d 104, 117 (D.D.C. 2014), (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000)), *aff'd*, 818 F.3d 751 (D.C. Cir. 2016).

23. Once the respondent provides a legitimate, non retaliatory reason for its decision, "the 'one central inquiry' on summary judgment is 'whether the [complainant] produced sufficient evidence for a reasonable jury to find that the employer's asserted non-[retaliatory] reason was not the actual reason and that the employer intentionally [retaliated] against the [complainant] on a prohibited basis.'" Hamilton v. Geithner, 666 F.3d 1344, 1351 (D.C. Cir. 2012) (citation omitted).

24. A court should consider the totality of circumstances and determine whether a factfinder could infer retaliation based on "(1) the [complainant's] prima facie case; (2) any evidence the [complainant] presents to attack the employer's proffered explanation

for its actions; and (3) any further evidence of [retaliation] that may be available to the [complainant] . . . or any contrary evidence that may be available to the employer." Hamilton v. Geithner, 666 F.3d 1344, 1351 (D.C. Cir. 2012) (citation omitted).

25. A plaintiff may support an inference that the employer's stated reasons were pretextual, and the real reasons were prohibited discrimination or retaliation, by citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group, its inconsistent or dishonest explanations, its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employees in the same protected group as the plaintiff, or other relevant evidence that a jury could reasonably conclude evinces an illicit motive. Walker v. Johnson, 798 F.3d 1085, 1092 (D.C. Cir. 2015) (citation omitted).

26. "[T]he types of monetary awards an ALJ may award is limited under § 1324b to back pay front pay, attorney's fees[.]" Ogunrinu v. Law Resources, 13 OCAHO no. 1332h, 17 (2020).

27. Monetary awards are discretionary. *See* Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 696 (1997) (citing 8 U.S.C. § 1324b(g)(2)(B)).

28. Although damages do not need to be proven with mathematical certainty, there needs to be a reasonable basis for the amount because "[d]amages cannot be awarded on the basis of mere speculation or guesswork." Window Specialists, Inc. v. Forney Enters., Inc., 106 F. Supp. 3d 64, 92 (D.D.C. 2015) (citations omitted).

29. "[I]t is well-settled law that a pro se litigant in the federal system is not entitled to claim attorney's fees for representing [herself], and that this is true even when the pro se litigant is [herself] a lawyer." Ogunrinu v. Law Resources, 13 OCAHO no. 1332h, 17 (2020) (citing Ojeda-Ojeda v. Booth Farms, 9 OCAHO no. 1121, 4 (2006)).

30. 8 U.S.C. § 1324b does not identify compensatory damages as a form of available relief. Breda v. Kindred Braintree Hospital, LLC, 11 OCAHO no. 1225, 5 (2014).

31. Similar to the compensatory damages, incidental costs of litigation are not an approved form of relief under the statute. *See* Breda v. Kindred Braintree Hospital, LLC, 11 OCAHO no. 1225, 4–5 (2014).("Absent any statutory or regulatory authority for an award of costs, each party must be responsible for its own incidental expenses."). *See generally* United States v. Great Earth Cos., Inc., 9 OCAHO no. 1070, 7 (2001); United States v. Zabala Vineyards, 6 OCAHO no. 844, 205, 207 (1996); Touissant v. Tekwood Assocs., Inc., 6 OCAHO no. 892, 784, 808 (1996). *But see* Hamilton v. Recorder, 7 OCAHO no. 978, 925, 935 (1997); Austin v. Jitney Jungle Stores of Am., Inc., 7 OCAHO no. 969, 763, 772 (1997); Lareau v. US Airways, Inc., 7 OCAHO no. 963, 619, 630–31 (1997).

32. "Unlike the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (b)(1)(A), which provides for the award of fees and other expenses, and unlike Rule 54(d) of the Federal

Rules of Civil Procedure, which provides for an award of costs as well as fees," neither the governing statute nor OCAHO's regulations provide for incidental costs or expenses of litigation. Breda v. Kindred Braintree Hospital, LLC, 11 OCAHO no. 1225, 4 (2014). (citing 8 U.S.C. § 1324b, and 28 C.F.R. § 68.52(d)(6)).

33. Back pay is a measure of damages which 8 U.S.C. § 1324b explicitly allows; the act provides that the court may order a company found to be in violation to "hire individuals directly and adversely affected, with or without backpay." 8 U.S.C. § 1324b(g)(2)(B)(iii).

34. As the court noted in United States v. Southwest Marine Corporation, although the language of section provides that the court may grant back pay as a form of relief, back pay is the usual remedy in OCAHO cases as well as their analogues in Title VII and violations of the NLRA; applications for back pay should not be denied except in exceptional circumstances. United States v. S.W. Marine Corp., 3 OCAHO no. 429, 29 (1992) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 521 (1975)).

35. Section 1324b(g)(2)(C) articulates the most commonly cited limit, both in OCAHO and in Title VII cases — the back pay earnings are diminished by any "interim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against[.]" 8 U.S.C. § 1324b(g)(2)(C).

36. When calculating back pay, the ALJ should consider "the appropriate time period, the items to be included in the gross award, and the amounts by which an award may be reduced." Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 696 (1997).

37. While the aggrieved party has a duty to mitigate its damages using a honest, good faith effort, the employer has the burden to prove "whether an employee/discriminatee mitigated damages sufficient to reduce an amount of back pay award[.]" United States v. Laa Marketing Firms, 1 OCAHO no. 141, 950, 974 (1990) (citing Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978)); *accord* Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111, 1134 (D.C. Cir. 1999) (citations omitted).

38. The sole consideration in determining the appropriate amount of back pay is the aggrieved party's wages lost due to discrimination or retaliation reduced by their interim earnings, adjusted for interest.

39. Front pay is "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001); Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 704 (1997) (front pay is appropriate in lieu of reinstatement).

40. As with back pay, front pay is a form of equitable relief. Barbour v. Medatlantic Mgmt. Corp., 952 F. Supp.857, 863 (D.D.C. 1997).

41. Front pay "is necessary only so long as the discriminatee must wait for the next available opening." Ogunrinu v. Law Resources, 13 OCAHO no. 1332h, 18 (2020) (citing Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 704 (1997)).

42. Front pay is make whole relief; its object is to place the aggrieved party at the position that they would have been but for the discrimination. Barbour v. Merrill, 48 F.3d 1270, 1279 (D.C. Cir. 1995).

43. While some speculation concerning front pay is essential, in that the court is making assumptions about future earnings, an award of front pay cannot be unduly speculative. Peyton v. DiMario, 287 F.3d 1121, 1128–29 (D.C. Cir. 2002) (citing McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1373 (7th Cir. 1992)).

44. Considerations of front pay often involve the nature of the wages made at the job lost due to the discriminatory action, the aggrieved person's age and health, the earnings of a comparable person in the same labor market, the type of job held, and the education and vocational background of the aggrieved person, among other factors. *See, e.g.,* Peyton v. DiMario, 287 F.3d 1121, 1128–30 (D.C. Cir. 2002) (wages, comparison of wages with market rate, nature of employment, length of employment, education and vocational background); Gotthard v. Nat'l RR Passenger Corp., 191 F.3d 1148, 1157 (9th Cir. 1999) (age, educational background, health); Downes v. Volkswagen of Am., Inc., 41 F.3d 1132, 1142–43 (7th Cir. 1994) (short duration of work and/or employer's financial difficulties prompting restructuring); Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 871 (5th Cir. 1991) (length of prior employment, permanency of position held, nature of the work, age and physical condition of the employee, possible consolidation of jobs, other factors).

45. In order to determine that front pay is available as a form of relief, the courts often consider whether the relationship between the aggrieved party and their potential or past employer has become so fractious as to make reinstatement unfeasible. In re Charge of Rosita Martinez United State of Am., 1 OCAHO no. 169, 1157 (1990).

46. "If an employer is found upon the preponderance of the evidence to have engaged in an unfair immigration-related employment practice, IRCA mandates that the administrative law judge shall issue a cease and desist order." Iron Workers Local 455 v. Lake Constr. & Dev. Corp., 7 OCAHO no. 964, 632, 696 (1997)) (citing 8 U.S.C. § 1324b(g)(2)(A)).

47. 8 U.S.C. § 1324b(g)(2)(B)(iv) provides that the Court may issue a civil penalty of between $250 and $2,000 for each person discriminated against for a respondent who has not been previously subject to a fine. "For civil penalties assessed after August 1, 2016, whose associated violations described in paragraph (d) of this section occurred

after November 2, 2015, the applicable civil penalty amounts are set forth in 28 CFR [§] 85.5." 28 C.F.R. § 68.52(d)(2).

48. The date of assessment for civil penalties in a 8 U.S.C. § 1324b case is the date the order imposing civil penalties is issued because that is the first date that the Court determines that a penalty is appropriate and concretely describes what the penalty will be.. *See* Assess, Black's Law Dictionary (11th ed. 2019) ("1. To calculate the amount or rate of (a tax, fine, etc.). 2. To impose (a tax, fine, etc.). 3. To determine the value of (something), esp. for tax purposes. 4. To evaluate the importance, quality, or extent of (someone or something).").

XI. CONCLUSION

For the reasons stated above, Complainant's Motion for Summary Decision is GRANTED in part, and DENIED in part. Complainant's Motion for Summary Decision is DENIED as it relates to her claim of retaliation involving both Respondents. Complainant's Motion for Summary Decision regarding her damages is DENIED. Her motion as it relates to her request for injunctive relief is GRANTED, in part, insofar as Respondents are ORDERED to cease and desist in unfair immigration-related employment practices violative of 8 U.S.C. § 1324b. Pursuant to the order of liability, Respondents are each assessed a fine of $2,000.

Complainant's motion for judicial notice is DENIED. Additionally, Law Resources' informal request to strike several of Complainant's exhibits is DENIED.

Arnold and Porter's motion for summary decision is GRANTED in its entirety.

Law Resources' motion for summary decision is GRANTED as it relates to the retaliation claim and document abuse claim. Law Resources' motion for summary decision is GRANTED in part as it relates to damages but DENIED as it relates to injunctive relief.

SO ORDERED.

_____

John A. Henderson
Administrative Law Judge

DATE: July 21, 2021

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.