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

September 30, 2004

GUY SANTIGLIA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 03B00008
SUN MICROSYSTEMS, INC., Respondent.	)	

FINAL DECISION AND ORDER DENYING SANTIGLIA'S MOTION FOR SUMMARY DECISION AND GRANTING SUN MICROSYSTEMS, INC.'S MOTION FOR SUMMARY DECISION

I. Procedural History

Guy Santiglia filed a pro se complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleged that Sun Microsystems, Inc. (Sun or SMI) discriminated against him in violation of the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b. Sun hired Santiglia, a United States citizen, to start on July 16, 2001 as a Systems Technologist in its IT Operations Department. Approximately three and a half months later Sun implemented a nationwide reduction in force (RIF) in the course of which Santiglia's job was eliminated. His complaint alleged that he was unfairly selected for the RIF based on his citizenship and national origin[1] and that after the RIF Sun retaliated against him by refusing to rehire him.

Discovery and motion practice have been protracted and contentious, but are now concluded. Presently pending are cross motions for summary decision. Each party responded to the other's motion and both motions are ripe for decision.

II. Materials Considered

For purposes of reviewing the motions, I have considered the record as a whole, including the pleadings, affidavits and other materials of record, as well as the responses to discovery requests to the extent that they have been made a part of the record. Because both parties captioned the

[1] The allegations respecting national origin discrimination were subsequently dismissed.

attachments to their motions alphabetically, those attachments are more specifically identified here for purposes of clarity by using a prefix consisting of the abbreviation either for Complainant's Exhibit (CX) or for Respondent's Exhibit (RX) to accompany their alphabetical designations. Thus CXA is Santiglia's attachment A, while RXA is Sun's attachment A. The attachments accompanying Santiglia's motion consist of CXA) a chart captioned "Sun IT Operations Client Services Bay Area Demographic Analysis: Pre and Post RIF" and CXB) an e-mail dated October 1, 2001 from Frank Tawil addressed to the "itops-eba-group."

Fourteen exhibits accompanied Sun's motion. These are: RXA) a manual dated October 4, 2001 captioned "Managing in Times of Change" consisting of 251 unnumbered pages; RXB) pages 198-212 of a transcript of the testimony of Fred Peters dated December 16, 2002; RXC) the affidavit of Fred Peters dated February 6, 2004; RXD) the affidavit of Fred Peters dated June 8, 2004; RXE) the affidavit of Brett Kanazawa dated June 8, 2004; RXF) Santiglia's responses to Sun's Requests for Admission dated June 14, 2004; RXG) a Workforce Reduction Decision Form for Guy Santiglia dated October 23, 2001; RXH) pages 2-10 of Santiglia's OCAHO complaint; RXI) a fax transmission dated January 7, 2003 and a cover letter together with the "Answer and Affirmative Defenses of Respondent Sun Microsystems, Inc.;" RXJ) a chart dated October, 2001 captioned "Roster of Employees Reporting to Fred Peters;" RXK) 12 pages of materials pertaining to Jerry Wang, including an I-9 Form, a copy of his passport, a Job Offer Form, an Application For Employment and a resume; RXL) 20 pages of materials pertaining to Clarito Duque, including an I-9 Form, copies of his Driver's License and Social Security card, a Job Offer Form, an Application For Employment, a resume, various performance reviews and a Termination Certificate; RXM) 37 pages of materials pertaining to Miriam Peterson, including an I-9 Form, a copy of her passport, a Job Offer Form, an Application For Employment, a resume, a RIF letter dated October 30, 2001, a performance review, a Job Offer Form dated April 30, 2002, a personal data form, an Application For Employment, a resume, a RIF letter for November 12, 2003, a Job Offer Form dated February 19, 2004, an Application For Employment dated February 20, 2004 and a resume; and RXN) 14 pages of materials pertaining to Susarla Suryanarayana, including an I-9 Form, a copy of a permanent resident card, an Application For Employment dated July 23, 2001 and a resume.

Each party responded to the other's motion[2] and each attached exhibits both sets of which again identified the attachments alphabetically starting with A; the documents are here redesignated for clarity's sake as Complainant's second exhibits (CX2) starting with CX2A and so forth, and Respondent's second exhibits (RX2) starting with RX2A. Complainant's attachments in response to Sun's motion, now identified as CX2A-CX2F, are: CX2A) the undated affidavit of Joan Hjerpe; CX2B) the undated affidavit of Brett Kanazawa; CX2C) the affidavit of Fred Peters dated June 8, 2004 (same as RXD); CX2D) the affidavit of Fred Peters dated July 22, 2004 (same

[2] Santiglia filed what is captioned as "Objection to Sun's Motion for Summary Decision." It is treated as a response to Sun's motion.

as RX2A); CX2E) four pages dated October 5, 2001 captioned "Guidelines for Filling Out Forms"; CX2F) an e-mail response from Heidi Wilson dated March 31, 2002 and an e-mail to Heidi Wilson dated March 15, 2002, evidently from Santiglia.

Sun's exhibits in response to Santiglia's motion are RX2A) the affidavit of Fred Peters dated July 22, 2004 (same as CX2D); RX2B) a computer printout pertaining to Raghavaiah Karumanchi; RX2C) three subparts here designated as RX2C(1) an Offer of Employment letter from Sun to Andrey N. Bashkin dated July 16, 2001, RX2C(2) a Form I-129 Petition for Immigrant Worker for Andrey N. Bashkin and RX2C(3) a computer printout pertaining to Andrey Bashkin; RXD2) the affidavit of Brett Kanazawa dated July 26, 2004.

III. Background Information Shown by Affidavits, Exhibits or Other Evidence

For purposes of reviewing the motions I accept as true unrebutted facts which are established by affidavit or by documentary evidence. However, any factual allegations made in the parties' motions or memoranda which are not supported by affidavits or documents are not evidence, and are not accepted as such. *United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996).

Sun is a multinational corporation which reported assets in excess of 12 billion dollars for the quarterly period ending on December 28, 2003 (Exhibit E to Santiglia's Reply to Sun's Response to Complainant's Second Motion to Compel Discovery). It describes itself as being a leading world-wide provider of products, services and support solutions for building and maintaining network computing environments (Exhibit 5 of the Exhibits to Sun's Third Response to First Set of Interrogatories and Production Requests).

Santiglia is a United States citizen who was hired by Area Support Manager (ASM) Fred Peters to be a Systems Technologist-2 starting on July 16, 2001.[3] On or about November 1, 2001 Sun conducted a RIF in which it laid off about 9 percent of its domestic workforce (Sun's Response to First Interrogatories, Attachment C to Santiglia's First Motion to Compel). Prior to the RIF, Sun had 26,000 employees in the United States; by June, 2002 it had 23,381 (*Id.*). Sun laid Santiglia off, along with a number of other technical support workers, as part of the RIF.

[3] Sun's response to Santiglia's motion inexplicably states, contrary to all the record evidence, that Santiglia started on August 6, 2001. This assertion is not supported by evidence and accordingly does not create a factual issue. Santiglia disputed the erroneous statement by filing a "Notice of Perjury Committed by Sun" with an attachment confirming, as the record reflects, that he started on July 16, 2001. The word "perjury" refers to the willful giving of false testimony under oath. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY, 1994. It has no application to unsworn allegations in a brief or memorandum.

To prepare for the RIF, materials were furnished to the managers by a private consulting company Sun retained to assist with the RIF logistics (Sun's Consolidated Response to Court's March 16, 2004 Order Concerning Complainant's First and Second Set of Interrogatories and Second Request for Documents, hereinafter "Sun's Consolidated Response"). These materials included power point presentations, FAQs (frequently asked questions) accompanying those presentations, a model Workforce Reduction Decision Form, and certain updates that appeared on Sun's internal website during October, 2001 (*Id.*). All the managers attended a four-hour training class on how to administer the layoff, the criteria to be applied, and how to handle matters on the day of the layoff (RXB at 204).

The RIF materials are captioned "Managing in Times of Change" (RXA). The process described called for each of the decisionmakers to work with a partner from Human Resources (HR) to complete a Workforce Reduction Decision Form for each employee he or she selected to be laid off. The manual listed four areas of overall consideration: ongoing business requirements of affected organizations, employee skills and experience to meet those business requirements, documented performance, and other criteria as required by local laws (RXA). (The fourth may apply to countries other than the United States.) The Workforce Reduction Decision Form itself identified four criteria on the basis of which employees could be assessed: Technical Skills, Interpersonal Skills, Experience and Performance (*Id.*).

Fred Peters was the manager of one of 13 technical support teams providing client services in the IT Operations Department in the Bay Area (CXA).[4] The responsibilities of his group included providing internal support for computer users on the Santa Clara campus. (RXB at 198). The roster of employees reporting to Peters in October of 2001 lists 26[5] Systems Technologists at grade levels varying from Systems Technologist-1 to Systems Technologist-4 (RXJ). Systems Technologist-1 was the most junior grade (Exhibit H with Sun's Motion to Dismiss Amended Charge and Motion to Restrict Original Complaint to Citizenship-Based Discrimination). According to an investigation by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Peters' work group at that point consisted of 22 United States citizens, three H-1B visa holders, and one registered alien (OSC's March 15, 2004 response to Order of Inquiry).

Peters said that he was told before the RIF that he needed to lay off 16.5 percent of his work group (RXB at 205-06). That actually came to "four point something" people, but he ended up having to lay off only four (RXB at 206). The IT Operations Department managers in the

[4] Two other managers headed groups providing administrative or infrastructure support rather than daily client services support for customers (RX2D).

[5] Peters said that in August, 2001 he had 27 in his group (RXB at 200). It is unclear if someone left prior to the RIF. The discrepancy is otherwise unexplained.

Bay Area did not consult each other about their respective RIF decisions; Peters said he made the decisions about the group he managed based on his own evaluations (Sun's response to Second Set of Interrogatories, Attachment E to Santiglia's Second Motion to Compel). He affirmed that he was the person who made the decision to hire Santiglia, and he was also the person who made the decision to include him in the RIF (RXC, RXD). No one else influenced Peters' decisions about which four people to select from his group (RXD).

The first thing Peters did in making his selections was to eliminate from the layoff pool the people he considered integral to the organization, the ones that had the most knowledge (RXB at 204-05). Then he eliminated the people he knew were good producers who could work independently and were guaranteeing the success of the group. That eliminated as candidates somewhere between a half and two thirds of his group. Then, among the rest still in the pool, he considered how they had performed, how much knowledge they had, and how long they had been there (*Id*. at 207). One of the things Peters did to assess the performance of the people working under his supervision was to review the service tickets (work orders) each had completed (RXD). That was one of the criteria he used (*Id*.).[6] Peters said he did not consider the citizenship or immigration status of the employees (RXB at 206-07). After the RIF Peters' group consisted of 18 United States citizens and four noncitizens (OSC's response March 15, 2004 to Order of Inquiry).

Brett Kanazawa was the HR support person for the Bay Area IT Operations Department during the RIF. He also assisted with the RIF training (CX2B). Kanazawa got advice from the legal department about how to word the Workforce Reduction Decision Forms, but not about the selections themselves (RXD). After Peters made the selections for his group he gave verbal feedback to Kanazawa about who would be RIFd and why (RXD), but Kanazawa did not influence or change Peters' decisions (RXE). Frank Tawil, the Senior Manager for Bay Area Campus Support (Exhibit 7 with Attachment L to Santiglia's Second Motion to Compel), approved Peters' decisions (CX2B). Kanazawa worked with the legal department to be sure the Workforce Reduction Decision Forms included all of the key points. After the forms were completed HR forwarded them to the legal department for final approval. Once the legal department approved the Workforce Reduction Decision Forms the respective supervisors were informed and they in turn informed the employees whose jobs had been eliminated (CX2B). It does not appear that copies of the forms were provided to the laid off employees or that they

[6] Shortly after the RIF, Sun was asked as part of an investigation by the Office of Federal Contract Compliance to document the service ticket closure rates and quality levels during Santiglia's tenure (Sun's Response to Complainant's May 14, 2004 Interrogatories). Peters helped to prepare charts for that agency which were subsequently produced in response to Santiglia's Second Document Requests as Exhibit 8A (ServiceDesk Tickets Closed April 2001 to October 2001 Santa Clara Campus non-iPlanet) and Exhibit 8B (Summary of ServiceDesk Customer Feedback July 2001 to October 2001 Employees Reporting to Fred Peters).

were told the specific reasons for their selection.[7] The attorneys who assisted with the RIF were Ted Borromeo, Sun's Deputy General Counsel, and Lori Middlehurst, Senior Attorney (Sun Microsystem's Response to Complainant's May 14, 2004 Interrogatories).

Sun initially produced copies of the four Workforce Reduction Decision Forms for Peters' group in response to Santiglia's Second Document Requests (Exhibits 4A, 4B, 4C and 4D with Attachment L to Santiglia's Second Motion to Compel). All but Santiglia's (Exhibit 4D) were redacted. In an Order Granting in Part and Denying in Part Santiglia's Second Motion to Compel, Sun was directed to produce unredacted forms. It did so (Exhibits 11-14 with Sun's Consolidated Response), but the Workforce Reduction Decision Forms produced for the other three employees were substantially different from the ones that Sun had produced earlier for the same people. However, Santiglia's form (RXG) was the same in the later as in the earlier version. It contained no entries under the categories "Technical Skills" or "Interpersonal Skills." Under "Experience" it stated,

> Guy has a relatively minimal level of knowledge regarding Sun's infrastructure environment and systems administration compared with other employees at his same grade level. He is still on a "learning curve" regarding our internal processes and procedures. Therefore, he is not at a point yet where he can perform a variety of responsibilities relating to systems administration.

Under "Performance" it stated,

> Guy's current performance level is relatively weak compared to the expectations of his position. He has been involved in a few projects but has not demonstrated the ability to share "lessons learned" from those experiences to other members of the group. This "transfer of knowledge" is a key expectation for someone at his level. Additionally, his overall resourcefulness could use some improvement. There are times when he doesn't seem to know where to go for information or which questions to ask. Because of this, his current contribution is relatively minimal compared to others at his same grade level.

[7] Sun's motion asserted without evidentiary support that Santiglia's Workforce Reduction Decision Form was given to him at the time of the RIF. Santiglia's reply asserted, again without evidentiary support, that the statement is untrue and that only he obtained the form by making a FOIA request to EEOC. Because neither party presented evidence on the point, no factual issue is presented.

No one was hired into Peters' group after the 2001 RIF (RXB at 208). In fact three more people were laid off the next time around (*Id*. at 209). There was very little hiring of Systems Technologists done in other components in the Bay Area during the period either. Three Systems Technologists were hired in the area between the date of the 2001 RIF and the filing of the complaint, Jerry Wang, Clarito Duque, and Miriam Peterson. Each is a citizen of the United States. Wang is a former Sun employee who was hired as an Systems Technologist-4 (Sun's Consolidated Response). His Job Offer Form is dated December 3, 2001 and reflects that the hiring manager was Hanumantha Neti (RXK). Duque was hired as an Systems Technologist-1 and was RIFd in November of 2002 (Sun's Consolidated Response). His Job Offer Form is dated December 13, 2001 and the hiring manager was Ralph Miller (RXL). Peterson, who had been RIFd in November 2001, was rehired on May 6, 2002 and RIFd again in November, 2003 (Sun's Consolidated Response). The relevant hiring manager was David Emberson (RXM).

Santiglia filed a timely charge with the OSC on or about April 9, 2002 (Attachment to complaint). The OSC sent him a letter dated August 16, 2002 notifying him of his right to file a complaint (*Id*.). Santiglia filed his OCAHO complaint on November 17, 2002.

IV. Standards Applicable to the Motions

A. Standards for Summary Decision

Rules applicable to OCAHO proceedings[8] provide that summary decision on all or part of a complaint may issue only if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the party is entitled to summary decision. 28 C.F.R. § 68.38(c). Only facts that might affect the outcome of the proceedings are deemed material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue, all facts and reasonable inferences therefrom are to be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).[9] Doubts

[8] Rules of Practice and Procedure, 28 C.F.R. Part 68 (2003).

[9] 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 been 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.

are resolved in favor of the party opposing summary decision. *Id*.

The filing of cross motions does not necessarily mean that summary disposition is appropriate. Each motion must be considered on its own merits. *William W. Schwartzer, Alan Hirsch and David J. Barrans, The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (1992). The party seeking a summary disposition bears the initial burden of demonstrating an absence of a material factual issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, when the burden of establishing the issue at trial would be on the nonmovant, the moving party may prevail merely by pointing out the absence of evidence supporting the nonmovant's case. *Bendig v. Conoco, Inc.*, 9 OCAHO no. 1077, 5 (2001). OCAHO case law is in accord that a failure of proof on any essential element upon which the nonmoving party bears the burden of proof necessarily renders all other facts immaterial. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 767 (2000), *petition for review denied*, No. 00-2052, 2001 WL 114717 (7th Cir. Feb. 9, 2001), *cert. denied*, 122 S.Ct. 89 (2001), *reh'g denied*, 122 S.Ct. 1130 (2002).

OCAHO rules provide that evidence to support or resist a summary decision must be presented through means designed to ensure its reliability. Affidavits must set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557 and should show affirmatively that the affiant is competent to testify as to the matters stated therein. 28 C.F.R. § 68.38(b). On issues where the nonmoving party bears the ultimate burden of proof, he must present definite, competent evidence to rebut the opposing party's motion. *Anderson*, 477 U.S. at 256-57. Evidence which is merely colorable or not significantly probative will not prevent a summary decision. *Id*. at 249-50.

B. Relative Burdens of Proof

The familiar burden shifting analysis in an employment discrimination case is that established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate some legitimate, nondiscriminatory reason for the challenged employment action; and third, if the defendant does so, the inference of discrimination raised by the prima facie case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's proffered reason is false and that the defendant intentionally discriminated against the plaintiff. *See generally*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

A prima facie discharge case under the traditional formulation requires a showing that the plaintiff is a member of a protected class, was qualified for the position held, was discharged, and was replaced by a person not in the plaintiff's protected class. *See, e.g., Jones v. Los Angeles Cmty. Coll. Dist.*, 702 F.2d 203, 205 (9th Cir. 1983). The failure to prove replacement, however,

is not fatal to the claim where the discharge is the result of a RIF. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). An employee terminated in a RIF may establish the fourth element of a prima facie case by a showing that other less qualified employees not in his protected group were more favorably treated, *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1994), or by any other circumstantial, statistical or direct evidence giving rise to an inference of discrimination. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

For purposes of the *McDonnell Douglas* analysis, a reduction in force is a legitimate nondiscriminatory reason for laying off or terminating an employee. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000), *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994). Once the employer responds to the prima facie case with support for a facially valid reason for the employment decision, any presumption created by the prima facie case drops out of the picture. *Wallis*, 26 F.3d at 889. The burden then reverts to the employee to discredit the employer's reasons by presenting sufficient evidence to permit a rational fact finder to find that the employer's explanation is pretextual. *Id*. at 890-92. The complainant's evidence must be "both specific and substantial" to overcome an employer's legitimate reasons and to create a triable issue. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002) (*citing cases*). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (*citation omitted*).

The Ninth Circuit, in which this case arises, recognizes the so-called "same actor" presumption, which holds that when the same person who was responsible for hiring an individual then fires that new employee within a short period of time, a strong inference arises that there was no discriminatory motive. *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996); *accord*, *Coleman*, 232 F.3d at 1286. *See also*, *Paul D. Seyferth, A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 Lab.Law 251, 263 (Fall, 1999) ("plaintiff will be 'hard pressed' to raise a genuine issue of material fact if the same person who hired plaintiff is the same person who fired, or took adverse action against the plaintiff").

In addition to prohibiting discrimination, § 1324b also prohibits retaliation against an individual for the purpose of interfering with protected rights or because the individual filed a charge or participated in a proceeding under the section. The triparte allocation of the burden of proof set out in the *McDonnell Douglas* framework is applicable as well to claims of retaliation. *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1065-66 (9th Cir. 2004); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002); *Fakunmoju v. Claims Admin. Corp.*, 4 OCAHO no. 624, 308, 323 (1994); *Yefremov v. NYC Dep't of Transp.*, 3 OCAHO no. 562, 1556, 1603 (1993). A prima facie case of retaliation is established by a showing that 1) the employee engaged in some conduct or activity which comes within the protection of the statute, 2) the employee suffered an adverse employment decision, and 3) there is a causal link between the protected activity and the adverse employment decision. *Nidds*, 113 F.3d at 919.

V. Santiglia's Motion for Summary Decision

Because Santiglia is the party bearing the ultimate burden of proof, his motion is considered first.

A. The Motion

Santiglia's Motion asserts that Sun had a "discriminatory preference for non-immigrant workers[10] in the 2001 RIF," which caused him and others to lose their jobs. He states that the reasons Sun provided for its decisions are false and changed over time, that Sun made false and misleading statements to the Court, and that H-1B employees were immunized from the RIF. He argues further that there is no documentation to support the reasons given in his Workforce Reduction Decision Form and that Sun has no credibility with respect to those reasons.

The motion contains certain charts Santiglia referred to as the "RIF Statistics," one of which compares the tenure at Sun of the four Systems Technologists laid off from Peters' group to three "non-immigrants" who were retained in the group. Similar comparisons were included for some, but not all, of the other 12 technical support work groups in the Bay Area. Charts were included for the groups managed by William Marxmiller, Gholam Adibi, Robert Gagen, Junko Taylor and Richard Pecoraro comparing the tenure at Sun for certain "non-immigrants" retained in those managers' work groups to the Sun tenure of the employees laid off from the same groups. An aggregate chart purports to show that the selected "non-immigrants" retained averaged 308 days of employment at Sun while the "U.S. Workers[11] Terminated" averaged 1045 days tenure at Sun.

Santiglia also pointed to discrepancies between three of the redacted Workforce Reduction Decision Forms produced in response to his initial document requests and the unredacted Workforce Reduction Decision Forms produced subsequently, saying that Sun had no credibility because of those discrepancies. Santiglia urged as well that Sun lacked credibility because it withheld information in discovery, pointing out that although 13 work teams were referred to in the report Kanazawa made to the Office of Federal Contract Compliance (CXA), 16 managers had been identified by name in a spreadsheet prepared by Manuel Quiogue and produced earlier (Exhibit 2B with Attachment L to Santiglia's Second Motion to Compel).

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[10] It appears from the context that Santiglia uses the term "non-immigrant workers" to refer to H-1B visa holders.

[11] As has been repeatedly explained in the course of this case, the term "U.S. worker" is not a synonym for U. S. citizen. While the term includes United States citizens, it also encompasses asylees, refugees, lawful permanent residents and lawful temporary residents all of whom are authorized for unrestricted employment in the United States. See 8 C.F.R. §§ 655.715, 656.3.

Santiglia contended further that he had no documented performance deficiencies. He tendered an e-mail Tawil received from a customer (CXB) to show that, contrary to the statements in his Workforce Reduction Decision Form, he was an outstanding employee. The e-mail states,

> Fred/Frank: I want to take a quick minute this morning to express my sincere gratitude and recognize the exemplary efforts of one of your team members. For the past 4 days, including both Saturday and Sunday, Guy Santiglia has gone way beyond the call of duty to help set up a Santa Clara lab facility for Vignette training that starts today. Guy has been cooperative, professional, and extremely generous with his time under difficult circumstances to get things up and running for over a dozen Sun engineers that will attend this important one-week course. I hope you will recognize his extra efforts as well in some sort of appropriate manner.

Santiglia said that contrary to his Workforce Reduction Decision Form he did have the ability to transfer knowledge to his group and that he had more Sun certifications than the three retained H-B1 Systems Technologists. He said Raghavaiah Karumanchi had the least seniority of any employee in Peters' group and that Karumanchi's university degree was inferior to his own. He asserted in conclusion, as he has throughout this proceeding, that Sun abused the H-1B visa process.

B. Sun's Response

Sun responded stating that Santiglia failed to establish a prima facie case. It said that whatever differences there were between some of the draft Workforce Reduction Decision Forms it produced first and the final versions of those forms it produced later, no discrepancies existed with respect to Santiglia's own form. Sun also stated that Santiglia's "statistics" were inherently incredible and incomplete, and that they lacked foundation, context or relevance because company seniority was never the determining factor for the RIF and Sun never said that it was. Finally, Sun said that no one was hired in Peters' group after the RIF.

Sun pointed to the Affidavits of Joan Hjerpe and Brett Kanazawa to explain the discrepancies in the two sets of Workforce Reduction Decision Forms, which it characterized as the result of a clerical error. The Hjerpe affidavit (CX2A) states that the affiant is a paralegal for Sun and was asked last year for copies of Peters' Workforce Reduction Decision Forms. She said she reviewed the records kept in the legal department and believed them to be the right ones. She redacted the names and Sun IDs and sent the forms to outside counsel. She did not realize at the time that they were not the final versions approved by the legal department. The ones Kanazawa had in HR were the final ones and the earlier drafts from the legal department were produced in error. She did not realize the ones in that department were not the finals until later when she compared them to the ones Kanazawa had. The Kanazawa affidavit (CX2B) states that

when he was asked to produce the unredacted Workforce Reduction Decision Forms for Peters' group he sent the forms that were kept in HR. He compared those forms to the redacted ones that had been submitted earlier, and verified that the latter were drafts done before the legal department's review. Peters also affirmed that the second production reflected the final forms and that the earlier production consisted of preliminary drafts (Exhibit 2 with Sun's Response to Complainant's Motion Requesting Review of New Evidence and Request for Reconsideration of Court's Previous Order Compelling Discovery). Sun points out that no contrary evidence or affidavits were presented so there were no factual disputes respecting the forms.

Sun also pointed to Kanazawa's affidavit of July 22, 2004 (RX2D) which states that any apparent discrepancy between the chart he prepared for the Office of Federal Contract Compliance (CXA) and the "snap shot" spreadsheet prepared by Manuel Quiogue resulted because Quiogue had included three managers who were not included on Kanazawa's chart: William Prouty, Earl Sanchez and Eric Corbin. The first two, Prouty and Sanchez, worked in administration, budget and logistics, not technical support, so Kanazawa did not include them on his RIF chart because they were not part of "the ITOPS world in which Santiglia worked." The third was omitted because he was a supervisor reporting to Richard Pecoraro, one of the listed managers, and his numbers were thus included in those of Pecoraro's team. Sun said that in any event the way the managers were listed in either of those charts had no relation to Santiglia and no bearing on Peters' selection of him for the RIF and consequently did not create a material factual issue.

C. Discussion

1. Selection of Santilglia for the RIF

In order to prevail on his motion for summary decision, Santiglia, as the complainant, must carry the ultimate burden of showing that his United States citizenship actually played a role in the decisionmaking process and that it had a determinative influence on the outcome. *Cf. Pottenger v. Potlatch Corp*., 329 F.3d 740, 745 (9th Cir. 2003) (*citations omitted*). Such a showing requires competent evidence. Santiglia's motion is a patchwork of argument, conclusions and unsupported factual allegations. Thus, he did not carry his ultimate burden. Furthermore, he did not address the question of a prima facie case. In reviewing the motion, I construe the facts and draw reasonable inferences, as I must, in favor of Sun as the nonmoving party.

The initial burden of proof required to show a prima facie case is not an onerous one. *Villiarimo*, 281 F.3d at 1062 (degree of proof for prima facie case "does not even need to rise to the level of a preponderance of the evidence" (*quoting Wallis*, 26 F.3d at 889). Nevertheless, Santiglia's motion made no attempt to articulate how he satisfied that limited burden, even given the minimal task of doing so: that a burden is minimal does not mean it is nonexistent. *See United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980).

Notwithstanding the failure of Santiglia's motion to address the question, the record establishes

the first three elements as undisputed: 1) as a United States citizen Santiglia is a member of a protected class, 2) he was qualified for his job, and 3) he was laid off in a RIF. Although all that is required in addition is some evidence which "suggests" that the decision was based on a discriminatory criterion, *Diaz v. AT&T*, 752 F.2d 1356, 1361 (9th Cir. 1985), Santiglia did not present such evidence. He faces an additional headwind, moreover, in the form of the "same actor" inference.

Sun's response mischaracterizes the same actor inference as a presumption of non-bias arising "when the alleged discriminator has the same status as the alleged victim." The critical factor for the same actor test is not, however, whether the decisionmaker has the same protected status; it is the fact that, as the term suggests, the person who terminated the plaintiff is the very same actor who hired him shortly before that. *See Bradley*, 104 F.3d at 270-71. Here, Peters is the same actor who made the decision to hire Santiglia three and a half months before selecting him for layoff. Whether the "same actor" formulation is treated as an inference, a presumption or an evidentiary rule, the doctrine operates to preclude an inference that Peters hired Santiglia and then somehow developed an aversion to United States citizens within the intervening three and a half months. Santiglia pointed to no meaningful evidence suggesting that Peters harbored or developed a discriminatory animus toward him because he was a United States citizen or that Peters selected him for layoff under circumstances giving rise to an inference of unlawful discrimination. *Burdine,* 450 U.S. at 253-56.

Santiglia seeks to buttress his claim that Sun had a "discriminatory preference for non-immigrant workers" with tables set out in his motion consisting of charts purporting to compare the average number of days of employment for selected "non-immigrant workers" retained in the Bay Area IT Operations Department to the number of days of employment for selected "U.S. workers" who were laid off. The charts amount to no more than argument and as Sun correctly points out they lack both probative value and foundation.

First, the charts lack significance because company seniority was not a determinative factor in the RIF. Santiglia argues that his charts show that "seniority criteria did not apply to the non-U.S. workers at Sun." So they do. But the record reflects that Sun did not apply "seniority criteria" to the "U.S. workers" either; Peters never suggested that seniority operated as the decisive factor for anyone. Peters' testimony did make a reference to tenure in response to a question about why the RIF decisions were so hard:

> Because you're comparing a number of people, and some of them with very short histories with you, and you don't know a year or two down the line how they're going to turn out. The only thing you know is their performance right at that moment and what their probable performance is going to be based on what you know about them. (RXB at 205).

It is clear that performance, not tenure, was Peters' principal consideration. He said he initially eliminated about two thirds of his group as candidates based on their unique knowledge or on their performance as independent producers. With respect to the remaining third, he looked at "how well the rest of the people had performed, how much knowledge they knew, how long they had been there, those types of criteria is what was applied" (RXB at 207). Tenure was the last thing he mentioned, not the first, and it was only mentioned as an afterthought with respect to the final third of the group. Peters also said he made his judgments based on his observations of the performance of the employees under his supervision and his review of the service tickets completed by each. Santiglia's charts nevertheless take no account of performance, knowledge or other variables. An analysis which fails to account for the variables actually considered can have little or no persuasive value.

Santiglia fails in any event to lay a foundation for the charts and they do not meet minimal evidentiary standards. He did not disclose who prepared them, how it was determined which groups to include or exclude or what validity the charts could have in light of the small numbers involved. Charts were included, moreover, for only half the technical support work groups in the Bay Area. They present only selected portions of the RIF data. The charts give no information about the actual size of the work groups or how many of the other employees retained in those groups were also United States citizens. The chart for Peters' group, for example, compares the alleged length of Sun service of the four employees laid off with the length of Sun service of three H-1B employees in the group who were retained. But the roster of employees reporting to Peters in October of 2001 (RXJ) lists 26 Systems Technologists, not seven. Santiglia's chart wholly ignores 19 other Systems Technologists who were retained, 18 of whom were also United States citizens. Any conclusions as to the "average" length of service of employees retained in Peters' group are meaningless where only three of the employees retained have been included in the chart.

None of Santiglia's charts even purports to reflect the length of any employee's service in the actual job at issue in this case. Two of the individuals laid off from Peters' group are shown in Santiglia's chart as having 4694 and 2709 days of Sun service respectively. But examination of the record reflects that both these employees started in wholly different job classifications at Sun and only later worked up to the technical job of Systems Technologist. One started in Communications as an Assistant and thereafter became a Communications Specialist before becoming a Systems Tech (Exhibit 4C with Attachment L to Santiglia's Second Motion to Compel). That individual in fact had less than a year's experience as a Systems Technologist (*Id*.). Peters estimated that this person had been in his group for about six months prior to the RIF (RX2A). The other individual started as a General Clerk, later becoming a Traffic Clerk, a Traffic Coordinator, a Production Planner, a Customer Service Representative and a Systems Support Specialist before becoming a Systems Technologist (Exhibit 4A with Attachment L to Santiglia's Second Motion to Compel, RX2A). The fourth laid off employee, like Santiglia, had about 3-4 months in the particular job (Exhibit 4B with Attachment L to Santiglia's Second Motion to Compel, RX2A).

In this individual disparate treatment case the focus is on how a particular individual was treated and why. Overall gross statistics combining small numbers of decisions made by different supervisors of employees in different work groups in different geographical locations with different assignments have little or no bearing on the question of a particular supervisor's individual intent when it comes to the dismissal of a specific individual. The usefulness of numerical analyses depends upon the relevance of the numbers to the specific decision affecting the individual plaintiff. *Coleman*, 232 F.3d at 1283, *citing Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 462 (9th Cir. 1987). *See Aragon*, 292 F.3d at 663. Santiglia's charts have no demonstrated relevance to Peters' selection of him for the RIF and thus cannot assist him either in creating an inference of discrimination or in establishing pretext. Even had Santiglia shown that the RIF had a disparate impact on "U.S. workers," that would not lend any weight to Santiglia's claims because the issue in this case is not whether "U.S. workers" were selected for layoff more frequently than H-1B visa holders, it is whether Sun intentionally discriminated against Santiglia on the basis of his United States citizenship. The disparate impact theory is not cognizable in our jurisprudence. *Bendig*, 9 OCAHO no. 1077 at 25, *Yefremov*, 3 OCAHO no. 562 at 1580; *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1664 (1993).

