IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MAYRA SALDANA,	)	**CASE NO. 4:13CV3108**
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM**
	)	**AND ORDER**
RHONDA LAHM,	)	
	)	
Defendant.	)	

This matter is before the Court on the Defendant's Motion for Summary Judgment (Filing No. 40), and the Plaintiff's "Motion to Address Defendant's Motion for Summary Judgment," (Filing No. 43) in which the Plaintiff asks that the Defendant's Motion be dismissed, without prejudice, pending further discovery.

Fed. R. Civ. P. 56(d) provides: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Here, the Plaintiff has not supported her motion by affidavit or declaration, nor has she set forth specific reasons why she cannot present facts essential to justify her opposition to the Defendant's Motion for Summary Judgment. The only brief submitted by Plaintiff (Filing No. 45) simply speculates that discovery might reveal that the Defendant's policies and practices, documented in the Defendant's Index of Evidence (Filing No. 42), are not followed consistently. Such speculation is not sufficient to support the Plaintiff's request that the Court dismiss the Defendant's Motion for Summary Judgment under Fed. R. Civ. P. 56(d). For the reasons discussed below, Defendant's Motion for Summary Judgment will be granted.

FACTS

NECivR 56.1(b)(1) provides: "The party opposing a summary judgment motion must include in its brief a concise response to the moving party's statement of material facts. Each material fact in the response must be set forth in a separate numbered paragraph, must include pinpoint references to affidavits, pleadings, discovery responses, deposition testimony (by page and line), or other materials upon which the opposing party relies, and, if applicable, must state the number of the paragraph in the movant's statement of material facts that is disputed. Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response." (Emphasis in original).

The Defendant's Brief in Support of her Motion for Summary Judgment (Filing No. 41) sets out a "Statement of Material Facts about which Defendant Contends There is No Genuine Dispute." (*Id*. at 7-12.) That statement of facts has pinpoint citations to the evidence, and complies with NECivR 56.1(a). The Plaintiff has not responded to any of the Defendant's properly referenced material facts, and they are considered admitted. The following is a summary of those facts, supplemented by the undisputed allegations in the Plaintiff's First Amended Complaint (Filing No. 16).

Plaintiff Mayra Saldana ("Saldana") is a 24-year-old resident of Lincoln, Nebraska, who came to the United States from Mexico when she was two years old. On December 3, 2012, she was granted "deferred action" through a program implemented by the Secretary of Homeland Security, called Deferred Action for Childhood Arrivals ("DACA").

Deferred action is a long-standing form of prosecutorial discretion, through which immigration authorities make a discretionary determination not to remove an individual from the United States during a specified period, but deferred action does not confer an individual with lawful status.

After Saldana was granted deferred action, she was issued an employment authorization document ("EAD") and a Social Security Number. In January 2013, she attempted to apply for a Nebraska driver's license and was told by employees of Nebraska's Department of Motor Vehicles ("DMV") that she was ineligible. She tried twice more to obtain a driver's license, and each time she was denied.

Defendant Rhonda Lahm ("Lahm") is the Director of the DMV, and has the authority to adopt rules necessary to carry out DMV's responsibilities. Saldana sued Lahm in her official capacity, seeking declaratory and injunctive relief. Saldana contends that the DMV policy denying her a driver's license violates the United States Constitution, specifically the Supremacy Clause (art. VI, cl. 2) and the Equal Protection Clause (amend. XIV, sec. 1).

On October 11, 2013, this Court granted Lahm's Motion to Dismiss Saldana's Supremacy Clause claim. (Memorandum and Order, Filing No. 29 at 6-10.) The Court declined to dismiss Saldana's claim under the Equal Protection Clause, however, because Saldana alleged Lahm issued driver's licenses to other persons with deferred-action status and EADs, but not to those with DACA-related deferred action status and EADs. It was unclear what, if any, rational basis supported the different treatment alleged. (*Id*. at 10-11.)