For purposes of this motion I nevertheless take notice that the record reflects that Santiglia was selected for layoff while similarly situated noncitizens were retained and that Sun provided an explanation for Peters' layoff decisions. Santiglia contends that Sun's explanation is pretextual. He attacks the credibility of Peters' reasons on the grounds that the reasons given to him at the time of the RIF are different from those in his Workforce Reduction Decision Form, but he offered no evidentiary support for this contention. He also argued that there is no documentation supporting the comments made about his performance in his Workforce Reduction Decision Form and that the comments themselves are fabricated. He pointed to the e-mail from Frank Tawil to "itops-eba-group" transmitting the message Tawil had received from a customer (CXB) commending Santiglia's efforts over a four day period in helping set up a lab facility for Vignette training.

There is no inconsistency between that e-mail and the remainder of the evidence. Sun has never said that Santiglia was not competent or that he was a bad employee. Absent the RIF there is no reason to believe that Santiglia or any of the other employees Peters laid off would have faced termination. Peters had in fact promoted one of these employees in the year just before the RIF (RX2A). He acknowledged that Santiglia had "good upside potential" (RX2A), and noted how difficult it had been to make the RIF decisions,

> . . . And the other part is that you grow attached to these people and you want to keep them there, and you feel like you're losing a friend or relative when you let them go. You know it's a hardship on them (RXB at 205).

Santiglia persists in trying to analyze the decision as though it had been a discharge for cause. It was not. It is in the very nature of a RIF that perfectly capable employees lose their jobs: all the employees may be above average, but some still have to go.

Santiglia contends, again without pointing to evidence, that his university degree was superior to Karumanchi's and he had more Sun certifications than some of the retained employees. But Peters did not assess the employees based on their academic degrees and certifications in the abstract; Santiglia's Workforce Reduction Decision Form reflects that he was selected for layoff based on Peters' assessment of his demonstrated knowledge and performance on the job compared to that of others at his same grade level. *Cf. Cotton v. City of Alameda*, 812 F.2d 1245, 1249 (9th Cir. 1987) (question is not whether plaintiff had better qualifications in the abstract; question is whether the other candidates are more qualified with respect to the criteria that the city actually employed).

Santiglia's focus on the Workforce Reduction Decision Forms is misplaced because it merges the process of actually making the selections with the subsequent process used to prepare the paperwork. This approach ignores undisputed evidence that the process of preparing the forms did not take place until after Peters made his decisions about which of his Systems Technologists to lay off. Santiglia is essentially asking that I use discrepancies in the post-hoc Workforce Reduction Decision Forms of other workers to draw inferences contrary to the unrebutted affidavits and testimony of Fred Peters. This I cannot do. Those forms raise no inference of pretext with respect to Santiglia's selection because they refer to different people and they were not created until after the decisions had already been made. Santiglia also characterizes the forms as "secret" and attempts to cast suspicion on them because they were not given to or discussed with the employees. But they were not prepared for the employees; it is evident that they were prepared for the purpose of protecting Sun's legal position. The Guidelines for Filling Out Forms (CX2E) emphasized that better forms reduce liability. The Guidelines also noted the need to avoid or minimize legal fees and wasted time, and warned that litigation costs would be charged against the business the claim came from.

As the party seeking summary decision, Santiglia bears the burden of proof: it is his responsibility to provide evidence in support of his motion. Liability in a disparate treatment case depends upon a showing that the protected characteristic, here United States citizenship status, actually motivated the employment decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (ADEA). Santiglia produced no evidence which suggests that his United States citizenship had anything to do with his selection for the RIF or that Sun's explanation was a pretext for citizenship status discrimination.

2. Retaliation

Santiglia's motion also fails at the threshold as to his claim of post-RIF hiring or retaliation.[12] A complainant seeking summary decision on the issue of retaliation has the burden of providing or pointing to evidence sufficient to establish all the elements of his claim. Retaliation, like discrimination, is an intentional act. Before it can take place the person causing the retaliatory act must have been aware of the protected activity. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). In order to show that there is a causal link between some protected activity on his part and Sun's failure to rehire him after the RIF, Santiglia must first point to evidence that he engaged in conduct protected under § 1324b. Second, he must identify the relevant decisionmaker and present or point to evidence that the person had knowledge of his protected activity. Decisionmakers do not retaliate on the basis of conduct of which they are entirely unaware. Finally, he must show a causal relationship between the protected activity and an adverse employment decision.

The record reflects that Santiglia engaged in conduct protected by § 1324b by filing his OCAHO complaint and by filing his OSC charge. The complaint alleges that Sun failed to rehire Santiglia on February 7, March 8 and May 10, 2002 in retaliation for his "filing this and other complaints of discrimination." Beyond the allegations of the complaint, Santiglia produced no evidence bearing on the issue of retaliation. He identified no particular job for which he was not selected and no particular manager who allegedly made a hiring decision which excluded him. His motion made no mention of the retaliation issue. It said that a Sun employee made a damaging statement about Santiglia which was quoted in Computer World of June 25, 2002, but he did not connect this statement with any activity protected under § 1324b. Unsupported and conclusory allegations in a memorandum do not provide a basis for summary decision and such allegations are all that Santiglia offered. The record reflects that the hiring managers for the only three systems Technologists Sun hired in the Bay Area between the RIF and the filing of the complaint were Hanumantha Neti, Ralph Miller and David Emberson. There is no evidence and no suggestion that any of these managers were aware of Santiglia or of his protected activity.

Santiglia's motion for summary decision accordingly must be denied both as to the issue of discriminatory selection for the RIF and the issue of retaliation.

VI. Sun's Motion for Summary Decision

A. The Motion

Sun states that the RIF was made for economic reasons and that it was implemented objectively and fairly, with the same criteria being applied to everyone. It contends that Santiglia failed to

[12] Santiglia's underlying OSC charge did not allege retaliation, but did allege a discriminatory failure to rehire. The allegation of retaliation arose for the first time in the complaint.

establish a prima facie case either as to his selection for the RIF or as to his claim of retaliation. It states further that it has provided legitimate nondiscriminatory reasons for its employment decisions and that Santiglia failed to produce any probative evidence of pretext.

1. Selection of Santiglia for the RIF

Sun points first to Peters' uncontradicted testimony and affidavits (RXB, RXC, RXD), all of which state that he and he alone made the selection of the four individuals laid off from his group and that he applied the criteria without regard to the citizenship of any individual. Sun states that Santiglia produced no factual evidence whatsoever to the contrary so there is no genuine issue of material fact with respect to his selection.

2. Retaliation

Sun's motion states further that two points compel summary decision in its favor on Santiglia's claim of retaliation. First, it points out that Santiglia's OCAHO complaint was not filed until November 17, 2002 and that Sun did not receive the OSC's notice of the charge until May 13, 2002 (RXI). Therefore, the alleged retaliatory instances of failure to hire Santiglia occurred before Sun was actually aware either of the instant complaint or of the underlying OSC charge. Sun states that it is a chronological impossibility for it to have retaliated against him for acts which had yet to occur and that an employer cannot be motivated by a factor of which it is unaware. To the extent Santiglia makes reference to other complaints made in other fora which complain about discrimination based on gender, national origin, and race or about violations of the rules regulating H-1B visa applications, Sun states these complaints do not allege conduct protected under § 1324b. Second, Sun states that Fred Peters hired no one during the post-RIF period and the few Systems Technologists hired in other components of the IT Operations Department were United States citizens.

B. Santiglia's Response

Santiglia responded to Sun's motion by stating that Sun "lied to the Court" by stating in its memorandum that he was given a Workforce Reduction Decision Form at the time of the layoff and that he only got the form by making a FOIA request to EEOC. He stated that because Frank Tawil's name appears on the forms Fred Peters may not have been the sole decision maker. He contends that data in his motion demonstrate that non-citizen workers were more favorably treated by not being considered for the RIF.

Santiglia points to the fact that one of the FAQs in the RIF Manual was, "[a]re people employed by Sun on visas at greater risk for layoff?" He states that the "mere fact that this was listed as a 'frequently asked question' indicates that Sun managers were aware and did consider the immigration status of employees at the time of the RIF." He also stated that because there were other immigration questions on Sun's Immigration website, the existence of such a website

created an "extra level of complexity" for a manager considering terminating such an employee. He contends that Sun has not provided legitimate reasons for selecting him to be laid off instead of Raghavaiah Karumanchi, and denies that his performance or experience were inferior to Karumanchi's. Finally, he argues that the acts of retaliation against him included not only Sun's failure to rehire him, but also putting false information in his personnel file, making a derogatory reference to him which appeared in a publication, and denying him access to its Labor Condition Application[13] files.

1. Selection of Santiglia for the RIF

Santiglia does not contend that the RIF itself was unnecessary or unjustified. Rather, he contends that he was wrongly selected and, by implication, that Karumanchi should have been selected instead. Construing the facts most favorably to Santiglia, I assume for purposes of this motion that he presented a prima facie case as to his selection for the layoff. Sun carried its burden of production by providing the reasons that Peters selected him.

At this stage all Santiglia needs to do to overcome Sun's motion is to produce enough evidence to allow a reasonable fact finder to conclude that the reasons Peters gave for selecting him for the RIF are false, or that the true reason was discrimination on the basis of his United States citizenship status. *Nidds*, 113 F.3d at 918. Looking at the evidence in the light most favorable to Santiglia, I cannot find that he has produced such evidence or that he identified any specific facts showing there is a genuine issue for trial.

First, I cannot infer, as Santaglia suggests I do, that Peters was not the only decisionmaker. Such an inference is not only unsupported in the record, it is also contrary to the unrebutted affidavits and testimony of Peters and Kanazawa. That HR and the legal department, as well as Frank Tawil, to whom Peters reported, reviewed Peters' decisions to ensure that the paperwork would support them does not create an inference that those reviewers made or influenced the decisions themselves when all the record evidence is otherwise. While Tawil's name appears on the Workforce Reduction Decision Forms, the evidence reflects that Peters alone was the person who actually made the decisions for his group and there is no competent evidence otherwise. It is well established that the actual decisionmaker is the necessary focus of the inquiry. *See Reeves*, 530 U.S. at 152-53. Santiglia has not furnished a scintilla of evidence that Frank Tawil participated in any way in making the layoff decisions for Peters' work group. Adequate opportunity was provided for Santiglia to explore this question in detail in discovery and all the

[13] A Labor Condition Application (LCA) is made to the Department of Labor (DOL) on Form ETA 9035. An employer files such an application in order to initiate the process of obtaining authorization to hire an H-1B worker. Once the Labor Condition Application is certified by the Department of Labor, application may be made for an H-1B visa. *See generally* 20 C.F.R. § 655.700 *et sequitur*.

resulting evidence consistently reflected that Peters alone made the decisions. While Santiglia is entitled to have all reasonable inferences drawn in his favor, an inference is not reasonable when it is contrary to unrebutted facts. Santiglia is simply asking me to disbelieve the evidence and to credit his unsupported allegations instead. Second, the contention that the "mere fact" that a question about visa holders appeared in the RIF manual demonstrates a preference for H-1B workers is ludicrous when the immediate answer given in response to that question is, "No. Criteria for employees with Sun on visas will be the same as for all other employees." While Santiglia argues that H-1B visa holders were immune from consideration in the RIF, this is his conclusion, not a fact.

Santiglia contends as well that Sun has not provided legitimate reasons for not selecting Karumanchi instead of him; he denies that his performance or experience were inferior to Karumanchi's. Other than Peters' testimony, the only evidence as to the comparative performance of employees under Peters' supervision is that set out in the service ticket chart and the service desk customer feedback chart Sun prepared for the Office of Federal Contract Compliance. Santiglia makes no reference to these charts. The first reflects that in September and October 2001 Santiglia completed 45 service ticket requests while Karumanchi completed 152 (Exhibit 8A with Attachment L to Santiglia's Second Motion to Compel). The customer feedback chart reflects that between July and October, 2001 Karumanchi received 47 comments, 44 of which were "good" and 3 were "average," while Santiglia received 9 "good" comments (Exhibit 8B with Attachment L to Santiglia's Second Motion to Compel). (It is not clear whether the e-mail to Tawil (CXB) is included in the 9 comments pertaining to Santiglia.) Santiglia's characterization of Karumanchi's comparative qualifications appears to rest on the allegation in his own motion that Karumanchi is the employee in Peters' group who had the least seniority at the time of the RIF and that Karumanchi's university degree is inferior to his own.

The fact that Karumanchi may have had two weeks less seniority than Santiglia (RX2B) cannot operate to create an issue of material fact as to pretext when seniority was not the determinative factor in the RIF. Neither does Santiglia's opinion - without supporting evidence - about the relative value of their academic degrees or the quality of their performance. The source of the employees' degrees was not a criterion in the RIF and the general rule is that a plaintiff's subjective evaluation of his own performance does not suffice to create a factual issue. *Coleman,* 232 F.3d at 1286. An employer has broad discretion in defining the expectations for employees' performance. *Yefremov,* 3 OCAHO no. 562 at 1584. Thus a difference of opinion between an employer and employee with respect to expectations or to the quality of the employee's job performance is not, in itself, sufficient to create a genuine issue of material fact. The question here is not whether Peters' assessment of Santiglia's performance relative to others in his group is objectively correct, or even fair. *Villiarimo,* 281 F.3d at 1063. Courts only require that the employer honestly believe the reason. *Id.* Section 1324b does not make it unlawful for an employer to do a bad job of selecting employees for layoff; it just makes it unlawful to discriminate on a prohibited basis, here citizenship status. *Cotton,* 812 F.2d at 1249 (ADEA).

In order to create a triable issue at the pretext stage there must be specific and substantial evidence of pretext. *Aragon*, 292 F.3d at 659; *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). I do not find such evidence. There is no factual basis in the record from which a rational trier of fact could conclude that Peters did not really believe the reasons he gave for his selection of Santiglia or that Peters fabricated the reasons as a cover up for citizenship status discrimination. The record is devoid of evidence showing any indicia of discrimination or any nexus between Santiglia's United States citizenship and his selection for the RIF.

2. Retaliation

Sun received notice of Santiglia's OSC charge on May 13, 2002 (RXI). If, as Santiglia alleges, Sun failed to rehire him on February 7, March 8 and May 10, 2002, I find as a matter of law that such failure could not have been in retaliation for his filing the charge or the instant complaint. *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094 at 8 (2003) ("common sense dictates the result: an employer cannot be motivated by a factor which is unknown to him") (*citing cases*).

Apart from the filing of the charge and the complaint, there is no evidence that Santiglia engaged in any other conduct protected under § 1324b.[14] Santiglia asserts that Sun also engaged in other retaliatory acts: he states that Sun put false information (the Workforce Reduction Decision Form) in his personnel file, that "Sun's Dianne Carlini made a derogatory reference about the Complainant's skills, which later appeared in a large publication," and that Heidi Wilson denied him access to Sun's Labor Condition Application files. He furnished no evidence that the Workforce Reduction Decision Form is false, or that the form is in his personnel file. He furnished no evidence of when Carlini actually made the alleged statement. In fact, he furnished no evidence of any link between any of the events alleged and any protected activity on his part.

The only evidentiary support Santiglia offered for his additional assertions is a copy of an e-mail he sent to Heidi Wilson and her response (CX2F). The e-mail states, "I want to get in there to finish going through all the 2002 LCAs. Please schedule a time for me. Wednesday would be good for me." The response states in pertinent part,

> Between February 6, 2002 and March 13, 2002 you have been given access to Sun's 2001 and 2002 LCA Public Access files on at least 5 occasions for several hours during each visit. We feel we have provided you with reasonable access to these files as required, and will not be allowing any additional time.

[14] Santiglia's complaint also said that he was fired in retaliation "for raising concerns that quotas would be used in making decisions for the layoff." He provided no evidence in support of this assertion and no reason to believe that raising such concerns is conduct protected by § 1324b.

There was no showing that this exchange of e-mail had any connection to specific conduct protected under § 1324b. Moreover, Santiglia cited no authority which suggests that access to those records must be provided on demand or for an indefinite period of time.

Whether the e-mails evidence a denial of reasonable access to the materials is within the authority of the Department of Labor to determine in the first instance. Indeed, the record reflects that on December 16, 2002 Santiglia had a hearing before an administrative law judge for the Department of Labor which addressed various allegations, including this same complaint that Sun denied him access to its Labor Condition Application files. The administrative law judge's decision dated February 19, 2003 (Attachment H to Sun's Motion to Dismiss Amended Charge and Motion to Restrict Original Complaint to Citizenship-Based Discrimination) noted that although Sun had refused Santiglia access to the Labor Condition Applications after March 31, 2002 access to the files was given again starting on July 24, 2002. The decision found that Santiglia reviewed those files on July 29, 2002, August 22, 2002, and October 2, 2002, and that they were subsequently available to him on other occasions but he refused to sign a log book. The administrative law judge expressly found that Sun's requirements for Santiglia to make appointments and to sign a log book did not constitute a denial of access to the files. She also found that Sun's limitation on how many boxes Santiglia could examine at one time and its prohibition against copying the files did not violate the regulations either.[15] There was no showing either in the Department of Labor proceeding or in this proceeding that Santiglia's inability to review Sun's Labor Condition Applications between March 31, 2002 and July 24, 2002 had any causal connection to his OSC charge or his OCAHO complaint.

Where a party fails to set forth specific facts or to identify with reasonable particularity the evidence precluding summary decision, the motion must be granted. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). While the nonmoving party is entitled to all of the favorable inferences that can be drawn from any reasonable construction of the facts in evidence, those inferences may not be so tenuous as to amount to speculation.

VII. Findings of Fact and Conclusions of Law

In consideration of the record as a whole, I make the following findings and conclusions:

A. Findings

1. Guy Santiglia is a citizen of the United States.

[15] Santiglia indicated that he appealed the administrative law judge's order to the Department of Labor's Administrative Review Board (Attachment A to Santiglia's Response to Respondent's Notice of Pleading) but he has thus far reported no resolution of that appeal.

2. Sun Microsystems, Inc., is a multinational corporation which reported assets in excess of 12 billion dollars for the quarterly period ending on December 28, 2003.

3. Sun Microsystems, Inc., describes itself as a provider of products, services and support solutions for building and maintaining network computing environments.

4. On July 16, 2001 Santiglia began work as an IR Systems Technologist-2 in Sun's IT Operations Department where he worked in a technical support group for the SMI campus in Santa Clara, California.

5. Santiglia was hired by Area Support Manager (ASM) Fred Peters.

6. In October, 2001, Sun managers began preparation for a reduction in force (RIF).

7. Sun laid Santiglia off, along with a number of other ITOPS Department technical workers in the Bay Area, as part of a RIF.

8. Fred Peters independently selected four individuals to be laid off from his group.

9. Fred Peters, the same person who hired Santiglia, also made the decision to lay him off as part of the RIF.

10. No one was hired into Peters' group between the 2001 RIF and the filing of the complaint.

11. Three Systems Technologists were hired in other components of the IT Operations Department in the Bay Area between the 2001 RIF and the filing of the complaint.

12. The hiring managers for the three Systems Technologists hired in the Bay Area between the 2001 RIF and the filing of the complaint were Hanumantha Neti, Ralph Miller, and David Emberson.

13. Santiglia filed a charge with the OSC on or about April 9, 2002.

14. Sun received notice of Santiglia's OSC charge on May 13, 2002.

15. OSC sent Santiglia a letter dated August 16, 2002 notifying him of his right to file a complaint.

16. Santiglia filed his OCAHO complaint on November 17, 2002.

B. Conclusions

1. Santiglia is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(A).

2. Sun Microsystems, Inc., is an entity within the meaning of 8 U.S.C. § 1324b(a)(1).

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

4. Neither party identified any genuine issue of material fact requiring a hearing in this matter.

5. Santiglia did not rebut the "same actor" inference nor did he produce evidence to demonstrate that Sun's explanation of its employment decisions is pretextual.

6. Sun Microsystems, Inc. is entitled to summary decision.

To the extent any statement of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth herein at length.

ORDER

Santiglia's motion for summary decision is denied. Sun's motion for summary decision is granted and the complaint is dismissed. All other pending motions are denied.

SO ORDERED.

Dated and entered this 30th day of September, 2004.

_____
Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of

8 U.S.C.§ 1324b(i), any person aggrieved by such Order seeks timely 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.