The uncontroverted evidence now demonstrates that the DMV issues driver's licenses and state identification cards only to persons with lawful status in the United States, as determined by the federal government and verified through the Systematic Alien

Verification for Entitlements ("SAVE") Program, administered by the United States Citizenship and Immigration Services ("USCIS"), an agency of the U.S. Department of Homeland Security. Lahm and DMV rely solely on the SAVE database to determine whether a non-citizen applicant has lawful status in the United States, and they do not differentiate between different categories of persons with deferred action status.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court will view "all facts in the light most favorable to the non-moving party and mak[e] all reasonable inferences in [that party's] favor." *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 819 (8th Cir 2011). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue . . . Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The moving party need not negate the nonmoving party's claims by showing "the absence of a genuine issue of material fact." *Id.* at 325. Instead, "the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

In response to the movant's showing, the nonmoving party's burden is to produce specific facts demonstrating "'a genuine issue of material fact' such that [its] claim should proceed to trial." *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 422 (8th Cir. 2009) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)).

The nonmoving party "'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (quoting *Matsushita*, 475 U.S. at 586-87), *cert. denied,* 132 S. Ct. 513 (2011). "[T]he mere existence of *some* alleged factual dispute between the parties" will not defeat an otherwise properly supported motion for summary judgment. *Quinn v. St. Louis Cnty.*, 653 F.3d 745, 751 (8th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986)) (internal quotation marks omitted).

In other words, in deciding "a motion for summary judgment, 'facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris,* 550 U.S. 372, 380 (2007)). Otherwise, where the Court finds that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party"–where there is no "genuine issue for trial"–summary judgment is appropriate. *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)) (internal quotation marks omitted).

DISCUSSION

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "But so too, 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same'" *Id.* at 216 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

> The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Id.

In *Plyler,* the Supreme Court held that, under the Equal Protection Clause, states may not deny children access to public education based on their undocumented immigration status. The Supreme Court concluded that children of illegal aliens[1] were similarly situated with other children for purposes of public education, noting specifically that the alien children lacked any responsibility for, or control over, their unlawful status. *Id*. at 219-20. The Court distinguished its earlier decision in *DeCanas v. Bica*, 424 U.S. 351 (1976), in which it held that states *may* prohibit the *employment* of illegal aliens. *Id.* at 249.

The *Plyler* Court observed that illegal aliens are not a suspect class, and a state need not demonstrate that the treatment of illegal aliens in a manner different from other persons is precisely tailored to serve a compelling governmental interest. *Plyler*, 457 U.S. at 219 n.19, 223; *see Id.* at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal.").

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[1] The Court uses the term "illegal alien," because that is the language employed by Congress in those sections of the United States Code dealing with immigration matters. The term is more specific than "undocumented persons," because many persons possessing certain documentation may nonetheless be "illegal aliens" as a matter of law.

If Lahm and DMV were following the policy alleged by Saldana in her First Amended Complaint–issuing driver's licenses to other deferred action recipients and individuals submitting EADs, but *not* to DACA recipients (First Amended Complaint, Filing No. 16 at ¶¶ 50-53)–the policy might well lack any rational basis. Instead, Lahm and DMV are following Nebraska's statute, Neb. Rev. Stat. § 60-484.04(Cum. Supp. 2012)[2], and relying upon the USCIS database, to issue driver's licenses only to applicants having lawful status in the United States.

Saldana is not similarly situated to persons having lawful status in the United States with respect to her qualification for a Nebraska driver's license, and Lahm has not denied Saldana equal protection of the law. See, *e.g., League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 530-36 (6th Cir. 2007) (denial of driver's licenses to illegal aliens and lawful temporary resident aliens did not burden a fundamental right or target a suspect class, and plaintiffs did not meet their burden of negating all possible rational justifications for the policy, including public safety and homeland security); *John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F.Supp.2d 1369, 1375-76 (N.D. Ga. 2001) (denial of state-issued driver's licenses to illegal aliens did not burden any fundamental right to travel, and furthered legitimate state goals including public safety and economy).

[2] "Before being issued any type of operator's license or a state identification card under the Motor Vehicle Operator's License Act, the department [DMV] shall require an applicant to present valid documentary evidence that he or she has lawful status in the United States." Neb. Rev. Stat. § 60-484.04(2) (Cum. Supp. 2012).

Accordingly,

IT IS ORDERED:

1. The Plaintiff Mayra Saldana's Motion to Address Defendant's Motion for Summary Judgment (Filing No. 43) is denied;

2. The Defendant Rhonda Lahm's Motion for Summary Judgment (Filing No. 40) is granted; and

3. A separate Judgment will be entered.

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DATED this 12th day of February, 2014.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge