IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. WMN 05 CV 1297
	)	
JOHN BAPTIST KOTMAIR, JR., et al.,	)	
	)	
Defendants.	)	

DECLARATION OF THOMAS M. NEWMAN IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

1. This declaration and attached exhibits are submitted under 28 U.S.C. § 1746 in connection with the United States' Motion for Summary Judgment. I am a trial attorney with the Department of Justice's Tax Division in Washington, D.C. to whom this case is assigned.

2. Attached as Exhibit 1 is a copy of the Final Decision and Order for the case *Aguilar v. U.P.S,* Case no. 97B00079.

3. Attached as Exhibit 2 is a copy of the Final Decision and Order for the case *Austin v. Jitney Jungle Store,* Case no. 97D00105.

4. Attached as Exhibit 3 is a copy of the Order granting attorneys fees for the case *Austin v. Jitney Jungle Store*, Case no. 97D00105.

5. Attached as Exhibit 4 is a copy of an Order in the case *Benz v. Department of Defense*, Case no. 97B00115.

6. Attached as Exhibit 5 is a copy of the Final Decision and Order for the case *Bunn v.*

USX/US Steel, Case no. 97B00160.

7. Attached as Exhibit 6 is a copy of the Final Decision and Order for the case *Cholerton v. Hadley Co,* 96B00046.

8. Attached as Exhibit 7 is a copy of the Order Granting Respondent's Motion to Dismiss for the case *Cook v. Pro Source, Inc*, Case no. 97B00090.

9. Attached as Exhibit 8 is a copy of the Order Granting Respondent's Motion to Dismiss for the case *Costigan v. Nynex,* Case no. 97B00026.

10. Attached as Exhibit 9 is a copy of the Order Granting Respondent's Motion to Dismiss for the case *D'Amico v. Erie Community College*, Case no. 97B00027.

11. Attached as Exhibit 10 is a copy of the Order of Dismissal for the case *Davis v. GTE,* Case no. 97B00087.

12. Attached as Exhibit 11 is a copy of the Final Decision and Order for the case *Hamilton v. The Recorder*, Case no. 97B00150.

13. Attached as Exhibit 12 is a copy of the Order Granting Attorneys Fees for the case *Hamilton v. The Recorder,* Case no. 97B00150.

14. Attached as Exhibit 13 is a copy of the Order Granting Respondent's Motion to Dismiss the case *Hendrickson v. GTE*, Case no. 97B00089.

15. Attached as Exhibit 14 is a copy of the Final Decision and Order for the case *Hollingsworth v. Applied Research Associates*, Case no. 97B00085.

16. Attached as Exhibit 15 is a copy of the Order Granting Attorneys Fees for the case *Horne v. Town of Hampstead,* Case no. 96B00106.

17. Attached as Exhibit 16 is a copy of the Final Decision and Order the case *Horne v.*

Town of Hampstead, Case no. 96B00106.

18. Attached as Exhibit 17 is a copy of the Final Decision and Order the case *Horst v. Juneau School District*, Case no. 97B00123.

19. Attached as Exhibit 18 is a copy of the Final Decision and Order the case *Hutchinson v. End Stage Renal Disease Network of Florida, Inc,* 97B00083.

20. Attached as Exhibit 19 is a copy of the Final Decision and Order the case *Johnson v. Florida Power Corporation*, Case no. 97B00149.

21. Attached as Exhibit 20 is a copy of the Order Granting Attorneys Fees for the case *Kosatschkow v. Allen Stevens Corporation*, Case no. 97B00125.

22. Attached as Exhibit 21 is a copy of the Final Decision and Order the case *Lareau v. USAIR, Inc*, Case no. 96B00048.

23. Attached as Exhibit 22 is a copy of the Order Granting Attorneys Fees for the case *Lareau v. USAIR, Inc.*, Case no. 96B00048.

24. Attached as Exhibit 23 is a copy of the Order of Inquiry for the case *Lee v. Airtouch Communications*, 96B00063.

25. Attached as Exhibit 24 is a copy of the Final Decision and Order for the case *Manning v. City of Jacksonville*, Case no. 97B00126.

26. Attached as Exhibit 25 is a copy of the Final Decision and Order for the case *Olson v. University Medical Center Corporation*, Case no. 97B00093.

27. Attached as Exhibit 26 is a copy of the Final Decision Granting Respondent's Motion to Dismiss for the case *Parham v. United States Postal Service*, Case no. 97B00122.

28. Attached as Exhibit 27 is a copy of the Final Decision and Order of Dismissal for the

case *Shepherd v. Sturm, Ruger, & Co., Inc.*, Case no. 97B00163.

29. Attached as Exhibit 28 is a copy of the Order of Dismissal for the case *Shephens v. Safe Kids Inc.*, Case no. 97B00092.

30. Attached as Exhibit 29 is a copy of the Final Decision and Order of Dismissal for the case *Werline v. Public Service Gas & Electric Company*, Case no. 97B00023.

31. Attached as Exhibit 30 is a copy of the Final Decision and Order for the case *Wilson v. Harrisburg School District*, Case no. 96B00045.

32. Attached as Exhibit 31 is a copy of the Final Decision and Order to Dismiss for the case *Winkler v. Timlin Corporation*, Case no. 96B00065.

33. Attached as Exhibit 32 is a copy of the District Court Order for the Middle District of Pennsylvania in the case *United States v. Thurston Bell*, Case no. 1:cv-01-2159.

34. Attached as Exhibits 33(A-D) is a copy of the Affidavit filed by Thurston Bell in the District Court for the Middle District of Pennsylvania in Case no. 1:cv-01-2159.

35. Attached as Exhibit 34 is a copy of the District Court Order for the Middle District of Florida, Tampa Division, in the case *United States v. Bossett*, Case no. 8:01-cv-2154-T-17TBM.

36. Attached as Exhibit 35 is a copy of the District Court Order of Permanent Injunction for the Western District of Washington at Seattle in the case *United States v. Cohen*, Case no. C04-0332P.

37. Attached as Exhibit 36 is a copy of the District Court Order for the Middle District of Florida, Tampa Division, in the case *United States v. Farnell*, Case no. 8:02-cv-1742-T-26TBM.

38. Attached as Exhibit 37 is a copy of the Magistrate Judge's Report and Recommendation of the District Court for the Middle District of Florida, Tampa Division, in the

case *United States v. Prater*, Case no. 8:02-cv-2052-T-26MSS.

39. Attached as Exhibit 38 is a copy of the District Court of New Jersey's Order of Permanent Injunction for case *United States v. Haraka*, Case no. 02-cv-534(JAP).

40. Attached as Exhibit 39 is a copy of the District Court's Order of Preliminary Injunction for the Middle District of Florida, Tampa Division, in the case *United States v. Rosile*, Case no. 8:02-cv-466-T-17MSS.

41. Attached as Exhibit 40 is a copy of the Fourth Circuit Court of Appeals unpublished decision affirming the conviction of Edward Louis Kotmair, Case no. 00-4139.

42. Attached as Exhibit 41 is a copy of a press release announcing the conviction of SAPF member George W. Frye for willful failure to file income tax returns.

43. Attached as Exhibit 42 is a copy of a press release announcing the guilty plea of SAPF member Dr. Charles E. Schutt for willful failure to file income tax returns.

44. Attached as Exhibits 43A-D is a copy of the deposition of John B. Kotmair, Jr.

I declare under penalty of perjury the foregoing is true and correct. Executed this 12th day of June, 2006.

/s/ Thomas M. Newman
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 2, 1997

RICHARD AGUILAR, Complainant,	)	8 U.S.C. § 1324b
v.	)	OCAHO Case No. 97B00079
UNITED PARCEL SERVICE, Respondent.	)	

Exhibit 1

FINAL DECISION AND ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, 8 U.S.C. § 1324b (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA) and by the Immigration Act of 1990 (IMMACT),[1] in which Richard Aguilar is the complainant and United Parcel Service (UPS), Anaheim, California, is the respondent. A letter dated December 9, 1996, to the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) from John B. Kotmair, Jr. (Kotmair), Director of the National Worker's Rights Committee, accompanies the complaint.

Also accompanying the complaint is a letter dated January 30, 1997 from OSC to Kotmair informing him that with respect to charges filed by him on behalf of eleven different individuals, including Aguilar:

> Based on this Office's investigation, the Special Counsel has determined that there is insufficient evidence of reasonable cause to believe that any of these charges state a cause of action under 8 U.S.C. § 1324b. See Tossaint (sic) v. Tekwood Associates, Inc., ___ OCAHO ___ (1996).

The letter authorizes the filing of a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of receipt.

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (IIRIRA), amended § 1324b(a)(6) as it applies to practices after a date to be set within one year subsequent to September 30, 1996. The amendments have no application to this case.

The complaint was filed with OCAHO on March 31, 1997, with various attachments. Kotmair's Notice of Appearance was subsequently filed on April 11, 1997. [2] Although Aguilar was employed by UPS from 1975 or 1976 until his termination on February 12, 1997, he seeks back pay from May 1996. The significance of that date is unexplained.

On his complaint form, Aguilar checked the box stating "yes" to the following statement:

> The Business/Employer refused to accept the documents that I presented to show I can work in the United States.

However, he crossed out the phrase, "to show I can work in the United States."

Specifically, the complaint alleges that UPS engaged in conduct prohibited by the INA when it refused to accept Aguilar's "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status,"[3] as well as his "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by [sic] revealing that I am not to be treated as an alien." According to Kotmair's letter to OSC, the documents were submitted to UPS on June 24, 1996.

Aguilar also checked the box on the complaint form stating "yes" in response to the following statement:

> I was intimidated, threatened, coerced or retaliated against because I filed or planned to file a complaint, or to keep me from assisting someone else to file a complaint.

Aguilar was terminated on February 12, 1997. Attached to the complaint is an explanation of the alleged acts of retaliation which describes the events leading to his termination

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[2] Kotmair's Notice of Appearance references an "enclosed Power of Attorney of the complainant," although no such document appears to have been submitted with that Notice. A power of attorney document is attached to the original complaint, apparently appended to a charge filed against UPS by Aguilar with the Equal Employment Opportunity Commission (EEOC). That power of attorney grants Kotmair "permission" to represent Aguilar "before ... OCAHO" and "before an Administrative Law Judge in OCAHO."

[3] Aguilar's "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" is not part of the record, and there is no assertion that it is related in any way to INS forms N-560 or N-561 Certificate of United States Citizenship. These forms, issued by the INS, do not purport to address issues of federal taxation.

as a driver for UPS. It states that on December 18, 1996, he was arrested and charged with "DWI" [Driving While Intoxicated]. Upon his release, he notified his manager. On February 6, 1997, he was found guilty and sentenced. He did not learn until some time after February 6, 1997 that his driver's license had been suspended since December 28, 1996. Aguilar had shown his license to his UPS supervisor after his arrest when he did not know that it had been suspended. The reason proffered by UPS for his dismissal, according to Aguilar, was "dishonesty about my license." Aguilar claims that at no time had he been dishonest or failed to inform his UPS supervisor of "all that I was aware of or that had happened." Aguilar does not allege any causal connection between the submission of his documents and his termination as a driver. Neither does he allege that his termination was related to his citizenship or national origin.

On May 13, 1997, UPS filed an answer denying the material allegations of the complaint together with a motion to dismiss the complaint for failure to state a claim. Respondent admits that Aguilar worked for UPS since 1975 or 1976 and that he was fired from his job as a driver on February 12, 1997. Three grounds are asserted for its motion to dismiss: first, that complainant does not allege that his termination was on the basis of citizenship status or national origin; second, that complainant alleges no improper conduct with regard to verification of any work authorization document; and third, that complainant is apparently confusing a New Mexico Department of Motor Vehicles work permit driver's license with an INS work permit authorization.

On June 6, 1997, complainant filed his reply to respondent's answer and motion to dismiss. That reply addresses only UPS's refusal to honor Aguilar's Statement of Citizenship and Affidavit of Constructive Notice. It does not discuss Aguilar's discharge or any alleged acts of retaliation. Instead, it states that "Respondent is correct in its assertion that 'The Complaint Does not Allege Termination on the Basis of Citizenship or National Origin." Rather, "[t]he substance of the complainant's charge relates solely to the respondent's refusal to recognize and honor the documents."

The response acknowledges that Aguilar's documents were submitted for the purpose of avoiding his federal income tax obligations, not for the purpose of verifying his employment eligibility. Aguilar sets forth at length the theory that only nonresident aliens, and not United States citizens, are required to participate in the social security system or to be subject to withholding for income taxes.

III. STANDARDS FOR RULING ON A MOTION TO DISMISS

A motion to dismiss should be granted only in the very limited circumstances where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). Although I must liberally construe the allegations in the complaint in the light most favorable to complainant, I am not required to assume that Aguilar can prove facts which have not been alleged, see Associated Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S.

519, 526 (1983), to consider facts which would be inadmissible at a hearing, or to make unwarranted inferences. Neither am I required to accept as true any conclusions regarding the legal effects which flow from the events Aguilar sets out.

Even liberal pleading standards have their limits and complainant must allege more than unsupported conclusions of law to defeat an otherwise meritorious motion to dismiss. See, Pulda v. General Dynamics Corp., 47 F.3d 872, 878 (7th Cir. 1995). If there is no reasonable prospect that a valid claim can be made out based on the facts alleged, the motion to dismiss should be granted. A complaint which does not set forth either direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory is subject to dismissal. LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1103 (6th Cir. 1995).

DISCUSSION

IRCA established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as prohibitions against certain unfair immigration-related employment practices, 8 U.S.C. § 1324b. Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer is obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a Form I-9 for each new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6) was added by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents. It provides that certain documentary practices may be treated as discriminatory hiring practices.

> For purposes of paragraph (1),[4] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[5] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals. (emphasis added).

Regulations identifying the specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R.

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[4] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[5] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

§§ 274a.2(b)(1)(v)(A), (B), and (C). When a document from those lists is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document if it appears on its face to be genuine. The documents Aguilar submitted are not among the listed documents acceptable to show identity or work eligibility pursuant to these regulations.

As is by now well established in OCAHO jurisprudence, the activities prohibited by 8 U.S.C. § 1324b include discrimination in hiring, firing, recruitment, referral for a fee, retaliation for engaging in protected activity, and document abuse. 8 U.S.C. §§ 1324b(a)(1), (a)(5), and (a)(6). Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 9 (1997) (citing Smiley v. City of Philadelphia, 7 OCAHO 925, at 18 (1997)); Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994). Other terms and conditions of employment such as wages, promotions, employee benefits, and the like are beyond the reach of the INA. See, Lareau v. USAir, Inc., 7 OCAHO 932, at 11 (1997) (citing cases). Thus, a long-term incumbent employee's complaints about the terms and conditions of his employment fail to state a claim under § 1324b. Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 3-4, 9 (1997); Horne v. Hampstead, 6 OCAHO 906, at 5-6 (1997).

Regulations implementing the employment eligibility verification system make clear that the statute was to have prospective application only. Employers are required to examine documents and to complete a Form I-9 only for individuals hired after November 6, 1986 who continued to be employed after May 31, 1987. 8 C.F.R. § 274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. § 274a.7. Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair hiring practice if, and only if, (1) the employee was recruited, hired, or referred for a fee after November 6, 1986; (2) the documents were presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral; (3) the documents on their face appear to be genuine; and (4) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system. The facts of this case as alleged in the complaint fail to satisfy any of these elements.

First, because Aguilar was steadily employed by respondent from 1975-1976 until February 1997, he was not an employee hired subsequent to the enactment of IRCA in 1986. UPS never had any obligation to make an inquiry as to his employment eligibility, to review any documents establishing his employment eligibility, or to complete a Form I-9 for him. Indeed, the complaint does not allege that UPS ever requested any documents whatsoever for the purposes of establishing Aguilar's eligibility to work in the United States. The employment eligibility verification process never comes into the picture at all for an individual who remained continually employed by the same employer from 1975-76 to 1997.

Second, both the original complaint form and complainant's reply to respondent's motion to dismiss acknowledge that Aguilar's "Statement of Citizenship" and "Affidavit of Constructive Notice" were not tendered to show his eligibility for hire in the United States. It is not alleged

that UPS requested any documents, or that document submission was required to verify employment eligibility or comply with federal law. Rather, Aguilar's documents were submitted for the purpose of avoiding his federal income tax obligations.

Third, neither the INS nor the Social Security Administration has exempted Aguilar from withholding for taxes and no other entity, including the National Worker's Rights Committee, has any statutory authority to do so and it is accordingly unclear how the documents could appear to be "genuine."

Fourth, the documents tendered were not in any event documents acceptable to show identity and/or employment authorization for purposes of satisfying the requirements of the employment verification system set out at § 1324a(b). Neither document appears on List A, B or C. Because Aguilar's documents are not documents acceptable to show he can work in the United States, the refusal of his employer to accept them, even had they been presented for that purpose, would not violate the INA.

Jurisdiction of administrative law judges over allegations of document abuse is limited by the terms of the governing statute. The employment verification system is set out in 8 U.S.C. § 1324a(b) which identifies the specific documents approved for the purpose of establishing identity and employment eligibility. Nothing in the statutory scheme permits much less requires an employer to accept documents other than the ones specifically approved to show eligibility to work in the United States. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. Rejection of an employee's unilateral claim of tax exemption is not an immigration-related employment practice. The issues complainant raises have nothing whatever to do with immigration-related employment practices related to the hiring of individuals, and are simply beyond the reach of 8 U.S.C. § 1324b(a)(6).

Aguilar purports to believe that the INA applies not only to documents presented in support of an Employment Eligibility Verification Form (Form I-9), but to any documents whatever submitted by an employee for the alleged purpose of "secur[ing] all of his rights as a U.S. Citizen in relationship to his employer." One of those rights, according to Aguilar, is the right to be free of withholding for taxes.

This case is one of a rapidly growing number of OCAHO cases premised upon the same or substantially similar allegations seeking to transform OCAHO proceedings into a forum for the exposition of the political agenda of the National Worker's Rights Committee. Manning v. City of Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Public Service Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Hadley, 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. A.K. Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear

Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc.; 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. Nynex, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[6] 6 OCAHO 892 (1996), appeal filed No. 96-3688 (3d Cir. 1996). Each of these cases asserted similar claims that a respondent employer's requirement for an employee's social security number and/or an employer's withholding of sums from an employee's wages for taxes, is an immigration-related unfair employment practice or otherwise discriminates in violation of 8 U.S.C. § 1324b. All of these cases were dismissed at an early stage; none has survived preliminary motions to dismiss either on jurisdictional grounds or for failure to state a claim.

Aguilar's assertion that citizens of the United States residing therein are not subject to federal taxation and are free to decline participation in the social security system have been rejected in a number of other federal fora. For over 75 years, the Supreme Court and lower federal courts have recognized the Sixteenth Amendment's authorization of non-apportioned direct income taxes upon United States citizens residing in the United States. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 12-19 (1916), Lovell v. United States, 755 F.2d 517, 519 (7th Cir. 1984), Parker v. Commissioner, 724 F.2d 469, 471 (5th Cir. 1984), United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981). Employers are required by 26 U.S.C. § 3102(a) and § 3402(a) to deduct and withhold income and social security taxes from the wages of their employees. It is also well established by the highest authority that one may not unilaterally opt out of the social security system. United States v. Lee, 455 U.S. 252, 258 (1982). The Ninth Circuit has long held that an employer is not liable to an employee for complying with a legal duty to withhold for taxes. Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986). These clear precedents are not vulnerable to overruling by an administrative tribunal with jurisdiction limited to specific provisions of the INA.

The complaint sets forth no factual assertions which could remotely give rise to an inference of retaliation. If Aguilar's driver's license was suspended, he may not lawfully work as a driver. No causal relation has been alleged or can reasonably be inferred between Aguilar's termination and the submission of his documents several months previously. While Aguilar is entitled to the benefit of every reasonable inference, no factfinder could draw such an inference from the facts alleged.

The complaint must be dismissed. Ordinarily the dismissal of a claim for failure to meet minimal pleading requirements should be accompanied by a grant of leave to file an amended complaint to cure the defect. However, where it appears to a certainty that amendment would be futile, there is no reason to permit such filing. Cf. Acito v. IMCERA Group, Inc., 47 F.3d 47, 55

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[6] While neither Kotmair or the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

(2d Cir. 1995). In light of the increasing weight of developing precedent in this forum summarily and unanimously rejecting similar frivolous claims, no amendment will be permitted.

FINDINGS

1. Richard Aguilar was hired by United Parcel Service in 1975 or 1976.

2. Richard Aguilar continued to work at United Parcel Service from 1975 or 1976 until February 12, 1997.

3. On June 24, 1996, Richard Aguilar presented to United Parcel Service documents entitled "A Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" and "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by (sic) revealing that I am not to be treated as an alien."

4. The precise origin of the documents is undisclosed.

5. The documents were presented to United Parcel Service for the purpose of persuading the employer to cease withholding sums from Aguilar's wages for federal taxes and social security contributions.

6. United Parcel Service declined to honor the documents or to cease withholding sums from Aguilar's wages for federal taxes and social security contributions as Aguilar requested.

7. The documents were not presented in the process of hiring, recruitment, or referral for a fee.

8. The documents were not presented for the purpose of showing Aguilar's identity or eligibility to work in the United States.

9. The documents are not documents acceptable for the purpose of showing an employee's identity or eligibility to work in the United States.

10. United Parcel Service had no obligation to ascertain Aguilar's eligibility to work in the United States or to complete a Form I-9 for him.

11. United Parcel Service's rejection of Aguilar's documents does not violate 8 U.S.C. § 1324b.

12. Richard Aguilar was terminated from his job as a driver with UPS on February 12, 1997.

13. Aguilar's termination was related to the suspension of his driver's license.

14. Aguilar's termination was not related to his submission of the subject documents.

CONCLUSIONS

1. The circumstances surrounding Aguilar's termination are not circumstances from which an inference of citizenship discrimination or of retaliation within the meaning of 8 U.S.C. § 1324b may be drawn by any reasonable factfinder.

2. Aguilar's complaint fails to state a claim upon which relief can be granted because it poses no issues cognizable under 8 U.S.C. § 1324b. It is accordingly dismissed.

SO ORDERED

Dated and entered this 2nd day of September, 1997.

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 1997, I have served copies of the foregoing Final Decision and Order of Dismissal on the following persons at the addresses indicated:

Poli Marmelejos, Esq.
Acting Special Counsel
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 7, 1997

JOYCE J. AUSTIN, Complainant, v. JITNEY JUNGLE STORES OF AMERICA, INC., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97D00105)))

Exhibit 2

FINAL DECISION AND ORDER GRANTING ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Charles L. Brocato, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, for Respondent.

I. *Procedural History*

On May 13, 1997, Jitney-Jungle Stores of America, Inc. (Respondent or Jitney-Jungle), filed a Motion for Attorney's Fees in *Joyce J. Austin v. Jitney-Jungle Stores of America*[1], 6 OCAHO 923

[1]*Austin* resolved three issues: (1) whether an employee whose wages are garnished in compliance with an Internal Revenue Service (IRS) Notice of Levy in satisfaction of unpaid taxes may successfully circumvent wage garnishment by suing her employer for discrimination under 8 U.S.C. §1324b, an immigration-related cause of action; (2) whether an employer who complies with an IRS Notice of Levy and is sued as a consequence may implead the United States in its role of tax collector; and (3) whether an employer's refusal to honor gratuitously tendered, unofficial documents purporting to exempt an employee from tax withholding and social security contribution constitutes discrimination. *Austin* held that (1) an employee cannot utilize 8 U.S.C. §1324b anti-discrimination provisions to avoid IRS tax obligations, including wage levies; (2) an employer sued for 8

Continued on next page—

(1997), 1997 WL 235918 (O.C.A.H.O.), and a Brief in Support of Motion and Proof of Service. Jitney-Jungle requested **$4,751.61** for attorney's fees and related expenses, provided counsel Charles L. Brocato's affidavit, which summarized the basis for the amount requested, including information related to certain of twelve factors indicating reasonable attorney's fees enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 (5th Cir. 1974) (the so-called *Johnson* factors).

To document the amount requested, on September 3, 1997, I ordered Jitney-Jungle to provide copies of itemized statements submitted by counsel. *See* 28 C.F.R. §68.52(c)(2)(v) (1996). On September 30, 1997, Jitney-Jungle responded, filing an Amendment to its request, which asked for **$4,971**, as documented in the Supplemental Affidavit of Charles L. Brocato.

II. *Discussion*

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Title 8 U.S.C. §1324b(h) provides in pertinent part that

> an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Furthermore,

> [T]he Supreme Court has held that a . . . [c]ourt may, in its discretion, award attorney's fees to a prevailing Defendant in a [discrimination] case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566, at 6 (1993), 1993 WL 544051, at *10–11 (O.C.A.H.O.), citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Continued—
U.S.C. §1324b discrimination may not implead the United States; and (3) an employer's refusal to honor gratuitously tendered, improvised tax-exemption documents is not a violation of 8 U.S.C. §1324b. Austin's Complaint was dismissed with prejudice because this forum lacks subject matter jurisdiction over tax and social security matters; 8 U.S.C. §1324b does not confer subject matter jurisdiction over terms and conditions of employment; the Anti-Injunction Act, 26 U.S.C. §7421(a), explicitly deprives courts of jurisdiction in actions meant to restrain tax collection; and Austin's Complaint failed to state a claim upon which relief can be granted under the relevant statute, 8 U.S.C. §1324b(a)(1).

An award of attorney's fees depends on satisfaction of a two-part test:

> (1) the party claiming attorney's fees must prevail, and
>
> (2) the complainant must have been unreasonable in filing the underlying action.

Id.

1. *Jitney-Jungle Is the Prevailing Party*

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988), defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought...." In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Those "who prevailed on a significant issue in the litigation and... obtained some of the relief sought... are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

Jitney-Jungle "succeeded" on a significant claim when I dismissed Austin's Complaint with prejudice for failure to state a cause of action cognizable under §1324b(g)(3), thus affording Jitney-Jungle the "relief sought," and "materially altering" Jitney-Jungle's and Austin's legal relationship. To similar effect, Jitney-Jungle's legal relationship with Austin was "materially altered" when I dismissed her Complaint for lack of subject matter jurisdiction. Jitney-Jungle, therefore, satisfies the first of this two-part test; it is the prevailing party.

I find that Respondent meets the prevailing party test of *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in litigation by demonstrating that Austin failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when I dismissed Austin's Complaint.

2. *Austin's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). *See Horne v.*

Hampstead, 7 OCAHO 959, at 6 (1997); *Jasso*, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

Austin continued to press her frivolous 8 U.S.C. §1324b claims—*i.e.*, she did not withdraw her Complaint as well she might have in light of unanimous OCAHO precedent dismissing discrimination claims predicated on an employer's refusal to accept self-styled tax-exemption documents.[2] Austin was, therefore, on notice that her claims were without foundation in fact and law.

On the core issue of *Austin v. Jitney-Jungle*, 7 OCAHO 932, 1997 WL 235918, whether or not an employee may successfully sue an employer for withholding federal taxes from the worker's wages, the U.S. Court of Appeals for the Seventh Circuit has held that:

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1984) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal by abusers of the tax system merely to harass the collection of public revenue"). *See also Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 353 (7th Cir. 1997) ("Money collected in error by a lawful agent [such as an employer] . . . can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund"), *petition for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97–347); *Webb v. United States*, 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

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[2]*See*—to cite only those cases decided prior to *Austin*—*Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Austin's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, *supra,* addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Austin's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where ***the plaintiff's case is dismissed for failure to state a claim on which relief could be granted. . . .***"[3] Austin maintains that her employer discriminated against her by refusing to accept her self-styled, gratuitously tendered documents,[4] subjecting her to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[5] Jitney-Jungle, moreover, is statutorily mandated to

[3]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. Suffolk County*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous"); *Rivera Carbana v. Cruz*, 588 F. Supp. 80 (D.P.R. 1984) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (Table).

[4]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Austin presented to prove tax exemption and social security secession). *See also* OSC Charge, wherein Austin characterizes as an "unfair employment practice" Jitney Jungle's refusal to forward her self-styled and gratuitously proffered Statement of Citizenship to the IRS, or to "acknowledge her Affidavit of Constructive Notice that she was exempt from social security taxes.

[5]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—*i.e.*, in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

withhold income taxes[6] and social security contributions[7] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[8] 26 U.S.C. §3403,[9] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[10] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17 (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Jitney-Jungle, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions, . . . is statutorily immunized from suit[,]" Austin's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Austin's] allegations," and I award Jitney-Jungle **$4,971** in attorney's fees and related expenses, the computation of which is explained at **II, B.**, below. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Austin's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

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[6]26 U.S.C. §3402(a).

[7]26 U.S.C. §3102(a).

[8]26 U.S.C. §3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person. . . .").

[9]26 U.S.C. §3403 ("The employer . . . shall not be liable to any person. . . .")

[10]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

B. *Reasonableness of Attorney's Fees Request*

To support fee-shifting, "[a]ny application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). Counsel supplies the following facts and figures to support Jitney-Jungle's request for **$4,971** in attorney's fees and related expenses:

1. *Attorney Charles L. Brocato*

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; 1961 graduate of the University of Mississippi School of Law; advanced degree in Taxation, New York University; thirty-six (36) years' experience.[11]

Rate Charged: discounted rate of $175 an hour
Number of Hours: 27.59[12] hours x $175 = $4,828.35

2. *Attorney Jeff Walker*

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; nineteen (19) years' labor and employment experience.[13]

Rate Charged: discounted rate of $175 an hour
Number of Hours: .20 hours x $175 = $35

3. *Misc. Costs*

1996 Copy Costs =	$ 72.00
Postage Costs =	35.65
Total =	$107.65

Total Charges: $4,971.00

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation

[11]*See* WESTLAW Database WLD-PRI.
[12]According to the amended motion; the first request for attorney's fees gave Brocato's time as 26.70 hours.
[13]*See* WESTLAW Database WLD-PRI.

provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. The *Hensley* calculation is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors.... [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the... court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The... court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*.... The Senate Report cites to *Johnson* as well...." *Hensley*, 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*,... have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees...." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[14] These twelve factors are:

> (1)... time and labor required.... (2)... novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part.... (3)... skill requisite to perform the legal service properly.... (4)... preclusion of other employment by the attorney due to accep-

[14]*See Barber*, 577 F.2d at 226:

> *We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.*

> tance of the case. . . . (5) . . . customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) . . . amount involved and the results obtained. . . . (9) . . . experience, reputation, and ability of the attorneys. . . . (10) . . . "undesirability" of the case. . . . (11) . . . nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in initially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[15] *Trimper v. City of Norfolk, Va.*, 58 F.3d at 73.

Applying the twelve *Johnson* factors, to Jitney Jungle's request, I find that the hourly rates are reasonable in light of recent OCAHO caselaw in which ALJs awarded attorney's fees ranging from $75 per hour to $284 per hour: *Kosatchkow v. Allen-Stevens* Corp., 7 OCAHO 966 (1997) (awarding $4,474 in attorney's fees and related expenses at rates of $180 per hour for a partner with twelve (12) years' experience; $160 an hour for an attorney with nine (9) years' experience, and $95 an hour for a new attorney in Detroit, MI); *Lareau v. US Airways*, 7 OCAHO 963 (1997) (awarding $5,296.47 in attorney's fees at rates ranging from $284.75 an hour for work by a senior partner with twenty-six (26) years' experience, $243 for "Of Counsel" with thirteen (13) years' tax experience, and $207 an hour for "Of Counsel" with ten (10) years' experience, to $30 an hour for work performed by a law clerk at a major Washington, DC law firm); *Horne v. Hampstead,* 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of

[15]"In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 535 (1995).

$1,833.75, with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[16] I find attorney's fees of **$4,971,** representing $175 dollars an hour for a senior partner with thirty-six (36) years' experience and for a partner with nineteen (19) years' experience, is reasonable in the Jackson, MS, market.

III. *Conclusion and Order*

By this Order, I find Jitney-Jungle's request reasonable and award **$4,971** in attorney's fees and related expenses for the services of senior attorney Charles L. Brocato (University of Mississippi School of Law, LL.B., 1961; Master of Laws in Taxation, New York University; former Clarksdale, MS, prosecuting attorney), a senior partner in the law firm of Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, of Jackson, Mississippi, and for the services of Jeffrey A. Walker, Esq., an attorney with nineteen (19) years' experience in labor and employment law, in the same firm.

Jitney-Jungle is the prevailing party and the Complaint is without reasonable foundation in law and fact. Austin is directed to pay Jitney-Jungle **$4,791** in attorney's fees and related expenses.

SO ORDERED.

Dated and entered this 7th of October, 1997.

MARVIN H. MORSE
Administrative Law Judge

[16]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .") or by the failure of EAJA to address the award of other fees and expenses.

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

JOYCE J. AUSTIN, Complainant, v. JITNEY JUNGLE STORES OF AMERICA, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding Case No. 97D00105

Exhibit 3

FINAL DECISION AND ORDER GRANTING ATTORNEY'S FEES
(October 7, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., on behalf of Complainant.**
Charles L. Brocato, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, for Respondent.

1. Procedural History

On May 13, 1997, Jitney-Jungle Stores of America, Inc. (Respondent or Jitney-Jungle), filed a Motion for Attorney's Fees in *Joyce J. Austin v. Jitney-Jungle Stores of America*[1], 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.), and a Brief in Support of Motion and

[1] *Austin* resolved three issues: (1) whether an employee whose wages are garnished in compliance with an Internal Revenue Service (IRS) Notice of Levy in satisfaction of unpaid taxes may successfully circumvent wage garnishment by suing her employer for discrimination under 8 U.S.C. § 1324b, an immigration-related cause of action; (2) whether an employer who complies with an IRS Notice of Levy and is sued as a consequence may implead the United States in its role of tax collector; and (3) whether an employer's refusal to honor gratuitously tendered, unofficial documents purporting to exempt an employee from tax withholding and social security contribution constitutes discrimination. *Austin* held that (1) an employee cannot utilize 8 U.S.C. § 1324b anti-discrimination provisions to avoid IRS tax obligations, including wage levies; (2) an employer sued for 8 U.S.C. § 1324b discrimination may not implead the United States; and (3) an employer's refusal to honor gratuitously tendered, improvised tax-exemption documents is not a violation of 8 U.S.C. § 1324b. Austin's Complaint was dismissed with prejudice because this forum lacks subject matter jurisdiction over tax and social security matters; 8 U.S.C. § 1324b does not confer subject matter jurisdiction over terms and conditions of employment; the Anti-Injunction Act, 26 U.S.C. § 7421(a), explicitly deprives courts of jurisdiction in actions meant to restrain tax collection; and Austin's Complaint failed to state a claim upon which relief can be granted under the relevant statute, 8 U.S.C. § 1324b(a)(1).

Proof of Service. Jitney-Jungle requested **$4,751.61** for attorney's fees and related expenses, provided counsel Charles L. Brocato's affidavit, which summarized the basis for the amount requested, including information related to certain of twelve factors indicating reasonable attorney's fees enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) (the so-called *Johnson* factors).

To document the amount requested, on September 3, 1997, I ordered Jitney-Jungle to provide copies of itemized statements submitted by counsel. *See* 28 C.F.R. § 68.52(c)(2)(v) (1996). On September 30, 1997, Jitney-Jungle responded, filing an Amendment to its request, which asked for **$4,971**, as documented in the Supplemental Affidavit of Charles L. Brocato.

2. Discussion

A. Test for Awards of Attorney's Fees Under 8 U.S.C. § 1324b

Title 8 U.S.C. § 1324b(h) provides in pertinent part that

> an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Furthermore,

> [T]he Supreme Court has held that a . . . [c]ourt may, in its discretion, award attorney's fees to a prevailing Defendant in a [discrimination] case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

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An award of attorney's fees depends on satisfaction of a two-part test:

(1) the party claiming attorney's fees must prevail, and

(2) the complainant must have been unreasonable in filing the underlying action.

Id.

1. Jitney-Jungle Is the Prevailing Party

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§ 1983, 1988), defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought . . . ." In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792-93. Those "who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

Jitney-Jungle "succeeded" on a significant claim when I dismissed Austin's Complaint with prejudice for failure to state a cause of action cognizable under § 1324b(g)(3), thus affording Jitney-Jungle the "relief sought," and "materially altering" Jitney-Jungle's and Austin's legal relationship. To similar effect, Jitney-Jungle's legal relationship with Austin was "materially altered" when I dismissed her Complaint for lack of subject matter jurisdiction. Jitney-Jungle, therefore, satisfies the first of this two-part test; it is the prevailing party.

I find that Respondent meets the prevailing party test of *Texas State Teachers, i.e.*, (1) it prevailed on a significant issue in litigation by demonstrating that Austin failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when I dismissed Austin's Complaint.

2. Austin's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous

Fee shifting turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h). *See Horne v. Hampstead*, 7 OCAHO 959, at 6 (1997); *Jasso*, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

Austin continued to press her frivolous 8 U.S.C. § 1324b claims -- *i.e.*, she did not withdraw her Complaint as well she might have in light of unanimous OCAHO precedent dismissing discrimination claims predicated on an employer's refusal to accept self-styled tax-

exemption documents.[2] Austin was, therefore, on notice that her claims were without foundation in fact and law.

On the core issue of *Austin v. Jitney-Jungle*, 7 OCAHO 932, 1997 WL 235918, whether or not an employee may successfully sue an employer for withholding federal taxes from the worker's wages, the U.S. Court of Appeals for the Seventh Circuit has held that:

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1984) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal by abusers of the tax system merely to harass the collection of public revenue"). *See also Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 353 (7th Cir. 1997) ("Money collected in error by a lawful agent [such as an employer] . . . can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund"), *petition for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347); *Webb v. United States,* 66 F.3d 691, 697-98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, *supra,* addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. § 1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94-1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Austin's Complaint was summarily dismissed for lack of subject matter jurisdiction and for

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[2] *See* -- to cite only those cases decided prior to *Austin* -- *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97-70124 (9th Cir. 1997); *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996). Austin's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where ***the plaintiff's case is dismissed for failure to state a claim on which relief could be granted*** . . . ."[3] Austin maintains that her employer discriminated against her by refusing to accept her self-styled, gratuitously tendered documents,[4] subjecting her to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[5] Jitney-Jungle, moreover, is statutorily mandated to withhold income taxes[6] and social security contributions[7] and is immunized from legal liability for withholding by 26 U.S.C. § 3102(b),[8] 26 U.S.C. § 3403,[9] and the Anti-Injunction Act, 26 U.S.C. § 7421(a),[10] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

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[3]1 Court Awarded Attorney Fees (MB) ¶ 10.04, at 10-77 - 10-78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. Suffolk County*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous"); *Rivera Carbana v. Cruz*, 588 F. Supp. 80 (D.P.R. 1984) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (Table).

[4]*See* Complaint, at ¶ 16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Austin presented to prove tax exemption and social security secession). *See also* OSC Charge, wherein Austin characterizes as an "unfair employment practice" Jitney Jungle's refusal to forward her self-styled and gratuitously proffered Statement of Citizenship to the IRS, or to "acknowledge her Affidavit of Constructive Notice that she was exempt from social security taxes.

[5]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"--*i.e.*, in the workplace, through payroll deductions. 26 U.S.C. §§ 3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[6]26 U.S.C. § 3402(a).

[7]26 U.S.C. § 3102(a).

[8]26 U.S.C. § 3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person . . . .").

[9]26 U.S.C. § 3403 ("The employer . . . shall not be liable to any person . . . .")

[10]26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . .").

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory . . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17 (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Jitney-Jungle, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions, . . . is statutorily immunized from suit[,]" Austin's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Austin's] allegations," and I award Jitney-Jungle **$4,971** in attorney's fees and related expenses, the computation of which is explained at **II, B.**, below. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Austin's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. § 1324b(h) two-part test for award of attorney's fees.

B. Reasonableness of Attorney's Fees Request

To support fee-shifting, "[a]ny application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. § 68.52(c)(2)(v). Counsel supplies the following facts and figures to support Jitney-Jungle's request for **$4,971** in attorney's fees and related expenses:

1. Attorney Charles L. Brocato

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; 1961 graduate of the University of Mississippi School of Law; advanced degree in Taxation, New York University; thirty-six (36) years' experience.[11]

Rate Charged: discounted rate of $175 an hour
Number of Hours: 27.59[12] hours x $175 = $4,828.35

2. Attorney Jeff Walker

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[11] *See* WESTLAW Database WLD-PRI.

[12] According to the amended motion; the first request for attorney's fees gave Brocato's time as 26.70 hours.

Qualifications: Partner, Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, Jackson, MS; nineteen (19) years' labor and employment experience.[13]

Rate Charged: discounted rate of $175 an hour
Number of Hours: .20 hours x $175 = $35

3. **Misc. Costs**

1996 Copy Costs = $72
Postage Costs = 35.65
Total = $107.65

Total Charges: $4,971.00

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. The *Hensley* calculation is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the . . . court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The . . . court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson* . . . . The Senate Report cites to *Johnson* as well . . . ." *Hensley*, 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934

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[13] *See* WESTLAW Database WLD-PRI.

(1978).[14] These twelve factors are:

> (1) . . . time and labor required. . . . (2) . . . novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) . . . skill requisite to perform the legal service properly. . . . (4) . . . preclusion of other employment by the attorney due to acceptance of the case. . . . (5) . . . customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) . . . amount involved and the results obtained. . . . (9) . . . experience, reputation, and ability of the attorneys. . . . (10) . . . "undesirability" of the case. . . . (11) . . . nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in initially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[15] *Trimper v. City of Norfolk, Va.*, 58 F.3d at 73.

Applying the twelve *Johnson* factors, to Jitney Jungle's request, I find that the hourly rates are reasonable in light of recent OCAHO caselaw in which ALJs awarded attorney's fees ranging from $75 per hour to $284 per hour: *Kosatchkow v. Allen-Stevens* Corp., 7 OCAHO 966 (1997) (awarding $4,474 in attorney's fees and related expenses at rates of $180 per hour for a partner with twelve (12) years' experience; $160 an hour for an attorney with nine (9) years' experience, and $95 an hour for a new attorney in Detroit, MI); *Lareau v. US Airways*, 7 OCAHO 963 (1997) (awarding $5,296.47 in attorney's fees at rates ranging from $284.75 an hour for work by a senior partner with twenty-six (26) years' experience, $243 for "Of Counsel" with thirteen (13) years' tax experience, and $207 an hour for "Of Counsel" with ten (10) years' experience, to $30

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[14] *See Barber*, 577 F.2d at 226:

> We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.

[15] "In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 535 (1995).

an hour for work performed by a law clerk at a major Washington, DC law firm); *Horne v. Hampstead,* 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75, with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[16] I find attorney's fees of **$4,971,** representing $175 dollars an hour for a senior partner with thirty-six (36) years' experience and for a partner with nineteen (19) years' experience, is reasonable in the Jackson, MS, market.

III. Conclusion and Order

By this Order, I find Jitney-Jungle's request reasonable and award **$4,971** in attorney's fees and related expenses for the services of senior attorney Charles L. Brocato (University of Mississippi School of Law, LL.B., 1961; Master of Laws in Taxation, New York University; former Clarksdale, MS, prosecuting attorney), a senior partner in the law firm of Butler, Snow, O'Mara, Stevens, & Cannada, PLLC, of Jackson, Mississippi, and for the services of Jeffrey A. Walker, Esq., an attorney with nineteen (19) years' experience in labor and employment law, in the same firm.

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[16]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. § 504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour . . . .") or by the failure of EAJA to address the award of other fees and expenses.

Jitney-Jungle is the prevailing party and the Complaint is without reasonable foundation in law and fact. Austin is directed to pay Jitney-Jungle **$4,791** in attorney's fees and related expenses.

SO ORDERED.

Dated and entered this 7th of October, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order of Inquiry were mailed first class this 7th day of October 1997, addressed as follows:

Complainant's Representative

John B. Kotmair, Jr., Director
National Worker's Rights Committee
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MARC BENZ, Complainant, v. DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Respondent.	8 U.S.C. § 1324b Proceeding OCAHO Case No. 97B00115 Judge Robert L. Barton, Jr.

Exhibit 4

ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE TO PLEAD AND MOTION TO DISMISS

(September 8, 1997)

I. BACKGROUND

On May 28, 1997, Marc Benz (Complainant or Benz), through his representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleges that the Department of Defense, Defense Finance and Accounting Service (Respondent) discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, and committed document abuse by refusing to accept documents he presented, namely a Statement of Citizenship and an Affidavit of Constructive Notice, Compl. ¶ 16. Complainant states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on February 5, 1997.[2] Compl. ¶ 18. The OSC charge reveals that the two documents in question purport to show that Complainant is not subject to income tax withholding. OSC Charge at 3-4. Complainant states that OSC sent him a letter that advised he could file a complaint directly with OCAHO. Compl. ¶ 19. Complainant requests back pay from June 1993. Compl. ¶¶ 20-21.

Respondent's answer to the Complaint was due July 7, 1997. As Respondent still had not

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[1] I have since excluded Mr. Kotmair from participation in this proceeding. See Order Excluding Complainant's Representative (Sept. 4, 1997).

[2] A copy of the letter that communicates Complainant's charge to OSC is attached as an exhibit to the Complaint.

filed an answer by July 29, 1997, I issued a Notice of Entry of Default on that date in which I warned that Respondent should act promptly in filing an answer to avoid a default judgment and should explain why an answer was not filed in a timely manner. On August 4, 1997, Respondent submitted its Motion for Leave to Plead and Motion to Dismiss Complaint, supported by an accompanying memorandum. Respondent states that I should dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. R. Mot. at 1; R. Mem. at 2-3.

Complainant was entitled to file a response to Respondent's Motion for Leave to Plead and Motion to Dismiss Complaint on or before August 19, 1997. See 28 C.F.R. §§ 68.11(b), 68.8(c)(2) (1996). Complainant, however, did not file a response until August 27, 1997.

II. STANDARDS GOVERNING A MOTION TO DISMISS

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 115 S. Ct. 2640 (1995). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Yamaguchi, 109 F.3d at 1481; Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997); Bent v. Brotman Medical Ctr. Pulse Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[3] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5.

"[C]onclusory allegations of law and unwarranted inferences," however, are not assumed to be true. See Rosenbaum v. Syntex Corp. (In re Syntex Corp. Securities Litigation), 95 F.3d 922, 926 (9th Cir. 1996); see also Ott v. Home Savings & Loan Ass'n, 265 F.2d 643, 648 n.8 (9th Cir. 1958) (noting that the mere conclusions in the complaint are not assumed to be true). Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Gilligan, 108 F.3d at 248 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459,

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[3] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

1463 (11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

III. DECISION AND ORDER

A. Respondent's Motion for Leave to Plead

Federal Rule of Civil Procedure 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). As I merely have entered Respondent's default and not an actual default judgment against Respondent, the standard found in Rule 55(c) is the appropriate one to apply. See Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986) ("The different treatment of default entry and judgment by Rule 55(c) frees a court considering a motion to set aside a default entry from the restraint of Rule 60(b) and entrusts determination to the discretion of the court.").

Despite the less stringent standard for setting aside an entry of default, courts consider the same factors utilized in setting aside a default judgment, such as (1) whether the default was culpable or willful, (2) whether setting aside the entry will prejudice the opposing party; and (3) whether the defaulting party has a meritorious defense to the action. See O'Connor v. State of Nevada, 27 F.3d 357, 364 (9th Cir. 1994), cert. denied, 514 U.S. 1021 (1995); Hawaii Carpenters, 794 F.2d at 513. "These Rule 60(b) grounds are liberally interpreted when used on a motion for relief from an entry of default." Id.; see also Mendoza v. Wight Vineyard Management, 783 F.2d 941, 945 (9th Cir. 1986) ("The court's discretion is especially broad where, as here, it is entry of default that is being set aside, rather than a default judgment."); O'Connor, 27 F.3d at 364. The application of the above factors to the present case weighs heavily in favor of setting aside my prior entry of default and allowing Respondent to plead.

Respondent did not fail to answer the Complaint in a timely fashion because of willful disregard or disrespect for the legal process. Instead, Respondent asserts that its delay in responding to the Complaint occurred because Respondent's Office of General Counsel failed to receive the Complaint as the result of an administrative oversight on the part of the personnel at the office to which the Complaint was sent. See R. Mem. at 2. Respondent states that it took action to prepare pleadings immediately upon receiving the Notice of Entry of Default. Id.

After learning of the action, Respondent's attorney indeed acted swiftly, filing a notice of appearance and the present motions within six days of the date I issued the Notice of Entry of Default. Complainant would suffer no prejudice if I grant Respondent's request to set aside the default because a relatively short amount of time has elapsed since Complainant filed his Complaint and, as Respondent notes, see id. at 2, because of the likelihood of lack of success of Complainant's claims.

Finally, it seems likely that Respondent presents a meritorious defense to the Complaint. A number of cases, all alleging facts and causes of action that are nearly identical to those asserted in

the present Complaint, have been filed with OCAHO Administrative Law Judges, and all such cases have been dismissed at early stages for failure to state a claim, lack of subject matter jurisdiction, or both. See Lee v. AT&T, OCAHO Case No. 97B00031 (Aug. 26, 1997); Manning v. City of Jacksonville, 7 OCAHO 956 (1997); Hendrickson v. GTE Communication Systems Corp., OCAHO Case No. 97B00089 (Aug. 14, 1997); Gayle Davis v. GTE Florida Inc., OCAHO Case No. 97B00088 (Aug. 14, 1997); John Davis v. GTE Florida Inc., OCAHO Case No. 97B00087 (Aug. 14, 1997); Horst v. Juneau Sch. Dist., 7 OCAHO 975 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); Eldon Hutchinson v. GTE Data Servs., 7 OCAHO 954 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Janet Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Winkler v. West Capital Financial Servs., 7 OCAHO 928 (1997); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923 (1997), 1997 WL 235918; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997), 1997 WL 242208; Costigan v. NYNEX, 6 OCAHO 918 (1997), 1997 WL 242199; Boyd v. Sherling, 6 OCAHO 916 (1997), 1997 WL 176910; Winkler v. Timlin Corp., 6 OCAHO 912 (1997), 1997 WL 148820; Horne v. Town of Hampstead, 6 OCAHO 906 (1997), 1997 WL 131346; Lee v. Airtouch Communications, 6 OCAHO 901 (1996), 1996 WL 780148, appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), 1996 WL 670179, appeal filed, No. 96-3688 (3d Cir. 1996).

Weighing all the above factors, I find that Respondent has shown good cause to set aside the entry of default. I grant Respondent's Motion for Leave to Plead and set aside the prior entry of default.

B. Respondent's Motion to Dismiss Complaint

1. Lack of subject matter jurisdiction

Respondent argues that I do not have subject matter jurisdiction over the present controversy because of Complainant's ongoing employment relationship with Respondent. See R. Mem. at 3.[4]

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[4] Respondent also argues that subject matter jurisdiction is lacking because the Equal Employment Opportunity Commission (EEOC) previously exercised jurisdiction over Complainant's citizenship status discrimination claim in an EEOC charge that arose from the same set of facts as the present OCAHO case. See R. Mem. at 2-3. Respondent misunderstands the statutory provision that prohibits overlap between OSC and EEOC charges. The relevant statute provides that a charge of national origin discrimination cannot be brought before OSC if a charge of national origin discrimination based on the same set of facts was filed with EEOC

(continued...)

Complainant alleges that Respondent discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, but he does not allege that Respondent either refused to hire or fired him, id. ¶¶ 13-14.[5] Respondent confirms Complainant's continuing employment relationship with Respondent. See R. Mem. at 3.

"It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment." Horne, 6 OCAHO 906, at 5, 1997 WL 131346, at *4 (citing Naginski v. Department of Defense, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *23). "Controversies over conditions of employment do not implicate the jurisdictional requirements of § 1324b." D'Amico, 7 OCAHO 948, at 10 (citing Costigan, 6 OCAHO 918, at 5, 1997 WL 242199, at *3, and Horne, 6 OCAHO 906, at 6, 1997 WL 131346, at *4). Consequently, I do not have subject matter jurisdiction over Complainant's citizenship status discrimination claim. See Hendrickson, OCAHO Case No. 97B00089, at 5 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 5 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 5 (Aug. 14, 1997); Eldon Hutchinson, 7 OCAHO 954, at 6 (complainant neither fired nor not hired because he resigned); Hollingsworth, 7 OCAHO 942, at 3, 5; Janet Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23 ; D'Amico, 7 OCAHO 948, at 10-11; Lareau, 7 OCAHO 932, at 13; Mathews, 7 OCAHO 929, at 17; Jarvis, 7 OCAHO 930, at 7-8 (complainant neither fired nor not hired because he retired voluntarily); Smiley, 7 OCAHO 925, at 18-19; Austin, 6 OCAHO 923, at 19, 1997 WL 235918, at *14; Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3; Horne, 6 OCAHO 906, at 4, 1997 WL 131346, at *3.

I also lack subject matter jurisdiction over Complainant's document abuse claim. Complainant alleges that Respondent refused to accept the following documents: a "Statement of Citizenship" and an "Affidavit of Constructive Notice." Compl. ¶ 16(a). The Immigration Reform and Control Act of 1986 (IRCA) provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

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[4](...continued)
and EEOC exercised jurisdiction over it. See 8 U.S.C. § 1324b(b)(2) (1994). An EEOC adjudication or other disposition of a national origin discrimination claim, however, does not affect Complainant's ability to file allegations of citizenship status discrimination with OSC and OCAHO. Consequently, Respondent's argument is without merit.

[5] In fact, Complainant has left completely blank the portions of the OCAHO form complaint that ask Complainant to state whether he was discriminatorily fired or not hired.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements of the employment eligibility verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 28 C.F.R. § 274a.2(b)(ii) (1997).

Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization.[6] The documents Complainant asserts Respondent refused to accept, a Statement of Citizenship and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility.[7] Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; accord AT&T, OCAHO Case No. 97B00031, at 8-10 (Aug. 26, 1997); Hendrickson, OCAHO Case No. 97B00089, at 6-7 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 6-7 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 6-7 (Aug. 14, 1997); Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12,23; D'Amico, 7 OCAHO 948, at 11-13; Cholerton, 7 OCAHO 934, at 13-14; Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 7-8; Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16-17, 1997 WL 242208, at *13; Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6.

Complainant does not even allege that he presented the documents to establish identity and/or

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[6] For purposes of this case, acceptable documents are noted at 8 U.S.C. § 1324a(b)(1)(B)-(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C) (1997). Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable List A and List C documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996 enactment date. See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

[7] Although a Certificate of U.S. Citizenship, INS Form N-560 or N-561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994) and 8 C.F.R. § 274a.2(b)(v)(A)(*2*) (1997), Complainant's Statement of Citizenship is not such a document.

work eligibility;[8] consequently, the Complaint itself shows that Complainant's claim fails to implicate the employment eligibility verification system. As a result of the foregoing, I am compelled to dismiss Complainant's document abuse claim because I lack subject matter jurisdiction over Complainant's particular allegations.

2. Failure to state a claim

IRCA only governs claims by protected individuals of citizenship status discrimination when the individual is fired or not hired. See 8 U.S.C. § 1324b(a)(1) (1994); 28 C.F.R. § 44.200(a)(1) (1997); see also, e.g., D'Amico, 7 OCAHO 948, at 10; Horne, 6 OCAHO 906, at 5-6, 1997 WL 131346, at *4.

Assuming that the facts alleged in the Complaint are true, and construing those facts in the light most favorable to Complainant, Complainant nonetheless fails to state a viable claim of citizenship status discrimination under 8 U.S.C. § 1324b. Complainant states that he is a U.S. citizen, see Compl. ¶ 2, which means that he qualifies as a "protected individual" under the statute, see 8 U.S.C. § 1324b(a)(3)(A) (1994). As previously noted, however, Complainant does not allege that he either was refused employment or was fired from his job. See Compl. ¶¶ 13-14. Complainant has not alleged the type of treatment that constitutes discrimination under section 1324b and, therefore, fails to state a claim upon which relief may be granted with respect to citizenship status discrimination. See Hendrickson, OCAHO Case No. 97B00089, at 7-8 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 7-8 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 8 (Aug. 14, 1997); Hollingsworth, 7 OCAHO 942, at 3, 5; Janet Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 13; Lareau, 7 OCAHO 932, at 13; Mathews, 7 OCAHO 929, at 17; Jarvis, 7 OCAHO 930, at 4; Smiley, 7 OCAHO 925, at 26; Austin, 6 OCAHO 923, at 19, 1997 WL 269376, at *14; Wilson, 6 OCAHO 919, at 15, 1997 WL 242208, at *12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6.

In addition, Respondent states that Complainant has failed to state a claim of citizenship status discrimination because he has not alleged that Respondent treated him differently from other similarly situated employees of different citizenship status. See R. Mem. at 3. It is true that Complainant does not allege disparate treatment as part of his citizenship status discrimination claim. See Compl. ¶ 14(e) (inquiry regarding disparate treatment left completely blank). Complainant's failure to allege disparate treatment as part of his citizenship status discrimination claim provides additional grounds for dismissing the Complaint for failure to state a claim of citizenship status

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[8] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." Compl. ¶ 16.

discrimination.[9] See AT&T, OCAHO Case No. 97B00031, at 10-11 (Aug. 26, 1997); Hogenmiller, 7 OCAHO 953, at 5-6; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 13; Cholerton, 7 OCAHO 934, at 11-12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6; Boyd, 6 OCAHO 916, at 23-24, 1997 WL 176910, at *20-21; Timlin Corp., 6 OCAHO 912, at 8-10, 1997 WL 148820, at *7-8; Airtouch, 6 OCAHO 901, at 10, 1996 WL 780148, at *8-9.

In addition to the jurisdictional defect, Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept his Statement of Citizenship and his Affidavit of Constructive Notice, but Complainant specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra note 8 and accompanying text. Also, as Respondent appropriately notes, see R. Mem. at 3, those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra notes 6 and 7 and accompanying text.

Assuming that all of Complainant's factual allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant still fails to state a claim of document abuse. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.[10]

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[9] Complainant confuses his citizenship status discrimination claim and his document abuse claim in responding to Respondent's disparate treatment argument. Complainant quotes a portion of Westendorf v. Brown & Root, Inc., 3 OCAHO 477 (1992), 1992 WL 535635, although he does not provide a citation for the quoted segment, for the proposition that disparate treatment is not an element of a document abuse claim. See C. Reply to Mot. Dismiss at 10. That is a true statement. See Westendorf, 3 OCAHO 477, at 9 n.6, 1992 WL 535635, at *8 n.6. Complainant apparently fails to understand that Respondent's disparate treatment argument is made with respect to the citizenship status discrimination claim. As even Westendorf confirms, see id. at 12, 1992 WL 535635, at *7-8, disparate treatment is a necessary element of a citizenship status discrimination claim.

[10] Complainant maintains that "[d]ispite (sic) Respondents (sic) assertions, the legally mandated acceptance under 1324b(a)(6) is not in any way limited to 'for purposes of satisfying the requirements of section 1324a(b),' as Congress has studiously omitted any such limitation." C. Reply to Mot. Dismiss at 7. Contrary to Complainant's assertions, that language of limitation expressly appears in the statute, see supra part III.B.1, and applies to the provision regarding an

(continued...)

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7. Another Administrative Law Judge's recent holding also is particularly apt:

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [the complainant] asserts that [the respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine.

Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10; see also AT&T, OCAHO Case No. 97B00031, at 11-12 (Aug. 26, 1997); Hendrickson, OCAHO Case No. 97B00089, at 8-9 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 8-9 (Aug. 14, 1997); John Davis , OCAHO Case No. 97B00087, at 8-9 (Aug. 14, 1997); Horst, 7 OCAHO 975, at 3-4; Hogenmiller, 7 OCAHO 953, at 4; Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12; D'Amico, 7 OCAHO 948, at 14; Cholerton, 7 OCAHO 934, at 13-14; Werline, 7 OCAHO 935, at 8 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 6; West Capital Fin. Servs., 7 OCAHO 928, at 11 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 19-20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16, 1997 WL 242208, at *12-13; Boyd, 6 OCAHO 916, at 26-27 (1997), 1997 WL 176910, at *21-22; Timlin Corp., 6 OCAHO 912, at 6, 10-12 (1997), 1997 WL 148820, at *6, 9-11. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).

IV. CONCLUSION

I grant Respondent's Motion for Leave to Plead by setting aside my prior Notice of Entry of Default. Taken together, the circumstances weigh decidedly in favor of granting Respondent's Motion, especially in consideration of strong judicial preference for adjudication on the merits, see Mendoza, 783 F.2d at 945-46; D'Amico v. Erie Community College, 7 OCAHO 927, at 2-3 (1997) (Order Denying Complainant's Motion for Default Judgment).

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[10](...continued)
employer's refusal to honor documents that appear to be genuine and to relate to the individual presenting them, see cases cited in the remainder of part III.B.2.

After considering the parties' pleadings, I grant Respondent's Motion to Dismiss.[11] Assuming that every fact Complainant has alleged is true,[12] I make the following findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims; and

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[11] Pro se civil rights complainants should be given a chance to amend their complaints to correct any deficiency unless it clearly appears that amendment cannot overcome the deficiency. See Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980). A court, however, "does not err in denying leave to amend where the amendment would be futile or where the amended complaint would be subject to dismissal." Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (internal citation omitted). Granting Complainant an opportunity to amend his Complaint in the present case would be futile. First, the long line of previously cited precedent reveals that allowing Complainant to amend his Complaint would serve no useful purpose. Also, the Complaint does not fail because it suffers from errors of a hypercritical, technical legal nature that only those people schooled in the law could be expected to understand. The complaint in cases brought under section 1324b consists of a form that elicits the pertinent information from a complainant. The form complaint seeks information, many times with questions that demand simple "yes" or "no" answers, that set forth the elements of the causes of action that this forum recognizes. For example, paragraphs 13 and 14 of the form complaint demand affirmative or negative responses to the following statements, respectively: "I was knowingly and intentionally not hired" and "I was knowingly and intentionally fired." In this case, Complainant has chosen to leave both of his options, lines clearly and conveniently marked "Yes" and "No," for each of those questions completely blank. No one could seriously entertain any notion that Complainant failed to provide a necessary response because the information requested was incomprehensible or was demanded in a cryptic manner.

[12] Complainant vehemently insists that "as in all cases that have been brought before the Office of [the] Chief Administrative Hearing Officer (OCAHO) by the Director of the National Worker's Rights Committee, the respondents have been able (with the help of Administrative Law Judges 'ALJ's' (sic)) to get away with discriminatory practices without disproving the Complainant's facts involving the discrimination." C. Reply to Mot. Dismiss at 1-2. Complainant fails to understand that, for purposes of deciding a motion to dismiss, **I assume that every fact he has alleged is true**. See supra part II. Disposing of a claim on the grounds of lack of subject matter jurisdiction and failure to state a claim means it is not necessary to move to a hearing stage in which Complainant would have to prove his allegations, because, even assuming that all the facts Complainant alleges are true, **those facts would not entitle Complainant to any relief in this forum**.

2. Complainant's allegations of citizenship status discrimination and document abuse fail to state causes of action upon which this forum may grant relief.

For those reasons, Complainant's Complaint is dismissed.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b).

SO ORDERED.

Dated and entered this 8th day of September, 1997.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1997, I have served the foregoing Order Granting Respondent's Motion for Leave to Plead and Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Marc Benz
P.O. Box 981
Bremerton, WA 98337
(Complainant)

Department of Defense
Defense Finance & Accounting Service
1545 Second St., W., Ste. C
Charleston, SC 29408-1968
(Respondent)

John P. Koenig, Esq.
Defense Finance and Accounting
Service, Cleveland Center
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(Attorney for Respondent)

Poli Marmolejos
Acting Special Counsel
Office of Special Counsel for Immigration
and Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(Hand Delivered)

_____

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 15, 1998

Exhibit 5

LARRY BUNN,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. 1324b Proceeding
	)	OCAHO Case No. 97B00160
USX/US STEEL,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

Appearances: John B. Kotmair, Jr., National Worker's Rights Committee
Westminster, Maryland, for complainant;
Jared Meyer, Esquire, Pittsburgh, Pennsylvania, for respondent.

Before: Administrative Law Judge McGuire

I. *Background*

On April 15, 1997, John B. Kotmair, Jr., Director of the National Worker's Rights Committee, filed a charge on behalf of Larry Bunn (Bunn/complainant) with the Office of Special Counsel (OSC), United States Department of Justice, alleging that USX/U.S. Steel (USX/respondent), by having refused to discontinue withholding federal taxes from his wages, had committed unfair immigration-related employment practices namely, national origin and citizenship status discrimination, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324b(a)(1) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6).

Bunn was hired by USX on September 9, 1969, as a steelworker in that company's Fairfield Steel Works in Birmingham, Alabama, and he has been steadily employed since then at that location.

In January of 1994, Bunn allegedly tendered two (2) self-created documents entitled "Statement of Citizenship" and "Affidavit of Constructive Notice" to USX and advised the latter that those documents provided the bases for his being exempt from the requirement that he pay federal income tax, as well as social security tax, on his wages. For that reason, he demanded that USX discontinue withholding federal income and social security taxes from his wages. USX declined to comply with Bunn's request and continued to withhold federal taxes from his wages pursuant to the requirements of the Internal Revenue Code.

Resultingly, Bunn filed a charge of national origin discrimination with the Equal Employment Opportunity Commission (EEOC). He has not provided the date upon which he filed that charge, nor has he supplied the date upon which EEOC dismissed that charge for lack of jurisdiction.

On April 15, 1997, Bunn, through his designated representative, John B. Kotmair, Jr., filed discrimination charges with OSC. The nature of those charges are contained in an eight (8)-page letter submitted to OSC:

> In January of 1994, Mr. Bunn submitted a Statement of Citizenship . . . which states that he is a U.S. Citizen, and the IRS publication 515, which states that after receipt of the statement, the withholding agent is relieved from the duty of withholding the income tax.
>
> . . .
>
> It was additionally communicated to Mr. Petz, at USX/US Steel, by service of an Affidavit of Constructive Notice, that Mr. Bunn does not have nor does he recognize a social security number in relationship to himself.

After completing its investigation, OSC forwarded a determination letter, dated July 15, 1997, to Bunn, advising him that his allegations "have not raised an issue within our jurisdiction . . . [and] we are taking no further action with respect to your correspondence."

OSC further informed Bunn that if he disagreed with its decision, he was entitled to file a private action directly with this Office if he did so within 90 days of his receipt of that correspondence.

It should be noted that Bunn alleges that he filed his OSC charge on April 15, 1997, Complaint ¶18. OSC, however, has indicated in its determination letter that it received his charge on July 11, 1997, some four days before issuing its determination letter. For purposes of this ruling, the earlier of the two (2) dates will be utilized.

On September 11, 1997, complainant timely commenced this private action by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of IRCA. In his OCAHO Complaint, Bunn seeks back pay from January, 1994.

It can be readily seen that Bunn's September 11, 1997 Complaint did not reallege the charge of national origin discrimination that was contained in his initial OSC charge. OCAHO has jurisdiction over claims of national origin discrimination only where the employer has more than three (3) but less than 15 employees. *See* 8 U.S.C. §1324b(a)(2)(B); *Wilson v. Harrisburg School District*, 6 OCAHO 919, at 14 (1997).

The burden of demonstrating that OCAHO has jurisdiction is placed on the complainant at all times, and cannot be waived by either party. It is quite clear that complainant cannot meet this burden since it is found, as a matter of official notice, that USX employs well over 14 employees. *See* 28 C.F.R. §68.41. Accordingly, our inquiry is limited to the two (2) allegations contained in the Complaint, citizenship status discrimination and document abuse.

On September 15, 1997, a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, were served on respondent by certified mail, return receipt requested.

On September 23, 1997, John B. Kotmair, Jr. filed a Notice of Appearance on behalf of the complainant.

On October 6, 1997, respondent filed its answer in which it denied having discriminated against Bunn based upon his citizenship status and also denied having committed acts of document abuse.

On November 13, 1997, USX filed a pleading captioned Respondents USX Corporation and its U.S. Steel Division's Motion to Dismiss, or In the Alternative, Motion for Summary Judgment.

On November 24, 1997, Bunn filed a response to USX's dispositive motion.

For the following reasons, respondent's motion to dismiss Bunn's claims is being granted for failure to state a cognizable section 1324b claim and because this Office lacks subject matter jurisdiction. Complainant's charge of document abuse is being dismissed on the additional ground of not having been timely filed.

II. *Standards of Decision*

OCAHO rules of practice and procedure[1] authorize the Administrative Law Judge to dispose of cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief can be granted, 28 C.F.R. §68.10. When matters outside the immediate pleadings are considered by the Administrative Law Judge, a motion to dismiss is treated as one for summary decision, 28 C.F.R. §68.38(c). Since the assessment of Bunn's claim is being limited to the immediate pleadings, the standards governing a motion to dismiss apply.

The pertinent procedural rule governing motions to dismiss, 28 C.F.R. §68.10, provides:

> The respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint.

A motion to dismiss for failure to state a claim upon which relief can be granted under section 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)[2]. *Costigan v. NYNEX*,

[1]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

[2]28 C.F.R. §68.1 provides that the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by OCAHO rules.

6 OCAHO 918, at 2 (1997)[3]; *Bent v. Brotman Medical Ctr. Pulse Health Servs.*, 5 OCAHO 764, at 364 (1995); *Kasathsko v. IRS*, 6 OCAHO 840, at 3 (1996).

In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the complainant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The allegations contained in the complaint are taken as true. Therefore, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *United States v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997); *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

III. *Bunn's Citizenship Status Discrimination Claim*

Complainant has alleged that respondent discriminated against him based on his citizenship status. IRCA provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . in the case of a protected individual, because of such individual's citizenship status." 8 U.S.C. §1324b(a)(1).

The burden of stating a prima facie case of discrimination under IRCA requires that complainant demonstrate that: 1) he is a member of a protected class; 2) the employer had an open position for which he applied or was discharged; 3) he was qualified for the position; and 4) he was rejected or discharged under circumstances giving rise to an inference of unlawful discrimination. *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11 (1996); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Comm. Affairs v.*

[3]Citations to OCAHO precedents reprinted in bound Volume 1 through Volume 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volume 1 through Volume 5 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

Burdine, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–07 (1993).

Once a complainant provides a sufficient quantum of facts to demonstrate a prima facie case, the burden of production shifts to the employer to present a legitimate non-discriminatory reason for its employment action.

However, if the complainant fails to meet its initial burden of demonstrating a prima facie case, the inference of discrimination never arises and the employer has no burden of production, and the complaint should be dismissed unless the defect can be cured by an amendment.

It is undisputed that Bunn, who is a United States citizen and thus within the class of persons granted IRCA protection against unlawful citizenship status discrimination, was hired in 1969 by USX and continues to be employed by the respondent firm. 8 U.S.C. §1324b(a)(3).

In support of its motion to dismiss, USX quite correctly argues that "[s]ince absolutely no event made illegal by section 1324b has occurred or been suffered by Complainant Bunn, as a matter of law there is no factual predicate or legal foundation whatever [to] underpin a decision to overturn [OSC's] conclusion that no remedial action is warranted in this case."

Bunn alleges that USX's refusal to accept his Statement of Citizenship and acknowledge that he is not subject to the Social Security Act, as well as USX's refusal to discontinue federal tax withholding, constitute discriminatory conduct that violates section 1324b. The tax-related legal theories and relief urged by Bunn's representative John B. Kotmair, Jr. have been fully tested and unanimously rejected in several other OCAHO rulings involving parallel factual scenarios. *Boyd v. Sherling*, 6 OCAHO 916 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996); *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Winkler v. Timlin Corporation*, 6 OCAHO 912 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *D'Amico v. Erie Comm. College*, 7 OCAHO 948 (1997); *Hogenmiller v.*

Lincare, Inc., 7 OCAHO 953 (1997); *Hamilton v. The Recorder*, 7 OCAHO 968 (1997); *Cook v. Pro Source, Inc.*, 7 OCAHO 960 (1997); *Hollingsworth v. Applied Research Assocs.*, 7 OCAHO 942 (1997); *Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatchkow v. Allen-Stevens Corp.*, 7 OCAHO 938 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Werline v. Pub. Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997).

Each of the cited cases involved the dismissal of similar claims by employees or prospective employees who sought to avoid having federal tax sums withheld from their wages, or who sought to avoid furnishing their social security numbers to employers. Bunn's response to complainant's dispositive motion provides no substantive explanation to distinguish his claims from those previously-enumerated tax protester cases.

Accordingly, in the absence of a prima facie showing of discriminatory treatment, respondent's motion to dismiss is granted as it pertains to complainant's citizenship status discrimination claim, and that claim is hereby ordered to be and is dismissed with prejudice to refiling.

IV. *Bunn's Document Abuse Claim*

Bunn's remaining allegation, that of document abuse, lacks any substantive merit as well.

The document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6), provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system.

The employment verification system requires every U.S. employer to verify at the time of hire that its employees are eligible to work in the United States by inspecting identity and work eligibility documents provided by the employee. The documents which an employee may tender for purposes of establishing identity and work authorization are those specified in IRCA's implementing regulations, 8 C.F.R. §274a.2(b)(1)(v).

In order to verify employment eligibility, employers utilize the Immigration and Naturalization Service Form I–9, officially known as the Employment Eligibility Verification Form. Every U.S. employer has been subject to the employment verification requirement since November 7, 1986. Nothing in IRCA nor its implementing regulations indicate that the employment verification system is to apply to employees hired before November 7, 1986. 8 C.F.R. 274a.2(a); *Johnson v. Florida Power Corp.*, 7 OCAHO 981, at 4 (1997).

At the risk of engaging in proscribed discriminatory document abuse, the employer may not request a particular document or demand more or different documents than are necessary to verify identity and employment eligibility, nor may an employer refuse to accept facially valid documents.

Bunn must show at a minimum that USX requested documents for purposes of satisfying IRCA's employment verification system. Elemental allegations of that nature are wholly absent from his pleadings. Bunn has alleged that in January, 1994, he voluntarily furnished two (2) documents, a Statement of Citizenship and an Affidavit of Constructive Notice, to demonstrate his purported exemption from participation in the federal social security system and from having federal tax withholding sums deducted from his earnings.

Because Bunn has been steadily employed since 1969, USX has obviously not required him to establish his identity and employment eligibility by providing acceptable documentation for that purpose. Consequently, the documents which Bunn voluntarily furnished could not possibly have been tendered in order to demonstrate his employment eligibility for IRCA purposes.

If indeed Bunn had shown that USX requested documents for the purpose of verifying his identity and employment eligibility, the self-created Statement of Citizenship and the Affidavit of Constructive Notice are not among the documents described at 8 C.F.R. §274a.2(b)(1)(v), and thus could not have been utilized for that purpose.

IRCA simply does not render unlawful an employer's refusal to accept documents which are gratuitously presented for purposes which

are wholly unrelated to the employment eligibility verification procedures. *Costigan v. NYNEX*, 6 OCAHO 918, at 9–10 (1997).

Bunn's Complaint fails to offer specific facts showing that USX had engaged in document abuse activity. In view of the foregoing discussion, respondent's motion to dismiss is granted as it pertains to complainant's document abuse claim. Accordingly, that claim is also hereby ordered to be dismissed with prejudice to refiling.

V. *Subject Matter Jurisdiction*

OSC declined to take further action with respect to Bunn's charges since it quite properly found that his allegations had not raised an issue addressable under IRCA's provisions.

Administrative Law Judges assigned to this Office are under an obligation to examine the complaint and determine whether there is subject matter jurisdiction regardless of whether the defense is raised by the respondent. *Jarvis v. AK Steel*, 7 OCAHO 930, at 8 (1997); *Boyd v. Sherling*, 6 OCAHO 916, at 7 (1997); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990).

As noted earlier, this case represents one of a significant number of cases which have been filed with this Office involving individuals who purport to be exempt from the payment of federal income and/or social security taxes. Most of those complainants have been represented by Mr. Kotmair and their collective allegations are identical to those alleged herein, or nearly so.

Prior OCAHO rulings in this area have clearly stated that this Office provides access only to those complainants seeking to resolve, among other things, disputes involving unfair immigration-related employment practices. There is nothing in the provisions of IRCA, nor in the pertinent implementing regulations, which even remotely suggest that this forum has subject matter jurisdiction over disputes which involve the withholding of federal income and/or social security taxes from wages. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 8 (1997) (order granting request for attorney's fees); *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 21 (1997).

A thorough review of Bunn's allegations demonstrate that the dispute at issue centers solely upon whether USX must comply with federal tax law and withhold federal taxes from Bunn's wages. The

reasoning in *Wilson v. Harrisburg School District*, *supra*, in which similar tax-related claims were pressed, applies with equal force to Bunn's allegations:

> Nothing in IRCA confers upon an employer the right to resist the [Internal Revenue Code] by accepting gratuitously tendered improvised documents purporting to relieve an employee from taxation. IRCA simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment does not violate IRCA. The gravamen of [the Complaint], a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

Accordingly, Bunn's Complaint is also being dismissed with prejudice for lack of subject matter jurisdiction.

VI. *Timeliness Issue*

IRCA provides that a charge of unfair immigration-related employment discrimination must be filed with OSC, or an agency with which OSC has a Memorandum of Understanding, within 180 days after the alleged discriminatory event. 8 U.S.C. §1324b(d)(3).

Under the terms of a 1989 Memorandum of Understanding (MOU) between the EEOC and OSC, a charge of discrimination filed with EEOC within the 180 day statutory period is deemed to have been timely filed with OSC, whether or not citizenship status discrimination is charged before the EEOC. 54 Fed. Reg. 32,499 (1989); *Walker v. United Air Lines, Inc.*, 4 OCAHO 686, at 821 (1994).

Construing the Complaint most favorably to Bunn, it is assumed that the alleged discriminatory acts occurred on January 31, 1994, and that his OSC charge was filed on April 15, 1997.

It can readily be determined, therefore, that Bunn filed his charge with OSC some 1,170 days or more than three (3) years, after the alleged discriminatory event, or well beyond the 180-day statutory filing period. The current record reveals no information regarding either the date upon which Bunn filed his EEOC charge, how long the proceeding was pending or when it was finally decided. Without those critical facts, it cannot be determined whether Bunn's claim of citizenship status discrimination was timely filed, in accordance with the wording of the MOU.

However, the inability to reach a conclusion regarding the timeliness issue is immaterial because it has already been decided that Bunn's citizenship status claim fails on two other independent grounds, those being his failure to state a claim upon which relief can be granted and the lack of the required subject matter jurisdiction.

Moreover, because the 1989 MOU predates the 1990 enactment of the document abuse cause of action and only refers to national origin and citizenship status discrimination, "the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline." *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 11 (1996); *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 879, at 11 (1996). Consequently, Bunn's claim of document abuse is being dismissed as having been untimely filed, also.

In view of the foregoing, complainant's September 11, 1997, Complaint alleging citizenship status discrimination and document abuse in violation of section 1324b(a)(1) and (6) of IRCA is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
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 a timely review of this 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 this Order.

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

May 29, 1997

Exhibit 6

ERIC R. CHOLERTON, Complainant, v. ROBERT M. HADLEY CO., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00046)))

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, Complainant's Representative.
James A. Hadley, President, Robert M. Hadley Co, Inc., Respondent's Representative.

I. *Introduction*

Yet another tax challenge seeking redress under 8 U.S.C. §1324b against a hapless employer who refuses to conspire with the complainant in avoiding federal income tax withholding and social security contribution, this case poses two variants of the typical question in such cases:

> Can a foreign-born, naturalized citizen of the United States, discharged by his employer for refusing to provide a social security number, but reinstated three weeks thereafter, successfully claim discrimination on the bases of citizenship status and document abuse, as defined by 8 U.S.C. §1324b?
>
> Does an employer commit retaliation cognizable under 8 U.S.C. §1324b when a fellow employee characterizes an OCAHO complainant as a "scumbag?"

The answer to both questions is no.

This Final Decision and Order, like numerous antecedent decisions by ALJs,[1] dismisses the case for lack of subject matter jurisdiction over tax matters and for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b. This forum of limited jurisdiction cannot override the Anti-Injunction Act, 26 U.S.C. §§7421, 7422, which prohibits suit to restrain collection of taxes. The prohibition of §1324b against ***immigration-related*** unfair employment practices is not implicated by the employer's refusal to accept improvised, unofficial, gratuitously tendered documents purporting to exempt the employee from tax withholding and social security compliance obligations. The coworker's remark is not employer retaliation.

II. *Procedural and Factual History*

This oft-told tale of tax avoidance begins on January 6, 1992, when Eric R. Cholerton (Cholerton or Complainant) applied for the position of Sales Representative and Applications Engineer with Robert M. Hadley Co., Inc. (Hadley or Respondent), an employer doing business in Ventura, California. Hadley hired Cholerton early in February, 1992.[2] Upon hire, Hadley refused to sign IRS Form W–4, the Internal Revenue Service form upon which federal income tax

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[1] *See Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Cholerton v. Hadley* is of this ilk.

[2] According to Cholerton, on February 7, 1992; according to Hadley, on February 4, 1992.

withholding and social security (FICA) payments are premised. Ignoring Cholerton's claim that he was not obligated to pay taxes or contribute to social security,[3] Hadley, as it is obliged to do by 26 U.S.C. §§3101, 3102, 3402, and 3403, withheld taxes and social security contributions from his wages.[4]

For more than two years Cholerton apparently suffered, although not in silence. However, on April 29, 1994, he renewed his tax and social security protest, this time presenting Hadley with self-styled, improvisational, unofficial documents which purported to exempt him from tax and social security because he was a United States citizen. These documents, familiar to forae which have heard tax protests, were a "Statement of Citizenship"[5] and an "Affidavit of

[3]Contrary to Cholerton's claims, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a), 3403. Employers who do so are immunized from legal liability by 26 U.S.C. §3102 ("[e]very employer . . . shall be indemnified against the claims and demands of any person"), 26 U.S.C. §3403 (an "employer shall not be liable to any person"), and the Anti-Injunction Act, 26 U.S.C. §7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"), which has been interpreted to prohibit suits against employers who withhold taxes. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984). Social security withholding contributions from employees are compelled, even if an employee declines benefits. *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982). The constitutionality of the Social Security Act has long been acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[4] *See Mcfarland v. Bechtel Petroleum, Inc.*, 586 F. Supp. 907, 910 (N.D. Cal. 1984) (holding that 26 U.S.C. §3403 "clearly proscribes employer liability" to the employee where wages are withheld, as the employer is merely complying with its federal "legal obligations, with the result that [the employee's] claim is statutorily barred."). *See also Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 770 (9th Cir. 1986) (holding employer not liable to employee because under 26 U.S.C. §3402, "an employer has a mandatory duty to withhold federal income tax from an employee's wages where required by applicable regulations[;]" under 26 U.S.C. §3403, "an employer is liable to the IRS for the payment of tax withheld, and 'shall not be liable to any person for the amount of any such payment.' Thus, suits by employees against employers for tax withheld are 'statutorily barred.'") (citations omitted); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984) ("[An] employer is immune from liability to the employee for the withholding [of taxes from an employee's pay], since the duty to withhold is mandatory, rather than discretionary, in nature.") (referencing *Chandler v. Perini Power Constructors, Inc.*, 520 F. Supp. 1152 (D.N.H. 1981).

[5]Such self-styled, improvisational, unofficial "Statement(s) of Citizenship" are apparently staple, albeit ineffective, weapons in the war on taxation. *See Brokers v. Morton*, 1995 WL 653260, at *1 (D. Alaska 1995). Self-styled "Statement(s) of Citizenship" are not to be confused with INS Forms N–560 or N–561, which are official INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2).

Constructive Notice."[6] Cholerton insisted that Hadley place the documents on its company letterhead and forward them to the IRS. This Hadley refused to do. Instead, Hadley discharged Cholerton.

Relenting, Hadley reinstated Cholerton on May 25, 1994! The next week, on May 31, 1994, Cholerton filed a discrimination charge[7] against Hadley with the Los Angeles office of the Equal Employment Opportunity Commission (EEOC), amended on September 3, 1995. The EEOC dismissed Cholerton's charge.[8]

On November 13, 1995, Cholerton filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), based on the same set of facts. Cholerton's OSC Charge claimed that by complying with federal income tax withholding and social security deduction regimens Hadley violated his status as a "state citizen" and discriminated against him on the bases of religion,[9] national origin, and citizenship status. Cholerton requested as compensation one month's back pay, representing his April 30—May 24, 1994 discharge, "without deductions of withholding," and "immediate cessation of unauthorized withholding." Repeating hoary, oft-discredited tax avoidance arguments, Cholerton contended that "this Citizen is not an 'employee'," that Hadley is "not this Citizen's 'employer'," and that "earnings . . . are not 'wages' . . . [or] 'income'" for the purpose of taxation. OSC Charge at ¶9. Cholerton threatened dire consequences for those who would ignore his claim:

> We the People will take our cases *pro se* to the federal courts and disrupt a few careers on the bench if we have to. Treason is treason, and most courts at the

[6]An equally ineffective armament is the oft-used "Affidavit of Constructive Notice." *See Risner v. Commissioner of Internal Revenue*, 71 T.C.M. (CCH) 2210 (1996).

[7]File No. 340941766.

[8]The EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII. Memorandum, Ellen J. Vargyas, EEOC Legal Counsel, to All EEOC District, Area & Local Directors, July 15, 1995. Dismissal for failure to state a claim is a merits disposition, precluding adjudication of the same claim by an ALJ because of statutory overlap prohibitions. 8 U.S.C. §1324b(b)(2). *See, Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 18 (1997), 1997 WL 235918, at *13.

[9]Cholerton cannot take advantage of the statutory social security exemption, 26 U.S.C. §3127, applicable only when both employer and employee belong to an established religious sect (such as the Amish) which eschews social security benefits and has received IRS exception.

> federal level know that most citizens do not know the facts of the United States' bankruptcy.

OSC Charge at p. 6 (Addendum: "Political Considerations").

By an undated letter, OSC informed Cholerton and eight (8) other individuals represented by Kotmair, that "there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. §1324b" or "document abuse under 8 U.S.C. §1324b(a)(6)." OSC advised Cholerton of his right to file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days of receipt of OSC's determination letter.

On May 14, 1996, Cholerton filed his OCAHO Complaint. Cholerton identifies himself as a native of "England or [the] United Kingdom," now a U.S. citizen who obtained permanent resident status on August 28, 1962; applied for naturalization on August 16, 1965; and was naturalized on September 5, 1968. Cholerton alleges discrimination on the basis of citizenship status because he was "knowingly and intentionally fired and rehired, after filing an EEOC Complaint."[10] This assertion, however, is belied by Cholerton's own OSC Charge, which states that Hadley fired him on April 29, 1994, and rehired him on May 24, 1994. Only ***after*** Cholerton rehired him, on May 31, 1994, did he file a discrimination charge with the EEOC. OSC Charge at ¶¶8 and 9. In order to have fired him on April 29, 1994, ***because*** he filed a May 31, 1994, EEOC charge, Hadley would have to have had a month's foreknowledge. This cannot be.

Cholerton also claims that he was "intimidated, threatened, coerced, or retaliated against" because he filed a complaint. Complaint at ¶15. Specifically, he contends that he was:

> Twice called a "SCUMBAG" by the Accounting Manager when it was discovered that a complaint was filed with the DOJ.

Id.

[10]Having conceded in his OSC Charge that Hadley employs more than fourteen indivduals, Cholerton's OCAHO Complaint explicitly omits any claim of national origin discrimination. *See* 8 U.S.C. §1324b(a)(2)(B).

Cholerton charges that Hadley committed document abuse (the practice of requesting too many or the wrong documents to verify employment eligibility ***at the time of hire***) by refusing to accept his self-styled, improved, tax-exemption papers, *i.e.*, his

> Statement of Citizenship [and] Affidavit of Constructive Notice Asserting his rights as a U.S. citizen not to be treated as an Alien for any purpose, practice, or reason under any federal law.

Id. at ¶16(a).

Cholerton alleges that Hadley also committed document abuse by requiring him to produce his "Social Security Number/Card." *Id.* at ¶17(a). Cholerton affixes to his Complaint a "Privacy Act Release Form and Power of Attorney" authorizing Kotmair to "investigate this matter for me."

On June 12, 1996, OCAHO issued a Notice of Hearing (NOH), served June 18, 1996, upon Hadley.

On July 16, 1996, by letter dated July 12, 1996, Hadley timely filed its Answer. Hadley contends that:

> Cholerton was terminated because he failed to comply with the Company's policy with regards to providing a Social Security Number. After initially submitting his Social Security Number when he was hired in February 1992, which he had claimed had been "revoked" but nevertheless provided; on March 31, 1994 we received notarized correspondence from Mr. Cholerton that he no longer had "a social security number to disclose." Furthermore, in the same correspondence, Mr. Cholerton contended he should not be considered and [sic] "employee" and that he did not earn "wages." Accordingly, he maintained that he was not subject to withholding of employment taxes. After much Management involvement with this matter and after he was given a reasonable time to come forward with a Social Security Number his employment with the Company was terminated. His citizenship and his immigration history have never been issues and were not grounds for his dismissal as he contends in the referenced Complaint. Since he was originally hired on February 4, 1992 and his United States Passport was given as evidence of United States' citizenship (in accordance with INS Form I–9 requirements) his citizenship has never been challenged.
>
> * * *
>
> Cholerton, we believe, thinks he is deserving of a special status insofar as taxes are concerned. Through various maneuvers since he was hired, he has attempted to "persuade" the Company to not forward to the Federal and California tax authorities what we have been instructed to forward by those authorities. His maneuvers have included:
>
> — claims that his civil rights were violated,

— filing a complaint with the EEOC (discrimination on religious grounds),[11]

— multiple threats of litigation himself or through his power of attorney,

— threats of quitting,

— the transferal [sic] of an extraordinary amount of written correspondence from various organizations such as National Worker's Rights Committee, Liberty Library, Save-A-Patriot Fellowship, the Spotlight newspaper, and the Free Enterprise Society, etc., to myself and others at the Company,

— threats of a RICO complaint,

— filing of a discrimination charge with the United States Department of Justice, Civil Rights Division,

— generation of written correspondence to me that my "American values . . . are in the cesspool," that the Company is a "miserable, rights-abusive, un-American organization."

Answer at pp. 1–2.

Perhaps paradoxically, Hadley then describes Cholerton as:

> a productive, and effective employee . . . [who] has had his salary upwardly adjusted a couple of times since [rehire].

Answer at p. 2.

On August 26, 1996, Cholerton's representative, Kotmair, filed a Notice of Appearance, accompanied by a revised Power of Attorney of sufficient breadth to authorize representation before the administrative law judge (ALJ).

On December 22, 1996, Cholerton filed a Motion To Strike Respondent's Answer and Violation of Rule 11, and a Brief in Support of Motion To Strike. Hadley did not respond.

III. *Discussion*

As appears from the Complaint, confirmed and explained by subsequent pleadings, Cholerton depends on an irrelevant federal tax regulation, 26 C.F.R. §1.1441–5 ("Withholding Tax on Nonresident Aliens and Foreign Corporations"), to support his claim that Hadley

[11]Title 26 U.S.C. §3127 provides an exemption from social security participation for ***employers*** and their employees when ***both*** are members of an established religious sect which is opposed to social security. That is not the case here. Cholerton describes the claim of religious discrimination as the denial of his "status as a state Citizen." OSC Charge ¶4.

has committed ***unfair immigration-related employment discrimination***. Cholerton, a naturalized United States citizen, disingenuously characterizes as discrimination Hadley's insistence that he supply a social security number as a condition of employment, and Hadley's refusal to give credence to his fanciful assertion that withholding of income taxes, and social security payments (FICA), is voluntary, not compulsory, for United States citizens. Through a miasma of immigration-related verbiage, Cholerton obscures the clear vista of a tax-avoidance scheme. This forum of limited jurisdiction cannot confer its *imprimatur* on such obfuscation, having received clear instruction on the disposition of tax-avoidance nuisance suits by the United States Court of Appeals for the Ninth Circuit.[12]

A. *The ALJ Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act and Is Forbidden To Hear Tax Collection Matters by the Anti-Injunction Act*

FED. R. CIV. P. 12 (h)(3)[13] compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

A federal forum has no authority to entertain a suit if no statute confers jurisdiction upon it. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). No statute confers jurisdiction on the ALJ to hear tax challenges. Indeed, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *International Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. §7421(a), The Anti-Injunction Act, which commands:

[12]Review of the final decision and order of an ALJ in an immigration-related unfair employment practice case under 8 U.S.C. §1324b may be in either (1) the circuit in which the violation is alleged to have occurred, or (2) the circuit in which the employer resides or transacts business. 8 U.S.C. §1324b(i)(1); 28 C.F.R. §68.53(b). *See Bright*, 780 F.2d at 769–70, 772 (employer who withholds federal taxes has no liability to employee for commensurate reduction in wages; award of attorney's fees is "an appropriate deterrent to future frivolous suits") (citation omitted); *Jolly v. United States*, 764 F.2d 642 (9th Cir. 1985); *Nunley v. Commissioner of Internal Revenue Serv.*, 758 F.2d 372 (9th Cir. 1985).

[13]Title 28 C.F.R. §68.1 authorizes ALJs to apply the Federal Rules of Civil Procedure for the District Courts as a general guideline.

> **[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.**

Tax collection includes tax withholding by employers. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

In order to sue, the taxpayer must satisfy a strict statutory condition precedent:

> **No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.**

26 U.S.C. §7422(a) ("pay now, sue later").

The Anti-Injunction Act obliges taxpayers to pursue remedies under its provisions, and otherwise proscribes suit. *Cheek v. United States*, 498 U.S. 192, 206 (1991) (directing tax complainants to follow the statutory scheme provided by the Anti-Injunction Act: "pay the tax, request a refund from the Internal Revenue Service, and if the refund is denied, litigate the invalidity of the tax in federal district court"); *South Carolina v. Regan*, 465 U.S. 367, 378 (1983); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974); 13B CHARLES B. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3580 (2d ed. 1984) (administrative claim for refund is jurisdictional prerequisite to bringing suit).

The very limited, judicially created, equitable *Enochs* exception, permits suit otherwise proscribed by the Anti-Injunction Act where a taxpayer satisfies four concurrent tests: (1) ***the suit is against the government***, (2) the taxpayer demonstrates ***irreparable harm***, (3) the taxpayer demonstrates ***certain success*** on the merits, and (4) the court in which the taxpayer seeks relief has ***equitable jurisdiction*** over the subject matter. *South Carolina v. Regan*, 465 U.S. at 374; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–7 (1962).

Cholerton is unable to claim the *Enochs* exception.

- First, his suit is ***not against the government,*** but against Hadley, his employer.

- Second, he has suffered ***no injury,*** let alone irreparable harm. Respondent's refusal to forward his self-styled "Statement of

Citizenship" to the IRS Service Center, and withholding of his payroll taxes and social security contributions cannot be characterized as injury, much less "irreparable harm." His employer is statutorily obliged to withhold taxes and social security obligations "at the source," and is relieved from liability for so doing. 26 U.S.C. §§3101, 3102, 3402, 3403. Furthermore, an employer has no legal duty to assist a tax protest. The Complainant himself could easily have sent his dubious documents to the IRS, thus mitigating whatever illusory "harm" his employer caused by not sending his tax protest to the IRS on company letterhead.

- Third, he cannot succeed on the merits. Twisted logic cannot transform this sow's ear of a tax protest into the silk purse of a legitimate refund action, much less an ***immigration-related*** unfair employment practice case. Under no conceivable circumstances can he prevail.

- Fourth, this forum of limited jurisdiction lacks equitable jurisdiction over tax actions. The proper places to bring tax actions are Tax Court and District Court.[14]

This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," lacks authority to hear tax causes of action, whether or not clothed in immigration guise. 8 U.S.C. §1324b(b)(1); 28 C.F.R. §44.300(a) (emphasis added); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929, at 18–19 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928, at 13–16 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 10–18 (1997), 1997 WL 235918, at *8–14. Cholerton's Complaint is, therefore, dismissed for lack of subject matter jurisdiction.

B. *The ALJ Lacks Subject Matter Jurisdiction Over Terms and Conditions of Employment*

Cholerton sued Hadley, his longtime employer, because Hadley discharged him for refusing to provide a social security number, be-

[14]Title 28 U.S.C. §1346(a)(i) provides that "district court shall have original jurisdiction . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed;" 26 U.S.C. §7422(f) also places post-administrative actions in district court. Jurisdiction is conferred on the Tax Court by 26 U.S.C. §7442.

cause Hadley refused to transcribe his self-styled tax exemption documents on its company letterhead and forward them to the IRS, and because Hadley insisted on continuing to withhold taxes and social security contributions from his wages, as it is bound to do under 26 U.S.C. §§3101, 3102, 3402, 3403, discussed, *supra*, at nn.3–4. Nothing in 8 U.S.C. §1324b obliges an employer to participate in an employee's tax avoidance scheme, nor prohibits an employer from fulfilling the command of 26 U.S.C. §3102 to collect social security contributions, or the mandate of 26 U.S.C. §3402 to deduct withholding taxes "at the source." Even assuming Cholerton was discharged for the reasons he alleges, the employer's conduct does not implicate an immigration-related unfair employment practice.

It is well-established that the ALJ has no authority over terms and conditions of employment, such as an employer's insistence that an employee furnish a social security number, and comply with IRS tax regimens. *Wilson v. Harrisburg Sch. Dist.*, 7 OCAHO 925, at 9 (1997), 1997 WL 242208, at *7. *See also Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11 (1992); *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)). Nothing in 8 U.S.C. §1324b relieves an employer of statutory obligations. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8–16 (1997), 1997 WL 176910, at *10–14; *Winkler v. Timlin*, 6 OCAHO 912, at 8–12 (1997), 1997 WL 148820, at *9–10. Nothing in §1324b's text or legislative history prohibits an employer from complying with the IRS regimen. *Winkler v. Timlin*, 6 OCAHO 912, at 11–12 (1997), 1997 WL 148820, at *10; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16–17 (1996), 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3–4 (O.C.A.H.O.). Nothing in §1324b confers upon an employer the right to assist an employee who wishes to resist the IRS by accepting gratuitously tendered, improvised documents purporting to relieve the employee from taxation, or obliges an employer to forward to the IRS these self-same documents on its own letterhead! Section 1324b simply does not reach tax and social security issues or exempt employers or employees from compliance with duties dictated elsewhere by statute.

It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment mandated by the government does not violate §1324b. The gravamen of Cholerton's Complaint, a challenge to the Internal Revenue Code

and the Social Security Act, is a matter altogether outside the scope of ALJ jurisdiction. Cholerton's Complaint is, therefore, dismissed for want of subject matter jurisdiction.

C. *Complainant Fails To State a Claim Upon Which Relief Can Be Granted Under 8 U.S.C. §1324b*

(1) *Complainant's Citizenship Claim Must Be Dismissed*

Cholerton alleges that Hadley discharged him because of his U.S. citizenship. It is the complainant's burden to prove citizenship discrimination. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820, at *7; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *12; *United States v. Mesa Airlines*, 1 OCAHO 462, 500. To state a *prima facie* case of citizenship discrimination, "a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8 (citing *L.R.L. Properties v. Portage Metro. Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995)). Although well-pleaded allegations of fact are taken as true, legal conclusions and unsupported inferences obtain no deference.

Disparate treatment is the heart of discrimination. For a claim to constitute discrimination "[t]he employer [must] . . . treat some people less favorably than others" because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). "Where citizenship status is the forbidden criterion, there must . . . be some claim . . . that the individual is being treated less favorably than others *because* of his citizenship status." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996) , 1996 WL 780148, at *8 (emphasis added). Where an employer treats all employees in the same way, there can be no discrimination.

In order for Hadley's conduct to have violated 8 U.S.C. §1324b(a)(1)(B), Hadley would need to have treated Cholerton ***differently*** from other employers because he was a U.S. citizen. To prevail, Cholerton would need to prove that he was accorded ***less favorable treatment than others*** because of his citizenship. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820 at *7; *Westendorf v. Brown & Root*, 3 OCAHO 477, at 6–7 (1992), 1992 WL 535635, at *8.

Cholerton claims that he was discriminated against on the basis of his U.S. citizenship when Hadley fired him because he refused to provide a social security number. Cholerton argues that because he repudiated his social security number, he was not obligated to pay tax or contribute to social security. Cholerton states that Hadley fired him when, in lieu of the requisite social security number requested as part of the IRS Form W–4 regimen, he submitted an unofficial, improvised "Statement of Citizenship" "asserting his rights as a U.S. Citizen not to be treated as an Alien for any reason or practice," and because Hadley refused to give credence to an unofficial, improvised "Affidavit of Constructive Notice" exempting Cholerton from providing a social security number and from tax withholding. Complaint at ¶¶14, 16, and 17. ***Cholerton, however, admits that no other workers of different citizenship were retained, thereby negating his claim of discrimination.*** Complaint at ¶14(e).

Cholerton's claim fails to allege one of two essential elements of a *prima facie* case for discriminatory discharge. Adapted from the framework the Supreme Court established in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973), and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), a *prima facie* case of discriminatory discharge on the basis of citizenship is established where an employee demonstrates that:

> (1) he is a member of a protected class;
>
> (2) he was fired under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Where the complainant establishes a *prima facie* case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Where, however, a complainant is unable to present a *prima facie* case of discrimination, "the inference of discrimination never arises and the employer has no burden of production." *Lee v. Airtouch*, 6 OCAHO 901, at 11 (citing *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st. Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)), *cited in Winkler v. Timlin*, 6 OCAHO 912, at 9, 1997 WL 148820, at *8.

Cholerton can satisfy the first, but not the second, of the test's two prongs. As a United States citizen, he is a member of the class of "protected individuals" defined at 8 U.S.C. §1324b(a)(3)(A) entitled to

benefit from the prohibition of discrimination at §1324b(a)(1)(B). Cholerton cannot, however, satisfy the second prong. His own claim denies discrimination. Nowhere does Cholerton allege that anyone else, citizen or alien, was treated differently from him.

Characterizing events in a light most favorable to him, Cholerton chose not to comply with Hadley's demand that he provide a social security number and instead submitted improvised written statements purporting to exempt him from the Internal Revenue Code and Social Security Act. Cholerton's tax and social security challenges do not invite an inference that Hadley discriminated in firing him. Cholerton's theory that only aliens are subject to producing social security numbers and to complying with compulsory tax withholding is inconsistent with the Internal Revenue Code. His convoluted inference, based on the erroneous theory that U.S. citizens alone can claim exemption from tax withholding and social security payments, does not support the supposition that an employer who fails to favor U.S. citizens similarly situated discriminates against them. Failure to favor a group is not discrimination against it.

Cholerton's gripe is not with immigration law. Nothing in §1324b touches on an employee's federal tax withholding obligations. The call for a social security number in IRS Form W–4 is made by the government, not by the employer.

It follows that under any conceivably reasonable reading of his Complaint, Cholerton cannot establish a *prima facie* case of discriminatory discharge on the basis of citizenship. His Complaint is so insubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing. Therefore, there is no call on Hadley to articulate a legitimate, non-discriminatory reason for firing Cholerton. It is certain, however, that Cholerton's insistence that he be exempted from Hadley's lawful and non-discriminatory regimen of tax withholding compliance would constitute such a reason.

Maximizing opportunities to amend discrimination complaints is generally favored. Because, however, Cholerton relies exclusively on Hadley's lawful request that he provide a social security number as the gravamen of his discrimination claim, the consequential lack of

any discernible meritorious §1324b claim forecasts that amendment would be futile. Cholerton's claim is, therefore, dismissed for failure to state a claim cognizable under IRCA.

(2) *Complainant's Document Abuse Claim Must Be Dismissed*

An incumbent employee who alleges that his employer refused to accept proffered documents to show work eligibility, but specifies documents not recognized by the employment eligibility verification system, fails also to state a cause of action under 8 U.S.C. §1324b.

At all times relevant to this case, jurisdiction over document abuse could only be established by proving that, in relation to ***hire***, the employer requested one or another specific official document from a prescribed list "for purposes of satisfying the [work eligibility] requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6).[15] Nothing in the case before me suggests that the tender of improvised documents identified by Cholerton at ¶16a of his Complaint ***years after hire*** implicates §1324a(b) requirements. Cholerton does not dispute Hadley's assertion that the I–9 requirement was satisfied at the time of hire in 1992 by tender of Cholerton's passport. Patently, the Complaint negates any inference that Cholerton was either denied employment, was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a, or was asked to provide specific documents. The Cholerton documents are not acceptable to or embraced by the verification regimen established under §1324a(b).

The holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10, is particularly apt:

[15]Title 8 U.S.C. §1324b(a)(6) as of the date of the Complaint prohibited a request "for more or different documents than are required [to establish eligibility to work in the United States] . . . or refusing to honor documents tendered that on their face reasonably appear to be genuine." The OSC Charge form explains that document abuse occurs where the "individual, business or organization refused to accept a valid document or demand . . . more or different documents than are required for completing the INS Form I–9." Title 8 U.S.C. §1324b(a)(6) was amended effective 9/30/96. Section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (September 30, 1996). As before, the prohibition against over documentation pertains only to tender of documents "for the purpose of satisfying the requirements of §1324a(b)." *Id.*

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 at 18–21 (1996) and cases cited therein.

Because nothing in the Complaint implicates Hadley's employer obligations under §1324a(b), I lack subject matter jurisdiction over Cholerton's §1324b(a)(6) allegations. Cholerton's Complaint is, therefore, dismissed for lack of subject matter jurisdiction and for failure to state a claim under §1324b.

(3) *Complainant's Retaliation Claim Must Be Dismissed*

An employer does not "retaliate" within the meaning of 8 U.S.C. §1324b(a)(5) by virtue of a fellow employee calling an OCAHO complainant a "scumbag." Assuming as true Cholerton's description of what occurred—i.e., that Hadley's Accounting Manager called him that, Cholerton alleges no facts that would attribute this remark to the employer. Cholerton was a Sales Representative, not a bookkeeper or accountant. The Accounting Manager occupied no supervisory relationship to Cholerton, and, therefore, was in no position to retaliate against Cholerton within the scope of 8 U.S.C. §1324b.

Prohibited employer retaliatory conduct generally consists of actions similar to discrimination under Title VII: "the refusal to hire or rehire, a delay in reinstatement, a disadvantageous transfer or assignment, the removal from a position as shop steward, a demotion, refusal to promote, refusal to transfer or to give a deserved pay raise, a suspension, discharge, or constructive discharge." LEX K. LARSON, EMPLOYMENT DISCRIMINATION, §34.04 (2d ed. 1997) ("What Employer Conduct Is Covered") (footnotes omitted). These retaliatory acts are not present in this case. Larson also catalogues retaliation in the form of harassment by fellow employees, such as "interrogation, reprimands, surveillance, unwarranted or unfavorable job evaluations, or the deprivation of some of the normal benefits or rights of the position, such as overtime, vacations, in-house dispute resolution procedures, office privileges, and access to clients." *Id.* The catalogue does not encompass the "scumbag" appellation. In any event, Cholerton has sustained no actionable injury. Despite Cholerton's persistent tax protests, his EEOC discrimination charge,

OSC Charge, and OCAHO Complaint, he remained, for better or worse, in Hadley's employ. This is not retaliation.

IV. *Decision and Order*

I have considered the pleadings of the parties. To the extent not addressed in this Final Decision and Order, all arguments and requests are rejected. Cholerton's citizenship status claim and document abuse claim are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

V. *Appeal*

This Decision and Order is the final administrative order on the merits in this proceeding and "shall be final unless appealed" **within 60 days** to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated and entered this 29th day of May 1997.

MARVIN H. MORSE
Administrative Law Judge

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

September 3, 1997

Exhibit 7

JAMES R. COOK, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00090
PRO SOURCE, INC., Respondent	)

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On December 9, 1996, James Cook (Cook/complainant), a U.S. citizen, filed a charge with the Office of Special Counsel (OSC), U.S. Department of Justice, alleging that on July 15, 1996, Pro Source, Inc. (Pro Source/respondent), committed unfair immigration-related employment practices namely, national origin and citizenship status discrimination, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324b(a)(1) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6).

Ordinarily, an individual alleging an unlawful immigration-related employment practice must complete and file a standard OSC charge form (Form OSC–1). In this case, however, OSC accepted for filing a nine (9)-page letter, dated December 9, 1996 (December 9, 1996 OSC letter/charge), signed by John B. Kotmair, Jr., Cook's designated representative in this proceeding.

In that correspondence, Kotmair alleged that on July 15, 1996, Cook had submitted a Statement of Citizenship Status to relieve Pro Source from the "duty of withholding income tax" from his wages. He also stated that "by service of an Affidavit of Constructive Notice, Mr. Cook does not have, nor does he recognize a social security number in relationship to himself... [and] [t]herefore, he is not qualified

by any personal act or Act of Congress to be subject to the Social Security Act, the taxes imposed in the Act, and the collection of the taxes as found in Subtitle C of the Internal Revenue Code."

That correspondence also discloses that Cook had filed a Title VII national origin discrimination charge with the Equal Employment Opportunity Commission (EEOC) before having filed his OSC charges, and that the EEOC dismissed the charge for lack of jurisdiction.

On January 30, 1997, after completing its investigation, OSC sent a determination letter to complainant advising him that "there is insufficient evidence of reasonable cause to believe that any of these charges state a cause of action under 8 U.S.C. §1324b".

For that reason, OSC informed complainant that it was declining to file an action on his behalf before an Administrative Law Judge assigned to this Office and that he was entitled to file a private action directly with this Office if he did so within 90 days of his receipt of that correspondence.

On April 4, 1997, complainant timely commenced this private action by having filed this Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of IRCA. A copy of the December 9, 1996 OSC letter/charge is attached to the Complaint.

The Complaint, at ¶¶11, 12, alleges that "On 07/96 I applied for or worked at the business/employer. The job was Mech. Designer." Cook seeks back pay from July to December, 1996.

On April 14, 1997, a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, were served on respondent by certified mail, return receipt requested.

On April 28, 1997, John B. Kotmair, Jr. filed a Notice of Appearance on behalf of the complainant.

On April 28, 1997, respondent, through its attorney, James M. Hughes, Esquire, filed its answer, in which it averred that "Pro Source neither discriminated against Mr. Cook nor refused to accept

any papers he submitted. Pro Source simply insisted upon withholding federal income taxes in accordance with federal law... [t]here is clearly no substance to this Complaint nor any jurisdiction by this Agency to review these matters."

On May 29, 1997, a prehearing telephonic conference was conducted, during the course of which respondent's attorney advised that he would be filing a motion to dismiss within seven (7) days. The issue of Kotmair's ability to commence this action on behalf of Cook was also discussed.

On June 4, 1997, Pro Source filed a pleading captioned Motion to Dismiss of Respondent Pro Source, Inc., seeking dismissal of the Complaint for failure to state a claim.

On June 16, 1997, complainant filed a pleading captioned Motion to Strike Respondent's Answer and Motion to Dismiss requesting that Pro Source's answer and dispositive motion be stricken for failing to properly effect service of its answer and motion on all parties of record, 28 C.F.R. §68.6(a)[1]. In addition, complainant notes that respondent's counsel has not filed a notice of appearance nor provided his qualifications to represent Pro Source in this matter, 28 C.F.R. §68.33(b)(4), (5).

Respondent has not filed a reply to complainant's Motion to Strike.

On June 16, 1997, complainant also filed a pleading captioned Motion for Default Judgment, seeking the entry of a default judgment in his favor because of similar procedural infractions namely, 1) the failure of respondent's counsel to file a notice of appearance and to provide qualifications, 28 C.F.R. §68.33(b)(4), (5), 2) the failure of respondent's answer to comport with the requirements set forth at 28 C.F.R. §68.9(c), and 3) the failure of respondent to serve all parties of record with its answer and motion to dismiss, 28 C.F.R. §68.6(a).

Respondent has not filed a response to complainant's Motion for Default Judgment.

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[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Part 68 (1996) [hereinafter cited as 28 C.F.R. §68.__].

Before assessing respondent's dispositive Motion to Dismiss, consideration of complainant's Motion to Strike and Motion for Default Judgment, filed on June 16, 1997, is in order.

Because OCAHO Rules of Practice and Procedure do not provide for motions to strike, OCAHO rulings have relied upon the Federal Rules of Civil Procedure for guidance. *United States v. Irani*, 6 OCAHO 860, at 3 (1996); *United States v. De Leon-Valenzuela*, 6 OCAHO 899, at 4 (1996); *United States v. Makilan*, 4 OCAHO 610, at 3 (1994). The OCAHO rules specifically provide that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules." 28 C.F.R. §68.1.

It is therefore appropriate to look to Rule 12(f) of the Federal Rules of Civil Procedure, which provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Under OCAHO and federal decisional law, motions to strike are highly disfavored because of the tendency for such motions to be asserted for dilatory purposes, and are not granted unless the language in the pleading at issue has no possible relation to the controversy and prejudice would clearly result from the denial of the motion. *United States v. Alvarez-Suarez*, 4 OCAHO 655, at 6 (1994) (a motion to strike is a drastic remedy and therefore is not favored); *United States v. Watson*, 1 OCAHO 253 (1990); *Morrow v. South*, 540 F. Supp. 1104, 1111 (S.D. Ohio 1982); *Lirtzman v. Spiegel, Inc.*, 493 F. Supp. 1029, 1031 (N.D. Ill. 1980); *Mitchell v. Bendix Corp.*, 603 F. Supp. 920, 921 (N.D. Ind. 1985).

In OCAHO proceedings, motions to strike have been routinely granted to sift the proceeding of insufficient affirmative defenses "which cannot succeed under any set of circumstances." *United States v. Alvarez-Suarez*, *supra* at 7; *United States v. Chavez-Ramirez*, 5 OCAHO 774 (1995); *United States v. Chi Ling, Inc.*, 5 OCAHO 723 (1995).

With the foregoing legal parameters in mind, we now assess complainant's Motion to Strike.

First, complainant has moved to strike respondent's June 4, 1997 Motion to Dismiss. It is noted, however, that Rule 12(f) applies only to pleadings. *See* Fed. R. Civ. P. 7(a)(defining pleadings as complaints, answers and replies to counterclaims); *Pilgrim v. Trustees of Tufts College*, __ F.3d __, 1997 WL 370286, at *3 (1st Cir. July 10, 1997)(Rule 12(f) applies only to pleadings and has no applicability to summary judgment motions); *Int'l Longshoremen's Ass'n v. Virginia Int'l Terminals, Inc.*, 904 F. Supp. 500, 504 (E.D. Va. 1995) (Rule 12(f) motion to strike not appropriate to challenge briefs and affidavits).

Accordingly, since motions are not equivalent to pleadings, a motion to strike is not a proper way to challenge respondent's motion to dismiss. For that reason, the portion of complainant's motion which seeks to strike respondent's June 4, 1997 Motion to Dismiss is denied.

Second, complainant has moved to strike respondent's April 28, 1997 answer. Rule 12(f) imposes a time limit upon parties seeking to strike a pleading namely, 20 days from the date of service of the pleading in question. Respondent was served with the Complaint on April 18, 1997. Respondent's answer was served by regular mail on April 24, 1997.

OCAHO Rules of Practice provide that service of all pleadings other than complaints is deemed effective at the time of mailing, 28 C.F.R. §68.8(c)(1), and that whenever a party has the right to take some action within a prescribed period after service of a pleading by regular mail, five (5) days shall be added to that period of time, 28 C.F.R. §68.8(c)(2).

Therefore, complainant had 25 days after April 24, 1997, or until May 19, 1997, to serve a motion to strike. Complainant did not serve his motion until June 13, 1997. Therefore, pursuant to Rule 12(f) and 28 C.F.R. §§68.8(c)(1) and (2), complainant's motion to strike respondent's answer was not timely filed and is therefore being denied.

Complainant's motion to strike respondent's answer must also be denied for not having applied the appropriate legal standard, that is a showing that Pro Source's answer contains insufficient defenses,

irrelevant or scandalous matter, and that the denial of the motion would be prejudicial.

Complainant urges that the answer be stricken because of respondent's failure to comply with certain OCAHO procedural rules.

First, complainant notes that respondent has not complied with the rule that requires an attorney of record to file a notice of appearance, 28 C.F.R. §68.33(b)(5), and to provide qualifications, 28 C.F.R. §68.33(b)(4).

Although a formal notice of appearance has not been filed, an answer to the Complaint has been filed on behalf of Pro Source by James M. Hughes, Esquire, Devin & Drohan, P.C.

Mr. Hughes has also represented the interests of Pro Source during the course of a prehearing telephonic conference conducted in this matter on May 29, 1997. This Office and the complainant, as well, have thus been afforded sufficient notice of the representation.

The other procedural rule cited by complainant, 28 C.F.R. §68.33(b)(4), provides that an "attorney's own representation that he/she is in good standing before any [federal or state court] shall be sufficient proof thereof, unless otherwise ordered by the Administrative Law Judge."

By having filed an answer and having appeared on behalf of Pro Source, Mr. Hughes has implicitly represented that he is in good standing. Absent some evidence to the contrary, Mr. Hughes has satisfactorily represented his good standing and need not furnish any additional evidence concerning his qualifications.

Complainant also notes that the respondent has failed to properly effect service of its answer and motion upon all parties of record, in violation of 28 C.F.R. §68.6 (Service and filing of documents), which provides in pertinent part:

> . . . all pleadings shall be delivered or mailed for filing to the Administrative Law Judge assigned to the case, and shall be accompanied by a certification indicating service to all parties of record. When a party is represented by an attorney, service shall be made upon the attorney.

It is noted for the record that neither respondent's answer nor its motion to dismiss are accompanied by the requisite certification, and are therefore in violation of the rule. Complainant has not provided any statutory or decisional bases that would allow an Administrative Law Judge to strike an answer based upon a party's failure to effect proper service. Obviously, complainant has received a copy of the respondent's answer and has been afforded the opportunity to challenge any insufficient defenses it may contain.

Given those circumstances, and because complainant neither timely filed his motion to strike nor in having met the legal standard for granting a motion to strike, complainant's June 16, 1997 Motion to Strike respondent's answer is also hereby being denied.

Complainant has also filed a pleading captioned Motion for Default Judgment, and in support of that motion has essentially cited the same procedural infractions namely,

1) the failure of respondent's counsel to file a notice of appearance and to provide his qualifications, 28 C.F.R. §68.33(b)(4), (5);

2) the failure of respondent to serve all parties of record with its answer and motion to dismiss, 28 C.F.R. §68.6; and

3) the failure of respondent's answer to comport with the requirements for filing answers, 28 C.F.R. §68.9(c).

The pertinent procedural rule governing defaults in OCAHO proceedings, 28 C.F.R. §68.9(b), provides that "[f]ailure of the respondent to file an answer within the time provided [30 days after service of a complaint] shall be deemed to constitute a waiver of his/her right to appear and contest the allegations of the complaint. The Administrative Law Judge may enter a judgment by default."

Because the cited rule contains precatory language, an Administrative Law Judge *may* enter a judgment by default where the respondent has failed to file a timely answer. In some cases, failure to respond to an Administrative Law Judge's pretrial orders may support the entry of a judgment by default. 28 C.F.R. §68.37(c); *United States v. Nu Line Fashions, Inc.*, 1 OCAHO 147 (1990).

Federal and OCAHO decisions consistently hold that default judgments are not favored and any doubts are resolved in favor of a trial on the merits. *United States v. Alvarez-Suarez*, 4 OCAHO 655, at 5 (1994). The U.S. Court of Appeals for the First Circuit has noted that "[a] default judgment is itself a drastic sanction that should be employed only in an extreme situation." *Luis C. Forteza e Hijos, Inc. v. Mills*, 534 F.2d 415, 419 (1st Cir. 1976); *Coyante v. Puerto Rico Ports Authority*, 105 F.3d 17, 23 (1st Cir. 1997); *cf. Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 396 (1st Cir.) (discovery abuse, while sanctionable, does not require as a matter of law imposition of most severe sanctions available), *cert. denied*, 498 U.S. 891 (1990).

On April 14, 1994, the Complaint was mailed to Pro Source by certified mail, return receipt requested. On April 25, 1997, the U.S. Postal Service Domestic Return Receipt, PS Form 3811, December 1994, which had been attached to the Complaint, was returned to this Office showing that it had been received by Pro Source on April 18, 1997. Thus, the 30 day period within which to have filed an answer was calculated from that date.

On April 29, 1997, Pro Source filed its answer. That filing was well within the 30 day period, and thus Pro Source is not in default.

Mindful that default judgments are not favored in the law, and absent any statutory, procedural or decisional bases upon which to do so, a judgment by default will not be entered based on the procedural infractions cited by the complainant. *United States v. A & A Maintenance Enter.*, 6 OCAHO 852 (1996).

Although respondent's answer does not comport with the particularized procedural requirements set forth at 28 C.F.R. §68.9(c), it is found to be sufficiently competent to constitute a general denial of all of complainant's allegations. The other cited procedural infractions have been discussed previously.

In view of the foregoing, complainant's June 16, 1997 Motion for Default Judgment is also being denied.

We now turn our attention to respondent's dispositive Motion to Dismiss, which was filed on June 4, 1997. Respondent states in the first sentence of that motion that "Defendant Pro Source, Inc. moves to dismiss this claim for failure to state a claim upon which relief can be granted under Regulation 68.11."

The appropriate procedural rule authorizing an Administrative Law Judge to dispose of cases upon motions to dismiss for failure to state a claim is contained in section 68.10 of the OCAHO rules. Although respondent has moved pursuant section 68.11, which governs motions and requests in general, its motion shall be treated as if made pursuant to section 68.10.

This procedural regulation is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, which has accordingly been used as a guidepost by the Administrative Law Judges in this Office in issuing orders pursuant to motions to dismiss under section 68.10.

In considering a motion to dismiss, our analysis is limited to the four corners of the Complaint, together with any documents incorporated into the Complaint by reference and materials subject to judicial notice. *Udala v. NYS Dept. of Education*, 4 OCAHO 633, at 4 (1994).

We also accept the Complaint's allegations as true and therefore extend to Cook all reasonable inferences. Dismissal is proper only if it is clear that no relief could be granted, under any theory, "under any set of facts that could be proved consistent with the allegations." *Kiely v. Raytheon Co.*, 105 F.3d 734, 735 (1st Cir. 1997) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994).

This case is another in a series of tax protester cases which have been filed in this Office involving individuals who purport to be exempted from the payment of federal taxes. *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996); *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Winkler v. Timlin Corporation*, 6 OCAHO 912 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 948 (1997); *Hogenmiller v. Lincare, Inc.*, 7 OCAHO 953 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Hollingsworth v. Applied Research Assocs.*, 7 OCAHO 942 (1997).

Most of these complaints, advancing the same theories as here, were filed by individuals represented by Kotmair, director of the

National Worker's Rights Committee, and were dismissed at an early stage for want of jurisdiction and for failure to state a claim upon which relief can be granted.

Furthermore, the factual scenarios giving rise to these tax protester cases are very similar. The individual has informed the employer that he or she is lawfully exempted from participation in the federal social security system, and has urged the employer to discontinue withholding federal taxes from paid wages. To demonstrate authority for such exemption, the individual provides the employer with two (2) self-created documents, a "Statement of Citizenship Status" and "Affidavit of Constructive Notice".

After the employer has refused to discontinue withholding, the individual files discrimination charges with OSC against the employer, on the basis of citizenship status, document abuse, and sometimes national origin, usually doing so only after having unsuccessfully filed a Title VII national origin discrimination charge with the Equal Employment Opportunity Commission.

In this case, Cook has alleged in his standard form OCAHO Complaint that he applied for or worked at Pro Source in July, 1996 and that he was "discriminated against because of [his] citizenship status", Complaint at ¶¶9, 11.

IRCA provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the **hiring**, or recruitment or referral for a fee, of the individual for employment or the **discharging** of the individual from employment . . . in the case of a protected individual, because of such individual's citizenship status." 8 U.S.C. §1324b(a) (emphasis added).

By its very terms, IRCA limits the assessment of citizenship status discrimination claims to those cases involving the hiring, recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment.

The burden of stating a prima facie case of citizenship status discrimination under IRCA is quite simple. Cook must allege 1) he is a protected individual; 2) Pro Source had an open position for which he applied or was discharged; 3) he was qualified for the position;

and 4) he was rejected or discharged under circumstances giving rise to an inference of unlawful citizenship status discrimination.

Although Cook is a U.S. citizen and therefore within the class which IRCA seeks to protect from unlawful citizenship status discrimination, the second and fourth elements are wholly unsatisfied under the facts alleged in either Cook's Complaint or in his December 9, 1996 OSC letter/charge. And nothing in Cook's subsequent filings contain allegations meeting those minimal factual pleading requirements.

Cook has affirmatively denied that he was knowingly and intentionally not hired on the basis of his citizenship status, Complaint at ¶13 .

Similarly, he has denied that he was knowingly and intentionally fired on the basis of his citizenship status, Complaint at ¶14.

Cook's claim of having been subject to citizenship status discrimination is clearly frivolous absent some pleaded facts showing that he was treated less favorably than others similarly situated. *See Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996) ("disparate or differential treatment is the essence of a discrimination claim").

To the extent Cook is alleging differential treatment on the basis of respondent's refusal to comply with his request to discontinue withholding taxes from his wages, prior OCAHO rulings have held that an employer's act of withholding federal taxes is a term or condition of employment which IRCA does not reach. *Horne v. Hampstead*, 6 OCAHO 906, at 5–6 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 6 (1997); *Lareau v. USAir, Inc.*, 7 OCAHO 932, at 11 (1997) (section 1324b does not reach tax and social security issues nor exempt employees from compliance with duties conferred by other statutes).

Hence, respondent's June 4, 1997 Motion to Dismiss Cook's citizenship status discrimination claim is hereby granted, and that portion of complainant's April 4, 1997 Complaint alleging citizenship status discrimination is hereby ordered to be and is dismissed with prejudice to refiling.

Having disposed of complainant's first cause of action, a consideration of Cook's final cause of action, that of document abuse, is now in order.

The document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6), provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system, 8 U.S.C. §1324a(b).

The employment verification system, among other things, requires an employer to verify at the time of hire that its employees are eligible to work in the United States by inspecting identity and employment eligibility documents provided by the employee. That task is accomplished by the completion of a Form I–9, officially known as the Employment Eligibility Verification Form. The documents which an employee may tender for purposes of establishing identity and work authorization are those specified in IRCA's implementing regulations, 8 C.F.R. §274a.2(b)(1)(v) (1996).

At the risk of engaging in document abuse, the employer may not request a particular document or demand more or different documents than are necessary to verify identity and employment eligibility, or refuse to accept facially valid documents.

To state a prima facie case of document abuse, the complainant must allege at a minimum that the employer requested documents for purposes of satisfying IRCA's employment verification system.

A review of the Cook's Complaint and his December 9, 1996 OSC letter/charge quite clearly show that he has failed to make those elemental allegations. For example, Cook contends at ¶16 of his April 14, 1997 Complaint:

> The Business/Employer refused to accept the documents that I presented [to show I can work in the United States].
>
> a) The Business/Employer refused to accept the following documents: Statement of Citizenship/Affidavit of Constructive Notice

Cook has crossed out the language "to show I can work in the United States," thus clearly negating facts which are essential to prove that Pro Source engaged in proscribed document abuse practices.

Cook has alleged that he tendered two (2) documents, a Statement of Citizenship and an Affidavit of Constructive Notice, not for purposes of completing the Form I–9, but rather to demonstrate his purported exemption from participation in the federal social security system and from federal tax withholding.

It is well settled that IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification (Form I–9) procedures. *Costigan v. NYNEX*, 6 OCAHO 918, at 9–10 (1997).

Therefore, Pro Source's act of refusing to accept Cook's Statement of Citizenship and Affidavit of Constructive Notice, which are not among the documents specified by IRCA to verify identity and employment eligibility, 8 C.F.R. §274a.2(b)(1)(v), was plainly not proscribed by IRCA, and is not a claim upon which relief can be granted.

Accordingly, respondent's June 4, 1997 Motion to Dismiss Cook's document abuse claim is hereby granted, and that portion of complainant's April 4, 1997 Complaint alleging document abuse is hereby ordered to be and is dismissed with prejudice to refiling.

Before a complaint is dismissed for failing to state a claim, a complainant is usually afforded the opportunity to amend the complaint to remedy the defect. In this case, however, it appears to a certainty that an amendment would be futile, and thus there is no reason to permit such amendment. *Glassman v. Computervision Corp.*, 90 F.3d 617, 622 (1st Cir. 1996).

Finally, because it is quite clear that Cook's allegations involve an ideological dispute with the Internal Revenue Service over the method of withholding for taxes and over the constitutionality of the system of taxation in the United States, the Complaint must be dismissed for lack of subject matter jurisdiction as well.

That OCAHO lacks subject matter jurisdiction over these types of tax-related claims is well established in OCAHO jurisprudence. *Horne v. Town of Hampstead*, 6 OCAHO 906, at 4 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919, at 16 (1997); *Winkler v. Timlin Corporation*, 6 OCAHO 912 (1997); *Costigan v. NYNEX*, 6 OCAHO 918, at 4 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7

OCAHO 929, at 18 (1997); *Hogenmiller v. Lincare*, 7 OCAHO 953, at 7 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 21 (1997).

This Office provides access only to those complainants seeking to resolve, among other things, disputes involving unfair immigration-related employment practices. Additionally, there is nothing in the statute nor implementing regulations to conclude that this forum has jurisdiction over disputes which involve the withholding of federal taxes from wages.

Accordingly, complainant's April 4, 1997 Complaint is hereby ordered to be and is dismissed with prejudice for lack of subject matter jurisdiction.

Order

In view of the foregoing, respondent's June 4, 1997 Motion to Dismiss complainant's April 4, 1997 Complaint is hereby granted.

Complainant's April 4, 1997 Complaint, alleging citizenship status discrimination and document abuse, in violation of IRCA, 8 U.S.C. §1324b, is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
Administrative Law Judge

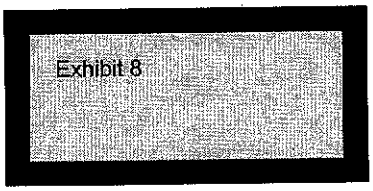
Appeal Information

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 a timely review of this 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 this Order.

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

March 5, 1997

WAYNE P. COSTIGAN, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 97B00026
NYNEX, Respondent.	)	



ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Background and Procedural History*

The Complaint in this case was filed on November 18, 1996, and alleges that Respondent NYNEX (hereinafter Respondent or NYNEX) discriminated against Complainant Wayne P. Costigan (hereinafter Complainant or Costigan) on the basis of his United States citizenship status (Comp. ¶9), and committed document abuse by refusing to accept the documents that he presented; namely a Statement of Citizenship and Affidavit of Constructive Notice (Comp. ¶16). The Complaint further asserts that Complainant filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) on August 3, 1996 (Comp. ¶18), and that OSC sent him a right to sue letter informing him that he could file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) (Comp. ¶19). Complainant attached to his Complaint a copy of the August 20, 1996, letter from OSC.

Respondent was served with a copy of the Complaint on December 9, 1996, and on January 13, 1997, I granted Respondent's request for an extension of time to file an answer to the Complaint. On February 3, 1997, Respondent filed its Answer to the Complaint,

which included three affirmative defenses, and also filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. Subsequently, on February 12, 1997, Respondent filed both an amended answer and an amended motion to dismiss. On March 4, 1997, I issued an order accepting the filing of both the amended answer and motion.[1] Respondent also moved to disqualify John B. Kotmair, Jr., Complainant's representative, on the ground that he is not an attorney qualified to represent a person before this agency and has not filed a declaration that he is a member in good standing of the highest court of the state. Per my Order of February 4, 1997, I directed Complainant to include certain factual information in its response to the Motion to Dismiss.

Complainant has filed a motion to strike the appearance of the attorney representing Respondent and a Motion for Findings of Fact and Conclusions or Reconsideration of Judgment. On February 14, 1997, Complainant filed a reply to Respondent's affirmative defenses, a reply to Respondent's Motion to Dismiss, and a reply to my Order of February 4, 1997.

In his reply to the February 4, 1997 Order of this Court, Complainant acknowledges that Complainant was hired on June 1, 1987, by NYNEX, was working for Respondent at the time the Complaint was filed on November 18, 1996, and is currently employed by Respondent NYNEX. (C. Reply to Order at 6). Complainant attached a copy of the Statement of Citizenship signed by Mr. Costigan and dated May 5, 1995, and the Affidavit of Constructive Notice signed by Mr. Costigan and dated July 6, 1995, which allegedly were submitted to Respondent on May 8, 1995, and July 7, 1995, respectively, *id.* at 6–7. Although Complainant challenges as inaccurate Respondent's assertion that Complainant's claim concerns withholding of taxes, and instead asserts that this case involves discrimination and document abuse, I note that the Statement of Citizenship states that it is being provided to conform to internal revenue regulations that will relieve a withholding agent of any duty to withhold money from payments to a United States citizen. Further, the Affidavit of Constructive Notice states, in pertinent part, that Mr. Costigan does not have a social security number

[1] The OCAHO Rules of Practice and Procedure provide that the Judge may allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the final order. *See* 28 C.F.R. §68.9(e).

and never lawfully registered with the Social Security Administration.

II. *Standards Governing a Motion to Dismiss*

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. *Painewebber Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d Cir. 1996) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411 (1986), and *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989)); *Murray v. Miner*, 74 F.3d 402, 403–04 (2d Cir. 1996). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all inferences that can be derived from the alleged facts. *Painewebber*, 81 F.3d at 1197–98 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984)); *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 20 (2d Cir. 1996); *Bent v. Brotman Medical Ctr. Pulse Health Servs.*, 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[2] (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5. A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Geller*, 86 F.3d at 20 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Murray*, 74 F.3d at 404 (citing same); *Painewebber*, 81 F.3d at 1198; *Bent*, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; *Zarazinski*, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "[That] principle is to be applied with particular strictness when the [complainant] complains of a civil rights violation or where the [complainant] is appearing *pro se*." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (internal citations omitted). However, the motion to dismiss may be granted if, even assuming that the complainant's factual assertions are true, the complaint fails to state a cognizable claim. *See Geller*, 86 F.3d at 20.

III. *Applicable Statutory Authority*

The complaint alleges violations of 8 U.S.C. §1324b, specifically citizenship status discrimination and document abuse. The statutory

[2] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM–OCAHO" database.

provisions for those types of unfair immigration-related employment practices provide as follows:

> (a) Prohibition of discrimination based on . . . citizenship status
>
> (1) General rule
>
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment —
>
> . . .
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.
>
> . . . .
>
> (6) Treatment of certain documentary practices as employment practices
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. §1324b(a)(1), (6) (1994).

IV. *Decision and Order*

A. *Lack of Subject Matter Jurisdiction*

The Complaint in this case raises the issue of whether, pursuant to 8 U.S.C. §1324b, a party can maintain an action against an employer with whom there is a continuing employment relationship based on a claim of citizenship status discrimination, pursuant to 8 U.S.C §1324b–(a)(1), and a claim of document abuse, pursuant to 8 U.S.C. §1324b(a)(6). This issue has been addressed recently in a Decision and Order by Judge Marvin H. Morse. *See Horne v. Town of Hampstead*, 6 OCAHO 906 (1997).[3]

[3] Because the issues are similar and because I agree with the findings and conclusions in *Horne*, I have borrowed liberally from the language of that decision on the issue of jurisdiction. Although I could have adopted the language of that decision by reference rather than repeating the language in this decision, for the convenience of the reader I have included significant portions of the exact language from pages 4–9 of that opinion.

As held in *Horne* at 4, OCAHO lacks subject matter jurisdiction of a "complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge ... because the power of the administrative law judge is limited to [granting relief for] discriminatory failure to hire and to discharge and does not include conditions of employment."

Although Respondent in this case did not move to dismiss for lack of subject matter jurisdiction, the issue of subject matter jurisdiction may be raised at any time, even by the court *sua sponte*. *Westmoreland Capital Corp. V. Findlay*, 100 F.3d 263, 266 (2d Cir. 1996); *United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994). A court's first duty is to determine subject matter jurisdiction because "lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, *reh'g denied*, 309 U.S. 695 (1940). It is always incumbent upon a federal court to evaluate its jurisdiction *sua sponte*, to ensure that it does not decide controversies beyond its authority. *See Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1175 (2d Cir. 1995) ("An inquiry respecting this issue is one we always have the power to undertake, and where jurisdiction is questionable we are obliged to examine it *sua sponte*"), *cert. denied*, 116 S. Ct. 1351 (1996); *McCorkle v. First Pa. Banking & Trust Co.*, 459 F.2d 243, 244 n.1 (4th Cir. 1972) ("It has often been held that federal courts must be alert to avoid overstepping their limited grants of jurisdiction"). "[L]ack of subject matter jurisdiction is an issue that requires sua sponte consideration when it is seriously in doubt." *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272, 1274 (4th Cir. 1985). Parties cannot confer jurisdiction by consent. *Insurance Corp. Of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993); *McCorkle*, 459 F.2d at 244 n.1. "If the court perceives the defect, it is obligated to raise the issue sua sponte." *Id.* at 244–45 n.1

As noted in *Horne* at 5, a judicial tribunal cannot expand or constrict the jurisdiction conferred on it by statute. *Willy v. Coastal Corp.*, 503 U.S. 131, 135, *reh'g denied*, 504 U.S. 935 (1992). Courts, therefore, have the authority "to determine whether or not they have jurisdiction to entertain [a] cause and for this purpose to construe and apply the statute under which they are asked to act." *Chicot*, 308 U.S. at 376.

The Supreme Court has opined that federal administrative law judges are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the administrative law judge is *a fortiori* a judge of limited jurisdiction subject to the same type of jurisdictional strictures applicable to federal district judges.

The present Complaint does not allege that Respondent either refused to hire or fired him, and, in fact, Complainant concedes in his reply to the Court's order that he was hired by Respondent in 1987, was working for Respondent when the complaint was filed, and is currently employed by Respondent. *Supra* at 2.

"It is established OCAHO jurisprudence that administrative law judges have §1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment." *Horne*, 6 OCAHO 906, at 5 (citing *Naginski v. Department of Defense*, 6 OCAHO 891, at 29 (1996) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *7), *appeal filed*, No. 96–2138 (1st Cir. 1996)); *Ipina v. Michigan Dep't of Labor*, 2 OCAHO 386 (1991), 1991 WL 531898, at *8–9; *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991), 1991 WL 531875, at *9)). Controversies over conditions of employment do not confer §1324b jurisdiction. *Horne*, 6 OCAHO 906, at 6; *Naginski*, 6 OCAHO 891, at 29.

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a section 274B, codified as 8 U.S.C. §1324b. Section 102 was enacted as part of comprehensive immigration reform legislation, to accompany Section 101, which, codified as 8 U.S.C. §1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by section 1324a, people who looked different or spoke differently might be subjected to workplace discrimination.[4]

[4] *See* "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99–1000, 99th Cong., 2d Sess. 87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842.

"President Ronald Reagan in his formal signing statement observed that '[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result.'" *Horne,* 6 OCAHO 906, at 6 (quoting Statement by President Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1536 (Nov. 10, 1986)).[5] Consistent with the purpose of prohibiting discrimination resulting from sanctions, section 1324b only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms and conditions of employment, as does Title VII. *Id.* at 6–7 (citing EEOC Notice No. –915.011, Responsibilities of the Department of Justice and the EEOC for Immigration Related Discrimination (September 4, 1987)); *Tal v. M.L. Energia, Inc.,* 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (as amended in 1990 to add §1324b(a)(6), §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse"), *petition for reh'g denied*, No. 94–3690 (3d Cir. 1994), *and review denied*, 66 F.3d 312 (3d Cir. 1995) (table)). Therefore, I do not have subject matter jurisdiction of Complainant's citizenship status discrimination claim.

I also lack jurisdiction of Complainant's document abuse claim. Section 101 of IRCA, 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements, which are set out at 8 U.S.C. §1324a(b). As implemented by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS employment eligibility verification form (form I–9) within a specified period of the date of hire. 8 C.F.R. §§274a.2(a), (b)(1)(ii) (1996). The employee must pro-

[5] *See Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872, at *4 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). *Accord, Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798, at *28 n.11. [Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.]

duce documentation establishing both identity and employment authorization. 8 U.S.C. §1324a(b)(1) (1994).

The employment verification system established under section 1324a provides a comprehensive scheme that stipulates categories of documents acceptable to establish identity and work authorization. *Id.*

§1324a(b)(1)(B)–(D); 8 C.F.R. §274a.2(b)(1)(v) (1996). When an employer hires an individual, the latter must sign an INS form I–9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. The employment verification process mandated in 8 U.S.C. §1324a requires that an employer, in completing section two of the I–9 form for each employee, examine documents that prove an employee's identity and employment eligibility. An employer is required to examine and document either a List A document, *or* a List B *and* a List C document. List A documents, for example a U.S. Passport, show both identity and employment eligibility.[6] List B documents, for example a driver's license or state issued I.D. card, establish identity.[7] List C documents, for example a social security card, establish employment eligibility.[8]

The employee completing the I–9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee that reasonably appear on their faces to be genuine and to relate to the person presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provi-

[6] Acceptable List A documents are noted at 8 U.S.C. §1324a(b)(1)(B) (1994) and8 C.F.R. §274a.2(b)(1)(v)(A) (1996).

[7] Acceptable List B documents are noted at 8 U.S.C. §1324a(b)(1)(D) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(B) (1996).

[8] Acceptable List C documents are noted at 8 U.S.C. §1324a(b)(1)(C) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(C) (1996).

sions." *Horne*, 6 OCAHO 906, at 8 (citing Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6)).

However, section 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement. Complainant's assertion that Respondent violated the Act by refusing to accept his Statement of Citizenship and Affidavit of Constructive Notice is not viable, particularly since the Complaint does not allege that the Respondent refused to accept documents tendered for the purpose of completing the I–9 form[9] or that Respondent either was denied employment or discharged.

Consequently, in this case there is no basis on which to posit jurisdiction of a section 1324b document abuse claim. Document abuse can only be established by proving that the employer refused to accept documents that were proffered "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6) (1994). Nothing in the case before me suggests that the tender of documents identified by Complainant at ¶16a of his Complaint implicates §1324a(b) requirements. Patently, the Complaint negates any inference that Complainant was either denied employment or was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. Indeed, the documents referenced in the Complaint are not acknowledged as acceptable by or embraced by that system. Neither the Statement of Citizenship nor the Affidavit of Constructive Notice is a document specified as an appropriate List A, B or C document.[10] Complainant does not assert that the employer asked for wrong or different documents than those required to show work authoriza-

[9] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." (Comp. ¶16).

[10] Although a Certificate of U.S. Citizenship, INS Form N–560 or N–561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. §1324a, Complainant's Statement of Citizenship is not such a document.

tion. (Comp. ¶17.) Accordingly, this tribunal has no subject matter jurisdiction over Complainant's purported document abuse claim.

B. *Failure to State a Claim*

In addition to the jurisdictional defect, Complainant has failed to state a claim of citizenship status discrimination or of document abuse. First, with respect to citizenship status discrimination, Complainant simply has made a bald assertion of citizenship discrimination without alleging any facts that show such discrimination. Although Complainant alleges that he is a United States citizen, (Comp. ¶2), and that he was discriminated against because of his citizenship (Comp. ¶9), he does not allege that he was refused employment or was fired from his job (Comp. ¶¶13–14). His only allegation of discrimination is that his employer refused to accept his proffered Statement of Citizenship and Affidavit of Constructive Notice and, thus, in some unspecified manner impeded his protected status under federal law to be entitled to all of his pay and not treated as an alien under federal law. Accepting, as I must, the truth of the facts in the Complaint for the purpose of adjudicating this Motion, the Complaint does not state how the Respondent's refusal to accept Complainant's proffered documents constituted any discrimination in the employment verification process.

Complainant has the burden of proving discrimination on the basis of citizenship status. *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *10, *appeal filed*, No. 96–3688 (3d Cir. 1996); *United States v. Mesa Airlines*, 1 OCAHO 74, at 500 (1989), 1989 WL 433896, at *32, *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991). In a section 1324b case based on citizenship status, a complainant must establish discriminatory treatment by proof that he was treated less favorably than others because of his protected status, i.e., his citizenship status. *See, e.g., Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 12 (1992), 1992 WL 535635, at *8. As a United States citizen, Complainant is a "protected individual" under 8 U.S.C. §1324b(a)(3) and, thus, has standing to bring a claim. However, Complainant must allege facts that show discriminatory treatment based on his citizenship status. Specifically, in the case at bar, to defeat a motion to dismiss Complainant must allege facts that, if true, would show that he was treated less favorably than other workers in his situation, but of different citizenship, because of his U.S. citizenship. He has not alleged such facts. Specifically, Complainant has not alleged that Respondent treated

U.S. citizens differently from noncitizens by requiring social security numbers from the first group but not the second. *See id.* Also, he has not alleged that he either was rejected for employment or was fired from his job because of his citizenship status. Thus, he has not shown the type of disparate treatment that has been found to constitute employment discrimination. Certainly he has failed to allege how the employer's conduct relates in any way to the employment verification procedure governed by IRCA. In sum, the Complaint completely fails to state a claim upon which relief may be granted with respect to citizenship status discrimination.

The Complaint also fails to state a claim with respect to document abuse. 8 U.S.C. §1324b(a)(6) provides, in pertinent part, that refusing to honor documents that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals. The purpose of this section of the Act is to prohibit employers from demanding any particular document to satisfy the employment eligibility verification requirements of 8 U.S.C. §1324a. *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *4; *Jones v. DeWitt Nursing Home*, 1 OCAHO 189, at 1250 (1990), 1990 WL 511979, at *11–12. The choice of documents that a job applicant may present to an employer to establish identity, work eligibility, or both, is exclusively that of the job applicant and not that of the employer. At the risk of engaging in an unfair immigration-related employment practice, the employer may not insist on a particular document to establish employment eligibility under IRCA. *United States v. A.J. Bart, Inc.*, 3 OCAHO 538, at 13–14 (1993), 1993 WL 406027, at *10; *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO 414, at 9 (1992), 1992 WL 535554, at *6.

IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA. In this case, the Complaint does not allege that Respondent refused to accept documents tendered by the employee for the purpose of satisfying the employment eligibility requirements of IRCA. Indeed, the documents identified in the Complaint, namely a Statement of Citizenship and an Affidavit of Constructive Notice, are not documents acceptable to establish an employee's identity or employment eligibility pursuant to 8 U.S.C. §1324a, *supra* n.10 and

accompanying text, and, in fact, the Complaint does not allege that they were offered for that purpose, *supra* n.9.

Since the document abuse provisions in 8 U.S.C. §1324b(a)(6) require that the questionable documentary practices must involve the employment eligibility verification system, it is necessary to address whether, examining the facts in the light most favorable to the Complainant, Complainant has sufficiently stated a claim of document abuse in his Complaint.

Complainant alleges that Respondent refused to accept his Statement of Citizenship and Affidavit of Constructive Notice. However, Complainant has not alleged in any of his many pleadings that nonacceptance of this document was made in the process of completing his employment eligibility verification. In fact, the alleged documents are not acceptable documents in Lists A, B or C for purposes of showing employment eligibility and/or identity. Moreover, the employer's refusal to accept those documents did not result in a refusal to hire or a decision to fire. Consequently, the employer's actions did not involve the employment verification system covered by IRCA. In this respect, the recent holding in *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), is particularly apt:

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO 892 at 18–21 (1996) and cases cited therein.

Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10, *appeal filed*, No. 97–70124 (9th Cir. 1997).

Finally, I would note that Complainant asserts that his Complaint against Respondent does not involve the question of withholding taxes, but, rather, "discrimination against him as a U.S. Citizen by the denial of his rights by document abuse under 8 U.S.C. §1324b, not any tax abuses." (C.'s Reply to R.'s Motion to Dismiss at 4; *see* Cl.'s Reply to R.'s Affirmative Defenses at 4). I find Complainant's assertion to be disingenuous. It is patently obvious, from the statements made in Complainant's Statement of Citizenship, Affidavit of Constructive Notice, and the June 29, 1995, letter from T. Paul Bell to Mr. McAndrews,[11] that the U.S. tax

requirements are central to Complainant's grievance. At any rate, regardless of whether tax law truly is the nucleus of Complainant's Complaint, it is certainly clear that Complainant does not state a claim under IRCA because Complainant's charge does not implicate the employment review and verification process.

Complainant has failed to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. §1324b(a)(6), even construing the standard for dismissal in the most stringent sense, considering that Complainant is appearing without legal counsel, *see supra* pt. II. Therefore, Respondent's Motion to Dismiss is granted as to the allegations in the Complaint related to both the claims as to citizenship status discrimination and document abuse.[12]not entitled to leave to amend the Complaint in this situation because Complainant has given *no indication* that he *can* state a valid claim under IRCA. Moreover, my Order of February 4 already has given Complainant an extra opportunity to clarify his contentions before my ruling on the Motion to Dismiss. Allowing Complainant the chance now to amend his Complaint so that it would state a cause of action under IRCA, i.e., having Complainant amend his allegations regarding his current employment status and the purpose for which he proffered the two documents in question, would be to encourage perjury, given Complainant's clear and unwavering positions on those decisive factual issues.

C. *Disqualification*

Respondent has moved to disqualify Complainant's representative solely on the ground that he is not an attorney. Mr. Kotmair does not

[11] These documents are attached as exhibits to Complainant's reply to my Order of February 4, 1997.

[12] The Second Circuit provides that "the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives *any indication* that a valid claim *might* be stated." *Branum*, 927 F.2d at 705 (emphasis added). Even in light of that pronouncement and Complainant's status as a *pro se* litigant, Complainant is not entitled to leave to amend the Complaint in this situation because Complainant has given no indication that he can state a valid claim under IRCA. Moreover, my Order of February 4 already has given Complainant an extra opportunity to clarify his contentions before my ruling on the Motion to Dismiss. Allowing Complainant the chance now to amend his Complaint so that it would state a cause of action under IRCA, i.e., having Complainant amend his allegations regarding his current employment status and the purpose for which he proffered the two documents in question, would be to encourage perjury, given Complainant's clear and unwavering positions on those decisive factual issues.

claim to be an attorney. However, he has produced a power of attorney that indicates Complainant has chosen Mr. Kotmair to represent him in this matter. The Rules of Practice neither specifically authorize or prohibit lay representation. *See* 28 C.F.R. §68.33 (1996). However, the language suggests that lay representation is possible. *See id.* §§68.33–(b)(6), 68.35(b) (both referring to a party's "representative," rather than a party's "attorney"). Moreover, lay representation has been permitted in some past cases. *See United States v. Chaudry*, 3 OCAHO 588, at 1 (1993) (allowing the respondent's brother, a non-attorney, to represent the respondent upon receiving no objection from the complainant and upon finding no prejudice to the Court); *Alvarez v. Interstate Highway Constr.*, 2 OCAHO 385, at 2 (1991) (allowing an association of employers to represent the respondent upon finding reliable proof that the party had authorized representation by a lay representative and that the non-attorney possessed some degree of competence, "including a familiarity with the statute and regulations that govern these proceedings").

While the Rules are not entirely clear as to the question of lay representation, given my ruling on the Motion to Dismiss, I do not need to decide this issue and, therefore, I decline to do so.[13]

V. *Respondent's Request for Costs and Attorney's Fees*

As part of its Motion to Dismiss, Respondent states that the Complaint is patently frivolous and should be dismissed with costs and fees to the Respondent. Pursuant to 8 U.S.C. §1324b(h) and 28 C.F.R. §68.52–(c)(2)(v), once the case has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact.

At this time I am reserving judgment on the issue of whether Respondent is entitled to receive attorney's fees and, if so, in what amount. The parties will be given an opportunity to brief the question of costs and attorney fees. Since the statute only refers to the

[13] Even assuming that lay representation is permissible, a particular lay representative may not be permitted to appear if there are reasonable concerns about his competence or ethical standards. If a lay representative seeks to represent a party in a particular case, the lay representative must act in accordance with the same ethical standards required of attorneys. Moreover, a representative may be barred from the proceeding if he fails to comply with directions or fails to adhere to reasonable standards of orderly and ethical conduct. 28 C.F.R. §68.35(b) (1996).

award of an "attorney's fee" and not costs, Respondent will have to show that an awarding of costs, as well as an attorney's fee, is authorized. Respondent bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting *without legal counsel.*

Therefore, Respondent is ordered to file, not later than April 7, 1997, a certification of services detailing the fees and costs incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate, as well as an itemized list of costs. It is Respondent's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Respondent will support its request with a legal brief or memorandum showing why Respondent's arguments are "without reasonable foundation in law and fact" and discussing (not just citing) the pertinent OCAHO case law, such as *Banuelos v. Transportation Leasing Co.*, 1 OCAHO 255 (1990), 1990 WL 512091, *request for CAHO review denied*, 1 OCAHO 259, 1990 WL 512083 (on the grounds that the Chief Administrative Hearing Officer does not have review authority over cases arising under 8 U.S.C. §1324b), *aff'd, Banuelos v. United States Dep't of Justice*, 5 F.3d 534 (9th Cir. 1993) (unpublished; available at 1993 WL 312769), *and cert. denied*, 114 S. Ct. 1055 (1994); *Becker v. Alarm Device Manufacturing Co. and District 65 Union*, 1 OCAHO 107 (1989), 1989 WL 433827, *errata issued*, 1 OCAHO 118, as well as more recent cases such as *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204, *aff'd*, 81 F.3d 155 (5th Cir. 1995) (table); *Chu v. Fujitsu Network Transmission System*, 5 OCAHO 778 (1995), 1995 WL 584254; *Bozoghlanian v. Lockheed-Advanced Development Co.*, 4 OCAHO 711 (1994), 1994 WL 761185; and *Huesca v. Rojas Bakery*, 4 OCAHO 654 (1994), 1994 WL 482552. Respondent also shall discuss the leading Title VII case law with respect to awards of attorney's fees, such as *Christiansburg Garment Co. v. EECO*, 434 U.S. 412 (1978), and *Miller v. Los Angeles County Board of Education*, 827 F.2d 617 (9th Cir. 1987).[14] Following Respondent's filing, Complainant shall have twenty days from the

[14] Because Complainant's representative is not an attorney, the same rules applicable to *pro se* parties may be pertinent here. Thus, Respondent should address the factors raised in such cases as *Christiansburg, Miller* and *Banuelos*, including the four factors discussed in *Banuelos*, 1 OCAHO 255, at 1653, 1990 WL 512091, at *12, which apply to the award of attorney's fees against *pro se* parties in discrimination cases. If Respondent contends that *pro se* rules should not apply here, it should state its position on that issue as well.

date of service of Respondent's submission to file its response to Respondent's submission.[15]

VI. *Conclusion*

For the above stated reasons, the Complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. I retain jurisdiction to determine whether costs and attorney's fees are appropriate in this case and in what amount. Any outstanding motions not expressly addressed in this Decision and Order, except for Respondent's motion for costs and attorney fees, are hereby denied.

IT IS SO ORDERED:

ROBERT L. BARTON, JR.
Administrative Law Judge

[15] The parties are reminded that "file" means that the document must be received by my office by that date. *See* 28 C.F.R. §68.8(b) (1996).

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

June 5, 1997

HOBART D'AMICO, JR., Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00027
ERIE COMMUNITY COLLEGE, Respondent.	)

Exhibit 9

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Background and Procedural History*

This case arises with Complainant Hobart D'Amico, Jr. filing a Complaint on November 18, 1996, alleging that Respondent Erie Community College (ECC) discriminated against him on the basis of his United States citizenship status (Comp. ¶9) and committed document abuse by refusing to accept his proffered "Statement of Citizenship" and "Affidavit of Constructive Notice" [1] (Comp. ¶16). A copy of Complainant's February 12, 1996, claim filed with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) accompanies the Complaint. Also attached to the Complaint is an August 20, 1996, letter OSC sent Complainant informing him of its opinion that his claim comprised insufficient evidence to state a cause of action under §1324b. This letter informed him of his right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) (Comp. ¶19).

[1] These documents should not be confused with INS Forms N–560 or N–561, which are official certificates of U.S. citizenship, documents acceptable for complying with employment eligibility requirements under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2).

Respondent was served with the Complaint on December 13, 1996. I did not receive an Answer from Respondent within the appropriate time period, which under OCAHO Rules of Practice and Procedure is thirty days after service of the complaint. 28 C.F.R. §68.9(a) (1996). Thus, on January 22, 1997, I issued a Notice of Default to the Respondent.[2] Complainant then filed a Motion for Default Judgment on February 12, 1997, on the same basis. No answer having been received by Respondent, on February 19, 1997, I issued an Order requiring Respondent to show cause why Complainant's Motion for Default Judgment should not be granted.

Also, on February 19, 1997, I issued an Order directing Complainant to provide information regarding his employment status at the time the complaint was filed, the date he was hired, whether he had ever been an employee, and when he ceased employment with Respondent. The Order also directed Complainant to provide information regarding the circumstances under which the "Statement of Citizenship" and "Affidavit of Constructive Notice" were submitted to Respondent. Complainant filed a Motion to Reconsider or Alter Order on March 10, 1997, taking exception to my February 19, 1997 Order directing him to provide information and questioning my authority to issue the January 22, 1997, Notice of Default Judgment. On March 11, 1997, I issued an Order denying Complainant's Motion to Reconsider or Alter Order.

Respondent then filed an Answer and Response to Complainant's Motion for Default Judgment on March 13, 1997, explaining that pleadings and notices of administrative actions are usually served on the relevant Erie County agency and the Erie County Attorney's office, but in this case such dual service did not occur (Ans. ¶3). As a result, the Erie County Attorney 's office only became aware of the Complaint when Complainant filed a Motion for Default Judgment (Ans. ¶4). Respondent also asserted that proceeding with the case would not prejudice the non-movant's case and that the Complaint failed to state a valid cause of action. Therefore, Respondent respectfully requested that Complainant's Motion for Default Judgment not be granted.

[2]Rule 55(a) of the Federal Rules of Civil Procedure provides that an entry of default may be noted when a party fails to file an answer. The OCAHO Rules of Practice and Procedure state that the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by the OCAHO Rules. 28 C.F.R. §68.1. Therefore, the entry of a notice of default was authorized under OCAHO Rules.

On March 13, 1997, I issued an Order Staying Proceedings and on March 17, 1997, Respondent filed an Affidavit in Opposition to Complainant's Motion to Reconsider or Alter Order. I then issued an Order denying Complainant's Motion for Default Judgment on April 22, 1997.

Respondent served a Motion to Dismiss, and brief in support thereof, on April 25, 1997, alleging that the Complaint should be dismissed, pursuant to 28 C.F.R. §68.11, on the grounds that the Complaint failed to state a cause of action for immigration-related employment discrimination and that this tribunal lacks subject-matter jurisdiction of this action. Complainant then filed a reply to Respondent's Motion to Dismiss on May 16, 1997, claiming that Respondent's refusal to honor the "Statement of Citizenship" and "Affidavit of Constructive Notice" constituted valid §1324b citizenship and document abuse claims.[3]

On May 22, 1997, I issued an Order requiring Respondent to submit information helpful in determining whether ECC is a local or state entity for purposes of Eleventh Amendment sovereign immunity. In compliance with this Order, Respondent sent a letter dated June 2, 1997, asserting that ECC considers itself a local entity.[4]

This Order dismisses the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted under 8 U.S.C. §1324b and is in accord with numerous antecedent decisions.[5]

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[3]The OCAHO Rules of Practice and Procedure (hereinafter OCAHO Rules), 28 C.F.R. §§68.8(c)(2) and 68.11(b) permit a party to file a response to a motion served by mail within 15 days of service. Consequently, Complainant's reply, filed on May 16, 1997, was late filed.

[4]Although my May 22 Order provided that Complainant could respond to Respondent's submission, since ECC is not asserting sovereign immunity, no response is necessary.

[5]*See Cholerton v. Hadley*, 7 OCAHO 934 , at 1 (1997) (which described the complaint as "[yet another tax challenge . . . against a hapless employer who refuses to conspire with the complainant in avoiding federal income tax withholding and social security contribution . . .]") *see Lareau v. USAir*, 7 OCAHO 932 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO

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II. *Standards Governing Dismissal / Summary Decision*

A court will assume that the facts alleged in the complaint are true, for purposes of ruling on a motion to dismiss. *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d. Cir. 1996) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc,* 476 U.S. 409, 411 (1986), and *Bankers Trust Co. v Rhoades*, 859 F.2d 1096, 1098 (2d. Cir. 1988, *cert. denied*, 490 U.S. 1007 (1989)); *Murray v. Miner*, 74 F.3d 402, 403–04 (2d Cir. 1996); *Bent v. Brotman Medical Ctr. Pulse Health Serv.*, 5 OCAHO 764, at 3 (1995), *citing Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the non-moving party the benefit of all inferences that can be derived from the alleged facts. *Painewebber*, 81 F.3d at 1197–98 (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)). The motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Geller v. County Line Auto Sales, Inc*, 86 F.3d 18, 20 (2d Cir. 1996) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Murray*, 74 F.3d at 404 (citing same); *Painewebber*, 81 F.3d at 1198. However, the motion to dismiss may be granted if, even assuming that the complainant's factual assertions are true, the complaint fails to state a cognizible claim. *See Geller*, 86 F.3d at 20.

"Among other things, Rule 12(b)(6) provides that if, on a motion to dismiss for failure to state a claim, matters outside the pleadings are presented to the court and not excluded, the motion 'shall be

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919 (1997); *Costigan v. Nynex*, 6 OCAHO 918 (1997), 1997 WL 176910; *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.) ; *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed,* No. 96–3688 (3d. Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *D'Amico v. Erie Community College* takes place in this very-familiar context.

treated as one for summary judgment.'" *Yosef v. Passamaquoddy Tribe*, 876 F.2d 283 (2d Cir. 1989); *see* Fed R. Civ. P. 12(c); *United States v. Italy Department Store,* 6 OCAHO 847, at 2–3 (1996). ECC relies on extraneous documents in support of the motion to dismiss, including a letter written by Timothy J. Trost to Hobart D'Amico, Jr., denying Complainant's request to stop all payroll deductions from his wages and an Affidavit of Revocation and Rescission sent to Respondent. Reliance on affidavits in support of motions to dismiss turns a motion to dismiss into a motion for summary judgment. *Samara v. United States*, 129 F.2d 594 (2d. Cir.), *cert. denied* 317 U.S. 686 (1942). Therefore, Respondent's motion to dismiss will be treated as a motion for a summary decision.[6]

The OCAHO Rules authorize the ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). After the moving party has met its burden, the burden of production then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." *United States v. Tri Component Product Corp.*, 5 OCAHO 82, at 4 (1995) (quoting Fed. R. Civ. P. 56(e)). Failure to meet this burden invites summary decision in the moving party's favor.

III. *Applicable Statutory Authority*

D'Amico's complaint alleges violations of 8 U.S.C. §1324b, specifically citizenship status discrimination and document abuse. The

[6]Although the OCAHO Rules use the term "summary decision" rather than "summary judgment," 28 C.F.R. §68.38, these are equivalent terms.

statutory provisions pertinent to these types of unfair immigration-related employment practices provide as follows:

> (a) Prohibition of discrimination based on . . . citizenship status
>
> (1) General rule
>
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of the title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
>
> . . .
>
> (B) in the case of a protected individual (as defined in paragraph (3), because of such individual's citizenship status.
>
> . . . .
>
> (6) Treatment of certain documentary practices as employment practices
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. §1324b(a)(1), (6)(1994).

IV. *Findings and Conclusions*

A. *Eleventh Amendment Sovereign Immunity*

In its motion to dismiss, Respondent has not raised the issue of sovereign immunity. In fact, in a letter dated June 2, 1997, Respondent disavows any claim of sovereign immunity because ECC is a local entity established by the county, not the state. Nevertheless, since the Eleventh Amendment to the United States Constitution is a jurisdictional bar, it is appropriate and necessary that I consider this issue *sua sponte*. *Atlantic Healthcare Benefits Trust v. Googins, et al,* 2 F.3d 1, 4 (2d Cir. 1993) (Court of Appeals raised Eleventh Amendment *sua sponte*, holding that Connecticut Department of Insurance was state agency immune from suit in federal court); *Esparza v. Valdez,* 862 F.2d 788, 793–94 (10th Cir. 1988). In this respect, the Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced against any state by citizens of another state. U.S. Const. amend XI. The Supreme Court has interpreted the Eleventh Amendment's bar to apply to suits

against a state by citizens of the same state as well. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996); *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 304 (1990).

In order for the state to be subject to suit in federal court, Congress must designate by legislation that the entity is amenable to suit in federal court, or the state must consent to suit. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Title 8 U.S.C. §1324b is silent on the subject of sovereign immunity, but the United States Court of Appeals for the Tenth Circuit has held that §1324b does not reach state entities. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994), *reh'g denied* (Nov. 21, 1994). More recently, the Supreme Court in *Seminole Tribe of Florida v. Florida*, *supra*, held that Congress can only abrogate Eleventh Amendment immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." 116 S.Ct. 1114, 1123 (1996). No such intention is manifest from the text of section 1324b. *Smiley*, 7 OCAHO 925, at 7 (1997).

Since 1324b does not manifest an intention to make the state amenable to such a suit and the state has not consented to such a suit, a state may invoke Eleventh Amendment sovereign immunity with respect to a law suit brought pursuant to 8 U.S.C. §1324b. Furthermore, state agencies and entities may be understood to act as the state's alter-ego, in which case the entity may invoke state sovereign immunity.[7] However, the Supreme Court has held that political subdivisions, such as counties and cities, do not ordinarily obtain Eleventh Amendment immunity. *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915, at 5 (1996). In *Monell v. Dept. of Social Services of New York City*, the Court held that municipalities and local governing bodies may be sued under 42 U.S.C. §1983 where official municipal policy causes a constitutional tort. 98 S.Ct. 2018, 2035–36 (1978) (overruling *Monroe v. Pape*, 81 S.Ct. 473 (1961)).[8]

[7]*Smiley v. City of Philadelphia*, 7 OCAHO 925, at 9 (1997); James J. Dodd-o & Martin A. Toth, *The Emperor's New Clothes: A Survey of Significant Court Decisions Interpreting Pennsylvania's Sovereign Immunity Act and Its Waivers*, 32 Duq. L. Rev. 1 (1993)).

[8]In two recent cases the United States Supreme Court has provided further guidance on the questions of liability of local entities and their employees under 42 U.S.C. §1983. *Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382, 1394 (1997) (distinguishing *Monell* and concluding that "Congress did not intend municipalities to be held liable [under §1983] unless deliberate action attributable to the municipality directly caused a deprivation of federal rights"); *McMillan v. Monroe County, Alabama*, 1997 WL 284827, at *6 (June 2, 1997) (finding that Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama and not their counties).

The U.S. Court of Appeals for the Second Circuit has also held that the Eleventh Amendment does not apply to suits against counties, municipal corporations, and other political subdivisions. *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 292 (2d Cir. 1996).[9]

The Respondent in this case has not brought suit against the State of New York, but instead against Erie Community College. Since local political subdivisions may not invoke Eleventh Amendment sovereign immunity but state agencies and entities may invoke such immunity, it is imperative to determine whether Erie Community College is a local or state entity. The ability to invoke the Eleventh Amendment depends on whether ECC is more like 'an arm of the State' such as a state agency, than like a municipal corporation or other political subdivision. *See Mt. Healthy City Sch. Dist. Bd. of Educ v. Doyle*, 429 U.S. 274, 280 (1977); *Mancuso*, 86 F.3d at 292.

In determining whether an entity is local or state for Eleventh Amendment purposes, the Second Circuit has used a six-factor test. "[E]ssentially the same broad principles identified by the Court as relevant in the multistage entity context apply also in determining whether, within a single state, a governmental entity is 'state' or 'local' for purposes of the Eleventh Amendment." *Mancuso*, 86 F.3d at 293; *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995). Accordingly, the test set out in *Mancuso* includes an inquiry into the following factors:

> (1) how the entity is referred to in the documents that created it;
>
> (2) how the governing members of the entity are appointed;
>
> (3) how the entity is funded;
>
> (4) whether the entity's function is traditionally one of local or state government
>
> (5) whether the state has a veto power over the entity's actions
>
> (6) whether the entity's obligations are binding upon the state.

Mancuso, 86 F.3d at 293; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). If, after analyzing

[9]Since ECC is in New York, the decisions of the U.S. Court of Appeals for the Second Circuit are the controlling federal circuit case law.

these factors, they seem to point in different directions, the Court of Appeals for the Second Circuit will turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk? *Mancuso*, 86 F.3d at 293.

While all of the above factors are important and relevant, whether the judgment will be paid out of state funds seems to be the most important factor considered. *Hess v. Port Authority Trans- Hudson Corp.,* 513 U.S. 30 (1994). "Even if it had not been abandoned, the claim against the state would of course fall by virtue of the Eleventh Amendment since it involves the payment of public funds from the state treasury." *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *see Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

While I was not provided with enough information to analyze extensively the *Mancuso* factors in regard to ECC, I did have access to information pertinent in making a determination of whether ECC is a state or local entity. One of the *Mancuso* factors inquires as to how the entity is funded. *Mancuso*, 86 F.3d at 293. ECC is jointly funded by state and local funds. Under New York Education Law §6304(1)(a), state funds finance one-third of the amount of ECC's operating costs, while a local sponsor(s) finances two-thirds of those costs. N.Y. Education Law §6304(1)(a) (McKinney 1985). Also, the local sponsor(s) provides one-half of ECC's capital costs. N.Y. Education Law §6304(1)(c) (McKinney 1985).

The most important factor in making the determination of whether ECC is a local or state entity (whether the judgment is paid out of the state treasury) also turns in favor of ECC being a local entity. Any recovery against respondent ECC would be paid by its local sponsors. New York Education Law §6308(3)(a) provides that, "[t]he local sponsor shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court. . . ." N.Y. Education Law §6308(3)(a) (McKinney 1985).

In an employment discrimination case alleging violations of §1983, Title VII and New York Executive Law, the court found that the City University of New York was an arm of the state of New York and could invoke Eleventh Amendment immunity. *Moche v. City University of New York*, 781 F. Supp. 160 (E.D.N.Y. 1992). However,

the court also held that Queensborough Community College (QCC) was not an arm of the state. *Id.* "The substantial local supervision over and control of defendants QCC and Physics Department of QCC, taken in connection with the City's indemnification for all judgments, indicates that the Eleventh Amendment is inapplicable to them." *Id.* at 166.

Just as any judgment against QCC would be paid by its local sponsor (City of New York), any judgment against ECC will be paid by its local sponsor or sponsors. The college is funded jointly by state and local funds and Respondent asserts in his Answer that ECC is a "semi-autonomous, municipal organization." Furthermore, Respondent is being represented by a local representative, the Assistant Attorney for the County of Erie. Additionally, in a June 2, 1997, letter written in compliance with my May 22, 1997 Order requiring Respondent to submit information regarding whether ECC considered itself a local or state entity, the Respondent asserts that ECC considers itself a local entity. Thus, I find that ECC is a local entity for Eleventh Amendment sovereign immunity purposes and is therefore amenable to suit in a federal court.

Having decided that sovereign immunity does not apply in this case, I will turn to the issues raised by Respondent's motion to dismiss.

B. *Lack of Subject Matter Jurisdiction*

Respondent has moved to dismiss for lack of subject matter jurisdiction. The present Complaint does not allege that Respondent either refused to hire Complainant (Comp. ¶13) or discharge him (Comp. ¶14). Conversely, Complainant explicitly avers that he either applied for or worked for ECC in November 1986.[10] Although

[10]Complainant's employment status is unclear. On February 19, 1997, I issued an Order directing Complainant to provide information regarding his employment status at the time the Complaint was filed, the date he was hired, whether he had even been an employee and when he ceased employment with Respondent. Complainant has refused to comply with this Order. Since Complainant has failed to comply with an order, pursuant to the OCAHO Rules of Practice, I could conclude that Complainant has abandoned its complaint and dismiss the complaint on that basis. 28 C.F.R. §68.37(b)(1). Alternatively, pursuant to 28 C.F.R. §68.23(c)(1)–(5), I may do the following:

> (1) Infer and conclude that the admission, testimony, documents, or evidence would have been adverse to the non-complying party;

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Complainant denies that he was not "knowingly or intentionally not hired" or discharged from ECC, he requests backpay from November 21, 1995. It is unclear whether Complainant is requesting backpay because he was discharged or whether he is simply requesting the social security taxes that he believes were wrongfully withheld from his wages. In any event, pursuant to 28 C.F.R. §68.23(c)(1)–(5), I conclude that he was not discharged and has been an employee of ECC continuously since November 1986.

Thus, the issue of whether a party can maintain an action against an employer with whom there is a continuing employment relationship based on a claim of citizenship status discrimination, pursuant to 8 U.S.C. §1324b(a)(1), and a claim of document abuse, pursuant to 8 U.S.C. §1324b(a)(6), is presented. This issue has been addressed in *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997)(J. Morse) and in *Costigan v. Nynex*, 6 OCAHO 918 (1997 (J. Barton).[11]

"It is established OCAHO jurisprudence that administrative law judges have §1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment." *Costigan*, 6 OCAHO 918, at 5 (1997); *Horne*, 6 OCAHO 906, at 5 (1997).

"A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge

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Continued—

(2) Rule that for purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;

(3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) Rule that the non-complying party may not be heard to object to introduction and use secondary evidence to show that the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both; . . .

28 C.F.R. §68.23(c)(1–5).

[11]Because the issues are similar, and because the findings and conclusions here are the same as those in *Costigan* and *Horne*, I have borrowed liberally from the language of those decisions on the issue of jurisdiction.

is insufficient as a matter of law." *Horne*, 6 OCAHO 906, at 4 (1997). In fact, the power of the administrative law judge to grant relief in such matters does not include conditions of employment. *Costigan*, 6 OCAHO 918, at 4 (1997); *Horne*, 6 OCAHO 906, at 4 (1997) (citing *Naginski v. Department of Defense*, 6 OCAHO 891, at 29 (1996) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *7), *appeal* filed, No. 96–2138 (1st Cir. 1996), *Ipina v. Michigan Dep't of Labor*, 2 OCAHO 364, at 13 (1991), 1991 WL 531875, at *9)). "It is well-established that this forum has no authority over terms and conditions of employment, such as an employer's insistence on complying with IRS tax regimens." *Lareau v. USAir, Inc.*, 7 OCAHO 932, at 11 (1997); *accord, Wilson v. Harrisburg Sch. Dist.*, 7 OCAHO 925, at 9 (1997); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at 5 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11 (1992); *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)). Controversies over conditions of employment do not implicate the jurisdictional requirements of §1324b. *Costigan*, 6 OCAHO 918, at 5 (1997); *Horne*, 6 OCAHO 906, at 6 (1997).

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a section 274B, codified as 8 U.S.C. §1324b. Section 102 was enacted as part of comprehensive immigration reform legislation to accompany Section 101, which, codified as 8 U.S.C. §1324a, forbids an employer from hiring and recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by section 1324a, people who looked different or spoke differently might be subjected to workplace discrimination.[12]

The major purpose of enacting Section 274B, as stated by President Ronald Reagan in his formal signing statement, is to reduce the possibility that the employer sanctions provision of §1324

[12]*See* "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99–1000, 99th Cong., 2d Sess. 87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842.

will result in increased national origin and citizenship discrimination and to provide a remedy for such discrimination if it does occur. *Costigan*, 6 OCAHO 918, at 6 (1997); *Horne*, 6 OCAHO 906, at 6 (1997) (quoting Statement by President Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1536 (Nov. 10, 1986)). *See Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), [13] 1990 WL 515872, at *4 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). *Accord*, *Kamal-Grifin v. Cahill Gordon & Reindel,* 3 OCAHO 568, at 14 n.11 (1993), 193 WL 557798, at *28 n.11. Thus, section 1324b only covers the practices of hiring, firing, recruitment or referral for a fee, retaliation, and document abuse, and it does not cover discrimination in wages, promotions, employee benefits or other terms and conditions or employment, such as an employer's insistence on complying with tax requirements. *Costigan*, 6 OCAHO 918, at 6 (1997); *Horne*, 6 OCAHO 906, at 6 (1997) (citing EEOC Notice No. 915.011, Responsibilities of the Department of Justice and the EEOC for Immigration Related Discrimination (Sept. 4, 1987)); *Lareau,* 7 OCAHO 932, at 11 (1997); *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11) (as amended in 1990 to add §1324(a)(6), §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse"), *petition for reh'g denied*, No. 94–3690 (3d Cir. 1994), *and review denied*, 66 F.3d 312 (3d Cir. 1995) (table)).

Complainant does not allege that he was "knowingly or intentionally not hired" or "knowingly and intentionally fired" (Comp. ¶¶13–14). Moreover, Complainant has refused to comply with my February 19, 1997, Order directing him to provide information about his employment status. Thus, I find that Complainant is a continuing employee of ECC. As established, the provisions of §1324b do not reach conditions of employment and I, therefore, do not have subject matter jurisdiction of Complainant's citizenship status discrimination claim.

[13]Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws,* reflect consecutive decision and order reprints within the bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

I also lack subject matter jurisdiction over Complainant's allegation that Respondent committed document abuse by refusing to accept Complainant's "Statement of Citizenship" and "Affidavit of Constructive Notice" (Comp. ¶16). Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements, set out in 8 U.S.C. §1324a(b). As implemented by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS employment eligibility verification form (form I–9) within a specified period of the date of hire. 8 C.F.R. §§274a.2(a), (b)(1)(ii) (1996).

This employment verification system delineates a scheme that categorizes the documents acceptable to establish identity and work authorization. 8 U.S.C. §1324a(b)(1)(B)–(D); 8 C.F.R. §274a.2(b)(1)(v) (1996). After an employer hires an individual, the individual then signs an INS I–9 form which certifies his or her eligibility to work and also certifies that the documents he or she presents to demonstrate the individual's identity and eligibility to work are genuine. The employer also signs the I–9 form, indicating which documents were examined, that they appeared to be genuine, and that they appear to relate to the individual hired. The employer must examine and verify a List A document, *or* a List B and List C document, for purposes of this requirement. List A documents show identity and employment eligibility. A U.S. Passport is a good example of a List A document.[14] List B documents establish identity, and examples of List B documents are a driver's license or state issued I.D. card.[15] List C documents establish employment eligibility, and a social security card is an example of a proper List C documents.[16]

In completing the I–9 process, an employee may choose the documents he wishes to proffer in relation to this requirement. The employer must accept any documents presented by the employee that appear to be genuine on their face and appear to relate to the individual presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain docu-

[14]8 U.S.C. §1324a(b)(1)(B) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(A)(1996) designate acceptable List A documents.

[15]8 U.S.C. §1324a(b)(1)(D) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(B) (1996) designate acceptable List B documents.

[16]8 U.S.C. §1324a(b)(1)(C) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(C) (1996) designate acceptable List C documents.

ments or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provisions." *Costigan*, 6 OCAHO 918, at 7 (1997); *Horne*, 6 OCAHO 906, at 8 (1997) (citing Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6)).

Complainant asserts that ECC committed document abuse by refusing to honor his "Statement of Citizenship" and "Affidavit of Constructive Notice." However, the Complaint explicitly states that the Respondent's refusal to honor these documents does not pertain to the purposes of completing the I–9 form. In fact, in the Complaint, Complainant responds affirmatively to the inquiry that "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," but expressly crosses out the portion of the question that states that the purpose of these documents is "to show [he] can work in the United States" (Comp. ¶16). Complainant also does not assert that Respondent asked for wrong or different documents than those required to show work authorization (Comp. ¶17).

Document abuse may only be established by proving that the employer refused to accept documents that were proffered "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. §1324(a)(6) (1994). In this case, there is no evidence or suggestion that Respondent requested the "Statement of Citizenship" and "Affidavit of Constructive Notice" for purposes of complying with section 1324a(b). In fact, Complainant gratuitously proffered such documents to Respondent so that Respondent would terminate the withholding of social security tax from Complainant's wages. Complainant's "Statement of Citizenship" and "Affidavit of Constructive Notice" are not even considered documents acceptable under 8 U.S.C. §1324a for purposes of showing employee's identity or employment eligibility. Thus, I do not have subject matter jurisdiction over Complainant's document abuse claim.

C. *Failure to State a Claim*

Respondent has also moved to dismiss on the basis that Complainant has not stated a claim upon which relief could be granted with respect to his citizenship claim and his document

abuse claim. Complainant bears the burden of proving citizenship basis discrimination. *Costigan*, 6 OCAHO 918, at 9 (1997); *Toussaint v. Tekwood Assocs. Inc.*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *10, *appeal filed,* No. 96–3688, at *32. To establish such discrimination, a Complainant must prove that he was treated less favorably than others because of his protected status, such as his citizenship status.

As a United States citizen, Complainant is a "protected individual" under 8 U.S.C. §1324b(a)(3) and, thus, has standing to bring a claim. However, to be successful in bringing a valid citizenship discrimination claim, Complainant must also successfully allege facts that show discriminatory treatment. Complainant falls short in alleging such facts. He has not alleged that, because of his United States citizenship, he was treated less favorably than other workers of different citizenship. More specifically, Complainant has not alleged that he either was rejected for employment or that he was fired from his job because of his citizenship.

It is the Complainant's burden to prove citizenship discrimination. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820, at 7*. Complainant's citizenship discrimination argument rests solely on the theory that only aliens should be required to have social security tax withheld from his or her wages and that United States citizens should have the right to all of his or her earnings. This theory, while somewhat interesting, does not establish grounds for a citizenship status discrimination claim. Disparate treatment is the heart of discrimination. For a claim to constitute discrimination, the employer must treat some people less favorably than others because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). Where citizenship status is the characteristic, there must be a claim that the individual was treated less favorably than others because of his citizenship status. *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8. When an employer treats all employees in the same way, there is no discrimination. Respondent has failed to allege different or less favorable treatment than other employees and consequently has not stated a viable claim of citizenship discrimination. *Cholerton* , 7 OCAHO 934, at 12; *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997).

Complainant also fails to state a claim upon which relief may be granted with respect to document abuse. 8 U.S.C. §1324 (a)(6) provides that refusing to accept documents that, on their face, reason-

ably appear to be genuine shall be treated as an unfair immigration-related employment practice. However, contrary to Respondent's belief, IRCA does not create a blanket rule with respect to an employee's proffer of documents. *Costigan*, 6 OCAHO 918, at 9 (1997). IRCA does not render unlawful an employer's refusal to accept documents unrelated to employment eligibility verification procedures. Here, Complainant does not proffer his "Statement of Citizenship" and "Affidavit of Constructive Notice" for employment verification procedures, but for purposes of avoiding withholding of taxes. Therefore, Complainant has failed to state a claim upon which relief can be granted with respect to his allegation of document abuse.[17]

V. *Conclusion*

ECC's Motion to Dismiss the Complaint is hereby granted because the Complaint fails to state a claim upon which relief may be granted and this tribunal lacks subject matter jurisdiction of this action. Any motions and arguments not expressly addressed are hereby denied.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Concerning Appeal

As provided by statute, not later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. *See* 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[17]While a complainant normally should be granted the opportunity to amend the complaint to cure any pleading defects, when, as here, such amendment would be futile, there is no reason to permit such filing. *See Acito v. IMCERA Group, Inc.* 47 F.3d 47, 55 (2d Cir. 1995)

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

JOHN E. DAVIS, Complainant, v. GTE FLORIDA INCORPORATED, Respondent.	8 U.S.C. § 1324b Proceeding OCAHO Case No. 97B00087 Judge Robert L. Barton, Jr.

Exhibit 10

ORDER OF DISMISSAL

(September 17, 1997)

On April 4, 1997, John E. Davis (Davis or Complainant), through his representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against General Telephone and Electric.[2] The Complaint and a notice of hearing were served by OCAHO on Respondent on April 18, 1997. In the Complaint, Mr. Davis states that he is a United States citizen, Compl. ¶ 2, and alleges that Respondent discriminated against him because of his citizenship status, id. ¶¶ 9-10, and committed document abuse by refusing to accept documents he presented, namely a Statement of Citizenship and an Affidavit of Constructive Notice, id. ¶ 16. On August 14, 1997, I issued an Order Granting Respondent's Motion to Dismiss by which all matters raised in the Complaint were resolved except for Complainant's request for sanctions.[3] The Order of August 14, 1997, required Respondent to file, on or before September 12, 1997, a certification of services detailing the fees incurred in connection with this action, as well as a brief showing why Complainant's arguments were without reasonable foundation in law and fact.

On September 12, 1997, Respondent filed a response to my August 14 Order by which it

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[1] Since then, I have excluded Mr. Kotmair from participation in this proceeding for the reasons stated in my Order Excluding Complainant's Representative, entered August 6, 1997.

[2] For reasons set forth in my Order of August 12, 1997, the caption has been corrected so that Respondent's name appears as "GTE Florida Incorporated."

[3] As OCAHO Administrative Law Judges do not have the authority to impose sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, I construed Respondent's request as one for attorney's fees, as governed by 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(c)(2). See Order Granting R.'s Mot. Dismiss at 14.

withdrew its request for attorney's fees. Therefore, as all issues in this matter have been resolved, I hereby dismiss the case with prejudice.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 1997, I have served the foregoing Order of Dismissal on the following persons at the addresses shown, by first class mail, unless otherwise indicated:

John E. Davis
824 Seabreeze Drive
Ruskin, FL 33570
(Complainant)

GTE Florida Incorporated
1002 South Alexander Street
Plant City, FL 33566
(Respondent)

Ernesto Mayor, Jr., Esq.
GTE Florida Incorporated
P.O. Box 110, MC FLTC0007
Tampa, FL 33601-0110
(Counsel for Respondent)

Poli Marmolejos
Acting Special Counsel
Office of Special Counsel for Immigration
and Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(Hand Delivered)

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
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FAX No.: (703) 305-1515

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

October 6, 1997

Exhibit 11

RUSSELL M. HAMILTON,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 97B00150
THE RECORDER,)
Respondent.)
)

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Gail A. Goolkasian, Esq., Hill & Barlow, P.C. for Respondent.

I. *Introduction*

This frivolous[1] Complaint, the latest in a volley of collateral tax

[1]A complaint is frivolous if it lacks an arguable basis in law or fact. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (*citing Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (*citing Neitzke*, 490 U.S. at 327). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous position." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir. 1986), *cert. denied*, 477 U.S. 905 (1986). U.S. citizen claims to be exempt from the income tax have been found to be frivolous *per se*. *LaRue v. Collector of Internal Revenue*, 96 F.3d 1450 (7th Cir. 1996) (Table), 1996 WL 508567, at *1 (7th Cir. 1996) (Unpublished Disposition) (Seventh Circuit Rule 53(b)(2) permits citation to support law of the case) ("LaRue's argument that he should be treated as a nonresident alien—one that is offered occasionally by tax protestors—is patently frivolous"). *See also Woods v. Internal Revenue Service*, 3 F.3d 403, 404 (11th Cir. 1993) ("we would not hesitate to order sanctions if appellant had been represented").

protests[2] disguised as claims of unfair ***immigration-related*** employment practices, is again brought on a complainant's behalf by perennial tax-protestor representative[3] John B. Kotmair, Jr., Director, the National Worker's Rights Committee (Kotmair). Like previous substantially identical complaints, it is dismissed with prejudice because: (1) it fails to state a claim under the relevant statute, 8 U.S.C. §1324b; (2) this forum lacks subject matter jurisdiction over terms and conditions of employment; and (3) the Anti-

[2]"The use of the term 'tax protester' is a permissible shorthand way for a judge to refer to such activities and highlight their relevance." *United States v. Turano*, 802 F.2d 10, 11 (1st Cir. 1986). For disposition of such tax protests before OCAHO administrative law judges (ALJs), *see Manning v. City of Jacksonville*, 7 OCAHO 956 (1997); *Eldon Hutchinson v. GTE Data Systems, Inc.*, 7 OCAHO 954 (1997); *Hogenmiller v. Lincare, Inc.*, 7 OCAHO 953 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 948 (1997); *Hollingsworth v. Applied Research Assocs.*, 7 OCAHO 942 (1997); *Janet L. Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications, Inc.*, 7 OCAHO 926, at 4–5 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Associates*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr., as Director, National Worker's Rights Committee, represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

[3]In *Save-A-Patriot Fellowship v. United States*, 962 F. Supp. 695, 696 (D. Md. 1996), Judge Garbis described the indefatigable Kotmair as "the corpse at every funeral, the bride at every wedding and the baby at every christening," invoking Alice Longworth Roosevelt's description of President Theodore Roosevelt.

Injunction Act,[4] 26 U.S.C. §7421(a), deprives courts of jurisdiction over attempts to restrain the collection of taxes, even when brought as collateral attacks under other statutes.

II. *Factual and Procedural History*

On January 8, 1996, Russell M. Hamilton (Hamilton or Complainant) applied for the job of Press Assistant at *The Recorder* (Respondent), a Greenfield, Massachusetts, newspaper. Complaint at ¶¶11, 12. On January 12, 1996, Hamilton submitted an improvised "Statement of Citizenship" which purported to exempt him from federal withholding tax. OSC Charge at p. 3. Hamilton also submitted an "Affidavit of Constructive Notice" that he was exempt from social security deductions. OSC Charge at p. 4. *The Recorder*'s agent, one Hillman, refused to credit Hamilton's claims and insisted as a condition of employment that Hamilton execute an IRS Form W–4, which requires disclosure of the employee's social security number (the individual tax payer identification number). *Id.* According to the OSC Charge, when Hamilton refused to complete the Form W–4 and to provide his social security number, he was fired. *Id.* at p. 6. (However, as his Complaint before me alleges both that he was not hired *and* that he was fired, I am doubtful he ever began work, an uncertainty of no consequence in view of the disposition of this Complaint.)

Hamilton filed a national origin discrimination charge with the Equal Employment Opportunity Commission which informed him that it "would take nine to twelve months for them to even contact him." OSC Charge at p. 9. Unwilling to brook such delay, Hamilton,

[4]*See Nadeau v. Internal Revenue Service,* 121 F.3d 695 (1st Cir. 1997) (Table), 1997 WL 422226 (1st Cir. 1997) (Unpublished Disposition) (First Circuit Local Rule 36.2(b)6 permits citation in related cases) ("The Anti-Injunction Act, 26 U.S.C. §7421(a), bars plaintiff's claim for injunction against tax collection"); *Tempelman v. United States,* 995 F.2d 1061 (1st Cir. 1993) (Table), 1993 WL 190882 (1st Cir. 1997) (Unpublished Disposition) ("The Anti-Injunction Act provides, with certain enumerated exceptions, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person'") (citation omitted); *Lane v. United States,* 727 F.2d 18, 19 (1st Cir. 1984), *cert. denied,* 469 U.S. 829 (1984). *McCarthy v. Marshall,* 723 F.2d 1034, 1037 (1st Cir. 1983); *Colangelo v. United States,* 575 F.2d 994, 995 (1st Cir. 1978) ("The prohibition against restraint on the assessment and collection of taxes 'is applicable not only to the assessment or collection itself, but . . . to activities which are intended to or may culminate in the assessment or collection of taxes'") (citation omitted); *Spencer Press, Inc. v. Alexander,* 491 F.2d 589, 591 (1st. Cir. 1974).

by letter dated April 5, 1996, filed a Charge with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), in order "to have swift justice."

One year later, by determination letter dated April 17, 1997, OSC informed Hamilton that it lacked jurisdiction over his charges of discrimination based on national origin, citizenship status, and document abuse, and advised Hamilton of his right to file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO).

On July 18, 1997, despite unanimous OCAHO caselaw dismissing such claims, Hamilton filed this private action, alleging citizenship status discrimination and document abuse. His entire case is that *The Recorder* insisted that he complete the Form W–4, the tax-withholding document,[5] or be fired, and that *The Recorder* refused to exempt him from federal income tax and social security regimens on the basis of his documents.[6]

On August 26, 1997, OCAHO issued a Notice of Hearing, and assigned the case to me. On September 5, 1997, mindful of concerns expressed by the United States Court of Appeals for the First Circuit regarding premature judicial termination of tax protests and discrimination charges, detailed, *infra*, at n.8, I issued an Order of Inquiry directing Hamilton to file by October 1, 1997, short and specific answers to three queries:

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[5]Charges based on this factual predicate have been found to be without merit. *See Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 10, 1997 WL 242208, at *7 ("The IRC compels an employer 'at the source' to withhold taxes and to deduct social security taxes from an employee's paycheck through IRS Form W–4. 26 U.S.C. §3402(a)(1); 26 C.F.R. §§31.3401(a)–1, 31.3402(b)–1, 31.3402(f)(5)–1(a)"); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 10, 1997 WL 235918, at *18; *Boyd v. Sherling*, 6 OCAHO 916, at 27, 1997 WL 176910, at *6–7 (denying approval of settlement and dismissing discrimination complaint of incumbent dental hygienist who refused to comply with employer's request that she complete IRS Form W–4, tax withholding form, and was fired as a consequence); *Winkler v. Timlin*, 6 OCAHO 912, at 13 , 1997 WL 148820, at *7 (denying approval to agreed voluntary disposition dismissal and dismissing with prejudice complaint of applicant telemarketer who alleged discrimination because telemarketing firm refused to hire him when he disputed policy that "everyone who works at this Company has to pay income taxes, and everyone has to complete a W–4 form and have taxes deducted if they want to work here").

[6]Complaints stemming from employers' rejection of dubious tax-exemption documents have, without exception, been dismissed. *See* n.2, *supra*.

1. Does Hamilton contend that *The Recorder* accepted unofficial tax-exemption documents proferred by non-U.S. citizens? If so, Hamilton must provide specific information about these individuals, the documents they tendered, and *The Recorder*'s response.

2. Does Hamilton contend that the documents he presented, *i.e.*, his "Affidavit of Constructive Notice" and "Statement of Citizenship" were proffered to verify his eligibility for employment in the United States? If so, why did he present documents other than those listed as acceptable for that purpose by the Immigration and Naturalization Service in its implementation of the employment eligibility verification regimen?

3. Does Hamilton contend that this claim differs from those identified at footnote 1, *supra*, each of which the ALJ dismissed? If so, he must explain, *in detail*, how this claim *differs* from previous complaints based on employers' refusals to "accept" unofficial documents submitted for tax-exemption purposes.

On September 11, 1997, Gail A. Goolkasian of Hill & Barlow, P.C., Boston, MA, filed a notice of appearance for *The Recorder*. On September 15, 1997, Kotmair filed a notice of appearance for Hamilton. To date, however, Complainant has filed no timely or other response to the command of the Order of Inquiry that he answer the three quoted queries by October 1, 1997. By failing to respond to the order of the judge, Hamilton compels the conclusion that he has abandoned his Complaint. 28 C.F.R. §68.37(b)(1). Because, however, this case presents §1324b issues of first impression within the appellate jurisdiction of the United States Court of Appeals for the First Circuit, I will not in the exercise of discretion dismiss it as abandoned. 28 C.F.R. §68.37(b).

On September 26, 1997, *The Recorder* filed its Answer, a Motion to Dismiss and a Motion for Attorney's Fees (Motion). *The Recorder* argues that Hamilton's Complaint is untimely and therefore time-barred, the events in question having taken place in January 1996, more than a year before he filed his OSC Charge, in violation of the 180-day tolling period of 8 U.S.C. §1324b(d)(3); that—accepting Hamilton's allegations as true—the Complaint fails to state a claim upon which relief can be granted; that OCAHO lacks subject matter

jurisdiction over tax matters and challenges to the Social Security Act. *The Recorder* requests attorney's fees under 8 U.S.C. §1324b(h) and 28 C.F.R. §68.52(c)(2)(v), because:

> Kotmair blatantly ignores the admonitions of OCAHO not to continue filing stereotypical and patently frivolous complaints such as this one. *Manning v. City of Jacksonville*, 7 OCAHO 956, at 8 (August 15, 1997). By continuing to file complaints virtually identical to those that have been rejected in the past, Kotmair and Hamilton make a mockery of this forum and impose an unfair burden on *The Recorder*.

Motion, at ¶4.

Granting *The Recorder*'s Motion, this Final Decision and Order dismisses the Complaint with prejudice for failure to state a claim of immigration-related unfair employment practices under 8 U.S.C. §1324b, and because I lack subject matter jurisdiction over tax challenges.[7]

III. *Discussion*

A. *Hamilton's Complaint Is Frivolous*

The Recorder is obliged to withhold income taxes and social security deductions from its employees' wages, and is immunized from liability in discharging this duty. 26 U.S.C. §§3101, 3102, 3402, 3403, 7421, 7422. A claim based upon a party's discharge of statutory duties derives from an indisputably meritless theory, and, as evidenced by the cases collected at no.1, supra, is frivolous *per se*. *LaRue v. Collector of Internal Revenue,* 96 F.3d 1450, 1997 WL 508567, at *1. Hamilton's Complaint is frivolous. But for the First Circuit's distaste for the imposition of summary disposition of poorly pleaded tax protests and unartful discrimination complaints,[8] this case would have been promptly dismissed sua sponte.[9]

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[7]Respondent's claim that the Complaint is untimely because the Charge was out of time is contradicted by the record which establishes that the Charge was timely filed on April 11, 1996, but was apparently misplaced by OSC, and was refiled, following OSC's letter to Kotmair of March 26, 1997, on April 16, 1997, and rejected the next day.

[8]*See Tempelman v. Beasley*, 43 F.3d 1456 (1st Cir. 1994) (Table), 1997 WL 708145, at *4 (1st Cir. 1994) (Unpublished Disposition) (First Circuit Local Rule 36.2(b)(6) permits the citation of unpublished opinions in related cases) (vacating in part District Court *sua sponte* decision enjoining veteran tax protestors from filing further actions without judicial approval because plaintiffs did not receive prior notice and were not afforded opportunity to respond); *Wyatt v. City of Boston*, 35 F.3d 13, 14–15 (1st Cir. 1994) ("a court may, in appropriate circumstances, note the inadequacy of the complaint and, on its own initiative, dismiss the complaint. Yet a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue") (citation omitted).

[9]*See e.g., Manning v. City of Jacksonville,* 7 OCAHO 956, at 8; *Hogenmiller v. Lincare, Inc.,* 7 OCAHO 953, at 7.

B. *Complainant Does Not Plead an Immigration-Related Cause of Action, the Only Action Cognizable Under 8 U.S.C. §1324b*

Title 8 U.S.C. §1324b,[10] under which Hamilton seeks redress, is an ***immigration-related*** cause of action, deriving from Congressional concern that those who looked different or spoke differently might be afforded disparate discriminatory treatment on that basis. No cause of action arises, however, where work-authorized aliens and citizens are treated alike. Hamilton does not allege that *The Recorder,* while rejecting *his* improvised tax-exemption documents, accepted *another's* unofficial representations of tax-exempt status. In any event, he nowhere specifies conduct which implicates §1324b liability. Citizenship status is not at issue and neither is over-documentation, which can arise only when an employee is asked to provide one or another particular document among those called for in compliance with §1324a(b) to determine the employee's eligibility to work in the United States. Hamilton's claim turns on documents outside and irrelevant to the §1324a(b) regimen. His claim, therefore, is patently outside the purview of 8 U.S.C. §1324b.

C. *Unanimous OCAHO Precedent Establishes That An Employer May Require an Employee To Submit to the Internal Revenue Code As a Condition of Employment.*

It is a jurisprudential truism that 8 U.S.C. §1324b, which forbids an employer to discriminate, does not reach lawful terms and conditions of employment.[11] Therefore, an employer who requires its employees to submit to lawful and non-discriminatory terms and conditions of employment commits no legal wrong. Employer insistence upon employee federal statutory compliance is lawful. Among the terms and conditions of employment an employer may legitimately and nondiscriminatorily impose is the requirement that its labor

[10]Title 8 U.S.C. §1324b proscribes "unfair immigration-related employment practice[s]," including discriminatory hiring, recruitment, discharge, and employment verification.

[11]*See Manning v. City of Jacksonville,* 7 OCAHO 956, at 4; *Naginsky v. Department of Defense,* 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11; *Ipina v. Michigan Dept. of Labor,* 2 OCAHO 386 (1991); *Huang v. Queens Motel,* 2 OCAHO 364, at 13 (1991)).

force submit to tax code[12] and social security[13] mandates. An employer may lawfully insist that employees comply with tax withholding and social security contribution regimens as a condition of employment.

Nothing in the text or legislative history of 8 U.S.C. §1324b prohibits an employer from complying with the tax code or from asking for a social security number (the individual tax identification number).[14] Furthermore, 8 U.S.C. §1324b cannot be construed so as to relieve an employer of statutory obligations to withhold social security contributions from ***all*** employees' wages.[15] Title 8 U.S.C. §1324b sim-

[12]Contrary to Hamilton's assertion, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a), 3403.

[13]Hamilton argues that he may opt out of social security. The Supreme Court has held otherwise. The Supreme Court has long acknowledged the constitutionality of the SSA. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system":

> "[Widespread individual voluntary coverage under social security. . . would undermine the soundness of the social security program." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. CODE CONG. & ADMIN. NEWS (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

United States v. Lee, 455 U.S. 252, 258 (1982). Manning's recitation of *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935), is unavailing. *Alton* is inapposite, dealing with the Railroad Retirement Act and predating the Court's consideration of the SSA. Although an employee may decline benefits, he must submit to deductions. *Lee*, 455 U.S. at 258, 261 n.12.

Title 26 U.S.C. §3101 imposes social security contributions "on the income of every individual" equal to certain percentages of wages "received by him with respect to employment." Title 26 U.S.C. §3102 (Federal Insurance Contributions Act: Tax on Employees) explicitly commands that social security contributions "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." Section 3102(b) in terms certain indemnifies the employer who performs this statutory duty:

> Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

[14]*See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 9, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 148820, at *7; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 8, 1997 WL 131346, at *6; *Toussaint v. Tekwood Assocs.*, 6 OCAHO 892, at 16–17, 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3–4 (O.C.A.H.O.).

[15]*See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Boyd v. Sherling*, 6 OCAHO 916, at 18, 1997 WL 148820, at *13; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 176910, at *10.

ply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute.

The Internal Revenue Code compels *The Recorder* to withhold taxes and social security (FICA) contributions "at the source"—*i.e.*, in the workplace and to utilize for this purpose IRS Form W–4. 26 U.S.C. §§3101, 3102, 3402, 3403; 26 C.F.R. §31.3401(a)–1, 31.3402(b)–1, 31.3402(f)(5)–1(a). This issue is well-settled in OCAHO jurisprudence. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 10, 1997 WL 242208, at *7; *Boyd v. Sherling*, 6 OCAHO 916, at 12, 1997 WL 17690, at *6–7; *Winkler v. Timlin*, 6 OCAHO 912, at 11, 1997 WL 148820, at *7. Hamilton's complaint therefore fails to state a claim under 8 U.S.C. §1324b.

D. *The Anti-Injunction Act, 26 U.S.C. §7421(a), Deprives This Forum of Jurisdiction Over Actions Meant To Impede the Collection of Income Tax, No Matter How Artfully (or Unartfully) Pleaded*

An employer commanded by federal statute to comply with the tax code is for that reason shielded by statute from liability for such compliance. Hamilton attempts to restrain *The Recorder* from collecting withholding tax and social security contributions. "[E]xcept in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Courts are barred from so doing by 26 U.S.C. §7421(a), "The Anti-Injunction Act," which generally prohibits suits restraining tax assessment, collection, and determination. *Tempelman v. United States*, 995 F.2d 1061, 1993 WL 190882.

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .

26 U.S.C. §7421(a) (emphasis supplied). The purpose of the Anti-Injunction Act is "to preserve the Government's ability to assess and collect taxes expeditiously with 'a minimum of preenforcement judicial interference' and 'to require that the legal right to the disputed sums be determined in a suit for refund.'" *Church of Scientology of California v. United States*, 920 F.2d 1481, 1484–85 (9th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991) (*quoting Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)), *cited in Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. 1 (1962). The Anti-Injunction Act enjoins suit to restrain all activities culminating in tax collection. *Colangelo v. United*

States, 574 F.2d at 995. **Such activities include employer withholding of taxes.** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

The gravamen of Hamilton's Complaint is a frivolous, oft-discredited tax protest altogether outside the scope of ALJ jurisdiction. Hamilton's claim is essentially a collateral attempt to avoid or restrain federal income tax collection. Hamilton seeks redress in this forum of limited jurisdiction in lieu of appropriate forae.[16] This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action.[17] 28 C.F.R. §44.300(a) (1996) (emphasis added).

E. *Hamilton's Frivolous Complaint Is Incapable of Amendment To State a Cause of Action Under 8 U.S.C. §1324b*

FED. R. CIV. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

See Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U.S. 379 (1884). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

The dismissal of Hamilton's frivolous tax protest is absolutely predictable and inescapable, given unanimous OCAHO precedent[18] and controlling federal tax law.[19] First, the ALJ lacks subject matter jurisdiction over terms and conditions of employment, including tax and social security compliance regimens. Hamilton, therefore, fails to state a claim cognizable under 8 U.S.C. §1324b. Second, the ALJ is statutorily prohibited from adjudicating tax matters, no matter how disingenuously disguised, by the Anti-Injunction Act, 26 U.S.C. §7421(a).

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[16]U.S. District Court or Tax Court.

[17]*See, e.g., Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 235918, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 917, at 11, 1997 WL 242208, at *8; *Boyd v. Sherling*, 6 OCAHO 916, at 8, 1997 WL 176910, at *9.

[18]*See* n.2, *supra.*

[19]*See* 26 U.S.C. §§3101, 3102, 3402, 3403, 6671, 6672, 7421, 7422.

Under standards governing entry of summary judgment pursuant to FED. R. CIV. P. 56(c) in federal court, *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247 (1986), an ALJ may enter summary decision if the pleadings or other matters of record show there is no genuine dispute of material fact, and that a party is entitled to a decision as a matter of law, 28 C.F.R. §68.38(c). *See Getahun v. Office of the Chief Administrative Hearing Officer,* No. 96–3531, 1997 WL 567323, at *3 (3rd Cir. Sept. 15, 1997). Taking all Hamilton's factual allegations as true, and construing them in a light most favorable to him, I determine that he is entitled to no relief under any reasonable reading of his pleadings. Even assuming he gratuitously tendered documents purporting to exempt him from federal income tax withholding and social security deductions, and even if *The Recorder* ignored these documents and insisted on its duty to make payroll tax and social security deductions, its conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Hamilton describes simply does not support the ***immigration-related*** cause of action he pleads. Hamilton raises no genuine issue of fact material to a cause of action based on his citizenship status, but simply espouses *verbatim* worn legal contentions long discredited by this forum. Hamilton's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside the scope of §1324b.

Although leave to amend is favored in discrimination cases where subject matter jurisdiction is ineffectively pleaded, there is no conceivable way that Hamilton can transform this tax protest into an unfair ***immigration-related*** employment complaint. *Glassman v. Computervision Corp.,* 90 F.3d 617, 622 (1st Cir. 1996). A complaint, even by a *pro se* Complainant (which Hamilton arguably is not), may be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). *See also Wyatt v. City of Boston*, 35 F.3d at 15 n.1 ("reversal of... Rule 12(b)(6) [*sua sponte* dismissal] . . . not warranted if it is patently obvious that the plaintiff could not prevail").

Hamilton's claim is incapable of viable amendment: there is no material factual dispute between parties, only a bald tax challenge beyond this forum's jurisdictional reach. The Complaint cannot be amended to an ***immigration-related*** cause of action. *The Recorder*'s insistence that all employees comply with tax code and social security requirements is entirely lawful. I am precluded from

hearing this suit by the limited reach of §1324b, by the Anti-Injunction Act, and by the tax code, which immunizes employers from liability when they withhold tax and social security contributions from wages.

IV. *Ultimate Findings, Conclusions, and Order*

(a) *Disposition*

Hamilton's action lacks "an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Hamilton's Complaint, having no arguable basis in fact or law, is frivolous. *See* n.1, *supra*. Where a claim is based upon a party's discharge of statutory duties, it derives from an indisputably meritless legal theory.[20] As an employer who complies with statutory obligations, *The Recorder* is immune from liability under the very statutes conferring duties upon it.[21] Accordingly, I dismiss Hamilton's Complaint without leave to amend because his tax challenge cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice. The Complaint is dismissed because it fails to state a claim of immigration-related unfair employment practice in violation of 8 U.S.C. §1324b and because this forum lacks subject matter jurisdiction over employment conditions and tax challenges.

The filing of this Complaint is patently frivolous, and, on the part of Kotmair, Hamilton's representative, disingenuous and irresponsible. He files this, the latest in a litany of tax protests, as recently as August 20, 1996, in the face of unanimous OCAHO precedents rejecting such collateral attacks on the tax code.[22] By reiterating substantially identical, stereotypical charges without discussing or otherwise acknowledging those precedents, he abuses the process of this forum. Were Kotmair an attorney, his actions would be sanctionable. *Woods v. Internal Revenue Service*, 3 F.3d at 404.

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[20]"A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d at 317 (*citing Nietzke*, 490 U.S. at 327).

[21]*See* 26 U.S.C. §3102 (immunizing employers who collect social security contributions from "the claims and demands of any person") and 26 U.S.C. §3403 (providing that employers who withhold taxes "shall not be liable to any person").

[22]*See* n.2, *supra*.

In view of the result in this case, to augment its Motion for attorney's fees, *The Recorder* may **by October 27, 1997**, provide in affidavit form, its attorney's resume, a summary of time expended, tasks performed, fees and expenses charged; and a brief description of Boston, MA, market rates for legal services at the level of the practitioner and in the specialized areas of tax and/or employment and immigration law. By **November 7, 1997**, Hamilton may respond to *The Recorder*'s request for and calculation of attorney's fees.

I have considered the pleadings of the parties. All requests not previously disposed of are denied.

(b) *Appellate Jurisdiction*

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *FluorConstructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding merits disposition is the final decision for purposes of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.
Dated and entered this 6th day of October, 1997.

MARVIN H. MORSE
Administrative Law Judge

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

November 17, 1997

RUSSELL M. HAMILTON, Complainant, v. THE RECORDER, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00150))

Exhibit 12

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Gail A. Goolkasian, Hill & Barlow, P.C., on behalf of Respondent.

I. *Procedural History*

Pursuant to the October 6, 1997 Final Decision and Order Granting Respondent's Motion To Dismiss, 7 OCAHO 968 (1997), *The Recorder* (Respondent), by its attorney, timely filed its Affidavit in Support of Attorney's Fees (Application) on October 29, 1997, clarified by its addendum letter of November 4, 1997. *The Recorder* seeks **$2,655** in reimbursement for attorney fees submitted by Gail A. Goolkasian of Hill & Barlow, P.C., **$44.85** for Goolkasian's copying, **$16.95** for Goolkasian's faxing, and **$291** for computer-assisted legal research, although Respondent also expended $2,539.50 for the services of three other Hill & Barlow tax attorneys. Hamilton (Complainant) neither contests nor otherwise responds to Respondent's Application.

Respondent requests a total of **$3,007.80** in attorney's fees and costs and provides a detailed explanation and summary in support of its request. Complainant, invited by the October 6, 1997 Final Decision and Order to respond to *The Recorder's* request for and calculation of attorney's fees by November 7, 1997, does not question the reasonableness of either the time set forth or the hourly rates claimed in Respondent's Application.

II. *Discussion*

Just as the disposition of this case on the merits was one of first impression in §1324b tax protestor jurisprudence in the First Circuit, this order addresses fee shifting in such cases for the first time in the First Circuit.

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Attorney's fees are awarded in an unfair immigration-related employment practice action based on a two-part test: (1) determination of prevailing party status; and (2) qualification of the action as frivolous or unreasonable. 8 U.S.C. §1324b(h) provides in part that

> an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

1. *The Recorder Is the Prevailing Party*

That *The Recorder* is the prevailing party is made clear by relevant OCAHO and federal case law. "Title VII served as a point of departure in drafting what became [8 U.S.C. §1324b]. . . . It is reasonable to conclude, therefore, that Title VII [of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*,] case law with respect to award of attorneys' fees is an important springboard for discussion of attorneys' fees under [§1324b]." *Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872, at *5 (O.C.A.H.O.).[1] *See also Lee v.*

[1]Citations to OCAHO precedents printed in bound Volumes 1–3, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, reflect consecutive pagination within that bound volume; pinpoint citations to Volumes 1–3 are to specific pages, *seriatim*, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volumes 1–3, however, are to pages within the original issuances.

Airtouch Communications, 7 OCAHO 926, at 2 (1997), 1997 WL 602712, at *12 (O.C.A.H.O.); *Banuelos v. Transportation Leasing Co.*, 1 OCAHO 255, at 1651–52 (1990), 1990 WL 512091, at *10–11 (O.C.A.H.O.).

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566 (1993), 1993 WL 544051 (O.C.A.H.O.),[2] referencing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), held that an award of attorney's fees depends on a finding of : (1) respondent's prevailing party status, and (2) complainant's unreasonableness in filing the underlying action. *Jasso* also relied upon the similarities between the attorney's fees provisions of IRCA and the Civil Rights Act:

> Title VII of the Civil Rights Act also illuminates the reasonableness test for fee shifting. Under Title VII the Supreme Court has held that a District Court may, in its discretion, award attorney's fees to a prevailing Defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

Jasso, 3 OCAHO 566, at 6, 1993 WL 544051, at *10–11.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983),[3] and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989),[4] defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought...." In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Parties "who prevailed on a significant issue in the litigation and... obtained some of the relief sought... are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

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[2]*Jasso v. Danbury Hilton & Towers*, 3 OCAHO 566, 1993 WL 544051 (finding respondent prevailing party, but denying award of attorney's fees because complainant was justified in bringing the action).

[3]*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988).

[4]*Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988).

Respondent "succeeded" on the second affirmative defense (failure to state a claim upon which relief can be granted) set forth in its Answer when I held that:

> Hamilton's action lacks "an arguable basis either in law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Hamilton's Complaint, having no arguable basis in fact or law, is frivolous. . . . Where a claim is based upon a party's discharge of statutory duties, it derives from an indisputable meritless legal theory. . . . As an employer who complies with statutory obligations, *The Recorder* is immune from liability under the very statutes conferring duties upon it. . . . Accordingly, I dismiss Hamilton's Complaint without leave to amend because his tax challenge cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice in violation of 8 U.S.C. §1324b and because this forum lacks subject matter jurisdiction over employment conditions and tax challenges.

Final Decision and Order Granting Respondent's Motion To Dismiss, pp. 10–11. The dismissal "afforded [*The Recorder*] . . . some of the relief sought." *The Recorder's* legal relationship with Hamilton was "materially altered" when I dismissed Hamilton's Complaint for failure to state a cause of action cognizable by §1324b(g)(3) and for lack of subject matter jurisdiction. I find, therefore, that *The Recorder* meets the prevailing party test of *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in the litigation by demonstrating that the Complainant failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when Hamilton's Complaint was dismissed. I conclude that the Respondent is clearly the prevailing party.

In the context of summary dispositions of complaints, ALJs have not always been of one mind in resolving whether a respondent is a prevailing party. *Banuelos*, 1 OCAHO 255, at 1650 n.7, 1990 WL 512091, at *10, disagreed with *Williamson*, 1 OCAHO 174, 1990 WL 515872, with respect to the "view that a respondent is not a 'prevailing party' simply because [an] ALJ has rendered a decision which dismisses, on jurisdictional grounds, a Complaint as charged by a *pro se* complainant. . . . [The *Banuelos* ALJ also] reject[ed] an interpretation . . . which would apply attorney fees analyses to 'all cases,' including, as [another ALJ] apparently sees it, to threshold dismissals for lack of jurisdiction against a *pro se*."[5]

[5]"The defendant has been held to be the prevailing party in cases involving a dismissal for want of jurisdiction." 1 ROBERT L. ROSSI, ATTORNEY'S FEES 363 (2d ed. 1995).

However, the concerns raised in *Banuelos* regarding the award of attorney's fees to the prevailing party in actions dismissed on jurisdictional grounds need not be addressed in the context of the case at hand. This is so because Hamilton did ***not*** appear *pro se*, but was represented by John B. Kotmair (Kotmair) and the National Worker's Rights Committee (Committee). To the extent that OCAHO rules permit representation by a non-bar member, Hamilton is represented by Kotmair and the Committee. By no means is Hamilton *pro se*. Accordingly, I need not address the *Banuelos* reservation, which would deny prevailing party status to successful respondents whose adversary is truly *pro se*. Moreover, *Hamilton* was dismissed with prejudice *not only* for lack of subject matter jurisdiction, but also for failure to state:

(1) a citizenship status discrimination cause of action cognizable under §1324b(a)(1); and

(2) an over documentation cause of action cognizable under §1324b(a)(6) and §1324a(b).

2. *Hamilton's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting turns on a determination that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Under 8 U.S.C. §1324b(h), the prevailing party obtains the benefit of fee shifting only upon a finding that the arguments of the opposing party were without reasonable foundation in law and fact." *Jasso*, 3 OCAHO 566, at 1636, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

In addition to 8 U.S.C. §1324b(h), Title VII precedent establishes a case to be frivolous if without reasonable foundation in law or fact. "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Although the text of §1324b(h) differs from that of Title VII, the result is the same.

Christiansburg Garment Co. v. EEOC, *supra*, addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a

Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, *supra,* the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Hamilton's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where **the plaintiff's case is dismissed for failure to state a claim on which relief could be granted. . . .**"[6] Hamilton maintains that his employer discriminated against him by refusing to accept self-styled, gratuitously tendered documents, which purported to exempt Hamilton from the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[7] *The Recorder*, however, is statutorily mandated to withhold income taxes[8] and social security contributions[9] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[10] 26 U.S.C. §3403,[11] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[12] which has been interpreted to prohibit

[6]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. County of Suffolk*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous"); *Riviera Carbana v. Cruz*, 588 F. Supp. 80 (D.P.R. 1980) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd*, 767 F.2d 905 (1st Cir. 1985) (unpublished decision).

[7]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[8]26 U.S.C. §3402(a).

[9]26 U.S.C. §3102(a).

[10]26 U.S.C. §3102(b) ("Every employer. . . shall be indemnified against the claims and demands of any person. . . .").

[11]26 U.S.C. §3403 ("The employer. . . shall not be liable to any person. . . .")

[12]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores of America, Inc.*, 6 OCAHO 923, at 22 (1997), 1997 WL 235918, at *17 (O.C.A.H.O.) (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Respondent, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions, . . . is statutorily immunized from suit[,]" Hamilton's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

"In any complaint respecting an unfair immigration-related employment practice, an [ALJ], in the judge's discretion, may allow a prevailing party . . . a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). I find that there is "no legal or factual basis for any of [Hamilton's] allegations," and award Respondent **$3,007.80** in attorney's fees and related expenses. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Hamilton's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees. This result accords, for example, with *Kosatchkow v. Allen-Stevens Corp.*, 7 OCAHO 966 (1997), *Lareau v. U.S. Airways*, 7 OCAHO 963 (1997), and *Horne v. Town of Hampstead*, 7 OCAHO 959 (1997).

B. *Reasonableness of Attorney's Fees Request*

"Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses

were computed." 28 C.F.R. §68.52(c)(2)(v). In *Hamilton*, counsel supplies the following figures to support its request:

Date	*Services*	*Hours*	*Amount*
9/9/97	Review materials re Complaint; conference with tax attorney Zielinski	1.3	292.50
9/10/97	Tel. conferences w. attorney Miller, client OCAHO clerk; review of procedures	1.8	405.00
9/22/97	Review cases/papers	1.8	405.00
9/24/97	Telephone conference w. client	.1	22.50
9/25/97	Review case and draft Answer, Motion To Dismiss	4.0	900.00
9/26/97	Telephone conferences w. client, OCAHO; Letter to OCAHO; review and revise Answer, Motion To Dismiss	2.8	630.00

Total Attorney Fees at $225.00 an hour for 11.8 hours: **$2,655.00**

Disbursement Purpose	*Amount*
Copying	44.85
Fax	16.95
Computer-assisted legal research	291.00

Total disbursements: **$352.80**

The reasonableness of these amounts must be assessed.[13]

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of

[13]The United States Court of Appeals for the First Circuit requires "the lower court to explain its actions [in awarding attorney's fees]. . . . The explanation need not be painstaking . . . but at a bare minimum, the order awarding fees, read against the backdrop of the record as a whole, must expose the court's thought process and show the method and manner underlying its decisional calculus." *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997).

the value of a lawyer's services." *Hensley*, 461 U.S. at 433; *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997) ("the lodestar method is the strongly preferred method"). This calculation, set forth in *Hensley*, and adopted by the First Circuit in *Coutin*, is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*. . . . The Senate Report cites to *Johnson* as well . . . ." *Hensley*, 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978). The First Circuit has adopted the *Johnson* factors. *Coutin*, 124 F.3d at 337 n.3. The twelve *Johnson* factors are:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment by the attorney due to acceptance of the case. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The experience, reputation, and ability

> of the attorneys. . . . (10) The 'undesirability' of the case. . . . (11) The nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. To award attorney's fees, a "court must first apply the *Johnson* factors in initially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995) (referencing *Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986)), *cert. denied*, 116 S. Ct. 535 (1995).

Applying the twelve *Johnson* factors to *The Recorder's* request, I find that Respondent's Application is reasonable: fully successful[14] in its defense against this frivolous action, counsel billed Respondent 11.8 hours at $225 an hour for researching, drafting, and finalizing Respondent's Answer and Motion To Dismiss and for conducting related reviews and telephone calls. Affidavit in Support of Motion for Attorney's Fees, Exhibit B. Counsel's rate of $225 an hour is reasonable for an attorney with eight (8) years' experience in the Boston, MA, market. Gail Goolkasian, the experienced counsel, holds a J.D., *cum laude*, from Harvard University Law School. In addition to her Associate's position at Hill & Barlow, P.C., Goolkasian has served as a Special District Attorney for the Middlesex County District Attorney's Office in Malden, MA. Goolkasian's hourly rate is also reasonable in light of recent OCAHO case law in which ALJs awarded attorney's fees ranging from $75 per hour to $284.75 per hour: *Austin v. Jitney Jungle Stores of Am., Inc.*, 7 OCAHO 969 (1997) (awarding $4,971 in attorney's fees and related expenses, rates including $175 an hour for a partner with thirty-six (36) years' experience in the Jackson, MS, market); *Kosatchkow v. Allen-Stevens Corp.*, 7 OCAHO 966 (1997) (awarding $4,474 in attorney's fees and related expenses at rates ranging from $180 per hour for a partner to $95 an hour for a new associate in the Detroit, MI market); *Lareau v. US Airways, Inc.*, 7 OCAHO 963 (1997) (awarding $5,296.47 in attorney's fees and related expenses at rates ranging from $284.75 per hour for the work of a Senior Partner with twenty-

[14]As the First Circuit noted, "the Supreme Court has identified results obtained as a preeminent consideration. . . . If a prevailing party is successful on all . . . of her claims, and receives complete relief, it goes without saying that reasonable fees should be paid for time productively spent, without any discount"). *Coutin*, 124 F.3d at 338.

six (26) years' experience at a major Washington area law firm to $207 an hour for the services of "Of Counsel"); *Horne v. Hampstead*, 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Co.*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75 with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation Dist.*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[15]

I find attorney's fees and expenses of **$3,007.80**, representing $225 an hour for a seasoned attorney with eight (8) years' experience, and small related expenses, reasonable in the Boston, MA, market.

III. *Conclusion*

Complainant is directed to pay to Respondent the amount of **$3,007.80** for attorney's fees and expenses related to defense against Complainant's frivolous action.

SO ORDERED.

Dated and entered this 17th day of November, 1997.

MARVIN H. MORSE
Administrative Law Judge

[15]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .").

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

Exhibit 13

PATRICIA L. HENDRICKSON, Complainant, v. GTE COMMUNICATION SYSTEMS CORPORATION, Respondent.	8 U.S.C. § 1324b Proceeding OCAHO Case No. 97B00089 Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(August 14, 1997)

I. BACKGROUND AND PROCEDURAL HISTORY

On April 4, 1997, Patricia L. Hendrickson (Hendrickson or Complainant), through her representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which she alleges that General Telephone Communication Corp.[2] discriminated against her because of her citizenship status, Compl. ¶¶ 9-10, and committed document abuse by refusing to accept documents she presented, namely a Statement of Citizenship and an Affidavit of Constructive Notice, id. ¶ 16. Complainant states that she filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on September 12, 1996. Id. ¶ 18. The OSC charge reveals that the two documents in question purport to show that Complainant is not subject to income tax withholding. See C. OSC Charge at 3-4. Complainant states that OSC sent her a letter that advised she could file a complaint directly with OCAHO. Compl. ¶ 19. Complainant enclosed the following three documents with her Complaint: (1) a paper entitled "Privacy Act Release Form and Power of Attorney," which is signed by Complainant and gives permission to John Kotmair to inquire of and procure from GTE information and documents relating to the withholding of taxes; (2) a copy of the charge filed with OSC; and (3) a copy of the letter sent from OSC regarding, among other cases in which Mr. Kotmair is acting as a representative, the present controversy.

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[1] Since then, I have excluded Mr. Kotmair from participation in this proceeding for the reasons stated in my Order Excluding Complainant's Representative, entered August 6, 1997.

[2] For reasons set forth in my Order of August 12, 1997, the caption has been corrected so that Respondent's name appears as "GTE Communication Systems Corporation."

Respondent's answer to the Complaint was due May 19, 1997. As Respondent still had not filed an answer by June 17, 1997, I issued a Notice of Entry of Default on that date in which I warned that Respondent should act promptly in filing an answer to avoid a default judgment. Respondent's attorney filed a notice of appearance on June 27, 1997. On July 1, Respondent submitted its Motion to Set Aside Entry of Default,[3] followed one day later by its Answer and its Motion to Dismiss Complaint.

In its Answer, Respondent states that it is improperly named as General Telephone Communication Corp. in the Complaint caption and that its actual name is GTE Communication Systems Corporation. In response to the allegations of the Complaint, Respondent denies that it discriminated against Complainant because of her citizenship status. Ans. ¶¶ 9-10. Respondent also denies that it committed acts of document abuse. Id. ¶ 16. Respondent enumerates five affirmative defenses to the Complaint: (1) the Complaint is frivolous and should be subject to sanctions under Federal Rule of Civil Procedure 11(c); (2) the Complaint fails to state a claim upon which relief can be granted; (3) Complainant failed to file a charge with OSC within 180 days of the claim upon which she bases the Complaint; (4) Respondent has treated Complainant as a U.S. citizen because it has not subjected her to the thirty percent withholding tax applicable to non-resident aliens in 28 U.S.C. § 1441; and (5) Respondent's treatment of Complainant is necessary to comply with the Internal Revenue Code. Ans. at 2-3.

In the Motion to Dismiss, Respondent requests that I dismiss the Complaint because it is frivolous, it fails to state a claim upon which relief can be granted, and the OSC charge underlying it was filed in an untimely manner. R. Mot. Dismiss at 1-5.

Complainant filed its Reply to Respondent's Motion to Dismiss one week late on July 24, 1997.[4] At the same time, Complainant filed a Reply to Respondent's Answer and Affirmative Defenses.[5] In the Reply to Respondent's Answer and Affirmative Defenses, Complainant states that

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[3] For reasons set forth in my Order of August 12, 1997, I have granted Respondent's Motion to Set Aside Entry of Default.

[4] Complainant's Reply to Respondent's Motion was due July 17, 1997. See 28 C.F.R. §§ 68.11(b), 68.8(a), (c)(2) (1996).

[5] In this document, Complainant replies both to Respondent's admissions and denials of the allegations of the Complaint and to Respondent's asserted affirmative defenses. The Rules of Practice that govern this proceeding only authorize a reply to a respondent's affirmative defenses, and not to the answer as a whole. See 28 C.F.R. § 68.9(d) (1996). Complainant provides further evidence of her confusion over the difference between an affirmative defense and a response to each particular allegation of a complaint. In response to paragraphs nine, ten, sixteen, twenty, and twenty-one of the Answer, all of which contain denials of the allegations in the corresponding paragraphs of the Complaint, Complainant states that "Respondent has not

(continued...)

Respondent fails to provide a statement of the facts that support its first three affirmative defenses, those of frivolousness, failure to state a claim, and timeliness.[6] See C. Reply to Ans. and Aff. Defenses at 3, 5. In response to Respondent's fourth affirmative defense, Complainant states that she has stated her claim sufficiently because she has alleged facts that show "Respondent discriminated against her based on her national origin[7] and her citizenship status." Id. at 7. Complainant argues that Respondent's fifth affirmative defense is an "invalid concept," a phrase Complainant defines as "words that represent attempts to integrate errors, contradictions and false propositions." Id.

In response to Respondent's argument that the Complaint is frivolous, Complainant states, inter alia, that Respondent fails to cite any law that supports Respondent's refusal to honor Complainant's Statement of Citizenship and Affidavit of Constructive Notice. See C. Reply to Mot. Dismiss at 3. Complainant maintains that she has stated a claim of document abuse because Respondent refused to honor her documents. See id. at 6. Finally, Complainant argues that she filed her OSC charge in a timely manner because OSC accepted her charge and that the filing period was subject to equitable tolling because OSC communicated to Complainant that she had the right to file a complaint directly with OCAHO and because Complainant originally filed a charge with the Equal Employment Opportunity Commission (EEOC). See id. at 7-8.

II. STANDARDS GOVERNING A MOTION TO DISMISS

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996); ICA Constr. Corp. v. Reich, 60 F.3d 1495, 1497 (11th Cir. 1995). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Stephens v. Department of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir.), cert. denied, 498 U.S. 998, and cert.

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[5](...continued)
bothered to provided (sic) any law and fact in support of th[ese] defense[s] and is in direct violation of 28 CFR § 68.9(c)(2) to provide 'A statement of the facts supporting **each** affirmative defense.'" C. Reply to Ans. and Aff. Defenses ¶¶ 9, 10, 16, 20, 21 (emphasis in Complainant's document). In response to the allegations of a complaint, a respondent simply must include "[a] statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation." 28 C.F.R. § 68.9(c)(1) (1996). Respondent, in answering each allegation of the Complaint, has fully complied with the applicable provision, which is 28 C.F.R. § 68.9(c)(1).

[6] Although Respondent does not list the facts in support of those affirmative defenses in the Answer, the Answer incorporates by reference those facts, which are included in Respondent's simultaneously filed Motion to Dismiss.

[7] Complainant, however, does not allege in her Complaint that she was discriminated against because of her national origin. See Compl. ¶ 8.

denied sub nom. Stephens v. Coleman, 498 U.S. 998 (1990); Bent v. Brotman Medical Ctr. Pulse Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[8] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5; see also Johannessen, 76 F.3d at 350 (trial court must construe the facts alleged in the light most favorable to plaintiff); ICA, 60 F.3d at 1497 (same). "Conclusory allegations and unwarranted deductions of fact," however, are not assumed to be true. See Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).[9]

Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Johannessen, 76 F.3d at 349 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Quality Foods, 711 F.2d at 995 (citing same); Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

III. DECISION AND ORDER

A. Lack of Subject Matter Jurisdiction

Respondent has not argued lack of subject matter jurisdiction as a basis for its Motion to Dismiss. Nonetheless, the issue of subject matter jurisdiction may be raised at any time, even by the court sua sponte. See Fitzgerald v. Seaboard System R.R., Inc., 760 F.2d 1249, 1251 (11th Cir. 1985); Rickard v. Auto Publisher, Inc., 735 F.2d 450, 453 n.1 (11th Cir. 1984) (citing Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2d 40, 43 (4th Cir. 1973)); Costigan v. NYNEX, 6 OCAHO 918, at 4-5 (1997), 1997 WL 242199, at *3 (Order Granting Respondent's Motion to Dismiss). In fact, "[a] federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." Fitzgerald,

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[8] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

[9] The U.S. Court of Appeals for the Eleventh Circuit "is bound by the caselaw of the former Fifth Circuit handed down before September 30, 1981 unless modified or overruled by [the Eleventh Circuit] en banc." Allen v. Newsome, 795 F.2d 934, 938 n.10 (11th Cir. 1986).

760 F.2d at 1251; see also Rickard, 735 F.2d at 453 n.1.

"A court's first duty is to determine subject matter jurisdiction because 'lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed.'" Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3 (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376, reh'g denied, 309 U.S. 695 (1940)). A court "cannot expand or constrict the jurisdiction conferred on it by statute." Horne v. Town of Hampstead, 6 OCAHO 906, at 5 (1997), 1997 WL 131346, at *4 (citing Willy v. Coastal Corp., 503 U.S. 131, 135, reh'g denied, 504 U.S. 935 (1992)). Parties cannot waive jurisdiction, nor can they confer jurisdiction by consent. See Fitzgerald, 760 F.2d at 1251 (citing Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974)).

1. Citizenship status discrimination claim

Complainant alleges that Respondent discriminated against her because of her citizenship status, Compl. ¶¶ 9-10, but she does not allege that Respondent either refused to hire or fired her, id. ¶¶ 13-14. Respondent confirms Complainant's continuing employment relationship with Respondent. See Mot. Set Aside Entry of Default ¶ 7.

"It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment." Horne, 6 OCAHO 906, at 5, 1997 WL 131346, at *4 (citing Naginski v. Department of Defense, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *23). "Controversies over conditions of employment do not implicate the jurisdictional requirements of § 1324b." D'Amico v. Erie Community College, 7 OCAHO 948, at 10 (1997) (Order Granting Respondent's Motion to Dismiss) (citing Costigan, 6 OCAHO 918, at 5, 1997 WL 242199, at *3, and Horne, 6 OCAHO 906, at 6, 1997 WL 131346, at *4). Consequently, I do not have subject matter jurisdiction over Complainant's citizenship status discrimination claim. See Hollingsworth v. Applied Research Assocs., 7 OCAHO 942, at 3, 5 (1997); Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939, at 3-4 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938, at 12, 23 (1997); D'Amico, 7 OCAHO 948, at 10-11; Lareau v. USAir, Inc., 7 OCAHO 932, at 13 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 17 (1997); Jarvis v. AK Steel, 7 OCAHO 930, at 7-8 (1997) (complainant neither fired nor not hired because he retired voluntarily); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925, at 18-19 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923, at 19 (1997), 1997 WL 235918, at *14; Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3; Horne, 6 OCAHO 906, at 4, 1997 WL 131346, at *3.

2. Document abuse claim

Complainant alleges that Respondent refused to accept the following documents: a "Statement

of Citizenship" and an "Affidavit of Constructive Notice." Compl. ¶ 16(a). The Immigration Reform and Control Act of 1986 (IRCA) provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements of the employment verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 28 C.F.R. § 274a.2(b)(ii) (1997). The employer must record information, including document identification number and, if applicable, expiration date, on the INS Employment Eligibility Verification Form (I-9 form), noting which documents were presented and examined. See id. § 274a.2(b)(v).

The employee must present and the employer must examine one List A document, which establishes identity and work eligibility, or one List B document, which establishes identity only, and one List C document, which establishes work eligibility only. Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization. Acceptable List A documents are noted at 8 U.S.C. § 1324a(b)(1)(B) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A) (1997); acceptable List B documents are noted at 8 U.S.C. § 1324a(b)(1)(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(B) (1997); and acceptable List C documents are noted at 8 U.S.C. § 1324a(b)(1)(C) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(C) (1997).[10]

"The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization." Horne, 6 OCAHO 906, at 7, 1997 WL 131346, at *6; see also Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5. In completing the I-9 process, the employer must accept any documents, from the statutory and regulatory lists of acceptable documents, presented by the employee that reasonably appear on their faces to be genuine and to relate to the person presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions." Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6 (citing

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[10] Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable List A and List C documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996, enactment date. See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6)).

The documents Complainant asserts Respondent refused to accept, a Statement of Citizenship and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility.[11] Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; accord Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 11-13; Cholerton v. Robert M. Hadley Co., 7 OCAHO 934, at 13-14 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 7-8; Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 20, 1997 WL 235918, at *15; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 16-17 (1997), 1997 WL 242208, at *13; Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6. Complainant does not even allege that she presented the documents to establish identity and/or work eligibility;[12] consequently, the Complaint itself shows that Complainant's claim fails to implicate the employment eligibility verification system. As a result of the foregoing, I am compelled to dismiss Complainant's document abuse claim because I lack subject matter jurisdiction over Complainant's particular allegations.

B. Failure to State a Claim

1. Citizenship status discrimination claim

Respondent moves for dismissal of the Complaint because the Complaint fails to allege any violation of 8 U.S.C. § 1324b. R. Mot. Dismiss at 2. Respondent correctly notes, by quoting relevant portions of 8 U.S.C. § 1324b(a)(1) and 28 C.F.R. § 44.200(a)(1), that IRCA only governs claims by protected individuals of citizenship status discrimination when the individual is fired or not hired. See also, e.g., D'Amico, 7 OCAHO 948, at 10; Horne, 6 OCAHO 906, at 5-6, 1997 WL 131346, at *4.

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[11] Although a Certificate of U.S. Citizenship, INS Form N-560 or N-561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994) and 8 C.F.R. § 274a.2(b)(v)(A)(*2*) (1997), Complainant's Statement of Citizenship is not such a document.

[12] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [she] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [she] can work in the United States." Compl. ¶ 16.

Assuming that the facts alleged in the Complaint are true, and construing those facts in the light most favorable to Complainant, Complainant nonetheless fails to state a viable claim of citizenship status discrimination under 8 U.S.C. § 1324b. Complainant states that she is a U.S. citizen, see Compl. ¶ 2, which means that she qualifies as a "protected individual" under the statute, see 8 U.S.C. § 1324b(a)(3)(A) (1994). As previously noted, however, Complainant expressly denies that she either was refused employment or was fired from her job. See Compl. ¶¶ 13-14. Complainant has not alleged the type of treatment that constitutes discrimination under section 1324b and, therefore, fails to state a claim upon which relief may be granted with respect to citizenship status discrimination. As Respondent aptly puts it, "in this particular case there are no allegations whatsoever that bring the complainant within the purview of the statute." R. Mot. Dismiss at 4.

2. Document abuse claim

In addition to the jurisdictional defect, Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept her Statement of Citizenship and her Affidavit of Constructive Notice, but, as Respondent appropriately points out, see R. Mot. Dismiss at 2, Complainant specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra note 12 and accompanying text. Also as Respondent astutely notes, see R. Mot. Dismiss at 4, those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra notes 10 and 11 and accompanying text.

Assuming that all of Complainant's factual allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant still fails to state a claim of document abuse. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.[13]

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7. Another Administrative Law Judge's recent holding also is particularly apt:

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[13] Complainant maintains that "[d]ispite (sic) Respondents (sic) assertions the legally mandated acceptance under 1324b(a)(6) is not in any way limited to 'for purposes of satisfying the requirements of section 1324a(b),' as Congress has studiously omitted any such limitation." C. Reply to Mot. Dismiss at 6. Contrary to Complainant's assertions, that language of limitation expressly appears in the statute, see supra part III.A.2, and applies to the provision regarding an employer's refusal to honor documents that appear to be genuine and to relate to the individual presenting them, see cases cited in the remainder of part III.B.2.

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [the complainant] asserts that [the respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine.

Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10, appeal filed, No. 97-70124 (9th Cir. 1997); see also Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12; D'Amico, 7 OCAHO 948, at 14; Cholerton, 7 OCAHO 934, at 13-14; Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935, at 8 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 6; Winkler v. West Capital Fin. Servs., 7 OCAHO 928, at 11 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 19-20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16; Boyd v. Sherling, 6 OCAHO 916, at 26-27 (1997), 1997 WL 176910, at *21-22; Winkler v. Timlin Corp., 6 OCAHO 912, at 6, 10-12 (1997), 1997 WL 148820, at *6, 9-11. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).

C. Timeliness

A complaint regarding an unfair immigration-related employment practice cannot be filed with OCAHO if the conduct giving rise to the complaint occurred more than 180 days before a charge was filed with OSC. See 8 U.S.C. § 1324b(d)(3) (1994). Respondent urges as additional grounds for its Motion to Dismiss that the present Complaint was untimely filed under that provision. See R. Mot. Dismiss at 5. Respondent argues as follows:

> Complainant alleges (Item No. 11) that she applied for employment with Respondent in March, 1978. The only other date referred to in the complaint is December 9, 1996, the date on which complainant allegedly filed a charge with the Office of Special Counsel (Item No. 18).
>
> Clearly, this charge is time barred under the 180 day statute of limitations found in 8 U.S.C. 1324b(d)(3)[.]

Id.

Complainant alleges that she applied for employment or worked at Respondent on March 13, 1978. Compl. ¶ 11. Complainant states, however, that she filed her OSC charge on September 12,

1996, not December 9, 1996, as Respondent propounds.[14] See id. ¶ 18. Also, the date of the OSC charge is not the "only other date referred to in the complaint." Complainant references February 1995 as the date from which she requests back pay. See id. ¶ 21.

The letter, signed by Mr. Kotmair, that conveys Complainant's charge to OSC[15] states that Complainant submitted a "Statement of Citizenship" to Respondent on February 27, 1995. C. OSC Charge at 3. Complainant asserts that Respondent did not withhold income taxes from her paycheck until a new person was appointed head of Respondent's payroll operations, at which point Respondent's practice of not withholding income taxes because of her Statement of Citizenship changed. Id. At that time, Complainant states, she submitted her Affidavit of Constructive Notice to Respondent. Id. at 4.

It is impossible to discern from the current record the date on which Respondent began to refuse Complainant's documents by starting to withhold income taxes from her salary. "It is axiomatic that the limitations period begins to run at the time of the alleged discriminatory act, provided that act is sufficiently clear to put Complainant on notice. Thus, an unequivocal notification of termination or rejection of employment delineates the commencement of the limitations period." Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 9 (1996), 1996 WL 670179, at *6 (citing Chardon v. Fernandez, 454 U.S. 6, 7 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980); and Lewis v. McDonald's Corp., 2 OCAHO 383, at 4 (1991), 1991 WL 531895, at *3 (Westlaw incorrectly lists the OCAHO citation for this case as "4 OCAHO 609")). As Complainant alleges acts of document abuse, and as Complainant's citizenship status discrimination charge hinges on Respondent's refusal to accept Complainant's proffered documents, the "unequivocal" act that would mark the commencement of the limitations period in this case would be Respondent's rejection of Complainant's documents. Because the record provides no way of determining the date on which Respondent began to disregard Complainant's proffered documents, it is impossible to decide whether Complainant filed her charge with OSC in a timely manner. The inability to reach a conclusion regarding the timeliness issue, however, is immaterial because I already have determined that Complainant's citizenship status discrimination and document abuse claims must be dismissed on two other independent grounds: lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

D. Rule 11 Sanctions

Respondent states, see R. Mot. Dismiss at 1-2, that the present Complaint is identical to that filed in Hutchinson v. End Stage Renal Disease Network of Florida, Inc., 7 OCAHO 939 (1997),

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[14] The date on which Complainant alleges she filed her OSC charge appears as "12/09/96," but, on the OCAHO form complaint, the "12" appears above the blank marked "day," and the "09" appears above the blank marked "month," see Compl. ¶ 18, making the correct reading of the date September 12, 1996.

[15] Attached as an exhibit to the Complaint.

about which Judge Morse states that the filing of the complaint was "a frivolous and irresponsible action by Complainant's representative" in the face of numerous and unanimous precedent rejecting the substantially identical theories Mr. Kotmair has put forth on behalf of so many complainants. See Hutchinson, 7 OCAHO 939, at 2-3. Respondent requests sanctions pursuant to Federal Rule of Civil Procedure 11(c) because "the present claim is so utterly devoid of any merit." R. Mot. Dismiss at 2.

Respondent does not cite any OCAHO cases that support its request that I impose Rule 11 sanctions. In fact, no such authority exists. The Chief Administrative Hearing Officer (CAHO) has stated that neither the CAHO nor the OCAHO ALJs have the substantive powers granted to U.S. district court judges in Federal Rules of Civil Procedure 11 and 37(b)(2). See United States v. Nu Look Cleaners of Pembroke Pines, Inc., 1 OCAHO 1771, 1780 (Ref. No. 274) (1990),[16] 1990 WL 512158, at *8 (Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order), cited in Toussaint, 6 OCAHO 892, at 21, 1996 WL 670179, at *17. Therefore, Respondent's request for sanctions pursuant to Rule 11(c) is denied.

"However, pursuant to 8 U.S.C. § 1324b(h) and 28 C.F.R. § 68.52(c)(2), once the case has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact." Toussaint, 6 OCAHO 892, at 22, 1996 WL 670179, at *17. I construe Respondent's request for Rule 11 sanctions, which includes the awarding of attorney's fees as an option, see Fed. R. Civ. P. 11(c)(2), as a general request for attorney's fees.

At this time I am reserving judgment on the issue of whether Respondent is entitled to receive attorney's fees and, if so, in what amount. The parties will be given an opportunity to brief the question of attorney fees. Respondent bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting without legal counsel.

Therefore, Respondent is ordered to file, not later than September 12, 1997, a certification of services detailing the fees incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate. It is Respondent's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Respondent will support its request with a legal brief or memorandum showing why Complainant's arguments are

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[16] Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Law of the United States, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances. Decisions that appear in Volume I will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I decisions.

"without reasonable foundation in law and fact." Complainant shall have twenty days from the date of service of Respondent's submission to file its response to Respondent's submission.[17]

IV. CONCLUSION

After considering the parties' pleadings, I grant Respondent's Motion to Dismiss.[18] Assuming that every fact Complainant has alleged is true,[19] I make the following findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims; and

2. Complainant's allegations of citizenship status discrimination and document abuse fail

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[17] The parties are reminded that "file" means that the document must be received by my office by that date. See 28 C.F.R. § 68.8(b) (1996).

[18] "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996) (quoting Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)) (emphasis added). Granting Complainant such an opportunity in the present case would be futile. The Complaint does not fail because it suffers from technical pleading errors; more careful drafting would not turn Complainant's allegations into a cause of action that this forum recognizes. The complaint in cases brought under section 1324b consists of a form that elicits the pertinent information from a complainant. The form complaint seeks information, many times with questions that demand simple "yes" or "no" answers, that set forth the elements of the causes of action that this forum recognizes. For example, paragraphs 13 and 14 of the form complaint demand affirmative or negative responses to the following statements, respectively: "I was knowingly and intentionally not hired" and "I was knowingly and intentionally fired." In this case, Complainant has checked the line marked "No" in response to each of those questions. As that example reveals, more careful drafting would not aid Complainant's cause before this forum.

[19] Complainant vehemently insists that "as in all cases that have been brought before the Office of [the] Chief Administrative Hearing Officer (OCAHO) by the Director of the National Worker's Rights Committee, the respondents have been able (with the help of Administrative Law Judges 'ALJ's' (sic)) to get away with discriminatory practices without disproving the Complainant's facts involving the discrimination." C. Reply Mot. Dismiss at 1-2. Complainant fails to understand that, for purposes of deciding a motion to dismiss, **I assume that every fact she has alleged is true**. See supra part II. Disposing of a claim on the grounds of lack of subject matter jurisdiction and failure to state a claim means it is not necessary to move to a hearing stage in which Complainant would have to prove her allegations, because, even assuming that all the facts Complainant alleges are true, **those facts would not entitle Complainant to any relief in this forum**.

to state causes of action upon which this forum may grant relief.

For those reasons, Complainant's Complaint is dismissed. I retain jurisdiction for purposes of deciding whether Respondent is entitled to attorney's fees in this case.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b). This final decision and order on the merits is the final decision for purpose of computing time for appeal where I have retained jurisdiction for resolution of fee-shifting issues. See Hollingsworth, 7 OCAHO 942, at 6 (1997) (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), and Fluor Constructors, Inc. v. Reich, 111 F.3d 94 (11th Cir. 1997) (specifically addressing time limit for appeal on the merits when jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding)).

SO ORDERED.

Dated and entered this 14th day of August, 1997.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1997, I have served the foregoing Order Granting Respondent's Motion to Dismiss on the following persons at the addresses shown by first class mail, unless otherwise noted:

Patricia L. Hendrickson
404 Clara Drive
Brandon, FL 33510
(Complainant)

GTE Communication Systems Corporation
(GTE Supply)
8800 Adamo Drive
Tampa, FL 33619
(Respondent)

Ernesto Mayor, Jr., Esq.
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P.O. Box 110, MC FLTC0007
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Poli Marmolejos
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Office of Special Counsel for Immigration
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Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JAMES L. HOLLINGSWORTH, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 97B00085
APPLIED RESEARCH ASSOCIATES, Respondent.	)	

Exhibit 14

FINAL DECISION AND ORDER
(July 1, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr.**, for Complainant.
William J. Sullivan, Esq., for Respondent.

This is another of a number of virtually identical complaints filed on behalf of individuals by the same representative, John B. Kotmair, Jr., Director, National Worker's Rights Committee (Kotmair). Kotmair filed this case in total disregard of the dismissal of every such case by each administrative law judge (ALJ) who has issued a decision. This case is groundless, lacking any standing under 8 U.S.C. § 1324b and, therefore, not within the jurisdiction of the ALJ.

Title 8 U.S.C. § 1324b, which prohibits certain discrimination in the workplace, was enacted as part of the Immigration Reform and Control Act of 1986 (IRCA). IRCA prohibits national origin discrimination in hiring and firing where there are four to fourteen employees, prohibits citizenship status discrimination where there are four or more employees, and, as amended, prohibits employers from requesting more or different documents than are tendered by a new employee in compliance with the employment eligibility verification regimen of 8 U.S.C. § 1324a. As amended, IRCA also prohibits retaliation, intimidation, threat or coercion occasioned by resort to § 1324b relief.

By his Complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on April 2, 1997, James L. Hollingsworth (Hollingsworth or Complainant) claims that Applied Research Associates, Albuquerque, New Mexico (Associates or Respondent), violated § 1324b by refusing to accept his improvised "statement of citizenship" and "affidavit of constructive notice" presented to avoid

tax withholding.[1] Hollingsworth is a United States citizen, employed by Associates since July, 1984. Hollingsworth's Complaint affirmatively rejects any claims of national origin discrimination or retaliation. Hollingsworth asserts that Associates "refused to accept" his "statement of citizenship" and "affidavit of constructive notice." However, he deleted by pen that portion of the OCAHO pre-printed complaint format that provides the opportunity to allege violation of § 1324b(a)(6), *i.e.*, that the rejected documents were presented "to show I can work in the United States." Complaint, at ¶ 16. Associates denies liability in its Answer to the Complaint, contending that the Complaint fails to state a cause of action upon which relief can be granted.

Hollingsworth's Complaint is yet another variant of a number of substantially identical cases asserting administrative law judge (ALJ) jurisdiction under § 1324b, each of which was dismissed for failure to state a claim on which § 1324b relief could be granted and/or for lack of subject matter jurisdiction.[2] However characterized by the complainants, these cases turn exclusively on the refusal by employers to participate in schemes to circumvent provisions of the Internal Revenue Code requiring employers to withhold federal income taxes and social security contributions (FICA) from employee

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[1] Complainant's rationale for his claim to be free from withholding is explained more fully in his charge against Associates filed with the United States Department of Justice, Special Counsel for Immigration Related Unfair Employment Practices (OSC), the agency which receives § 1324b filings in the first instance. 8 U.S.C. § 1324b(b)(1). The charge is essentially a boiler-plate reiteration, characteristic of those in a significant number of the cases collected at footnote 2.

[2] *See Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 927 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4-5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97-70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr., as Director, National Worker's Rights Committee, represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Hollingsworth v. Applied Research Associates* is another example.

wages.[3] No less than the others, Hollingsworth's suit against Associates is premised on the specious and discredited rationale that only aliens are subject to withholding.

In the face of unanimous precedent against him, however much credence Kotmair may once have given to this oft-repeated theory, he surely can no longer seriously assert its viability. Hollingsworth's allegations of citizenship status discrimination and document abuse only implicate the employer's failure to honor the "statement of citizenship" and "affidavit of constructive notice." Even without the overwhelming body of ALJ caselaw against him, these allegations must fail. This is so because 8 U.S.C. § 1324b(a) limits citizenship status claims to refusal to hire and to wrongful discharge, both of which the Hollingsworth Complaint explicitly disclaims, and because 8 U.S.C. § 1324b(a)(6) limits document abuse to demands arising out of the employment eligibility verification regimen of § 1324a(b), which the Complaint literally, by pen, exonerates.

The Complaint affirmatively denies that Associates rejected documents tendered "for purposes of satisfying the requirements of section 1324a(b)." Depending exclusively on documents tendered in compliance with § 1324a(b), subsection 1324b(a)(6) by definition excludes home-grown documents, including those presented to Associates. The specious nature of Hollingsworth's claim is particularly evident here, where the employment has subsisted since 1984, because employments which antedate November 6, 1986 are generally not subject to § 1324a(b).

Hollingsworth's citizenship status claim depends entirely on the discredited proposition that only non-citizens are subject to withholding. Complainant's sole claim is that his documents were given no effect by the employer. That claim lacks § 1324b standing as demonstrated by the cases cited at footnote 2. Accordingly, I find and conclude that the Complaint fails to state a cause of action on which relief can be granted, and that the Anti-Injunction Act, 26 U.S.C. § 7421(a), as well as the limited jurisdiction conferred by § 1324b defeat ALJ jurisdiction.

In light of footnote 2 precedents, eight of which issued before the April 2, 1997 filing of Hollingsworth's Complaint, this filing is a frivolous and irresponsible action by Complainant's representative.[4] The decisions and orders which were served on Kotmair made clear to Complainant's

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[3] *See* 26 U.S.C. §§ 3102(a) (requiring employer to deduct FICA from employees' wages), 3102(b) (imposing liability on employer who fails to withhold FICA taxes from employees' wages), 3402(a) (requiring employer to withhold income taxes from employees' wages), and 3403 (codifying employer liability for failure to withhold income taxes from employees' wages). *See* "The Anti-Injunction Act," 26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . .").

[4] *See Farris v. Lanier Bus. Prods., Inc.*, 626 F. Supp. 1227, 1228 (N.D. Ga. 1986) (relying on *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), where the court granted fees and costs to an employer as a result of the frivolous, unreasonable and litigious actions of its former employee, and stated, "Plaintiff's propensity for meritless litigation reflects poorly upon his good faith in filing the present lawsuit.") (citation omitted), *aff'd*, 806 F.2d 1069

(continued...)

representative that under no conceivably reasonable reading of the Complaint could the ALJ assert subject matter jurisdiction over his claims. Hollingsworth cannot establish a *prima facie* case of citizenship status discrimination. His Complaint is so attenuated and unsubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing.

Maximizing opportunities to amend discrimination complaints is generally encouraged. As this is the first § 1324b tax withholding case to reach decision by an ALJ within the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit, that court's affirmance of dismissals sua sponte by trial judges is instructive. The Tenth Circuit has not hesitated to approve dismissals upon determining that to allow even a pro se discrimination plaintiff the opportunity to amend a complaint would be futile. *See Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir. 1991) *cert. denied*, 504 U.S. 941, 112 S. Ct. 2276 (1992) (affirming dismissal where the "complaint lacks any legal or factual specificity which would allow [a court] reasonably to read the pleadings as stating a recognized claim") (*citing Hall v. Bellmon,* 935 F.2d 1106, 1119 (10th Cir. 1991)); *see also Whitney v. State of New Mexico,* 113 F.3d 1170 (10th Cir. 1997).

Because Hollingsworth relies exclusively on Associates' refusal to accept his documents as the gravamen of his discrimination claim, the consequential lack of any discernible meritorious § 1324b claim forecasts that amendment would be futile. Although not captioned as a motion to dismiss, Respondent's Answer asserts that "the Complaint fails to state a cause of action," and that in effect the ALJ lacks jurisdiction. By his Reply to the Answer, filed as recently as May 9, 1997, in face of all the precedents but with no acknowledgment of their existence, Hollingsworth repeats over and over again the thoroughly discredited notion that only aliens are subject to tax withholding, and that he is, therefore, entitled to § 1324b relief. That filing demonstrates the futility of holding the case open for still another reiteration. Hollingsworth's claim is, therefore, dismissed for failure to state a claim cognizable under § 1324b.

However disguised, this is a tax protest case, and nothing more. The Tenth Circuit's deference to the Anti-Injunction Act, 26 U.S.C. § 7421(a), is controlling. In *Lonsdale v. United States*, 919 F.2d 1440, 1442 (10th Cir. 1990), taxpayers were not permitted "to avoid the

jurisdictional restrictions of the Anti-Injunction Act by characterizing their action as one to quiet title." So, too with IRCA.

The Tenth Circuit acknowledges that where the bar of the Anti-Injunction Act applies, even its

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[4](...continued)
(11th Cir. 1986) (unpublished table decision). Although the *Farris* court addressed the actions of the party, not the representative, the text is particularly apt in the instant case. *See also*, *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

jurisdiction as a reviewing court is precluded. Of particular significance to ALJ administrative adjudication under 8 U.S.C. § 1324b is the circuit's recognition that the Administrative Procedure Act does not override the limitations of the Anti-Injunction Act and, as well, the limitations of the tax exception provision of the Declaratory Judgment Act, 28 U.S.C. § 2201. *Fostvedt. v. United States*, 978 F.2d 1201,1203-04 (10th Cir. 1992), *cert. denied*, 507 U.S. 988, 113 S.Ct. 1589 (1993). The Tenth Circuit lacks patience with obfuscation. *See Wyoming Trucking Ass'n, Inc. v. Bentsen, Secretary of the Treasury*, 82 F.3d 930, 933 (10th Cir. 1996) ("Ignoring the Anti-Injunction Act simply because a plaintiff characterizes his claim as a constitutional question would elevate semantics over substance, and such a tactic would quickly become a method of choice for avoidance of the Anti-Injunction Act"). Hollingsworth's claim is, therefore, dismissed for lack of § 1324b subject matter jurisdiction.

An ordered system of justice requires that the tribunal recognize when it is being misused. The proliferation of claims of the genre here compels dismissal of Hollingsworth's Complaint. Jurisdictional parameters could not be clearer. Judicial economy and efficiency demand no less.

So obviously does Hollingsworth's case lack 8 U.S.C. § 1324b viability that there is no need to delay the inevitable outcome, providing an early opportunity to seek appellate review, if he so elects.

II. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings of the parties. All requests not disposed of in this final decision and order are denied.

The Complaint, having no arguable basis in fact or law, is dismissed because the ALJ lacks subject matter jurisdiction, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. § 1324b(g)(3).

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding that the merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 1st day of July, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order were mailed first class, this 1st day of July, 1997 addressed as follows:

Complainant's Representative

John B. Kotmair, Jr., Director
National Worker's Rights Committee
12 Carroll Street, Suite 105
Westminster, MD 21157

Counsel for Respondent

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

August 20, 1997

EARL RUSSELL HORNE, JR., Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 96B00106
TOWN OF HAMPSTEAD, Respondent.	)

Exhibit 15

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Thomas J. Gisriel, Esq., and Steven B. Schwartzman, Esq., on behalf of Respondent.

I. *Procedural History*

Pursuant to the January 17, 1997, Decision and Order Dismissing Complaint, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.), the Town of Hampstead, Maryland (Respondent), by its attorneys, timely filed its Application for an Award of Attorneys Fees (Application) on April 1, 1997 for the proceeding in 6 OCAHO 906, Docket No. 96B00106 (*Horne II*), and for the work performed in conjunction with 6 OCAHO 884 (1996), 1996 WL 658405 (O.C.A.H.O.), Docket No. 96B00050 (*Horne I*). Earl Russell Horne, Jr. (Horne or

Complainant) neither contests nor otherwise responds to Respondent's Application.[1]

Respondent requests $4,620[2] in attorney's fees and provides a detailed explanation and summary in support of its request. Complainant does not question the reasonableness of either the time set forth or the hourly rates claimed in Respondent's Application.

II. *Discussion*

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Attorney's fees are awarded in an unfair immigration-related employment practice action based on a two-part test: (1) determination of prevailing party status; and (2) qualification of the action as frivolous or unreasonable. 8 U.S.C. §1324b(h) provides in part that

[1]On February 4, 1997, Complainant filed a post-decision Motion for Findings of Fact and Conclusions of Law and Reconsideration of Judgment (Motion) which argues that Complainant's action was in fact "founded in *reasonable* law and fact" and "was asserted in *reasonable* law and fact and in good faith" and which states that Respondent "doesn't merit any award of attorney fees. . . ." Motion, at 10. In cases arising under 8 U.S.C. §1324b, 28 C.F.R. §68.52(c)(4) permits the ALJ to correct errors or mistakes in a decision or order within sixty days after issuance. Complainant's Motion is not encompassed by this regulatory provision because it asks for more than correction of an error or mistake. Complainant requests "reconsideration" of the ALJ's decision, relief which is not authorized by statute or regulation. As stated in *Horne II*, 6 OCAHO 906, at 14, 1996 WL 131346, at *11, the review sought is only available in the Court of Appeals. *See* 8 U.S.C. §1324b(i)(1); 28 C.F.R. §68.53(b).

By the same token, even though 28 C.F.R. §68.1 permits the Federal Rules of Civil Procedure to "be used as a general guideline in any situation not provided for or controlled by [28 C.F.R. pt. 68], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation," Complainant's Motion falls outside Fed. R. Civ. P. 52(b) (Amendment) or 59(e) (Motion to Alter or Amend Judgment) because Complainant clearly seeks review and reconsideration of the entire decision and order, not a mere correction or amendment. Finally, Complainant's Motion was not timely filed within "10 days after entry of the judgment" which is required by both Rules 52(b) and 59(e). In any event, the Motion is obviously only another iteration of the claim set forth in the Complaint.

[2]Although Respondent's Application, at 4, requests an award of $4,650 (and an award of "$4,6250 [sic]," Application, at 3), the total attorney's fees billed is $4,620. That sum, $4,620, is the cumulative total of $3,990 in fees for *Horne I* (Case No. 96B00050) and $630 in fees for *Horne II* (Case No. 96B00106). "Thus, the total amount billed in the two proceedings was $4,620." Application, at 4. A literal reading of the "Amount" column of Respondent's Application, Exhibit, at 1–4, shows an amount less than that requested for the hours billed. Because there is a logical nexus between the narrative and the rates recited, I adopt the rate of $150 per hour stated in the Application, at 4, consistent in total sum ($4,620) with Respondent's own calculation.

an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

1. *Town of Hampstead Is the Prevailing Party*

(a) *Horne I*

In the first *Horne* action, Horne voluntarily withdrew his complaint and requested that the case be dismissed. The August 9, 1996, Order Confirming Withdrawal of Complaint acknowledged Horne's "voluntary dismissal of the complaint without prejudice." *Horne v. Hampstead*, 6 OCAHO 884, at 6, 1996 WL 658405, at *5. "Where the plaintiff has voluntarily dismissed his or her action, a number of courts have held that the [respondent[3]] is the 'prevailing' or 'successful' party." 1 ROBERT L. ROSSI, ATTORNEYS' FEES 362 (2d ed. 1995) (footnote omitted).[4] The "term 'prevailing party' is applicable to a [respondent] against whom a voluntary dismissal is taken." *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 922 (Fla. Dist. Ct. App. 1983).[5]

[3]Respondent is inserted into the quotation to replace the term "defendant." Defendants and respondents are similarly situated in that they both have actions brought against them by a plaintiff or complainant, respectively, and are interchangeable for these definition purposes. Respondent "denotes the person upon whom an ordinary petition in the court . . . is served, and who is, as it were, a defendant thereto." BLACK'S LAW DICTIONARY 1546 (3d ed. 1933).

[4]*See Cantrell v. International Bhd. of Elec. Workers, AFL-CIO 2021*, 69 F.3d 456, 458 (10th Cir. 1995) (en banc) (holding that defendant is the prevailing party when a plaintiff voluntarily dismisses his action whether dismissed with or without prejudice); *Western Coal & Mining Co. v. Petty*, 132 F. 603 (8th Cir. 1904) (concluding that defendant is the prevailing party entitled to "legal costs" when plaintiff abandoned and dismissed his action); *Uniflow Mfg. Co. v. Superflow Mfg. Corp.*, 10 F.R.D. 589 (N.D. Ohio 1950) (finding defendant is the prevailing party where plaintiff voluntarily dismissed action, but court only awarded defendant actual costs due to bad act of appropriating copyright).

[5]*See McKelvey*, 430 So. 2d at 922 n.3:

> *See e.g., Dolphin Towers Condominium Assoc., Inc. v. Del Bene*, 388 So. 2d 1268 (Fla. [Dist. Ct. App.] 1980) (term 'prevailing party' in statute allowing prevailing party in action by or against condominium association to recover reasonable attorney fees includes defendant against whom voluntary dismissal is taken); *MacBain v. Bowling*, 374 So. 2d 75 (Fla. [Dist. Ct. App.] 1979) (voluntary dismissal will authorize an award of attorney's fees under section 57.105 where trial court finds that there is a complete absence of a justiciable issue of either law or fact); *Gordon v. Warren Heating & Air Conditioning, Inc.*, 340 So. 2d 1234 (Fla. [Dist. Ct. App.] 1976) (where a mechanic's lien is voluntarily dismissed, party against whom claim was brought is the 'prevailing party' and is entitled to recover attorney's fees and costs).

Respondent's prevailing party status is supported by *Cantrell v. International Brotherhood of Electrical Workers, AFL-CIO, Local 2021*, 69 F.3d 456 (10th Cir. 1995), where the Tenth Circuit held that the defendant is the prevailing party "when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice." I conclude that Respondent is the prevailing party in *Horne I*.

(b) *Horne II*

That Respondent is the prevailing party in *Horne II* is made clear by relevant OCAHO and federal case law. "Title VII served as a point of departure in drafting what became [8 U.S.C. §1324b. . . . It is reasonable to conclude, therefore, that Title VII [of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*,] case law with respect to award of attorneys' fees is an important springboard for discussion of attorneys' fees under [§1324b]." *Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872, at *5 (O.C.A.H.O.).[6] *See also Lee v. Airtouch Communications*, 7 OCAHO 926, at 2 (1997); *Banuelos v. Transportation Leasing Co.*, 1 OCAHO 255, at 1651–52 (1990), 1990 WL 512091, at *10–11 (O.C.A.H.O.).

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566 (1993), 1993 WL 544051 (O.C.A.H.O.),[7] referenced *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421 (1978), as establishing that an award of attorney's fees depends on a finding of respondent's prevailing party status and a lack of reasonableness on the part of the complainant in filing the underlying action. *Jasso* also relied upon the similarities between the attorney's fees provisions of IRCA and the Civil Rights Act:

> Title VII of the Civil Rights Act also illuminates the reasonableness test for fee shifting. Under Title VII the Supreme Court has held that a District Court may, in its discretion, award attorney's fees to a prevailing Defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable,

[6]Citations to OCAHO precedents printed in bound Volume 1, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

[7]*Jasso v. Danbury Hilton & Towers*, 3 OCAHO 566, 1993 WL 544051 (finding respondent prevailing party, but denying award of attorney's fees because complainant was justified in bringing the action).

> groundless and without foundation, even though not brought in subjective bad faith.

Jasso, 3 OCAHO 566, at 6, 1993 WL 544051, at *10–11.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983),[8] and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 (1989),[9] defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought.... In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Parties "who prevailed on a significant issue in the litigation and ... obtained some of the relief sought ... are thus 'prevailing parties' within the meaning of [the statute]." *Id.*, at 793.

Respondent "succeeded" on all of its significant claims as set forth in Respondent's affirmative defenses[10] which "afforded it some of the relief sought" when the action was dismissed. Respondent's legal relationship with Horne was "materially altered" when I dismissed Horne's Complaint for failure to state a cause of action cognizable by §1324b(g)(3) and for lack of subject matter jurisdiction. I find that Respondent meets the prevailing party test in *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in the litigation by demonstrating that the Complainant failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when Horne's Complaint was dismissed. I conclude that the Respondent is clearly the prevailing party in *Horne II*.

In the context of summary dispositions of complaints, ALJs have not always been of one mind in resolving whether a respondent is a prevailing party. *Banuelos*, 1 OCAHO 255, at 1650 n.7, 1990 WL 512091, at *10, disagreed with *Williamson*, 1 OCAHO 174, 1990 WL 515872, with respect to the "view that a respondent is not a 'prevailing party' simply because [an] ALJ has rendered a decision which dismisses, on jurisdictional grounds, a Complaint as charged by a

[8]*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988).

[9]*Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988).

[10]Answer, at 3–9.

pro se complainant. . . . [The *Banuelos* ALJ also] reject[ed] an interpretation . . . which would apply attorney fees analyses to 'all cases,' including, as [another ALJ] apparently sees it, to threshold dismissals for lack of jurisdiction against a pro se."[11]

However, the concerns raised in *Banuelos* regarding the award of attorney's fees to the prevailing party in actions dismissed on jurisdictional grounds need not be addressed in the context of the case at hand. This is so because the Complainant did *not* appear *pro se* in *Horne II*, but was represented by John B. Kotmair (Kotmair) and the National Worker's Rights Committee (Committee). To the extent that OCAHO rules permit representation by a non-bar member, Horne is represented by Kotmair and the Committee. By no means is Complainant *pro se*. Accordingly, I need not address the reservation by the *Banuelos* judge which would deny prevailing party status to successful respondents whose adversary is truly *pro se*.

Moreover, *Horne II* was dismissed with prejudice *not* only for lack of subject matter jurisdiction, but also for failure to state:

> (1) a citizenship status discrimination cause of action cognizable under §1324b(a)(1);
>
> (2) an over documentation cause of action cognizable under §1324b(a)(6) and §1324a(b); and
>
> (3) a cause of action cognizable under §1324b as further defined by §§1324b(b)(1),[12] 1324b(d)(2),[13] 28 C.F.R. §§44.301(b),[14] 44.303(a)–(c),[15] and 28 C.F.R. §68.4.[16]

Horne II, 6 OCAHO 906, at 4, 9, 11, 1996 WL 131346, at *3, *7, *8.

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[11]"The defendant has been held to be the prevailing party in cases involving a dismissal for want of jurisdiction." 1 ROBERT L. ROSSI, ATTORNEY'S FEES 363 (2d ed. 1995). *See Pritchard v. Fowler*, 40 So. 955 (Ala. 1906); *Thomas v. Thomas*, 56 A. 651 (Me. 1903).

[12]8 U.S.C. §1324b(b)(1) (requiring that a charge be filed first with the Special Counsel).

[13]8 U.S.C. §1324b(d)(2) (requiring that the Special Counsel determine not to file a complaint before an ALJ prior to permitting the filing of a private action by the person making the charge).

[14]28 C.F.R. §44.301(b) (stating that a charging party may file complaint before an ALJ "if the Special Counsel does not do so within 120 days of receipt of the charge").

[15]28 C.F.R. §§44.303(a)–(c) (outlining determination procedures when the Special Counsel decides not to file a complaint with an ALJ).

[16]28 C.F.R. §68.4 (outlining procedures related to charges and complaints for unfair immigration-related employment practices).

2. *Horne II's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting ultimately turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Under 8 U.S.C. §1324b(h), the prevailing party obtains the benefit of fee shifting only upon a finding that the arguments of the opposing party were without reasonable foundation in law and fact." Jasso, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing Jones v. Dewitt Nursing Home, 1 OCAHO 1235, 1268 (1990)).

(a) *Horne I Distinguished*

As to the first *Horne* action, I must conclude that Respondent is not entitled to an award of attorney's fees, even though Respondent is the prevailing party. In *Horne I*, Horne voluntarily dismissed his Complaint without prejudice pursuant to FED. R. CIV. P. 41(a)(1)(i). "[A] dismissal without prejudice operates to leave the parties as if no action had been brought at all. . . ." *Mangir v. TRW, Inc.*, 4 OCAHO 672, at 3 (1994), 1994 WL 595802, at *1 (O.C.A.H.O.). Because Horne voluntarily dismissed his Complaint, I am unable to evaluate the case on its merits or to determine the reasonableness of Horne's arguments, precluding a determination as to reasonableness for fee shifting purposes. *See Monterey Development Corp. v. Lawyer's Title Insurance Corp.*, 4 F.3d 605, 608 (8th Cir. 1993) ("'The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought,' reasoning that a dismissal without prejudice does not comply with the requirement of a valid and final judgment. . . .") (citing *In re Piper Aircraft Dist. Sys. Antitrust Litig.*, 551 F.2d 213, 219–20 (8th Cir. 1977); *Szabo Foods Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987) (determining that voluntary dismissal "under 41(a)(1)(i) strips a court of 'jurisdiction.' The dismissal terminates the case by itself. There is nothing left to adjudicate. . . . 'It is as if the suit had never been brought.'") (quoting *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949)), *cert. dismissed*, 485 U.S. 901 (1988). Because I am unable to conclude that Complainant's arguments in *Horne I* are "without reasonable foundation in law and fact," so as to satisfy

the §1324b(h) test, I am unable to award Respondent attorney's fees allocable to *Horne I*.[17]

(b) *Horne II*

In addition to 8 U.S.C. §1324b(h), which sets forth the standard for award of attorney's fees in OCAHO cases, Title VII precedent establishes a case to be frivolous if without reasonable foundation in law or fact. "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Although the text of §1324b(h) differs from that of Title VII, the result is the same.

Christiansburg Garment Company v. EEOC is the seminal case which addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Horne's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where **the plaintiff's case is dismissed for failure to**

[17]It is implicit in counsels' submission of a modest 4.2 hours expended for *Horne II* that they expended 26.6 hours for *Horne I*. Obviously, counsel benefitted from the *Horne I* experience, candidly allocating a substantially smaller portion of their time to *Horne II*. I am unable, however, to reallocate the time credited to *Horne I* toward the *Horne II* submission.

[18]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. County of Suffolk*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous."); *Riviera Carbana v. Cruz*, 588 F. Supp 80 (D.P.R. 1980) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (unpublished table decision).

state a claim on which relief could be granted. . . ."[18] Horne maintains that his employer discriminated against him by refusing to accept his self-styled, gratuitously tendered documents,[19] subjecting him to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled.[20] Respondent, however, is statutorily mandated to withhold income taxes[21] and social security contributions[22] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[23] 26 U.S.C. §3403,[24] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[25] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores, Inc.*, 6 OCAHO 923, at 22 (1997), 1997 WL 235918, at *17 (O.C.A.H.O.) (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because Respondent, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security

[19]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Horne presented "so that the U.S. Citizen is given 100% of his payment for his labor unencumbered by any Congressiona[l] Act.").

[20]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[21]26 U.S.C. §3402(a).

[22]26 U.S.C. §3102(a).

[23]26 U.S.C. §3102(b) ("Every employer. . . shall be indemnified against the claims and demands of any person. . . .").

[24]26 U.S.C. §3403 ("The employer. . . shall not be liable to any person. . . .")

[25]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .).

contributions, . . . is statutorily immunized from suit[,]" Horne's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Horne's] allegations," and I award Respondent $630 in attorney's fees. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Horne's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

B. *Reasonableness of Attorney's Fees Request*

"In any complaint respecting an unfair immigration-related employment practice, an [ALJ], in the judge's discretion, may allow a prevailing party . . . a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). In *Horne II*, counsel supplies the following figures to support its $630 attorney's fees request: 4.2 hours expended on the litigation[26] at a rate of $150 per hour.[27] The reasonableness of this $630 "lodestar" amount must be assessed.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. This calculation, set forth in *Hensley*, is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

[26]Application, Exhibit, at 4. Even though Respondent's counsel actually expended 4.7 hours, only 4.2 hours are billed or included in calculating the lodestar amount because counsel decided not to bill 0.50 hours to Respondent which Thomas J. Gisriel spent reviewing, correcting and conferencing related to the case. Application, at 4; Application, Exhibit, at 4.

[27]*See* note 2, *supra*.

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.] 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*. . . . The Senate Report cites to *Johnson* as well. . . ." *Hensley,* 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[28] These twelve factors are:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment by the attorney due to acceptance of the case. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The 'undesirability' of the case. . . . (11) The nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in ini-

[28] *See Barber*, 577 F.2d at 226:

> We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.

tially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[29] *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir.) (referencing *Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986)), *cert. denied*, 116 S. Ct. 535 (1995).

Employing the twelve *Johnson* factors, Respondent's Application is a reasonable request for attorney's fees. For *Horne II*, counsel billed Respondent 4.2 hours for drafting and finalizing Respondent's Answer, Affirmative Defenses, and Notice of Appearance, and for conducting related reviews and telephone calls. Application, Exhibit, at 4. The time claimed is reasonable.

Counsel worked at a reduced rate for Respondent and discounted the total billings charged from $851 to $630. The discounted hourly rate of $150 is reasonable and customary for the work of both Carl S. Silverman, a partner, and Steven B. Schwartzman, an associate, at the Towson, Maryland, office of Hodes, Ulman, Pessin & Katz, P.A..[30] The discounted hourly rate of $150 is reasonable, especially in light of recent OCAHO case law in which ALJs awarded attorney's fees ranging from $75 per hour to $275 per hour: *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75 with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding

[29]"In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995).

[30]Silverman customarily bills at an hourly rate of $220, and Schwartzman customarily bills at an hourly rate of $170. Towson, MD, is a suburb of Baltimore, MD.

"legal fees" of $51,530.34 in the Austin, TX, market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[31]

Finally, the lodestar figure of $630 for *Horne II* is reasonable because it is the product of 4.2 hours, a reasonable number of hours expended by counsel on the proceedings, multiplied by $150, a reasonable hourly rate for counsel.

III. *Conclusion*

Fee shifting is unavailable as to *Horne I* because the voluntary dismissal precludes the conclusion that the Complaint lacks legal or factual foundation. As to *Horne II*, I conclude that Respondent is the prevailing party and that the Complaint is without reasonable foundation in law and fact.

Complainant is directed to pay to Respondent the amount of $630 for attorney's fees.

SO ORDERED.

Dated and entered this 20th day of August, 1997.

MARVIN H. MORSE
Administrative Law Judge

[31]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .").

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

EARL RUSSELL HORNE, JR., Complainant	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 96B00106
TOWN OF HAMPSTEAD, Respondent	)	Exhibit 16

DECISION AND ORDER DISMISSING COMPLAINT
(January 17, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: John B. Kotmair, Jr., on behalf of Complainant.
Thomas J. Gisriel, and Steven B. Schwartzman, Esq.
on behalf of Respondent.

I. Procedural History

On September 11, 1996, a Complaint was filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of Earl R. Horne, Jr. (Horne or Complainant), against the Town of Hampstead, Maryland (Hampstead). The Complaint alleges that Hampstead discriminated against Horne, a United States citizen, in violation of 8 U.S.C. § 1324b, and that in October 1988 he "applied for or worked" for Hampstead as a "Town Police Officer." Horne does not allege that he was denied employment or that he was discharged from employment.

The allegations in this case essentially reiterate those in Horne v. Town of Hampstead, OCAHO Case No. 96B00050, a case dismissed without prejudice by Order dated August 9, 1996 upon request of Horne, the Complainant in both dockets. 6 OCAHO 884 (1996). Horne's request for dismissal without prejudice was granted in accord with Fed. R. Civ. P. 41(a)(1)(i) prior to the filing of an Answer to the Complaint. Because the history of that proceeding is detailed in that Order, it is sufficient to incorporate it by reference, referring to it below to the extent necessary to disposition of the present case.

Horne initiated Docket No. 96B00050 by filing a charge in the Office of Special Counsel for

Immigration-Related Unfair Employment Practices (OSC) which cited, as Hampstead's unfair employment practice, an October 15, 1994 letter which "finally refused to honor" Horne's "statement of Citizenship . . . wherein he claimed not to be subject to the withholding of income taxes since he is a citizen of the United States." Charge dated 12/15/95 at ¶ 9.

The two Complaints, consisting of entries on the OCAHO complaint format, are substantially similar but differ in certain material respects, notably that in the earlier docket, at ¶¶ 8 and 9 of his OCAHO complaint, Horne alleged national origin and citizenship status discrimination while specifying only citizenship status discrimination in the new Complaint.

In both iterations, however, the inquiry at ¶ 13, "I was knowingly and intentionally not hired" is answered in the negative, and the entry at ¶ 13a is blank:

> I was not hired because of my:
> ____ citizenship status
> ____ national origin
> ____ citizenship status AND national origin.

In both filings also,

- at ¶ 13, where Complainant is asked whether he "was knowingly and intentionally not hired," the choice between "yes" and "no" is answered in the negative;

- at ¶ 14, where Complainant is asked whether he "was knowingly and intentionally fired," the choice between "yes" and "no" is answered in the negative;

- at ¶ 16, where Complainant is asked whether Hampstead "refused to accept the documents that I presented to show I can work in the United States," the choice between "yes" and "no" is answered in the positive;

- at ¶ 17, where Complainant is asked whether Hampstead "asked me for too many or wrong documents than required to show that I am authorized to work in the United States," the choice between "yes" and "no" is answered in the negative;

- at ¶ 18, the date entered for having "filed a charge with [OSC]" is December 16, 1995;

- at ¶ 19, Complainant responds affirmatively to the question whether OSC sent

him a letter advising that he could file a complaint in OCAHO;

- at ¶¶ 20 and 21, Complainant asserts a demand for back pay from

"10 / 6 / 94
Day Month Year."

In both complaints, Horne alleges document abuse, contending in the new case at ¶ 16 that Hampstead "refused to accept the documents that I presented to show I can work in the United States." In response to the inquiry at ¶ 16 as to Hampstead's refusal "to accept the following documents," i.e., a "Statement of citizenship" and an "Affidavit of Constructive Notice," the Complaint, varying slightly from the claim in the prior case, recites that,

> Both documents assert Constitutional Rights of a U.S. citizen as secured by statute, so that Citizens are not Treated as Aliens for any employment practice so that the U. S. Citizen is given 100% of his payment for his labor unencumbered by any Congressional Act.

Horne's Complaint is signed in his stead by John Kotmair, Jr. (Kotmair) under date of September 5, 1996 pursuant to an "attached Power of Attorney," by which Horne gives Kotmair "in his position of Director of National Workers Rights Committee or any of his designees," permission to take certain actions, including representation before "the [OSC,] . . . OCAHO, and in any proceeding before an Administrative Law Judge in OCAHO." The Complaint is accompanied also by a letter of transmittal from Kotmair to OCAHO dated September 4, 1996.

Referring to the OSC right-to-file an OCAHO complaint letter, there is a bold-print caveat in the OCAHO complaint format at ¶ 19:

"IMPORTANT: YOU MUST ATTACH A COPY OF THIS LETTER"

Consistent with the OCAHO caveat, the Complaint in Docket No. 96B00050 was accompanied by an undated OSC letter addressed to Kotmair, listing the Horne charge among others. OSC stated that it had determined--as to charges by all the named individuals--that "there is no reasonable cause to believe that [the injuries alleged] state a cause of action" of citizenship status or national origin discrimination under 8 U.S.C. § 1324b, or of document abuse under 8 U.S.C. § 1324b(a)(6). As to Horne, OSC's additional conclusion that the charges "were not timely filed," was presumably measured by the interval between the claim in his charge that the unfair practice occurred on October 15, 1994, and December 1995 when he filed his charge, a period in excess of the 180 days prescribed by statute for filing such charge. 8 U.S.C. § 1324b(d)(3). Horne's present filing is more than 90 days after receipt of the OSC determination letter which certainly preceded the May 14, 1996 filing of the complaint in the prior docket. 8 U.S.C. § 1324b(d)(2).

Complainant in the present case did not file a charge with OSC before filing his OCAHO Complaint. Instead, the Kotmair transmittal letter refers to a "re-filing," asserting reliance on withdrawal of the prior complaint without prejudice, and failure by the Department of Justice "to apply the unwritten policy to waive the 180 day filing deadline requirement," since Horne "did originally file his complaint with the EEOC [Equal Employment Opportunity Commission]."

On October 9, 1996, Hampstead filed a timely answer to the Complaint, denying liability and asserting numerous affirmative defenses, including, *inter alia*, failure of Complainant to have first filed the requisite charge with OSC.

II. Analysis and Ruling

This proceeding raises two issues not previously addressed in OCAHO jurisprudence:

(a) assertion in a private action under 8 U.S.C. § 1324b(d)(2) by an individual against an employer with whom there is a continuing employment relationship of a claim of citizenship status discrimination in violation of § 1324b(a)(1), and a claim of overdocumentation (document abuse) in violation of § 1324b(a)(6) which fails to implicate the employment eligibility verification system, and

(b) the filing of a complaint without first filing a charge with OSC under a claim of prior filing in a proceeding which resulted in voluntary dismissal of the complaint without prejudice.

(a) Subject Matter Jurisdiction Is Lacking

A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege injury compels a finding of lack of subject matter jurisdiction. This is so because the power of the administrative law judge is limited to discriminatory failure to hire and to discharge and does not include conditions of employment.

An incumbent employee alleging that an employer refused to accept proffered documents to show work eligibility, who specifies documents which from the face of the complaint are not documents lawfully cognizable by the employment eligibility verification system, while denying that the employer asked for too many or wrong documents to show work authorization, fails also to state a cause of action under 8 U.S.C. § 1324b.

The issue of subject matter jurisdiction "may be raised at any time, even on appeal, even by the court *sua sponte*." Capitol Credit Plan of Tennessee v. Shaffer, 912 F.2d 749, 750 (4th Cir. 1990) (citing Mansfield, Coldwater & Lake Railway Co. v. Swan, 111 U.S. 379, 382 (1884)).

A court's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940). "It is always incumbent upon a federal court to evaluate its jurisdiction *sua sponte*, to ensure that it does not decide controversies beyond its authority." Davis v. Pak, 856 F.2d 648, 650 (4th Cir. 1988) (citing Johnson v. Town of Elizabethtown, 800 F.2d 404, 407 n.2 (4th Cir. 1986)). "[L]ack of subject matter jurisdiction is an issue that requires *sua sponte* consideration when it is seriously in doubt." Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1274 (4th Cir. 1985). Parties cannot confer jurisdiction by consent. McCorkle v. First Pennsylvania Banking & Trust Co., 459 F.2d 243, 244 n.1 (4th Cir. 1972). "If the court perceives the defect, it is obligated to raise the issue *sua sponte*." Id.

The forum cannot expand or constrict the jurisdiction conferred on it by statute. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992). Courts therefore have the authority "to determine whether or not they have jurisdiction to entertain [a] cause and for this purpose to construe and apply the statute under which they are asked to act." Chicot, 308 U.S. at 376.

The Supreme Court has instructed that federal administrative law judges are "functionally comparable" to Article III judges. Butz v. Economou, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the administrative law judge is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures.

(1) Lack of a Citizenship Status Discrimination Cause of Action

Refusal to hire or discharge are the only citizenship status discrimination claims cognizable under § 1324b. The entries, *seriatim*, on Horne's OCAHO complaint format, as well as the tenor of pleadings in the prior case indicate an ongoing employment relationship, as confirmed by the first sentence of Kotmair's September 4, 1996 letter to OCAHO transmitting the Complaint, i.e., the "re-filing of his complaint against his employer the Town of Hampstead." (Emphasis supplied). The employment is confirmed also in Kotmair's letter of September 4, 1996, responding to the August 9, 1996 Order in Docket No. 96B00050. That letter, dated the same day as the transmittal in the new docket, recites that "Mr. Horne is a Police Officer with the Town of Hampstead."[1] Nothing in the complaint or any pleading in either docket suggests that Horne was either refused employment or discharged by Hampstead.

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[1] Compare ¶ 20 of the Complaint where Complainant requests back pay. As a matter of law, however, an employee who continues on the payroll is barred from back pay. See 8 U.S.C. § 1324b(g)(C) ("No order shall require . . . payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.")

It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily rejected or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment. Naginski v. Department of Defense, et al., 6 OCAHO 891 at 29 (1996) (citing Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 11 (1993); Ipina v. Michigan Dept. of Labor, 2 OCAHO 386 (1991); Huang v. Queens Motel, 2 OCAHO 364 at 13 (1991)). Controversies over conditions of employment do not confer § 1324b jurisdiction. Id. Here, although Horne remains employed, claiming neither refusal to hire nor wrongful termination, he seeks recourse over his dispute concerning federal tax withholding and social security law compliance.

This proceeding stems from what can at best be characterized as misapprehension that administrative law judge jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations imposed by federal revenue and employment law. Such philosophical and political dispute is beyond the scope of § 1324b. Complainant is in the wrong forum for the relief he seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit § 1324b jurisdiction that turns on requests by an employer for a social security number or execution of tax withholding forms. Horne's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a Section 274B, codified as 8 U.S.C. § 1324b. Section 102 was enacted as part of comprehensive immigration reform legislation, to accompany Section 101 which, codified as 8 U.S.C. § 1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by § 1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[2]

President Ronald Reagan in his formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this

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[2]See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

result."[3] As understood by the EEOC (Notice No.-915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§ 1324b] only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

See Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994) (as amended in 1990 to add § 1324b(a)(6), § 1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse").

Section 101 of IRCA, 8 U.S.C. § 1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. §§ 1324a(b). As implemented by the Immigration and Naturalization Service, the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS Form I-9 within a specified period of the date of hire. The employee must produce documentation establishing both identity and employment authorization.

The employment verification system established under § 1324a provides a comprehensive scheme which stipulates categories of documents acceptable to establish identity and work authorization. 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v). When an employer hires an individual, the latter must sign an INS Form I-9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. List A documents can be used to establish both work authorization and identity. List B documents establish only identity and List C documents establish only employment eligibility. Employees who opt to use List B and List C documents to complete the I-9 process must submit one of each type of document. Only those

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[3]Statement by President Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1536 (Nov. 10, 1986). See Williamson v. Autorama, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). Accord, Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 14, n. 11 (1993), 1993 WL 557798. [Citations to OCAHO precedents in bound Volume I, (Continued) Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.]

documents listed may be used.

The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the person presenting them. The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions. See Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6).

In sum, § 1324b and the administrative enforcement and adjudication modalities authorized to execute and adjudicate the national policy it evinces are not sufficiently broad to address Complainant's attacks on the tax and the social security systems. Nothing in his pleadings engages the employment eligibility verification system. Where § 1324b has been held to be available to address citizenship status discriminaton without implicating the I-9 process, the aggrieved individual was found to have been treated differently from others, and, unlike Horne, consequently discriminatorily denied employment. United States v. Mesa Airlines, 1 OCAHO 74, at 466, 467 (1989).

The pleadings in this case as understood in light of the filings in the prior docket fail to disclose that Hampstead requested Horne to produce a social security card either in connection with preparation of section 2 of a Form I-9 or at all. See Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 10 (1993). There is nothing in the text or legislative history of IRCA to suggest that an employer is prohibited from asking for a social security number. Lewis v. McDonald's Corp., 2 OCAHO 383, at 5 (1991). Patently, Horne's disagreement over employee obligations is outside the scope of administrative law judges. Horne was neither denied employment, nor discharged. Accordingly, there is no basis on which to posit § 1324b citizenship status discrimination.

(2) The Overdocumentation Cause of Action Is Deficient

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. § 1324b(a)(6). Nothing in the case before me suggests that the tender of documents identified by Complainant at ¶ 16a of his Complaint implicates § 1324a(b) requirements. Patently, the Complaint negates any inference that Complainant was either denied employment or was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. § 1324a. The documents Horne insists should have been accepted by the employer are not acknowledged as acceptable by or embraced by that system. He disclaims at ¶ 17 that the employer asked for wrong or different documents than those required to show work authorization, denying in effect that he was the victim of document abuse in violation of § 1324b(a)(6). The recent holding in

Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. Cf. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892 at 18-21 (1996) and cases cited therein.

Because nothing in the Complaint implicates obligations of an employer under § 1324a(b), I lack subject matter jurisdiction over Horne's § 1324b(a)(6) allegations.

(b) The Complaint Fails To State a Cause of Action Cognizable Under 8 U.S.C. § 1324b

Complainant is in error in thinking himself at liberty to manipulate the adjudication system to avoid in a subsequent proceeding whatever evil he perceived might befall him in the first. Had Complainant wished to attack the OSC conclusion that his charge was untimely, he was obliged to do so in that action. He acted at his peril in failing to pursue his claim there. Having elected to withdraw that Complaint, he has filed the new one without satisfying the jurisdictional condition precedent of first filing a charge with OSC. That is a condition commanded by statute, and implemented by regulation. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2); 28 C.F.R. §§44.301(b), 44.303(a),(b),(c), 68.4. See Report of the Committee on the Judiciary: "The bill [IRCA] prohibits the filing of a complaint with an ALJ unless a charge has been filed with the Special Counsel within 180 days of the alleged discriminatory activity." H.R. Rep. No. 99-682, 99th Cong., 2d Sess., pt. 1, at 71 (1986). Accord Kupferberg v. University of Oklahoma Health Sciences Ctr., 4 OCAHO 689, at 1 (1994), United States v. Auburn Univ., 4 OCAHO 617, at 1 (1994).

"It is within the power of a . . . [federal] court to dismiss a claim sua sponte; federal question jurisdiction requires the presentation of a 'substantial' federal question." Crosby v. Holsinger, 816 F.2d 162, 163 (4th Cir. 1987) (citing Hagans v. Lavine, 415 U.S. 528, 537-38 (1974)). A claim is insubstantial if "'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" Id. (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973) (quoting Ex parte Poresky, 290 U.S. 30, 31 (1933), further quoting Hannis Distilling Co. v. Baltimore, 216 U.S.

285, 288 (1910)).

OCAHO Rules of Practice and Procedures (Rules), codified at 28 C.F.R. § 68.1 et seq., provide that for situations not covered by Part 68, the Rules of Civil Procedure for United States District Courts may be used as a general guideline. Accordingly, it is necessary and appropriate to apply Fed. R. Civ. P. 12(b)(6). Dismissal pursuant to Fed. R. 12(b)(6) is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts to support her allegations." Revene v. Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989) (citing District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979); Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)). It is necessary to resolve the question of jurisdiction where, as here, the Complaint on its face appears not to comport with statutory and regulatory imperatives.

Whether dismissal without prejudice simply revives the former cause of action or requires a new claim subject to conditions precedent as a new cause of action is a question of first impression in OCAHO. It is not, however, a new question for the federal judiciary.

The Order of August 9, 1996 necessarily treated Complainant's "Request for Withdrawal of Complaint" as a voluntary dismissal under Fed. R. Civ. P. 41(a)(1)(i). Complainant seeks to benefit from that disposition, invoking jurisdiction of the administrative law judge by filing a complaint without first filing an OSC charge. We need, therefore, to determine the effect of the voluntary dismissal and to determine whether there is precedent that would allow Complainant to continue his claim from the point where he left off, rather than follow the statutory regime.

"The effect of a voluntary dismissal [under Fed. R. Civ. P. 41(a)(1)(i)] is to render the [dismissed] proceedings a nullity and leave the parties as if the action had never been brought." In re Piper Aircraft Distribution System Antitrust Litigation, 551 F.2d 213, 219 (8th Cir. 1977). A "lawsuit voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a) . . . is treated as if it had never been filed." Beck v. Caterpillar Inc., 50 F.3d 405, 407 (7th Cir. 1995) (emphasis supplied). "[A] voluntary dismissal under Fed. R. Civ. P. 41(a) wipes the slate clean, making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action." Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990).

"[V]oluntary dismissal under Rule 41(a) does not toll the running of the federal statute of limitations." Id. (citing Adams v. Lever Bros. Co., 874 F.2d 393 (7th Cir. 1989)). "If a plaintiff voluntarily dismisses an action without prejudice, it is considered that the suit had never been filed. For purposes of the statute of limitations, the plaintiff receives no credit or tolling for the time that elapsed during the pendency of the original suit. Furthermore, a court may not reinstate a suit after a voluntary dismissal if the statute of limitations has run out in the interim." Ford v. Sharp, 758 F.2d 1018, 1023-24 (5th Cir. 1985).

I am unaware of any authority to the effect that a party obtaining voluntary dismissal may refile

from the point where the prior case left off.

Section 1324b imposes a condition precedent of filing a charge with OSC before seeking review by an administrative law judge. 8 U.S.C. §§ 1324b(b)(1), 1324b(d)(2). Complainant failed to comply with 8 U.S.C. § 1324b(d) and implementing regulations. Whatever the reason the statutory and regulatory imperatives were not followed, Complainant can obtain no benefits in this forum of limited jurisdiction. Failure *in this case* to satisfy the condition precedent of filing a charge with OSC compels rejection of the complaint because the administrative law judge lacks subject matter jurisdiction.

The requirement that a complainant comply with statutory and regulatory conditions precedent to suit is not satisfied by taking initial administrative steps and then abandoning the process. "Exhaustion of administrative relief before resorting to the courts does not require mere initiation of prescribed administrative procedures; they must be pursued to their conclusion." Mackay v. United States Postal Service, 607 F. Supp. 271, 276 (E.D. Pa. 1985). This is also true of a complainant who abandons his claim before an agency has reached a determination. "To withdraw is to abandon one's claim, to fail to exhaust one's remedies. Impatience with the agency does not justify immediate resort to the courts." Rivera v. United States Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987), cert. denied, Rivera v. Frank, 486 U.S. 1009 (1988), reh'g denied, 487 U.S. 1228 (1988).

A complainant is obliged to follow statutory procedures to the letter of the law. McCarthy v. Madigan, 503 U.S. 140, 144 (1992); Brady Development Co., Inc. v. Resolution Trust Corp., 14 F.3d 998, 1006 (4th Cir. 1994) (statutory administrative scheme unwaivable jurisdictional prerequisite to judicial review); In re Lilly, 76 F.3d 568, 573 (4th Cir. 1996) (statutory language dispositive when determining if administrative remedies have been exhausted).

OCAHO subject matter jurisdiction is lacking where the private action is filed more than 90 days after receipt of the OSC determination letter. 8 U.S.C. § 1324b(d)(2). Complainant did not file a new charge with OSC. Having elected to short cut the mandatory administrative procedure, he therefore could not and did not attach to his new complaint the requisite OSC letter authorizing a private action to initiate this proceeding. It is certain from the tenor of his representative's transmittal and from the text of the new Complaint that this is the same claim as the one he voluntarily dismissed. Having sought and obtained withdrawal of Docket No. 96B00050, Complainant cannot proceed now as though the prior case is effective as the administrative predicate of the second, without confronting the barrier that he is out of time by waiting more than 90 days from receipt of the OSC letter filed in the prior docket. A lawsuit filed within the limitations period, later dismissed pursuant to Fed. R. Civ. P. 41(a), is treated as if never filed. Beck v. Caterpillar, 50 F.3d at 407. "Voluntary dismissal under Fed. R. Civ. P. 41(a) does not toll the running of the federal statute of limitations." Id. (citing Adams v. Lever Bros. Co., 874 F.2d 393 (7th Cir. 1989)).

Equitable Tolling Inapplicable

Equitable tolling is a judicial doctrine, not (as Complainant's representative contends) an unwritten policy. Zipes v. Trans World Airlines, 455 U.S. 385, 393, 395, 398 (1982). Equitable tolling is available where the putative victim of discrimination asserted rights in the wrong forum, was actively misled by the employer, or was prevented in some extraordinary way from exercising his or her rights. Udala v. New York State Dep't of Education, 4 OCAHO 633 (1994); United States v. Weld County School Dist., 2 OCAHO 326, at 17 (1991). Federal courts typically extend equitable relief only sparingly, and not to protect against excusable neglect. Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990); Caspi v. Trigild Corp, 6 OCAHO 838, at 6 (1996).

The attempt in the transmittal letter to obtain equitable tolling of the 90 day period cannot succeed. Even were Complainant appearing pro se, he is ineligible for such relief because failure to comply with the 90 day period of limitations is his fault--not that of the employer or OSC. Moreover, as Horne has been represented at all times relevant, he does not fit within the class of individuals to whom such equitable assistance can be provided.

Complainant refers to the Justice Department's purportedly "unwritten policy" of equitable tolling as a cure for his failure to file his complaint with OSC within the required 180 day statutory period. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 68.4(a). In light of sole reliance on the OSC determination letter filed in Docket No. 96B00050 which obviously preceded the filing of the present complaint by more than the statutory 90 day period in which to file the second complaint, he implicitly relies on equitable tolling in that respect as well. § 1324b(d)(2); 28 C.F.R. § 68.4(c).

The 180-day charge filing deadline has been held to be one of limitations, and not jurisdiction, and, therefore, susceptible to equitable tolling of the period of limitations. Udala, 4 OCAHO 633 (citing United States v. Mesa Airlines, 1 OCAHO 74, 461 at 482-84 (1989)). See also Lundy v. OOCL (USA) Inc., 1 OCAHO 215, 1438, at 1445-46 (1990); Ortiz v. Moll-Tex Broadcasting Co., 3 OCAHO 440, at 4 (1992); Halim v. Accu-Labs Research, Inc., 3 OCAHO 474 at 12-15 (1992).

OCAHO caselaw suggests also that the 90 day filing deadline is not jurisdictional, and, therefore, subject to equitable tolling. Briceno-Briceno v. Farmco Farms, 4 OCAHO 629, at 15-16 (1994); Grodzki v. OOCL (USA) Inc., 1 OCAHO 295, at 1951-56 (1991); Williams v. Deloitte & Touche, 1 OCAHO 258, at 1679 (1990).

Applying general principles to the present case, however, equitable tolling is not available to Complainant to relieve him from the 180 day filing deadline. First, Complainant's voluntary dismissal "wiped the slate clean," with no opportunity to short circuit the statutory regimen. I am unaware of any principle which entitles Complainant, having failed to file the mandatory OSC charge for his second complaint, to revive the original OSC charge from his voluntarily dismissed first complaint, much less to equitable relief. Nor is Complainant entitled to relief from failure to file his OCAHO complaint within 90 days after receipt of the OSC determination letter. He was not misled to his detriment with respect to a § 1324b cause of action by OSC or by the employer. Absent a credible basis for equitable tolling,

even a one day delay in filing can defeat administrative law judge jurisdiction. Grodzki, 1 OCAHO 295 at 1951-56 (1991).

Second, and of controlling significance, consonant with federal court caselaw, pertinent OCAHO precedent defeats equitable tolling where, as here, the individual seeking relief is represented. In Lundy v. OOCL (USA) Inc., 1 OCAHO 215 (1990), the complainant retained counsel at the time of his OSC charge, and was represented on his subsequent OCAHO complaint. Lundy rejected equitable tolling as an excuse for failure to file within the statutory time period "where counsel is available to a party." Id. at 1448 (citations omitted). See also Morse v. Daily Press, Inc., 826 F.2d 1351, 1353 (4th Cir. 1987), cert. denied, 108 U.S. 455 (1987) ("Retaining an attorney extinguishes the equitable reasons for tolling . . . "); Salcido v. New-Way Pork Co., 3 OCAHO 425, at 13-14 (1992).

Assuming *arguendo* that Horne might otherwise successfully assert equitable tolling, the power of attorney by which Horne has authorized Kotmair to serve as his representative extinguishes that claim. A complainant must accept the consequences as well as the benefits of representation.

III. Conclusion

(a) Disposition

Complainant's § 1324b claims are animated by a pervasive delusion that creation of new causes of action to achieve the specific, finite policy goal of a discrimination-free workplace can resolve citizen grievances beyond the scope of that goal. Accordingly, as more fully explained above, the Complaint is dismissed with prejudice for lack of subject matter jurisdiction and for failure to state a cause of action on which relief can be granted. All requests not disposed of in this Decision and Order are denied. Accordingly, the Complaint is dismissed. 8 U.S.C. § 1324b(g)(3).

Because my August 9, 1996 Order in the prior case offered certain suggestions and caveats, Horne's representative, Kotmair, asks in effect that I be recused from this case. It is sufficient for me to note in response that neither OCAHO, having assigned this case to me, nor I having retained it, agree with Horne's representative.

(b) Post-Decision Procedure

Hampstead asks in its Answer for an award of attorneys' fees. Fee shifting is authorized by 8 U.S.C. § 1324b(j)(4). I am prepared to consider that request. Compare Williamson v. Autorama, 1 OCAHO 174, at 1172-1175 (1990). Hampstead may file an appropriate motion explaining the rationale for such award together with a sufficient showing on which to premise an accurate and just calculation of attorneys' fees. Hampstead will be expected to allocate the award requested between

this proceeding and the work performed in conjunction with Docket No. 96B00050. Hampstead's filing, if any, is due not later than Tuesday, April 1, 1997. A response by Complainant will be timely if filed not later than Thursday, May 1, 1997.

(c) Deadlines

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 17th day of January, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Dismissing Complaint were mailed postage prepaid this 17th day of January, 1997, addressed as follows:

Complainant's Representative

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National Worker's Rights Committee
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 13, 1997

SUSAN K. HORST Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
JUNEAU SCHOOL DISTRICT, CITY AND BOROUGH OF JUNEAU Respondent.	)	OCAHO Case No. 97B00123

Exhibit 17

FINAL DECISION AND ORDER WITH
SCHEDULE FOR BRIEFING ON ATTORNEY'S FEES

PROCEDURAL HISTORY

This is an action alleging unfair immigration-related employment practices in which Susan K. Horst is the complainant and Juneau School District, City and Borough of Juneau is the respondent. Horst alleged that Juneau School District engaged in conduct prohibited by the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (1994) (INA) when it refused to accept the documents that she presented to show she can work in the United States. The complaint is signed by John B. Kotmair, Jr., Director of the National Worker's Rights Committee.

Horst's complaint alleges that she is a United States citizen and a teacher, employed by the Respondent since August 1978. She seeks back pay from July 1995. The significance of that date is unelaborated. The complaint alleges that the school district refused to accept her Statement of Citizenship and Affidavit of Constructive Notice, but denies that the employer asked for too many or wrong documents to show she was authorized to work in the United States. The paragraph of the form complaint reading "The Business/Employer refused to accept the documents that I presented to show I can work in the United States" is checked "yes" but the words "to show I can work in the United States" are crossed out.

Accompanying the complaint is a nine-page letter dated January 29, 1997 to the Office of the Special Counsel for Immigration-Related Unfair Employment Practices from John B. Kotmair, Jr., Director of the National Worker's Rights Committee with attachments.[1] The thrust of the letter is an explication of the views of the National Worker's Rights Committee that United

[1] Among the attachments is a letter from OSC dated April 2, 1997, stating that the Horst charge raised no issue within OSC's jurisdiction and authorizing the filing of a complaint within 90 days thereafter with the Office of the Chief Administrative Hearing Officer.

States citizens are not obliged to have money deducted from their wages for taxes and are free to decline participation in the Social Security system.

On July 22, 1997, respondent filed an answer and a motion to dismiss. The answer admits that complainant is a United States citizen and has been employed by respondent as a teacher since 1978. It admits withholding from complainant's wages and refusing to honor the subject documents for the purpose of creating an exemption from withholding. It denies that complainant's right to work in the United States is in issue. It also requests reasonable costs and attorney's fees in defending against Horst's claims. The motion to dismiss asserts that no claim is stated because the complaint alleges no acts prohibited by § 1324b and because the school district acted pursuant to the requirements of federal law in withholding for taxes.

THE APPLICABLE STATUTORY PROVISION

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as prohibitions against certain unfair immigration-related employment practices. 8 U.S.C. § 1324b. Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer is obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a Form I-9 for each new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6), provides that certain documentary practices may be treated as discriminatory hiring practices.

> For purposes of paragraph (1),[2] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[3] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§ 274a.2(b)(1)(v)(A), (B), and (C). List A

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[2] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[3] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS Forms N-550 or N-570, I-151 or I-551, I-688, I-688A, I-688B, I-327, I-571, and N-560 or N-561, a Certificate of United States Citizenship.[4] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, various State Department Forms including FS-545 and DS-1350, and INS Forms including I-197 and I-179, or unexpired employment authorization documents issued by INS. When a document from the lists set out in § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair hiring practice under this provision if: 1) a document from List A, or one document each from both List B and List C, are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

Regulations implementing the employment eligibility verification system make clear that the statute was to have prospective application only. Employers are required to examine documents and to complete Form I-9 only for individuals hired after November 6, 1986 who continued to be employed after May 31, 1987. 8 C.F.R. § 274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. § 274a.7.

STANDARDS FOR MOTION TO DISMISS

A motion to dismiss for failure to state a claim is a disfavored motion. The usual caution is that dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Cf. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Nevertheless, a party can plead him or herself out of court by pleading facts showing the absence of a valid claim. Tregenza v. Great Am. Communications Co., 12 F.3d 717, 718 (7th Cir. 1993), cert. denied, 511 U.S. 1085, (1994), Early v. Bankers Life & Cas. Co., 959 F.2d 75, 79 (7th Cir. 1992). While well pleaded factual allegations and inferences reasonably drawn from those facts will be taken as true in ruling on a motion to dismiss, there is no obligation to ignore facts in the complaint which

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[4] The source of Horst's "Statement of Citizenship" is unclear. The form is not part of the record and there is no assertion that it is related in any way to INS form N-560 or N-561 Certificate of United States Citizenship. The forms issued by INS do not purport to address issues of federal taxation.

undermine the pleader's claim. R.J.R. Servs., Inc. v. Aetna Cas. and Sur. Co., 895 F.2d 279, 281 (7th Cir. 1989). Neither is there any obligation to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Papasan v. Allain, 478 U.S. 265, 286 (1986).

As is by now well established in OCAHO jurisprudence, the activities prohibited by 8 U.S.C. § 1324b include discrimination in hiring, firing, recruitment, referral for a fee, retaliation for engaging in protected activity, and document abuse. 8 U.S.C. §§ 1324b(a)(1), (a)(5), and (a)(6). Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 9 (1997) (citing Smiley v. City of Philadelphia, 7 OCAHO 925, at 18 (1997)); Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994). Other terms and conditions of employment such as wages, promotions, employee benefits, and the like are beyond the reach of the INA. See, Lareau v. USAir, Inc., 7 OCAHO 932, at 11 (1997) (citing cases). Thus a long term incumbent employee's complaints about the terms and conditions of his or her employment fail to state a claim under § 1324b. Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 3-4, 9 (1997), Horne v. Hampstead, 6 OCAHO 906, at 5-6 (1997). Similarly beyond the reach of the INA is a complaint which does not set forth either direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory. LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1103 (6th Cir. 1995).

DISCUSSION

Horst is a long term employee of the Juneau School District and alleges no facts involving hiring, recruitment, referral for a fee, or retaliation for engaging in protected activity. She does not allege that the subject documents were tendered "to show I can work in the United States". There seems to be no factual dispute between the parties. The school district indeed declined to honor her tendered documents requesting it to cease withholding sums from Horst's wages for federal taxes and social security contributions. Whether these facts state a claim justiciable in this forum is purely a question of law.

That complainant's assertions state no claim under 8 U.S.C. § 1324b is well established in OCAHO jurisprudence. Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997), Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Public Service Electric & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. A.K. Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. Nynex, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997);

Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[5] 6 OCAHO 892 (1996), appeal filed No. 96-3688 (3d Cir. 1996).

The Ninth Circuit has likewise long and repeatedly held that an employer is not liable to an employee for complying with a legal duty to withhold for taxes, Bright v. Bechtel Petroleum, Inc., 780 F.2d 766 (9th Cir. 1986) and cases cited therein. To argue otherwise is patently frivolous.

The complaint must be dismissed. Ordinarily the dismissal of a claim for failure to meet minimal pleading requirements should be accompanied by a grant of leave to file an amended complaint to cure the defect. Simmons v. Abruzzo, 49 F.3d 83, 86-87 (2d. Cir. 1995), Bransom v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (citing Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)). Where, as here, it appears to a certainty that amendment would be futile, there is no reason to permit such filing. Cf. Acito v. IMCERA Group, Inc., 47 F.3d 47, 55 (2d Cir. 1995).

The complaint is accordingly dismissed. Respondent shall have until September 7 1997 to file a detailed submission of its costs and attorney's fees, with supporting documentation. Complainant shall file her response, if any, on or before September 30, 1997.

SO ORDERED.

Dated and entered this 13th day of August, 1997.

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.

[5] While neither Kotmair nor the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 1997, I have served copies of the foregoing Final Decision and Order with Schedule for Briefing on Attorney's Fees on the following persons at the addresses indicated.

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

JANET L. HUTCHINSON, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 97B00083
END STAGE RENAL DISEASE NETWORK OF FLORIDA INC.	)	

Exhibit 18

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
(June 26, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., for Complainant**
Mark A. Hanley, Esq., for Respondent

I. DISCUSSION

Title 8 U.S.C. § 1324b, which prohibits certain discrimination in the workplace, was enacted as part of comprehensive legislation in 1986 as the Immigration Reform and Control Act (IRCA). IRCA prohibits national origin discrimination in hiring and firing where there are four to fourteen employees, prohibits citizenship status discrimination where there are four or more employees, and, as amended, prohibits employers from requesting more or different documents than are tendered by a new employee in compliance with the employment eligibility verification regimen of 8 U.S.C. § 1324a. As amended, IRCA also prohibits retaliation, intimidation, threat or coercion occasioned by resort to § 1324b relief.

By her Complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on April 2, 1997, Janet L. Hutchinson (Hutchinson or Complainant) claims that End Stage Renal Disease Network of Florida, Inc. (End Stage or Respondent), violated § 1324b by refusing to accept her improvised "statement of citizenship" and "affidavit of constructive notice" presented to avoid tax

withholding.[1] Hutchinson is a United States citizen, employed since July, 1987, by End Stage. Hutchinson's Complaint affirmatively rejects any claims of national origin discrimination or retaliation. Hutchinson asserts that End Stage "refused to accept" her "statement of citizenship" and "affidavit of constructive notice." However, she deleted by pen that portion of the OCAHO pre-printed complaint format that provides the opportunity to allege violation of § 1324b(a)(6), *i.e.*, that the rejected documents were presented "to show I can work in the United States." Complaint, at ¶ 16. End Stage denies liability in its Answer to the Complaint and, by its Motion to Dismiss, contends that the Complaint fails to state a cause of action upon which relief can be granted.

This Complaint is a variant of a number of substantially identical cases asserting administrative law judge (ALJ) jurisdiction under § 1324b. Every such case decided to date resulted in dismissal for failure to state a claim on which § 1324b relief could be granted and/or for lack of subject matter jurisdiction.[2] However characterized by the complainants, these cases turn exclusively on the refusal by employers to participate in schemes to circumvent provisions of the Internal Revenue Code requiring employers to withhold federal income taxes and social security contributions (FICA) from employees'

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[1] Complainant's rationale for her claim to be free from withholding is explained more fully in her charge against End Stage filed with the Special Counsel for Immigration Related Unfair Employment Practices, the agency which receives § 1324b filings in the first instance. 8 U.S.C. § 1324b(b)(1).

[2] *See Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 927 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4-5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97-70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr., as Director, National Worker's Rights Committee, represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Hutchinson v. End Stage Renal Disease Network, Inc.* is of this ilk.

wages.[3] No less than the others, Hutchinson's attack on End Stage turns on the specious and discredited rationale that only aliens are subject to withholding. However much her representative, John B. Kotmair, Jr. (Kotmair), may once have given credence to that oft-repeated theory, in the face of unanimous precedent against him, he surely can no longer seriously assert its viability. Moreover, the Hutchinson Complaint explicitly denies hiring or firing discrimination, asserting only citizenship status discrimination and document abuse for failure to honor the "statement of citizenship" and "affidavit of constructive notice." In contrast, 8 U.S.C. § 1324b(a)(6) limits document abuse to demands arising out of the employment eligibility verification regimen of § 1324a(b), which the Complaint literally, by pen, exonerates. Hutchinson's Complaint affirmatively denies that End Stage rejected documents tendered "for purposes of satisfying the requirements of section 1324a(b)." By turning exclusively on documents tendered in compliance with § 1324a(b), subsection 1324b(a)(6) in any case excludes the home-grown documents presented here. The citizenship status claim depends entirely on the discredited proposition that only non-citizens are subject to withholding. Complainant's sole claim is that her documents were given no effect by the employer. That claim lacks § 1324b standing as demonstrated by the cases cited at footnote 2. Accordingly, I find and conclude that no cause of action survives this analysis.

In light of footnote 2 precedents, eight of which issued before the April 2, 1997 filing of Hutchinson's Complaint, this filing is a frivolous and irresponsible action by Complainant's representative.[4] In any ordered system of justice, there comes a time when the public interest compels the swift rejection of claims so obviously lacking in credibility because repeatedly found to be outside the forum's jurisdiction. Judicial economy and efficiency demand no less.

So clearly does Hutchinson's case lack 8 U.S.C. § 1324b viability that there is no need to delay the inevitable outcome. This rapid disposition provides an early opportunity, if she so elects, to seek appellate review.

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[3] 26 U.S.C. §§ 3102(a) (requiring employer to deduct FICA from employees' wages), 3102(b) (imposing liability on employer who fails to withhold FICA taxes from employees' wages), 3402(a) (requiring employer to withhold income taxes from employees' wages), and 3403 (codifying employer liability for failure to withhold income taxes from employees' wages). *See* "The Anti-Injunction Act," 26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . .").

[4] *See Farris v. Lanier Bus. Prods., Inc.*, 626 F. Supp. 1227, 1228 (N.D. Ga. 1986) (relying on *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), where the court granted fees and costs to an employer as a result of the frivolous, unreasonable and litigious actions of its former employee, and stated, "Plaintiff's propensity for meritless litigation reflects poorly upon his good faith in filing the present lawsuit.") (citation omitted), *aff'd*, 806 F.2d 1069 (11th Cir. 1986) (unpublished table decision). Although the *Farris* court addressed the actions of the party, not the representative, the text is particularly apt in the instant case. *See also*, *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

II. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings of the parties. All requests not disposed of in this final decision and order are denied.

Respondent's motion to dismiss is granted. The Complaint, having no arguable basis in fact or law, is dismissed because the ALJ lacks subject matter jurisdiction, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. § 1324b(g)(3).

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding that the merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 26th day of June, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order Granting Respondent's Motion to Dismiss were mailed first class, this 26th day of June, 1997 addressed as follows:

Complainant's Representative

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

December 10, 1997

EBBON JOHNSON Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO CASE NO. 97B00149
FLORIDA POWER CORPORATION Respondent.	)	

Exhibit 19

FINAL DECISION AND ORDER OF DISMISSAL

PROCEDURAL HISTORY

On August 14, 1997, John B. Kotmair, Jr., Director of the National Worker's Rights Committee, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of Ebbon Johnson of Sorrento, Florida. The complaint asserted that in May 1973 (sic) Johnson applied for work as a lineman for respondent Florida Power Corporation (Florida Power or FPC). Boxes on the complaint form were checked indicating both that the employer "refused to accept the documents I presented to show I can work in the United States" and that the complainant had been discriminated against because of his citizenship status. The documents respondent allegedly refused to accept were identified as a "Statement of Citizenship" and an "Affidavit of Constructive Notice." Attached to the complaint were copies of the charge Johnson filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) and the letter dated June 13, 1997 from OSC stating that Kotmair may[1] have the right to file a complaint on behalf of his client within 90 days from the receipt of this determination letter. He did so. The complaint seeks back pay from June 1994. A companion charge alleging national origin discrimination was evidently also filed with the EEOC.

Florida Power filed an answer on September 17, 1997 in accordance with applicable rules, [2]

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[1] The term "may" is evidently used because OSC had previously dismissed the charge without issuing a notification letter; the instant letter was issued in response to an inquiry about the status of the charge. For purposes of this order I have assumed without deciding that OSC may issue such a letter nunc pro tunc without reopening the charge.

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

together with a Motion to Dismiss and numerous attachments.[3] The attachments demonstrate that Johnson was hired by Florida Power in February 1973 as a lineman and that he has evidently been continuously employed there since that time. Johnson claimed he "renounced" his social security number on February 11, 1994 and in June 1994 wrote Florida Power alleging that he was not subject to withholding for taxes because "Congress lacks the Constitutional authority to compel membership in social security" and because "the Internal Revenue Code under Title 26 has never been passed into positive law."

On October 15, 1997, Johnson moved to strike the answer on the ground that it was not accompanied by a notice of appearance as required by 28 C.F.R. § 68.33(b)(5). On October 30, 1997 a response to this motion was filed, together with the notice of appearance of Rodney E. Gaddy, noting also that Kendall Crowder would serve as co-counsel for Florida Power. For reasons stated herein, the motion to strike the answer is denied and the motion to dismiss the complaint is granted.

THE APPLICABLE STATUTORY PROVISIONS

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as a prohibition against certain unfair immigration-related employment practices based on the national origin or citizenship status of an applicant for employment. 8 U.S.C. § 1324b. In 1986 Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer has since then been obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a covered worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a form I-9 for each such new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6), was added to the INA by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents, and to ensure that the choice among the documents on the approved list would be the employee's choice, not the employer's. It provides that certain documentary practices, informally referred to as "document abuse," may be treated as discriminatory hiring

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[3] Exhibits filed with the motion include 1) a letter dated June 27, 1994 from Ebbon Johnson to whom it may concern, 2) a one-page document captioned "Statement of Citizenship," 3) a letter dated July 1, 1994 from Rodney Gaddy of Florida Power to Ebbon Johnson, 4) a letter dated February 14, 1995 from the Internal Revenue Service to Florida Power, 5) a letter dated July 6, 1994 from Ebbon Johnson to whom it may concern, and 6) a two-page document captioned "Affidavit of Constructive Notice."

practices.[4]

> For purposes of paragraph (1),[5] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[6] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§ 274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS Forms N-560 or N-561, Certificate of United States Citizenship.[7] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, and various State Department or INS Forms. When a document from the lists set out in § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document for that purpose if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair immigration-related employment practice under this provision if: 1) a document from List A or one document each from both List B and List C are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility

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[4] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 421, 110 Stat. 3009, 3670 (1996), made significant changes in this provision with respect to events occurring on or after September 30, 1996. Because the events in question here occurred in 1995, IIRIRA does not apply.

[5] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[6] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

[7] IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105-54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction.

verification system.

Regulations implementing the employment eligibility verification system make abundantly clear that the statute was meant to have prospective application only. Employers are required to examine documents and to complete Form I-9 only for individuals hired after November 6, 1986 who then continued to be employed after May 31, 1987. 8 C.F.R. § 274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. § 274a.7.

DISCUSSION

A. Complainant's Motion to Strike

Complainant's Motion to Strike is lacking in justification. While it is true that 28 C.F.R. § 68.33(b)(5) requires each attorney to file a notice of appearance, nothing in that rule or any other suggests either that counsel's notice of appearance must be filed contemporaneously with the answer or that an answer without a contemporaneous notice accompanying it is subject to striking. Where, as here, no significant development has occurred in the case, little time has passed, and no prejudice is asserted or shown, Johnson's request can only be seen as an attempt to exalt form over substance. Consequently it must be rejected.

B. Respondent's Motion to Dismiss

Construing the allegations most favorably to Johnson, as I must, and taking the factual allegations as true, the complaint nevertheless fails to raise any issues cognizable under 8 U.S.C. § 1324b because the acts complained of are not immigration-related employment practices at all. Thus, it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations of the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

First, it is evident that Florida Power had no occasion to verify Johnson's eligibility to work in the United States pursuant to the INA because Johnson was hired at Florida Power prior to November 6, 1986 and continued to be employed there until the present. It is also evident, moreover, that the gravamen of Johnson's complaint is a challenge to Florida Power's lawful withholding of sums from his wages for federal income and social security taxes, and that no issues whatever are raised respecting the employment eligibility verification process. Notwithstanding Johnson's allegation that FPC refused to accept the documents he presented to show he could work in the United States, the documents he refers to are not documents which evidence anything of the sort. As the text of Johnson's charge also makes clear, the subject documents were tendered for the purpose of persuading Florida Power to cease withholding sums

from Johnson's wages for federal income and FICA taxes. His "Statement of Citizenship," attached as Exhibit 2 to respondent's Motion to Dismiss states:

I am a citizen of the United States of America by birth.

I was born in: Ithaca, New York, on February 26, 1939

This statement is provided in duplicate to conform to the provisions of internal revenue regulations which will relieve a withholding agent of any duty to withhold money from payments to a United States citizen and/or resident. The withholding agent is also relieved of any liability, pursuant to the regulations, because money is not withheld.

"Section 1.1441-5 Claiming to be not subject to withholding.

"(a) Individuals. For purposes of Chapter 3 of the code, an individual's written statement that he or she is a citizen or resident of the United States may be relied upon by the payor of the income as proof that such individual is a citizen or resident of the United States. This statement shall be furnished to the withholding agent in duplicate."

The duplicate copy of this statement of citizenship, along with a letter of transmittal, must be sent only to Internal Revenue Service Center, Philadelphia, PA 19255, by the withholding agent, pursuant to 26 Code of Federal Regulations section 1.1441-5.

His "Affidavit of Constructive Notice," attached to the motion as Exhibit 6, alleges:

I, Ebbon C. Johnson of 1061 St. Croix Avenue, Apopka, Florida 32703, do hereby declare for the purposes of clarifying my position on possession of a social security number, and placing all concerned on constructive notice, that I do not recognize any connection between myself and a social security number, and do not have a social security number to disclose for the following reasons:

1. The Treasury Secretary has been duly notified of the nullification of my social security file account on 2/11/94 and has not objected to the severing of my association with this account number;

2. I do not meet the qualifications of a person required by law to have a social security number under Title 42 section 405(B);

3. Knowingly using an incorrect social security number may substantiate execution of false or fraudulent Internal Revenue documents, under penalties of perjury, which might impose penalties and backup withholding under § 3406(a)(1)(B); and;

4. Not having a social security number places me outside of the legal definition of "employee" and I do not earn "wages", per 20 CFR §§ 404.1005 and 404.1041 respectively, and

   (A) is subject to Title 26, Subtitle C §§ 3121, 3401, and 3402 of the IRC which govern the subjects of the voluntary social security program, and;

   (B) must voluntarily subject themselves, by voluntarily executing a Form W-4, pursuant to 26 CFR § 31.3402(p)-1, authorizing withholding of employment taxes, to withhold employment taxes pursuant to Chapters 21, 23, and 24 of the IRC.

Affiant hereby declares that he is responsible for himself, pays all taxes that he is liable for, and requests that Florida Power Corporation enter "None" in the space provided for the Affiant's social security number, on the all returns, statements, and or other documents used by Florida Power Corporation to declare the amounts reimbursed to the Affiant, for materials and time, while working for Florida Power Corporation.

Affiant further declares that use of a false or fraudulent number is expressly prohibited by law and the fines and penalties for the unauthorized use shall rest fully upon the person(s) entering the number on any record or legal instrument of the IRS or any other agency per the Internal Revenue Code § 6065 **"Verification of Returns"** and § 7207 **"Fraudulent returns, statements, or other documents."** Any use thereof is false and fraudulent, and an infringement and breach of the Affiant's right to privacy.

The above is true, correct, and complete to the best of my knowledge.

Further Affiant saith not.

Even assuming, arguendo, that Johnson presented these documents to Florida Power to show that he could work in the United States, they are plainly not documents acceptable by an employer for that purpose because they are not among the documents set out in 8 U.S.C. § 1324a(b)(1)(B), (C), and (D), 8 C.F.R. § 274a.2(b)(1)(v)(A), (B), and (C). The origin of Johnson's purported

"Statement of Citizenship" is unclear, but examination of the form demonstrates that it is not related in any way to INS form N-560 or N-561 Certificate of United States Citizenship. The forms issued by INS do not purport to address issues of federal taxation. Accordingly Florida Power's refusal to accept Johnson's documents to show he can work in the United States cannot be found to violate § 1324b.

Similarly, Johnson's allegations of citizenship status discrimination state no claim under INA, first because there is no assertion that any other similarly situated employee of differing citizenship was differently treated, and second because an employer's compliance with tax laws of uniform general applicability does not discriminate against any employee to whom such laws apply. Differential treatment is the essence of a discrimination claim. Absent any suggestion that any other employees were treated any differently, no claim of citizenship discrimination has been stated.

However disguised, this is in reality yet another challenge to an employer's compliance with federal income tax withholding laws and regulations. 26 U.S.C. § 3402 et. seq., 28 C.F.R. § 31.3402. The underlying charge is framed in language virtually identical to that in a plethora of similar cases filed in this office. OCAHO case law has already addressed these claims at great length and rather than do so yet again, I refer the interested reader to the decisions in those cases: Hamilton v. The Recorder, 7 OCAHO 968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[8] 6 OCAHO 892 (1996), aff'd sub

[8] While neither Kotmair nor the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997). Each of these cases dismissed similar claims by employees or prospective employees who sought to avoid withholding from their wages for federal taxes or having to provide employers with their social security numbers. OCAHO case law makes clear that an employer's request for a social security number poses no issues under 8 U.S.C. § 1324b(a)(6). Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 811 (1992)[9] ("[T]here is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment"), Lewis v. McDonald's Corp., 2 OCAHO 383 at 701 (1991) ("[N]othing in the logic, text, or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment").

OCAHO case law having unanimously rejected the theories which Johnson asserts, I am constrained to find that his allegations are frivolous, unreasonable, and without foundation in law or fact. Johnson cites no authority, and my research discloses none, which would provide a modicum of support for the proposition that the INA has any application to his disputes with his employer over issues of federal taxation.

The complaint must accordingly be dismissed.

FINDINGS

1. Ebbon Johnson was hired by Florida Power Corporation in February 1973.

2. Ebbon Johnson has continued to work at Florida Power Corporation at all times relevant to the complaint, presently in the capacity of a lineman.

3. In June 1994 Ebbon Johnson presented to Florida Power Corporation two documents entitled respectively "Statement of Citizenship" and "Affidavit of Constructive Notice."

4. The precise origin of the documents remains undisclosed.

5. The documents were presented to Florida Power Corporation for the purpose of persuading the employer to cease withholding sums from Johnson's wages for federal taxes and social security contributions.

6. Florida Power Corporation declined to honor the documents or to cease withholding

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[9] Citations to OCAHO precedents reprinted in Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States Volumes 1 through 5 reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

sums from Johnson's wages for federal taxes and social security contributions as Johnson requested.

7. The documents were not presented in the process of hiring, recruitment, or referral for a fee.

8. The documents are not documents acceptable for the purpose of showing an employee's identity or eligibility to work in the United States.

9. Florida Power Corporation had no obligation to ascertain Johnson's eligibility to work in the United States or to complete an I-9 form for him.

10. The documents were not presented for the purpose of showing Johnson's identity or eligibility to work in the United States.

11. Florida Power Corporation's rejection of Johnson's proffered documents does not violate 8 U.S.C. § 1324b.

12. No claim is made that any other employees were treated more favorably than was Ebbon Johnson.

CONCLUSION

Johnson's complaint fails to state a claim upon which relief can be granted because it poses no issues cognizable under 8 U.S.C. § 1324b. It is accordingly dismissed. Florida Power's request for attorney's fees will be timely if filed on or before January 31, 1998. Johnson shall have 30 days in which to respond to such request.

SO ORDERED.

Dated and entered this 10th day of December, 1997.

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, I have served copies of the foregoing Final Decision and Order of Dismissal on the following parties at the addresses indicated:

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

September 17, 1997

ALEXANDER KOSATSCHKOW, Complainant,	)
v.	) U.S.C. §1324b Proceeding) OCAHO Case No. 97B00025
ALLEN-STEVENS CORP., Respondent.	)

Exhibit 20

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Richard M. Miettinen, Esq.; Daniel J. Dulworth, Esq.; Karen H. Rader, Esq., Timmis & Inman, L.L.P., for Respondent.

I. *Procedural History*

Alexander Kosatchkow (Kosatschkow or Complainant), a German-born naturalized citizen residing in or near Nuremberg, Pennsylvania, sought redress against his employer, Allen-Stevens Corp. (Allen-Stevens or Respondent) of West Hazelton, Pa., a manufacturer of zinc die castings. Kosatchkow worked for Allen-Stevens as a Trimmer/Melter for more than thirty-two (32) years. Kosatchkow charged that Allen-Stevens discriminated against him in violation of 8 U.S.C. §1324b by withholding taxes from his paycheck in compliance with an IRS wage levy, and by deducting social security (FICA) contributions from his wages. His Complaint was dismissed as untimely, for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction.

Pursuant to the June 18, 1997, Final Decision and Order Granting Respondent's Motion to Dismiss the Complaint, 7 OCAHO 938 (1997), Allen-Stevens timely filed a Motion for Attorney Fees (Application). Allen-Stevens requests $4,490 in attorney's fees and related expenses, and on August 20, 1997, provided an itemized statement in support.

Kosatchkow neither contests nor otherwise responds to the Application. Kosatschkow does not question the reasonableness of either the time or hourly rates claimed in the Application.

II. *Discussion*

Allen-Stevens bears the burden of proving that the requested attorney's fees are reasonable. Allen-Stevens "'must submit evidence supporting the hours worked and the rates claimed.'" *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Kosatchkow bears "the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee." *Id.* (*citing Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989)). This Kosatchkow has not done.

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Title 8 U.S.C. §1324b(h) provides in pertinent part that

> an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

As acknowledged in OCAHO jurisprudence,

> [T]he Supreme Court has held that a . . . [c]ourt may, in its discretion, award attorney's fees to a prevailing Defendant in a [discrimination] case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566, at 6 (1993), 1993 WL 544051, at *10–11 (O.C.A.H.O.), citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

An award of attorney's fees depends on satisfaction of a two-part test:

(1) the party claiming attorney's fees must prevail, and

(2) the complainant must have been unreasonable in filing the underlying action.

Id.

1. *Allen-Stevens Is the Prevailing Party*

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988)[1] and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988), defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought. . . ." In *Texas State Teachers*, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Those "who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

Allen-Stevens "succeeded" on significant claims set forth in its Answer, *i.e.*, failure to state a claim upon which relief can be granted because (1) withholding of taxes and social security contributions is not discrimination under 8 U.S.C. §1324b, (2) an employer action which affects all employees is not discriminatory, (3) the Complaint was untimely under 8 U.S.C. §1324b(d)(3), (4) the Complaint was barred by 8 U.S.C. §1324b(a)(2)(B) and (C) exceptions, and (5) Complainant has sued the wrong party, when I dismissed

[1]The *Lindy* approach to attorney's fees, long employed by the United States Court of Appeals for the Third Circuit, the court with appellate jurisdiction in this case, 8 U.S.C. §1324b(i)(1), is consistent with *Hensley*. *See Lindy Brothers Builders, Inc., of Philadelphia v. American Radiator & Standard Sanitary Corp. ("Lindy I")*, 487 F.2d 161, 167 (3d Cir. 1973), *appeal following remand, "Lindy II,"* 540 F.2d 102, 111 (3d Cir. 1976). Utilizing the *Lindy* approach, a court multiplies the number of compensable hours by a reasonable hourly rate, as defined by such factors as the relevant market, and the individual attorney's qualifications, experience, reputation, and practice, as well as the nature of services provided. This produces a presumptively reasonable "lodestar" figure. For an analysis of Third Circuit practice regarding attorney's fees through 1985 *see* COURT-AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 242 , 245 , 259 (1985) ("[T]he *Lindy* lodestar approach . . . received the Supreme Court's imprimatur . . . in *Hensley v. Eckerhart*").

Kosatschkow's Complaint with prejudice for failure to state a cause of action cognizable under §1324b(g)(3), thus affording Allen-Stevens the "relief sought," and "materially altering" Allen-Stevens' and Kosatschkow's legal relationship. To similar effect, Allen-Stevens' legal relationship with Kosatschkow was "materially altered" when I dismissed his Complaint for lack of timeliness and for want of subject matter jurisdiction. Allen-Stevens, therefore, satisfies the first of this two-part test; it is the prevailing party.

I find that Respondent meets the prevailing party test of *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in the litigation by demonstrating that Kosatschkow failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when I dismissed Kosatschkow's Complaint.

2. *Kosatschkow's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). *See Lareau v. US Airways,* 7 OCAHO 963, at 3 (1997); *Horne v. Hampstead*, 7 OCAHO 959, at 6 (1997); *Jasso*, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

Kosatschkow continued to press his frivolous 8 U.S.C. §1324b claims—*i.e.,* he did not withdraw his Complaint as well he might have in light of unanimous OCAHO precedent dismissing discrimination claims predicated on an employer's refusal to accept self-styled tax-exemption documents.[2] Kosatschkow was, therefore, on notice that his claims were without foundation in fact and law.

[2]*See*—to recite a litany of cases decided before *Allen-Stevens*—*Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications, Inc.*, 7 OCAHO 926, at 4–5 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL

Continued on next page—

On the core issue of *Kosatschkow v. Allen-Stevens*, 7 OCAHO 938, whether or not an employee may successfully sue an employer for withholding federal taxes from the worker's wages in satisfaction of a wage levy, 26 U.S.C. §6331(a), as interpreted by 26 C.F.R. §301.6331–1(a) ("Levy and Distraint"), provides that:

> If any person liable to pay any tax neglects or refuses to pay the tax within 10 days after notice and demand, the district director to whom the assessment is charged . . . may proceed to collect the tax by levy. The district director may levy upon any property, or rights to property, whether real or personal, tangible or intangible, belonging to the taxpayer. . . . [T]he term tax includes any interest, additional amount, addition to tax, or assessable penalty, together with costs and expenses. . . . Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to . . . salaries, wages, commissions, or other compensation.
>
> A levy on salary or wages has continuous effect from the time the levy originally is made until the levy is released pursuant to §6343. . . . The levy attaches to both salary and wages earned but not yet paid at the time of the levy, advances on salary or wages made subsequent to the date of the levy, and salary or wages earned and becoming payable subsequent to the date of the levy, until the levy is released pursuant to §6343.[3]

Employers who comply with IRS wage levies are immune from suit because their compliance is statutorily mandated:

Continued—
131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Associates*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation, both withholding and levy. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

[3]Title 26 U.S.C. §6334(a)(9), (d), as interpreted by 26 C.F.R. §404.6334(d)–1(c), provides a minimum exemption from levy for $50 of wages if the taxpayer is paid weekly; $100, if paid biweekly; $108.33, if paid semimonthly, and $216.67, if paid monthly. Additional monetary exemptions for dependents are allowed where a taxpayer submits to "his employer for submission to the district director [a properly verified statement] specifying the facts necessary to determine the standard deduction and the aggregate amount of the deductions for personal exemptions allowed the taxpayer under §151 in the taxable year in which the levy is served." 1997 Stand. Fed. Tax Rep. (CCH) ¶39,114.

> Section 6332(a) of the Internal Revenue Code provides that "any person in possession of . . . property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights. . . ." A person who fails to surrender the property subject to the levy upon demand of the Secretary "shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered . . . together with costs and interests on such sum . . ." and shall also be liable for a penalty equal to 50 percent of that amount. 26 U.S.C. §6332(d). On the other hand, one who complies with the Secretary's demand and surrenders the property is immune from any legal action by the delinquent taxpayer with respect to such property or rights to property arising from surrender or payment. 26 U.S.C. §6332(e).

Miller v. United States, 817 F. Supp. 1493, 1497 (E.D. Wash. 1992).

An employer's compliance with a levy properly asserted is a complete defense to an employee's action because

> Section 6332(d) of the Internal Revenue Code states that one who complies with a levy "shall be discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such [compliance with the levy]."

Pawlowske v. Chrysler Corp., 623 F. Supp. 569, 570 (N.D. Ill. 1985), *aff'd*, 799 F.2d 753 (7th Cir. 1986) (unpublished order). Complaints against employers stemming from employer compliance with IRS levies must therefore be dismissed for failure to state a claim upon which relief can be granted. *Miller*, 817 F. Supp. at 1497.

Furthermore, the Court of Appeals for the Seventh Circuit has held that:

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1986) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal by abusers of the tax system merely to harass the collection of public revenue"). *See also Kaucky v. Southwest Airlines*, 109 F.3d 350, 353 (7th Cir. 1997) ("Money collected in error by a lawful agent [such as an employer] . . . can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund"), *petition for cert. filed*, July 14, 1997, No. 97–137; *Webb v. United States*, 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, *supra,* addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Kosatschkow's Complaint was summarily dismissed for failure to state a claim upon which relief could be granted, lack of subject matter jurisdiction, and untimeliness. "[T]he *Christiansburg* standard is . . . likely to have been met where ***the plaintiff's case is dismissed for failure to state a claim on which relief could be granted. . . .***"[4] Kosatschkow maintains that his employer discriminated against him by refusing to accept self-styled, gratuitously tendered documents,[5] subjecting him to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and long-settled,[6] and, presumably, exempting

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[4]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. County of Suffolk*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous."); *Riviera Carbana v. Cruz*, 588 F. Supp 80 (D.P.R. 1980) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (unpublished table decision).

[5]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Kosatschkow presented to prove tax exemption and social security secession). *See also* OSC Charge, wherein Kosatschkow characterizes as an "unfair employment practice" Allen-Stevens' refusal to act upon his self-styled and gratuitously proferred Statement of Citizenship and Affidavit of Constructive Notice that he had repudiated his social security number by exempting him from the Internal Revenue Code and the Social Security Act.

[6]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

him from the wage levy discussed above. Similar to its obligation to comply with wage levies is Allen-Stevens' statutory mandate to withhold income taxes[7] and social security contributions.[8] Allen-Stevens is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[9] 26 U.S.C. §3403,[10] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[11] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores, of Am., Inc.*, 6 OCAHO 923, at 22 (1997), 1997 WL 235918, at *17 (O.C.A.H.O.) (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986). Because Allen-Stevens, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions . . . is statutorily immunized from suit[,]" Kosatschkow's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Kosatschkow's] allegations," and I award Allen-Stevens **$4,474.00** in attorney's fees and related expenses, the computation of which is explained at **II, B.**, below. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Kosatschkow's action against an employer legally immunized from liability satisfy both requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

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[7]26 U.S.C. §3402(a).

[8]26 U.S.C. §3102(a).

[9]26 U.S.C. §3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person. . . .").

[10]26 U.S.C. §3403 ("The employer . . . shall not be liable to any person. . . .")

[11]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

B. *Reasonableness of Attorney's Fees Request*

"Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). Counsel for Allen-Stevens supplies the following facts and figures to support its $4,490.00 attorney's fees request:

1. *Attorney Richard Miettinen*

Qualifications: Partner, Timmis & Inman, LLP; 1985 graduate of Wayne State University Law School; twelve (12) years' experience.[12]

Rate Charged:	$180
Number of Hours:	x 3.5
Total:	**$603.00**

2. *Attorney Daniel J. Dulworth*

Qualifications: Attorney, 1988 graduate of University of Detroit Mercy School of Law; nine (9) years' experience.[13]

Rate:	$160.00
Number of Hours:	x 15.20
Total:	**$2,432.00**

3. *Attorney Karen H. Rader*

Qualifications: Attorney

Rate:	$95.00
Number of Hours:	x 15.00
Total:	**$1,425.00**

4. *Expenses:*

—Total Attorney Fees:	$4,460.00
—Lexis:	$14.00
Total Charges:	**$4,474.00**

[12]*See* WEST'S LEGAL DIRECTORY-PRIVATE PRACTICE (WLD-PRI).
[13]*Id.*

Allen-Stevens requests **$4,490.00**.[14] "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. The *Hensley* calculation is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

To similar effect:

> The most familiar formula courts in this [the Third Circuit] use to calculate attorneys' fees is undoubtedly the "lodestar" approach . . . [under which] a court first establishes a reasonable hourly rate (corresponding to the value of the services and the cost of comparable services . . . for each set of compensable services) and then multiplies each rate by the reasonable number of hours of compensable work included in each respective set.

In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 849 n.21 (3d Cir. 1994).

> The . . . court should exclude hours that are not reasonably expended. . . . Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary . . . The court can also deduct hours when the fee petition inadequately documents the hours claimed.

Rode, 892 F.2d at 1183 (*citing Hensley*, 461 U.S. at 433).

> [T]he court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. . . . Once the court determines the reasonable hourly rate, it multiplies that rate by the reasonable hours expended to obtain the lodestar. The lodestar is presumed to be the reasonable fee.

Id.

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead

[14]Allen-Stevens' computation is in error. For example, the itemized statement supporting Allen-Stevens' application for attorney's fees wrongly computes the 7/30/97 charge for Dulworth's services for .60 hours at $160 an hour as $112; however, .60 hours x $160 is $96.

the . . . court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "Attorney's fees awarded under [fee-shifting] statute[s] are to be based on market rates for the services rendered." *In re Busy Beaver*, 19 F.3d at 849 (*quoting Missouri v. Jenkins*, 491 U.S. 274, 283 (1989)).

Utilizing this approach, the Application is a reasonable request for attorney's fees. In *Allen Stevens,* counsel billed Allen-Stevens a total of **33.7** attorney's hours for: reviewing statutes, procedures, and documents sent by the client; legal research; drafting its Answer; consulting with client regarding facts of case; assembling exhibits; and reviewing the opinion dismissing this case. I determine that $180 per hour is a reasonable fee for a partner with twelve (12) years' experience; $160 an hour, a reasonable fee for an attorney with nine (9) years' experience; and $95 an hour, a reasonable fee for a junior attorney, in the relevant Pennsylvania market. The hourly total, **33.7** hours, which represents less than a week's work, is a modest amount of time.

These hourly rates are reasonable in light of recent OCAHO caselaw in which ALJs awarded attorney's fees ranging from $75 per hour to $284 per hour: *Lareau v. US Airways*, 7 OCAHO 963 (1997) (awarding $5,296.47 in attorney's fees at rates ranging from $284.75 an hour for work by a senior partner with twenty-six (26) years' experience, $243 for "Of Counsel" with thirteen (13) years' tax experience, and $207 an hour for "Of Counsel" with ten (10) years' experience, to $30 an hour for work performed by a law clerk at a major Washington, DC law firm); *Horne v. Hampstead,* 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75, with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX,

market at the rate of $185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[15] I find attorney's fees of **$4,474.00,** representing $180 dollars an hour for a senior partner with twelve (12) years' experience; $160 an hour for an attorney with nine (9) years' experience, and $95 for a junior attorney, reasonable. Accordingly, I award a total of **$4,474.00** in attorney's fees and related expenses, as follows:

Charge	***Amount***
Attorney's fees	$4,460.00
Expenses	14.00
Total Award:	**$4,474.00**

III. *Conclusion*

Respondent is the prevailing party and the Complaint is without reasonable foundation in law and fact. Kosatschkow is directed to pay Allen-Stevens **$4,474.00** in attorney's fees and related expenses.

SO ORDERED.

Dated and entered this 17th day of September, 1997.

MARVIN H. MORSE
Administrative Law Judge

[15]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .") or by the failure of EAJA to address the award of other fees and expenses.

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

May 21, 1997

Exhibit 21

RICHARD F. LAREAU,
Complainant,

v.

USAIR, INC.,
Respondent.

8 U.S.C. §1324b Proceeding
OCAHO Case No. 96B00048

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr., Complainant's Representative.*
Barbara Berish Brown, Esq., Kenneth M. Willner, Esq., Paul, Hastings, Janofsky & Walker L.L.P. and *Michelle V. Bryan, Esq.*, for Respondent.

I. *Introduction*

Yet another in a series of tax challenges seeking redress under 8 U.S.C. §1324b against actual and virtual employers who refuse to conspire with complainants in avoiding federal income tax withholding and social security contribution, this case poses two questions:

- Can a tax challenge, articulated in immigration-related verbiage, confer 8 U.S.C. §1324b jurisdiction on administrative law judges (ALJs) and overrule the Anti-Injunction Act, 26 U.S.C. §7421(a)?

- Does an employer's refusal to conspire with an employee[1] to avoid tax withholding and social security contribution violate 8 U.S.C. §1324b, which prohibits unfair immigration-related employment practices?

Common sense and judicial precedent compel an answer in the negative to both questions.

This Final Decision and Order, like numerous antecedent decisions by ALJs,[2] dismisses the case for lack of subject matter jurisdiction over tax matters and for failure to state a claim upon which re-

[1]Although the pleadings suggest that Lareau is currently an incumbent employee, his precise status is not all that clear. This is so because, while USAir's Response to the Order To Show Cause (Response) recites at page 1 that "Lareau is a Maintenance Inspector employed by USAir in Indianapolis," an assertion repeated at paragraph 11 of its Answer to the Complaint, his status is obscured when, on page 5 of its Response, USAir states that it "would not assist him, post-employment, with his efforts to evade taxes." But it makes no difference, as Lareau's Complaint explicitly excludes the allegation that he was not hired or discharged in violation of §1324b, or that USAir asked him for too many or wrong documents than required to establish eligibility for employment in the United States. If there were a valid claim, it is instructive that on addressing liability for discriminatory retaliation under Title VII of the Civil Rights Act of 1964, §704(a), 42 U.S.C. §2000e–3(a), a unanimous Supreme Court has recently held that the definition of employee controls as to former as well as current employees "consistent with the broader context of Title VII and the primary purpose of §704(a)." Robinson v. Shell Oil Co., 117 S. Ct. 843, 848 (1997).

[2] *See Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents were always self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Lareau v. USAir, Inc.* takes place in this too-familiar context.

lief can be granted under 8 U.S.C. §1324b. It is certain that this forum of limited jurisdiction cannot override the Anti-Injunction Act, which prohibits all suits to restrain the collection of taxes. It is also clear that §1324b's prohibition of ***immigration-related*** unfair employment practices is not implicated by an employer's refusal to accept improvised, unofficial, gratuitously tendered documents purporting to exempt the employee from tax withholding and social security compliance obligations.

II. *Procedural History*

On July 24, 1985, USAir, Inc. (USAir or Respondent) hired Richard F. Lareau (Lareau or Complainant). According to Lareau, USAir hired him as an Aircraft Mechanic. According to USAir, Lareau was a Maintenance Inspector. Whether as a mechanic or maintenance man, he apparently served at least nine years without incident in USAir's employ. On May 26, 1994, this peaceful period came to an end when Lareau tendered USAir self-styled tax exemption documents—i.e., a "Statement of Citizenship"[3] and an "Affidavit of Constructive Notice,"[4] and asked USAir to transmit the documents to the IRS and to cease and desist from withholding taxes and social security contributions.

On February 13, 1995, Lareau filed a discrimination complaint against USAir with the Indiana Civil Rights Commission and the Indianapolis Equal Employment Opportunity Commission (EEOC) Office. Lareau alleged that beginning May 26, 1994, and continuing through January 12, 1995, USAir discriminated against him on the basis of national origin by "refusing to forward my statement of citizenship to the I.R.S. Service Center, and [by continuing] . . . to withhold taxes. . . . Further, Respondent has failed to acknowledge my rescission and revocation of my social security application." EEOC Charge.

[3]Such self-styled, improvisational, unofficial "Statement(s) of Citizenship" are apparently staple, albeit ineffective, weapons in the war on taxation. *See Brokers v. Morton*, 1995 WL 653260, at *1 (D. Alaska 1995). Self-styled "Statement(s) of Citizenship" are not to be confused with INS Forms N–560 or N–561, which are official INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2).

[4]An equally ineffective armament is the oft-used "Affidavit of Constructive Notice." *See Risner v. Commissioner of Internal Revenue*, 71 T.C.M. (CCH) 2210 (1996).

On July 14, 1995, the EEOC dismissed Lareau's Charge on its merits because:

> The facts you allege fail to state a claim under any of the statutes enforced by the Commission.
>
> * * *
>
> This is your NOTICE OF RIGHT TO SUE... *WITHIN 90 DAYS* [in U.S. District Court] ... otherwise your right to sue is lost.

Apparently Lareau did not sue in District Court. Instead, on November 26, 1995, one month after his right to sue expired, he filed a charge based on the same factual predicate with the United States Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Lareau's OSC Charge characterized USAir's refusal to join in his tax avoidance scheme as a discriminatory, ***immigration-based***, unfair employment practice, based on Lareau's undisclosed national origin and his status as a United States citizen. Specifically, Lareau contended that, by withholding taxes and social security contributions from his paycheck, USAir treated him as a non-resident "alien," who, according to Lareau, are the only individuals statutorily obligated to pay income tax and contribute to social security.[5] By treating him as an "alien," alleged Lareau, USAir discriminated

[5]Contrary to Lareau's claims, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which their employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a), 3403. Employers who do so are immunized from legal liability by 26 U.S.C. §3102 ("[e]very employer... shall be indemnified against the claims and demands of any person"), 26 U.S.C. §3403 (an "employer shall not be liable to any person"), and the Anti-Injunction Act, 26 U.S.C. §7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"), which has been interpreted to prohibit suits against employers who withhold taxes. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974); *United States v. Kim*, 1997 WL 194135, at *4—5 (7th Cir. 1997); *Bowlen v. United States*, 956 F.2d 723, 726 (7th Cir. 1992); *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984) ("All individuals, natural or unnatural, must pay federal income tax on their wages"); *United States v. First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984); *Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir. 1984); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984); *Rappaport v. United States*, 583 F.2d 298, 300 (7th Cir. 1978); *United States v. Dema*, 544 F.2d 1373, 1375 (7th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977). Social security withholding contributions from employees are compelled, even if an employee declines benefits. *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982). The constitutionality of the Social Security Act has long been acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

against him and thereby violated 8 U.S.C. §1324b. Lareau claimed that USAir violated 8 U.S.C. §1324b when it

> REFUSED TO FORWARD MY **STATEMENT OF CITIZENSHIP** TO THE IRS SERVICE CENTER IN PHILADELPHIA, PA 19255 PURSUANT TO 26 CODE OF FEDERAL REGULATIONS, SECTION 1.1441-5, FREEING THEM [sic] OF AUTHORITY TO WITHHOLD INCOME TAXES FROM ME. EMPLOYER ALSO REFUSED TO ACKNOWLEDGE MY **AFFIDAVIT OF CONSTRUCTIVE NOTICE** THAT I NO LONGER HAD APPLICATION FOR SOCIAL SECURITY BENEFITS AND CONTINUES TO WITHOLD [sic] FICA TAXES FROM MY REMUNERATION.

OSC Charge at ¶8 (emphasis added).[6]

Lareau sought relief under 8 U.S.C. §1324b(a)(1), which prohibits discrimination based on national origin or citizenship status,[7] and under §1324b(a)(6), which prohibits "document abuse," the practice of requesting more or different documents than those required to prove that one can work in the United States.[8] Lareau's November 26, 1995, OSC Charge specified May 26, 1994, a date eighteen months earlier, as that of the alleged discrimination.[9] On that date,

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[6]Lareau refers to 26 C.F.R. §1.1441-5 (1997) ("Withholding of Tax on Nonresident Aliens and Foreign Corporations and Tax-Free Covenant Bonds"), a regulation applicable to U.S. citizens residing abroad, which states that "an individual's written statement that he or she is a citizen or resident of the United States may be relied upon by the payer of the income as proof that such individual is a citizen or resident of the United States." Lareau's reliance on this regulation is misplaced, for Lareau does not reside in a foreign land. At the time of the alleged offense, he resided in Indiana, and now lives in Pennsylvania.

[7]Specifically, 8 U.S.C. §1324b(a)(1) states that:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment —
>
> (A)because of such individual's national origin, or
>
> (B)in the case of a protected individual . . . because of such individual's citizenship status.

[8]Title 8 U.S.C. §1324b(a)(6) as of the date of the Complaint prohibited a request "for more or different documents than are required [to establish eligibility to work in the United States] . . . or refusing to honor documents tendered that on their face reasonably appear to be genuine." The OSC charge form explains that document abuse occurs where the "individual, business, or organization refused to accept a valid document or demand . . . more or different documents than are required for completing the INS Form I-9."

Title 8 U.S.C. §1324b(a)(6) was amended effective 9/30/96. Section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996). As before, the prohibition against over documentation pertains only to tender of documents "for the purpose of satisfying the requirements of §1324a(b), as discussed *infra* at III.D.(2).

according to Lareau, his "employer refused to forward my statement of citizenship to the IRS Service Center in Philadelphia." OSC Charge at ¶8. Lareau identified his employer as having fifteen (15) or more employees, a fact fatal to ALJ adjudication of his national origin discrimination claim,[10] and admitted that he filed a charge[11] based on the same set of facts with the Indianapolis EEOC office on February 13, 1995, another barrier to this forum's adjudication of his national origin discrimination claim.[12] OSC Charge at ¶¶3, 8.

OSC dismissed Lareau's Charge and eight others filed by his lay representative, Kotmair, in an undated determination letter. Lacking "reasonable cause to believe" that the charges stated §1324b causes of action, OSC advised them that it declined to file complaints on their behalf, but apprised them of the right to file private actions within 90 days of receipt of the determination letter.

On May 14, 1996, Kotmair filed a complaint on Lareau's behalf in the Office of the Chief Administrative Hearing Officer (OCAHO). On June 12, 1996, OCAHO issued its Notice of Hearing (NOH) transmitting the Complaint to USAir, cautioning that an answer was due thirty (30) days after receipt. The United States Postal Service receipt returned to OCAHO confirms that USAir received the NOH on June 14, 1996. On August 14, 1996, no answer having been timely filed, I issued an Order inviting USAir "to explain its failure to timely answer" and to show cause not later than September 6, 1996 "why judgment should not be issued against it."

By a filing on September 5, 1996, USAir explained that the NOH never reached a responsible management official among the 800 employees at its Arlington, Virginia, headquarters. Its Response opposed entry of default judgment and included an Answer to the Complaint. On September 12, 1996, Lareau filed a Motion for Default Judgment and Specific Relief Sought, with Brief and Legal Authorities in Support. Lareau's default motion ignored USAir's response to the Show Cause order. Including the names of USAir retained counsel on Lareau's service list, however, suggests that

[9]Time limits for filing OSC charges are specified in 28 C.F.R. §68.4, which states, "An individual must file a charge with the special counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice."

[10]ALJ jurisdiction over claims of national origin attaches only where employers employ between four and fourteen employees. 8 U.S.C. §1324b(a)(2)(A), (B).

[11]EEOC File No. 240950943.

Lareau was aware of the USAir pleadings. On September 19, 1996, USAir filed a Response to Lareau's motion, incorporating by reference its previously filed response to the Show Cause. On October 1, 1996, I issued an Order advising the parties that:

> The law disfavors defaults, as noted in the Response, citing 10 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §2685 (1983). I disfavor defaults. Accordingly, the motion for default is denied.

On January 2, 1997, Lareau filed a Motion for Reconsideration of the Order Denying Motion for Default Judgment, with brief in support, challenging Respondent counsel's failure to enter a notice of appearance. Respondent's counsel entered appearances pursuant to 28 C.F.R. §68.33 by Notice filed January 15, 1997. On January 16, 1997, USAir filed a Memorandum in Opposition to Lareau's Motion for Reconsideration of the October 1, 1996 Order which refused to default USAir. On January 23, 1997, Lareau filed a Reply. Lareau assailed USAir's counsels' initial lack of formal entry of appearance, misreading 8 C.F.R. §68.33 (1997), which implicitly acknowledges the appearance of counsel by virtue of filing a pleading, absent challenge by the judge. (In contrast, Lareau's initial power of attorney was insufficient to authorize representation by Kotmair before an ALJ, a deficiency not cured until September 12, 1996, when he filed a substitute power.)

In similar vein, USAir challenged Kotmair's lay representation. Although eschewed by Article III courts, lay representation of individuals is neither clearly prohibited nor explicitly countenanced by OCAHO Rules of Practice and Procedure (the Rules). 28 C.F.R. §68.33. To date, ALJs have not put to rest the issue of lay representation, because each decided case was dismissed on other grounds, rendering the issue moot.[13] In view of the result reached here, *i.e.*, dismissal of Lareau's Complaint for lack of subject matter jurisdiction and failure to state a claim on which §1324b relief can be

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[12] *See* 8 U.S.C. §§1324b(a)(2)(B) ("Exceptions" [to jurisdiction]), and 1324b(b)(2) ("No Overlap with EEOC Complaints").

[13] In *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11–12 (1996), where the respondent sought to exclude Kotmair as a lay representative on the basis, *inter alia*, that he was a convicted felon, the judge found it unnecessary to decide the representation issue because the case was dismissed on other grounds. To the same effect, in *Costigan v. NYNEX*, 7 OCAHO 918, at 12 (1997), where the respondent moved to disqualify Kotmair as the complainant's representative *solely* on the basis that he was not an attorney, the judge, granting a NYNEX motion to dismiss, declined to reach the lay representation issue. Most recently, in *Lee v. AT&T*, 7 OCAHO 924, at 6 (1997) (Order Excluding Complainant's Representative), the judge succinctly put the question:

(Continued)—

granted, I too decline to decide whether the Rules contemplate lay representation.

III. *Discussion*

As appears from his Complaint, confirmed and expanded by subsequent pleadings, Lareau depends on an irrelevant federal tax regulation, 26 C.F.R. §1.1441–5 ("Withholding Tax on Nonresident Aliens and Foreign Corporations"), to support his claim that USAir has committed ***unfair immigration-related employment discrimination***. Lareau, a United States citizen, disingenuously characterizes as discrimination USAir's refusal to give credence to his fanciful assertion that withholding of income taxes, and social security payments (FICA), is voluntary, not compulsory, for United States citizens. Through a miasma of immigration-related verbiage, Lareau clouds the clear vista of a tax-avoidance scheme. This forum of limited jurisdiction cannot confer its *imprimatur* on such obfuscation, having received clear instruction on the disposition of tax-avoidance nuisance suits from the Fourth and Seventh Circuit United States Courts of Appeal, reviewing courts for the purpose of this action.[14]

A. *The ALJ Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act and Is Forbidden To Hear Tax Collection Matters by the Anti-Injunction Act*

FED. R. CIV. P. 12 (h)(3)[15] compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

—(Continued)

> When a party seeks to be represented by a lay individual, two questions are presented:
> 1. Whether the OCAHO Rules . . . authorize the Judge to allow such representation; and
> 2. Whether the OCAHO Rules . . . require the Judge to permit such representation.

The judge concluded that, because he was barring Kotmair's participation for reasons of competency and conduct, it was unnecessary to resolve the issue of lay representation of an individual party. *Id.* at 5–7.

[14]Review of the final decision and order of an ALJ in an unlawful immigration-related employment practice case arising under 8 U.S.C. §1324b may be in either (1) the circuit in which the violation is alleged to have occurred, or (2) the circuit in which the employer resides or transacts business. 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[15]Title 28 C.F.R. §68.1 authorizes ALJs to apply the Federal Rules of Civil Procedure for the District Courts as a general guideline.

A federal forum has no authority to entertain a suit if no statute confers jurisdiction upon it. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Abercrombie v. Office of the Comptroller of the Currency*, 833 F.2d 672, 674 (7th Cir. 1987). No statute confers jurisdiction on this forum to hear tax challenges.

Even when a forum has statutory jurisidiction, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *International Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. §7421(a), the statute popularly known as "The Anti-Injunction Act," which commands that:

> **[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.**

Tax collection under the Anti-Injunction Act includes tax withholding by employers. *United States v. American Friends Serv. Comm.*, 419 U.S. at 10.

Any taxpayer who wishes to sue must satisfy a strict statutory condition precedent:

> **No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.**

26 U.S.C. §7422(a) ("pay now, sue later").

The Anti-Injunction Act obliges taxpayers to pursue their remedies under its provisions, and otherwise proscribes suit. *Cheek v. United States*, 498 U.S. 192, 206 (1991) (directing tax complainants to follow the statutory scheme provided by the Anti-Injunction Act: "pay the tax, request a refund from the Internal Revenue Service, and if the refund is denied, litigate the invalidity of the tax in federal district court"); *South Carolina v. Regan*, 465 U.S. 367, 378 (1983); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974); *Goulding v. United States*, 929 F.2d 329, 331 (7th Cir. 1991), *cert. denied*, 506 U.S. 865 (1992); 13B CHARLES B. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3580 (2d ed.

1984) (administrative claim for refund is jurisdictional prerequisite to bringing suit).

The very limited, judicially created, equitable *Enochs* exception, permits suit otherwise proscribed by the Anti-Injunction Act where a taxpayer satisfies four concurrent tests: (1) ***the suit is against the government***, (2) the taxpayer demonstrates ***irreparable harm***, (3) the taxpayer demonstrates ***certain success*** on the merits, and (4) the court in which the taxpayer seeks relief has ***equitable jurisdiction*** over the subject matter. *South Carolina v. Regan*, 465 U.S. at 374; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–7 (1962); *Educo, Inc. v. Alexander*, 557 F.2d 617, 619–21 (7th Cir. 1977).

Lareau is unable to claim the *Enochs* exception.

- First, Lareau's suit is ***not against the government,*** but against USAir, his employer.

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1986) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal filed by abusers of the tax system merely to delay and harass the collection of public revenues").

> Money collected in error by a lawful agent, public or private, or the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.

Kaucky v. Southwest Airlines, 109 F.3d 349, 350, 353 (7th Cir. 1997). *See also Webb v. United States*, 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

- Second, Lareau suffered ***no injury,*** let alone irreparable harm. USAir's refusal to forward Lareau's self-styled "Statement of Citizenship" to the IRS Service Center, and withholding of his payroll taxes and social security contributions cannot be characterized as harm, much less "irreparable injury." USAir is statutorily obliged as an employer to withhold taxes and social security

obligations "at the source," and is relieved from liability for so doing. 26 U.S.C. §§3101, 3102, 3402, 3403. Furthermore, USAir had no legal duty to assist him in his tax protest. Lareau himself could easily have sent his dubious document to the IRS, thus mitigating whatever illusory "harm" USAir caused by not sending his tax protest to the IRS.

- Third, Lareau cannot succeed on the merits. "The notion that federal income tax is . . . consensual in nature is not only utterly without foundation, but . . . has been repeatedly rejected by the courts." Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986). Lareau's twisted logic cannot transform this sow's ear of a tax protest into the silk purse of a legitimate refund action, much less an ***immigration-related*** unfair employment practice case. Under no conceivable circumstances can he prevail.

- Fourth, this forum of limited jurisdiction lacks equitable jurisdiction over tax actions. The proper places to bring tax actions are Tax Court and District Court.[16]

This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is without authority to hear tax causes of action, whether or not clothed in immigration guise. 8 U.S.C. §1324b(b)(1); 28 C.F.R. §44.300(a) (emphasis added). Lareau's Complaint is, therefore, dismissed for lack of subject matter jurisdiction.

B. *The ALJ Lacks Subject Matter Jurisdiction Over Terms and Conditions of Employment*

Lareau sues USAir, his longtime employer, because USAir refused to forward his self-styled tax exemption documents to the IRS, and because USAir insisted on continuing to withhold taxes and social security contributions from his wages, as it is bound to do under 26 U.S.C. §§3101, 3102, 3402, 3403, discussed, *supra*, at n.5. Nothing in 8 U.S.C. §1324b obliges an employer to submit to an employee's tax avoidance scheme, nor prohibits an employer from fulfilling 26

[16]Title 28 U.S.C. §1346(a)(i) provides that "district court shall have original jurisdiction . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed;" 26 U.S.C. §7422(f) also places post-administrative actions in district court.

U.S.C. §3102's command to collect social security contributions, or §3402's mandate to deduct withholding taxes "at the source."

It is well-established that this forum has no authority over terms and conditions of employment, such as an employer's insistence on complying with IRS tax regimens. *Wilson v. Harrisburg Sch. Dist.*, 7 OCAHO 925, at 9 (1997); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11; *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)). Nothing in 8 U.S.C. §1324b relieves an employer of statutory obligations. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8–16 (1997), 1997 WL 176910, at *10–14; *Winkler v. Timlin*, 6 OCAHO 912, at 8–12 (1997), 1997 WL 148820, at *9–10. Nothing in §1324b's text or legislative history prohibits an employer from complying with the IRS regimen. *Winkler v. Timlin*, 6 OCAHO 912, at 11–12 (1997), 1997 WL 148820, at *10; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16–17 (1996), 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3–4 (O.C.A.H.O.). Nothing in §1324b confers upon an employer the right to assist an employee who wishes to resist the IRS by accepting gratuitously tendered, improvised documents purporting to relieve the employee from taxation, or obliges an employer to forward to the IRS these self-same documents. Section 1324b simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute.

It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment does not violate §1324b. The gravamen of Lareau's Complaint, a challenge to the Internal Revenue Code and the Social Security Act, is a matter altogether outside the scope of ALJ jurisdiction. Lareau's Complaint is, therefore, dismissed for want of subject matter jurisdiction.

C. *The ALJ Lacks Subject Matter Jurisdiction Over Charges of National Origin Discrimination Where the Employer Employs More Than Fourteen Employees and/or Where the Matter Has Previously Been Adjudicated on Its Merits by the EEOC*

Lareau alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986 as amended (IRCA), specifically §274B of the Immigration and

Nationality Act, codified as 8 U.S.C. §1324b, was not intended to supersede EEOC jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. 8 U.S.C. §1324b(b)(2). Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three and fewer than fifteen individuals. 8 U.S.C. §1324b(a)(2)(B); *Huang v. United States Postal Serv.*, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd sub nom., Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n.6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990). Lareau acknowledges in his OSC Charge that USAir employs fifteen or more employees, and Respondent's filings confirm this. Because ALJs are only empowered to hear cases of national origin discrimination where an employer employs four through fourteen individuals, and Lareau properly invoked EEOC jurisdiction, ALJ jurisdiction is unavailable as a matter of law.

Size of the payroll aside, prior exercise of EEOC jurisdiction over Lareau's Complaint precludes present OCAHO jurisdiction. Once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act. *Winkler v. Timlin*, 6 OCAHO 912 at 5 (1997), 1997 WL 148820, at *5; *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 2 (1995), 1995 WL 509453, at *6 (O.C.A.H.O.). Section 1324b(b)(2) precludes ALJ jurisdiction over alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEOC charge. *Wockenfuss*, 5 OCAHO 767, at 3, 1995 WL 509453, at *6; *Adame*, 5 OCAHO 722, at 3–5, 1995 WL 217517, at *3. Section 1324b provides in pertinent part:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000e *et seq.*], unless the charge is dismissed as being outside the scope of such title.

8 U.S.C. §1324b(b)(2).

This is true even where the EEOC errs in assuming jurisdiction. *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at *3 (O.C.A.H.O.).

Lareau concedes in his OSC Charge that on February 13, 1995, he filed a charge alleging national origin discrimination, based on the same set of facts as the present Complaint, with the Indiana Civil Rights Commission and the local EEOC branch office. On July 14, 1995, the EEOC dismissed his charge for failure "to state a claim," a merits disposition. It is undisputed that USAir employs 800 employees at its Arlington, Virginia headquarters. Because dismissal for failure to state a claim is a merits disposition, I conclude that Lareau's national origin claim is barred because of 8 U.S.C. §1324b(b)(2) overlap prohibitions. *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 18 (1997); *Winkler v. Timlin*, 6 OCAHO 912, at 5–6 (1997), 1997 WL 148820, at *5.

I find that at all times relevant to this action: (1) USAir employed more than fourteen individuals; (2) Lareau filed a charge with respect to national origin discrimination based on the same set of facts with the EEOC under Title VII of the Civil Rights Act of 1964; (3) the EEOC dismissed his charge on its merits; and (4) I, therefore, lack subject matter jurisdiction over Lareau's national origin discrimination claim. I dismiss that portion of the Complaint alleging national origin discrimination. 8 U.S.C. §1324b(a)(2)(B).

Furthermore, a national origin discrimination complaint which fails to identify the complainant's national origin is insufficient as a matter of law, at least where there has been ample opportunity to make this identification and where there has been a full exchange of pleadings. *Austin v. Jitney-Jungle*, 6 OCAHO 923, at 18 (1997); *Boyd v. Sherling*, 6 OCAHO 916, at 23 (1997), 1997 WL 176910, at *17; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15 (1996), 1996 WL 670179, at *11. Remarkably, Lareau never identifies his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against U.S. citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Because by its own terms the national origin claim is based entirely on Lareau's citizenship status, it must be dismissed on the additional ground of failure to state a claim on which relief can be granted.

D. *Complainant Fails To State a Claim Upon Which Relief Can Be Granted Under 8 U.S.C. §1324b*

(1) *Complainant's Citizenship Claim Must Be Dismissed*

A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. *Mathews v. Goodyear*, 7 OCAHO 929, at 17. Failure to allege injury compels a finding of lack of subject matter jurisdiction. This is so because the ALJ's power is limited to discriminatory failure to hire and to discharge and does not include conditions of employment. The entries, *seriatim*, on Lareau's OCAHO Complaint format, which deny that USAir refused to hire, discharged him, or retaliated against him, as well as the tenor of pleadings, evidence Lareau's and USAir's long and ongoing relationship. Nothing in the Complaint or any pleading even remotely suggests that Lareau was refused employment or discharged by USAir. Refusal to hire and discharge are the only citizenship status discrimination claims cognizable under §1324b. Lareau's Complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under §1324b.

(2) *Complainant's Document Abuse Claim Must Be Dismissed*

An incumbent employee who alleges that his employer refused to accept proffered documents to show work eligibility, but specifies documents not recognized by the employment eligibility verification system, fails also to state a cause of action under 8 U.S.C. §1324b.

Jurisdiction over document abuse can only be established by proving that, in relation to ***hire***, the employer requested one or another specific official document from a prescribed list "for purposes of satisfying the [work eligibility] requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6). Nothing in the case before me suggests that the tender of improvised documents identified by Lareau at ¶16a of his Complaint ***years after hire*** implicates §1324a(b) requirements. Patently, the Complaint negates any inference that Lareau was either denied employment, was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a, or was asked to provide specific documents. The self-styled tax-exemption documents Lareau insists USAir should have accepted are not acknowledged as acceptable or embraced by the verification system.

The holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10, is particularly apt:

> The prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C)tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 at 18–21 (1996) and cases cited therein.

Because nothing in the Complaint implicates USAir's employer obligations under §1324a(b), I lack subject matter jurisdiction over Lareau's §1324b(a)(6) allegations. Lareau's Complaint is, therefore, dismissed for lack of subject matter jurisdiction and for failure to state a claim under §1324b.

IV. *Decision and Order*

Other than conclusory allegations, Lareau nowhere specifies any act of national origin or citizenship status discrimination cognizable under 8 U.S.C. §1324b. In fact, Lareau denies that USAir refused to hire him, fired him, or retaliated against him for filing a complaint. Lareau charges that USAir "refused to accept the documents I presented to show that I can work in the United States." OCAHO Complaint at ¶¶16, 16(a). However, Lareau did not present his improvisational papers to prove that he was eligible to work in the United States, but to establish that he was exempt from taxation and social security contribution. Furthermore, Lareau presented his self-styled documents ***nine years*** after he was hired. In addition, his *sui generis* certificate and affidavit are not among those official documents prescribed to prove work eligibility under 8 U.S.C. §1324a(b), a mandatory condition precedent to a viable claim of document abuse in violation of 8 U.S.C. §1324b(a)(6).

I have considered the pleadings of the parties. To the extent not addressed in this Final Decision and Order, all arguments and requests are rejected. Lareau's national origin claim, citizenship status claim, and document abuse claim are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b.

VI. *Post-Decision Procedure: Attorneys' Fees*

USAir requests attorneys' fees. Fee shifting is authorized by 8 U.S.C. §1324b(h). In support of its request, USAir may file an appro-

priate statement which explains the rationale for fee-shifting together with a sufficient showing on which to premise an accurate and just calculation of attorney's fees. USAir's filing is due no later than ***June 30, 1997***. Complainant's response to USAir's filing—limited to the subject at hand, the amount of attorney's fees requested—will be timely if filed not later than ***July 21, 1997***.

V. *Appeal*

This Decision and Order is the final administrative order on the merits in this proceeding and "shall be final unless appealed" **within 60 days** to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated and entered this 21st day of May, 1997.

MARVIN H. MORSE
Administrative Law Judge

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

September 10, 1997

RICHARD F. LAREAU,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 96B00048
US AIRWAYS, INC.,)
Respondent.)
)

ORDER GRANTING RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

MARVIN H. MORSE, Administrative Law Judge

Appearances: John B. Kotmair, Jr., on behalf of Complainant.
Barbara Berish Brown, Esq. and Kenneth M. Willner, Esq., Paul, Hastings, Janofsky & Walker, LLP, and Michelle V. Bryan, Esq., US Airways, Inc., on behalf of Respondent.

I. *Procedural History*

Pursuant to the May 21, 1997, Final Decision and Order, 7 OCAHO 932 (1997), dismissing the Complaint of Richard F. Lareau (Lareau or Complainant), on June 30, 1997, US Airways, Inc. (US Airways[1] or Respondent), by its attorneys, timely filed a Motion for Attorneys' Fees (Application). Lareau neither contests nor otherwise responds to the Application.

US Airways requests $8,469.61 in attorney's fees, law clerk's and technician's fees, and related expenses, and provides a detailed ex-

[1]Formerly, USAir, Inc.

planation and summary in support. Lareau does not question the reasonableness of either the time or hourly rates claimed in the Application.

II. *Discussion*

A. *Test for Awards of Attorney's Fees Under 8 U.S.C. §1324b*

Title 8 U.S.C. §1324b(h) provides in pertinent part that

> An administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Furthermore,

> [T]he Supreme Court has held that a . . . [c]ourt may, in its discretion, award attorney's fees to a prevailing Defendant in a [discrimination] case upon a finding that the plaintiff's action was frivolous, unreasonable, groundless and without foundation, even though not brought in subjective bad faith.

Jasso v. Danbury Hilton & Towers, 3 OCAHO 566, at 6 (1993), 1993 WL 544051, at *10–11 (O.C.A.H.O.), citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

An award of attorney's fees depends on satisfaction of a two-part test:

> (1) the party claiming attorney's fees must prevail, and
>
> (2) the complainant must have been unreasonable in filing the underlying action.

Id.

1. *US Airways Is the Prevailing Party*

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing fee awards under Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988) and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (discussing fee awards under 42 U.S.C. §§1983, 1988), defined the prevailing party as the one who succeeds or prevails "on a significant issue in the litigation" and achieves "some of the relief they sought. . . ." In *Texas*

State Teachers, the Court found that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792–93. Those "who prevailed on a significant issue in the litigation and . . . obtained some of the relief sought . . . are thus 'prevailing parties' within the meaning of [the statute]." *Id.* at 793.

US Airways "succeeded" on a significant claim set forth in its second affirmative defense, failure to state a claim upon which relief can be granted, when I dismissed Lareau's Complaint with prejudice for failure to state a cause of action cognizable under §1324b(g)(3), thus affording US Airways the "relief sought," and "materially altering" US Airways' and Lareau's legal relationship. To similar effect, US Airways' legal relationship with Lareau was "materially altered" when I dismissed his Complaint for lack of subject matter jurisdiction. US Airways, therefore, satisfies the first of this two-part test; it is the prevailing party.

I find that Respondent meets the prevailing party test of *Texas State Teachers*, *i.e.*, (1) it prevailed on a significant issue in the litigation by demonstrating that Lareau failed to state a cause of action, and (2) it obtained the relief it sought in its Answer when I dismissed Lareau's Complaint.

2. *Lareau's Complaint, Without Reasonable Foundation in Law and Fact, Is Frivolous*

Fee shifting turns on a determination that the prevailing party has established that "the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). *See Horne v. Hampstead*, 7 OCAHO 959, at 6 (1997); *Jasso*, 3 OCAHO 566, at 5, 1993 WL 544051, at *2 (citing *Jones v. Dewitt Nursing Home*, 1 OCAHO 1235, 1268 (1990)).

Lareau continued to press his frivolous 8 U.S.C. §1324b claims—*i.e.*, he did not withdraw his Complaint as well he might have in light of unanimous OCAHO precedent dismissing discrimination claims predicated on an employer's refusal to accept self-styled tax-

exemption documents.[2] Lareau was, therefore, on notice that his claims were without foundation in fact and law.

On the core issue of *Lareau v. US Airways*, 7 OCAHO 932, whether or not an employee may successfully sue an employer for withholding federal taxes from the worker's wages, the U.S. Court of Appeals for the Seventh Circuit has held that:

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1986) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal by abusers of the tax system merely to harass the collection of public revenue"). *See also Kaucky v. Southwest Airlines*, 109 F.3d 350, 353 (7th Cir. 1997) ("Money collected in error by a lawful agent [such as an employer]. . . can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund"); *Webb v. United States,* 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

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[2]*See*—to cite only those cases decided prior to *Lareau*—*Jarvis v. AK Steel,* 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications, Inc.*, 7 OCAHO 926, at 4–5 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, *supra,* addressed fee-shifting. In *Christiansburg*, the Supreme Court applied the prevailing party standard to civil rights defendants, holding that a court "may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith." 434 U.S. at 421. Subsequently, in *Hensley v. Eckerhart*, the Court explained that "[a] prevailing defendant [in a 42 U.S.C. §1988 civil rights action] may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R. Rep. No. 94–1558, p. 7 (1976)." 461 U.S. at 429 n.2.

Lareau's Complaint was summarily dismissed for lack of subject matter jurisdiction *and* for failure to state a claim upon which relief could be granted. "[T]he *Christiansburg* standard is . . . likely to have been met where ***the plaintiff's case is dismissed for failure to state a claim on which relief could be granted. . . .***"[3] Lareau maintains that his employer discriminated against him by refusing to accept his self-styled, gratuitously tendered documents,[4] subjecting him to the universal demands of the Internal Revenue Code and the Social Security Act, the legality of which are undisputed and

[3]1 Court Awarded Attorney Fees (MB) ¶10.04, at 10–77—10–78 (May 1997) (footnote omitted) (emphasis added). *See, e.g., Patton v. County of Kings*, 857 F.2d 1379 (9th Cir. 1988) (upholding attorney's fees awarded to prevailing defendant where action dismissed for plaintiff's failure to state a cause of action and where plaintiff's action found frivolous); *Harbulak v. County of Suffolk*, 654 F.2d 194, 197 (2d Cir. 1981) (reversing and remanding for award of attorney's fees to defendant after finding "no basis whatsoever for a suit against" the defendant and plaintiff's claim "unreasonable and groundless, if not frivolous."); *Riviera Carbana v. Cruz*, 588 F. Supp 80 (D.P.R. 1980) (holding that plaintiff failed to allege or state a cause of action and stating that even if plaintiff had stated a cause of action, "'federal courts are without power to entertain claims if they are so attenuated and unsubstantial as to be absolutely devoid of merit' or if they are obviously, as in the instant case, frivolous") (citation omitted), *aff'd sub nom. Carbana v. Cruz*, 767 F.2d 905 (1st Cir. 1985) (unpublished table decision).

[4]*See* Complaint, at ¶16a (identifying the documents which Respondent refused to accept as "Statement of Citizenship" and "Affidavit of Constructive Notice" which Lareau presented to prove tax exemption and social security secession). *See also* OSC Charge, wherein Lareau characterizes as an "unfair employment practice" US Airway's refusal to forward his self-styled and gratuitously proferred Statement of Citizenship to the IRS, to "acknowledge my Affidavit of Constructive Notice that I no longer had application for social security benefits," and to exempt him from federal withholding taxes.

long-settled.[5] US Airways, moreover, is statutorily mandated to withhold income taxes[6] and social security contributions[7] and is immunized from legal liability for withholding by 26 U.S.C. §3102(b),[8] 26 U.S.C. §3403,[9] and the Anti-Injunction Act, 26 U.S.C. §7421(a),[10] which has been interpreted to prohibit suits against employers who withhold taxes. *See United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous action." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir.), *cert. denied*, 477 U.S. 905 (1986).

Where an employer is statutorily immunized from liability, an action brought against the employer for the performance of that duty is frivolous *per se*. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. . . ." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)); *Austin v. Jitney-Jungle Stores, Inc.*, 6 OCAHO 923, at 22 (1997), 1997 WL 235918, at *17 (O.C.A.H.O.) (citing *Neitzke*, 490 U.S. at 325, *cited in Graves*, 1 F.3d at 317). Because US Airways, "an employer who in compliance with statutory obligations . . . deducts withholding tax and social security contributions, . . . is statutorily immunized from suit[,]" Lareau's action is frivolous and meritless. *Austin*, 6 OCAHO 923, at 22, 1997 WL 235918, at *17.

Therefore, I find that there is "no legal or factual basis for any of [Lareau's] allegations," and I award US Airways **$5,296.47** in attorney's fees and related expenses, the computation of which is ex-

[5]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a)(1), 3403. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

[6]26 U.S.C. §3402(a).

[7]26 U.S.C. §3102(a).

[8]26 U.S.C. §3102(b) ("Every employer . . . shall be indemnified against the claims and demands of any person. . . .").

[9]26 U.S.C. §3403 ("The employer . . . shall not be liable to any person. . . .")

[10]26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

plained at **II, B.**, below. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 6. Respondent's prevailing party status and Lareau's action against an employer legally immunized from liability satisfy the threshold requirements of the 8 U.S.C. §1324b(h) two-part test for award of attorney's fees.

B. *Reasonableness of Attorney's Fees Request*

"In any complaint respecting an unfair immigration-related employment practice, an [ALJ], in the judge's discretion, may allow a prevailing party . . . a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). "Any application for attorney's fees shall be accompanied by an itemized statement from the attorney or representative, stating the actual time expended and the rate at which fees and other expenses were computed." 28 C.F.R. §68.52(c)(2)(v). In *Lareau*, counsel supplies the following facts and figures to support its $8,469.61 attorney's fees request:

1. ***Attorney Barbara Berish Brown***

Qualifications: Senior Partner, Paul Hastings; 1971 graduate of Yale University Law School; chair of firm's employment law practice; coauthor of EEO Update (BNA, 1997).
Rate Charged: $284.75 (discounted from usual rate of $350 per hour).
Number of Hours: 2.25 x $284.75 = $640.68.

2. ***Attorney Kenneth Wilner***

Qualifications: "Of Counsel," Paul Hastings; 1987 graduate of University of Virginia School of Law; ten years' experience in labor and employment law.
Rate: $207 (discounted from regular rate of $235).
Number of Hours: 14.75 x $207.00 = $3,053.25.

3. ***Attorney Julian B. Decyk***

Qualifications: "Of Counsel," Paul Hastings, Los Angeles Office; 1984 graduate of Harvard University Law School; expert in taxation.
Rate: $243
Number of Hours: .75 x $243 = $182.25.

4. *Law Clerk Glenn Merten*

Rate: $90
Number of Hours: 58 x $90 = $5,220.00.

5. *Legal Assistant Christian Dennison*

Rate: $67.50
Number of Hours: .50 x $67.50 = $33.75.

5. *Other Expenses*:

—Photocopy Charges:	7.40
—Postage/Express Mail:	1.24
—Lexis:	35.00
—Photocopy Charges:	55.80
—Photocopy Charges:	13.40
—Postage/Express Mail:	7.32
—Lexis:	631.88
—Photocopy:	9.60
—Facsimile:	54.97
Total Miscellaneous Charges:	$816.61.
Total Charges:	**$9,946.54.**

Of this total, US Airways requests **$8,469.61**. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley*, 461 U.S. at 433. The *Hensley* calculation is the "lodestar" amount. "The courts may then adjust this lodestar calculation by other factors. . . . [I]n *Hensley* and in subsequent cases, [the Supreme Court has] adopted the lodestar approach as the centerpiece of attorney's fee awards." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

"The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the . . . court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. "The . . . court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 ([5th Cir.]

1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Hensley*, 461 U.S. at 434 n.9. "The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." *Blanchard*, 489 U.S. at 94. "The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson*. . . . The Senate Report cites to *Johnson* as well. . . ." *Hensley*, 461 U.S. at 430.

"A number of circuits, following the lead of the Fifth Circuit in *Johnson v. Georgia Highway Express*, . . . have announced that their district courts are to consider and make detailed findings with regard to twelve factors relevant to the determination of reasonable attorneys' fees. . . ." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978).[11] These twelve factors are:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment by the attorney due to acceptance of the case. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. [*But see Blanchard v. Bergeron*, 489 U.S. 87 (1989)]. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The 'undesirability' of the case. . . . (11) The nature and length of the professional relationship with the client. . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717–19. The Fourth Circuit held that to award attorney's fees, a "court must first apply the *Johnson* factors in initially calculating the reasonable hourly rate and the reasonable number of hours expended by the attorney; the resulting 'lodestar' fee, which is based on the reasonable rate and hours calculation, is presumed to be fully compensatory without producing a windfall."[12]

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[11] *See Barber*, 577 F.2d at 226:

> We agree that these factors must be considered by district courts in this circuit in arriving at a determination of reasonable attorneys' fees in any case where such determination is necessary; and in order to make review by us effective, we hold that any award must be accompanied by detailed findings of fact with regard to the factors considered.

[12] "In determining a 'reasonable' attorney's fee . . . this Court has long held that a district court's discretion must be guided strictly by the factors enumerated by the Fifth Circuit in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See Daly v. Hill*, 790 F.2d 1071, 1077 (4th Cir. 1986). . . . *Daly*, 790 F.2d at 1075 n.2 (noting that the Johnson approach has been approved by Congress and by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 . . . (1983))." *Trimper v. City of Norfolk, Va.*, 58 F.3d 68, 73 (4th Cir. 1995).

Trimper v. City of Norfolk, Va., 58 F.3d 68, 73 (4th Cir. 1995) (referencing *Daly v. Hill*, 790 F.2d 1071, 1078 (4th Cir. 1986)), *cert. denied*, 116 S. Ct. 535 (1995).

Employing the twelve *Johnson* factors, US Airways' Application is a reasonable request for attorney's fees. For *Lareau,* counsel billed US Airways a total of 17.75 attorney's hours, 58 law clerk's hours, and .5 of a legal assistant's hour for reviewing statutes, procedures, and documents sent by the client; legal research; drafting Answer; consulting with client regarding facts of case; assembling exhibits; preparing opposition to motion for default judgment; preparing motion for summary judgment; and reviewing the opinion dismissing this case. Of these hours, charges related to defending against Lareau's motion for a default judgment will be disallowed, because it is not the fault of Lareau alone[13] that the Complaint was not timely answered. Furthermore, attorney's fees arising from US Airways' own delay in answering the Complaint are not "reasonable." It would be inequitable to force Lareau to shoulder charges US Airways could reasonably have avoided by answering the Complaint in a timely manner. In the absence of any clear authority for awarding *unnecessary* attorney's fees, this is the better rule.[14]

Therefore, as derived from October 25, 1996—June 19, 1997 Paul, Hastings, Janofsky & Walker, LLP's billing records, tendered in support of the Application, those charges reasonably allocable to US Airways' response to Lareau's motion for default judgment will be deducted from the amount requested:

[13]Although Lareau's OSC Charge contained a more complete address for USAir, the Notice of Hearing was mailed to USAir utilizing only a street address. OSC Charge, ¶2. USAir's Response To Order To Show Cause blames this for its failure to timely answer Lareau's Complaint: "The Complaint was served on USAir... [but] [n]o USAir official was specified on the envelope."

[14]Because of important public policy concerns, forums have broad discretion when awarding attorney's fees to winning defendants charged with discrimination. *See Edward Brown v. Fairleigh Dickinson University,* 560 F. Supp. 391, 402 (D. New Jersey, 1983) (assessing against plaintiff in a discrimination case containing both frivolous and legitimate claims only those attorney's fees clearly deriving from frivolous claims). Although *all* of Lareau's claims are frivolous, the default motion practice was not *entirely* of his doing. Therefore, as a matter of discretion, taking into account the relative economic posture of the parties, this portion of the fee claim is rejected. *Compare Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 161–162 (1990) ("the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than line-items").

Date	*Charge Deducted*	*Amount of Reduction*
8/27/97	default research; response (KMW)	4 hrs. x $207 = ($828)
8/29/96	revise response (KMW)	.25 hrs. x $207 = (51.75)
8/30/96	review response (BBB)	.50 hrs. x $284.75 = ($142.37)
8/30/96	revise response (KMW)	.10 hrs. x $207 = ($20.70)
9/04/96	confer and prepare response exh. (KMW)	.25 hrs. x $207 = ($51.75)
9/16/96	prepare opposition to motion (KMW)	.25 hrs. x $207 = ($51.75)

Total Amount Deductible From Attorney's Fees: ($1,146.32)

Counsel worked at a reduced rate for US Airways and discounted the total billings charged. The discounted hourly rate of $284 for work by a partner in a major Washington firm is reasonable and customary, as is $243 and $207 for Of Counsels' work. The discounted hourly rates are reasonable in light of recent OCAHO caselaw in which ALJs awarded attorney's fees ranging from $75 per hour to $275 per hour: *Horne v. Hampstead,* 7 OCAHO 959 (1997) (awarding $630 in attorney's fees at $150 an hour for work by a partner and an associate in Towson, MD, a suburb of Baltimore); *Werline v. Public Service Electric & Gas Company*, 7 OCAHO 955 (1997) (awarding $512.50 in attorney's fees at $125 per hour for work by an associate attorney general for respondent in Cedarville, NJ); *Jarvis v. AK Steel*, 7 OCAHO 952 (1997) (awarding "legal fees" in the amount of $1,833.75, with compensation for attorneys in Pittsburgh, PA, at rates of $275 per hour and $240 per hour); *Lee v. Airtouch*, 7 OCAHO 926 (1997) (awarding $7,531.26 for attorney's fees including $15.70 in costs billed for the San Diego, CA, market at rates of $155 per hour for in-house counsel and $216.75 per hour for outside counsel); and *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204 (O.C.A.H.O.) (awarding "legal fees" of $51,530.34 in the Austin, TX, market at the rate of

$185 per hour for a partner and the rates of $120 per hour and $75 per hour for associate attorneys).[15] Therefore, attorney's fees of **$2,547.61** ($3,693.93 less ($1,146.32) expended for response to the motion for default) are reasonable.

However, this does not end the inquiry, because US Airways has also requested compensation for a law clerk's and a legal technician's time. Here, the $90 hourly rate charged for the services of a law clerk, whom US Airways does not contend is a member of the Bar of any state, appears excessive (*see Johnson* factors number three, five, nine, and twelve—requisite skill; customary fee; experience, reputation, and ability; and awards in similar cases),[16] particularly in light of standards such as those articulated in the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, Pub. L. 96–481, §203(a)(1), which—although not controlling here—generally limits ***attorney*** compensation to a rate not to exceed $125 an hour, and by this forum, which has approved attorney fee awards as low as $75 an hour. More puzzling yet is the legal assistant rate, at $67.50 an hour.[17] Therefore, I lower the law clerk's hourly rate to $30 an hour, $10 an hour beyond the upper limit of what Washington area law firms advertise as the hourly salary for law clerk positions, and the rate of the legal technician to $20 an hour.

Accordingly, I award a total of **$5,296.47** in attorney's fees and related expenses, as follows:

Charge	*Amount*	
Attorney's fees	$2,729.86	(discussed *supra*)
Law Clerk's fees	$1,740.00	(58 hours at $30 an hour)

[15]As this is not a fee award under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, I am not bound by the generally applicable EAJA statutory limit of $125 per hour. 5 U.S.C. §504(b)(1)(A)(ii) ("attorney or agent fees shall not be awarded in excess of $125 per hour. . . .") or by the failure of EAJA to address awarding of other fees and expenses.

[16]Computing the minimum annual amount charged for a law clerk's time at $90 an hour, 40 hours a week, 52 weeks a year, one would project an annual billing of at least $187,200!

[17]Again, computing the minimum annual amount charged for a legal technician's time at $67.50 an hour, 40 hours a week, 52 weeks a year, one would project an annual billing of at least $140,400!

Legal Tech's fees	10.00	(.50 hour at $20 an hour)
Expenses	816.61	
Total Award:	**$5,296.47**	

III. *Conclusion*

Respondent is the prevailing party and the Complaint is without reasonable foundation in law and fact.

Lareau is directed to pay to US Airways **$5,296.47** in attorney's fees and related expenses.

SO ORDERED.

Dated and entered this 10th day of September, 1997.

MARVIN H. MORSE
Administrative Law Judge

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

August 30, 1996

Exhibit 23

MICHAEL K. LEE,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 96B00063
AIRTOUCH COMMUNICATIONS,)
Respondent.)
)

ORDER OF INQUIRY

Procedural History

Michael K. Lee, a United States citizen, filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on November 11, 1995, in which he alleged that Airtouch Communications[1] (respondent or AirTouch) engaged in unfair immigration-related employment practices on October 2, 1995 in violation of the Immigration and Nationality Act, 8 U.S.C. §1324b (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA). He checked boxes on the charge form indicating that he was subjected to national origin discrimination, citizenship status discrimination, retaliation for asserting rights protected under 8 U.S.C. §1324b, and document abuse. A letter included with his charge set out a chronology of events detailing his negotiations with AirTouch about employment as a Senior RF engineer.

On March 18, 1996, OSC notified Mr. Lee that it had determined there was no reasonable cause to believe that a cause of action was stated for citizenship status discrimination or national origin dis-

[1] Respondent has indicated that its name is actually AirTouch Cellular.

crimination under 8 U.S.C. §1324b or for document abuse under §1324b(a)(6). The letter advised Mr. Lee that he had 90 days from its receipt to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

On June 21, 1996, a complaint was filed with OCAHO in Lee's name which was captioned as a *pro se* complaint, but was not signed by the nominal complainant. Rather, it bore the signature of John Kotmair, Jr.[2] The complaint asserts that Lee was fired by AirTouch on October 6, 1995 because of his citizenship status and national origin, that AirTouch refused to accept the documents Lee presented to show that he was authorized to work in the United States, and that AirTouch requested other, different documents.[3] The documents which the complaint alleges were not accepted were a "Statement of Citizenship (stating He is a U.S. citizen and is not subject to withholding of income taxes under Federal Law)" and an "Affidavit of Constructive Notice (He does not have an SSN and is not subject to the Social Security Act)." The document the complaint alleges that AirTouch requested was a "social security number/card."

An answer to the complaint was filed on August 2, 1996 which denied the material allegations of the complaint and asserted twelve separately denominated affirmative defenses. The thrust of this answer is that respondent admits asking complainant for his social security number for the purpose of complying with income tax withholding laws and regulations, but denies requesting the social security card itself, or asking for any documents whatsoever for the purpose of showing Lee's eligibility to work in the United States. Respondent denied firing complainant but stated it failed to hire him for several reasons, one being his unwillingness to disclose his social security number.

Respondent asserted further that:

[2] Although a document attached to the complaint appeared to give Kotmair a power of attorney solely for the purpose of obtaining information, a subsequent notice of appearance was filed on August 26, 1996 with an attached power of attorney signed by Lee specifically authorizing Kotmair to represent complainant in OCAHO proceedings.

[3] Although complainant's original charge had included an allegation of retaliation for asserting rights protected under 8 U.S.C. §1324b, the complaint did not allege retaliation; in fact, in response to the question of whether he was retaliated against, complainant checked the box indicating "No."

> Complainant has acted in bad faith, with the intent to harass, annoy and intimidate AirTouch, thus entitling AirTouch to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. The documents and correspondence submitted to AirTouch by Complainant and the Complainant's Representative, John Kotmair, attached hereto as Exhibit A, show that Complainant is associated with a tax protest group led by Mr. Kotmair which propounds untenable, garbled interpretations of the law in support of its members' claims to be exempt from United States tax laws, and uses baseless litigation in order to achieve its ends.

AirTouch requests for this reason that attorneys' fees be assessed against complainant, as the complaint is without a reasonable basis in law or fact.

Applicable Rules

OCAHO rules of practice and procedure,[4] a copy of which was transmitted to each party with the Notice of Hearing, provide that a party may be represented by an attorney at no expense to the government. 28 C.F.R. §68.32(b)(1). The rules are silent, however, as to the question of whether a party may be represented by someone other than an attorney. The implication of the language of §68.32(b)(6) (referring to *any* individual acting in a representative capacity) and of §68.35 (discussing suspension of a proceeding for a reasonable time to enable a party to obtain another attorney *or representative*) (emphasis supplied) is certainly suggestive that representation is not limited to attorneys.

The Administrative Procedure Act, 5 U.S.C. §555(b), provides no assistance because it neither grants nor denies non-lawyers the authority to appear in a representative capacity, but leaves it to agency discretion to establish who is a qualified representative. OCAHO case law precedent, while not extensive, has previously authorized both organizations and individuals to engage in representation of a party, at least where the request was unopposed. *Alvarez v. Interstate Highway Constr.*, 2 OCAHO 385 at 2 (1991)[5] (Mountain States Employers' Counsel Inc. permitted to represent respondent

[4] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1995).

[5] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* reflect consecutive pagination within that bound volume, pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

on finding that organization was both authorized and competent), *United States v. Chaudry*, 3 OCAHO 588 at 1–2 (1993) (respondent's brother authorized to act as his representative, but the representation precluded the brother from being an interpreter or witness in the same proceeding).

As noted, a power of attorney has been filed in which Lee specifically authorizes Kotmair to represent him in OCAHO proceedings. While I am satisfied for purposes of 28 C.F.R. §68.32(b)(6) that Kotmair is authorized to represent complainant in this matter, before allowing him to represent another person, I must also find that he is capable of doing so. *Alvarez, supra*. Accordingly, he will be required to furnish a statement indicating his qualifications to undertake the representation of another. Basic familiarity with the statute and regulations governing these proceedings is expected of any representative, lay or otherwise. Both litigants and representatives in this forum are expected to make reasonable efforts to comply with the applicable procedural rules, and to invoke the judicial process only where there is a good faith reasonable basis to believe that the party has a meritorious claim. This includes an obligation to make a prefiling inquiry as to facts and the law.

Respondent has requested sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. This rule does not apply in OCAHO proceedings; nevertheless cases decided under it provide general guidance as to the appropriate expectations where one individual seeks to represent the interests of another. OCAHO rule §68.1 expressly provides that the federal rules may be used as a guideline. Rule 11 provides basically that the signature of a party or representative on a pleading certifies that to the best of the signer's knowledge and belief formed after reasonable inquiry, the claim is well grounded in fact and warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law. The signer of a pleading in this forum is expected to meet this standard. While Rule 11 does not apply, an administrative law judge (ALJ) may award attorneys' fees to a prevailing party against whom charges have been unreasonably brought, 8 U.S.C. §1324b (h) and 28 C.F.R. §68.52 (c)(2)(v).

Respondent will have ten days after receipt of the proposed representative's statement of qualifications to make its objections, if any, to Kotmair's representation of Lee.

Applicable Law

Ordinarily at this stage the next step would be the commencement of discovery. Before the case is further developed, however, it may be useful for me to outline the legal backdrop against which these allegations are raised. Because lay representation is contemplated here, the initial attention of the parties is directed to relevant OCAHO precedents and other pertinent authority dealing with some of the substantive questions relating to the issues raised by the complaint. Consideration of these authorities, together with responses to the inquiries made here, may assist the parties in making a preliminary assessment of whether a *prima facie* case can be made out on the facts here alleged.

Because the complaint is premised in part upon alleged violations of the employment eligibility verification system, the implementing regulations are set forth here in some detail. Regulations which govern the employment eligibility verification system, 8 C.F.R. §§274a.2(b)(v)(A), (B), and (C), provide lists of documents which are acceptable as evidence of (A) both identity and employment eligibility, (B) identity only, and (C) employment authorization only. An individual may present one of ten specific documents from the A list *or* one of nine documents from the B list (for an individual over 16) *and* one of eight documents from the C list. While the employer may not specify which of the listed documents an individual must present in order to show eligibility for employment in the United States, nothing in the verification program authorizes, much less compels, an employer's acceptance of documents other than those listed in the regulations, or for purposes other than establishing identity and employment eligibility. The employment eligibility verification system, in other words, simply does not address questions of the validity of claimed tax exemptions, appropriateness of withholding taxes, or any other terms and conditions of employment.

In *United States v. A.J. Bart, Inc.*, 3 OCAHO 538 at 6–7 (1993), the regulatory scheme for completion of the I–9 form for the employment eligibility verification process was described as follows:

> Employers are clearly advised in the section 2 wording that specified documents from Lists A, B, and C are to be examined and utilized to determine the identity and employment eligibility of all job applicants. List A documents establish both identity and employment eligibility and include United States passports, certificates of United States citizenship, certificates of naturalization, unexpired foreign passports with attached employment authorization and alien registration cards with photographs (green cards). Accordingly, any job

> applicant presenting a single document from List A effectively establishes both his/her identity and his/her employment eligibility and no other documents need be furnished.
>
> Meanwhile, List B documents establish the applicant's identity only and include, among others, a State-issued driver's license or a State-issued I.D. card with a photograph, or information, including name, sex, date of birth, height, weight, and color of eyes, and a U.S. military card. Resultingly, all persons providing a List B document must also furnish a List C document.
>
> List C documents establish an applicant's employment eligibility only and include, among others, an original Social Security number card (other than a card stating it is not valid for employment), a birth certificate issued by State, county, or municipal authority bearing a seal or other certification, and unexpired INS employment authorization. And all individuals having presented a List C document must also provide a List B document.
>
> Accordingly, any applicant has the option of presenting a List A document which establishes his/her identity and employment eligibility and no other documentation is necessary for Form I–9 purposes.

Specifically, the documents alleged to have been rejected in this case, the "Statement of Citizenship (stating He is a U.S. Citizen and is not subject to withholding of income taxes under Federal Law)" and the "Affidavit of Constructive Notice (He does not have an SSN and is not subject to the Social Security Act)" are not documents referenced in 8 C.F.R. §274a.2(b)(v). While a certificate of United States citizenship proffered for the purpose of showing identity and work eligibility must be accepted *for that purpose,* nothing in the employment eligibility verification system requires an employer uncritically to accept a prospective employee's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes, or to accept documents to establish identity or eligibility other than those specifically enumerated.

Precedent decisions in other cases under OCAHO law have previously addressed factual allegations similar to those raised here. In *Westendorf v. Brown & Root Inc.*, 3 OCAHO 477 (1992), for example, a respondent had refused to hire the complainant as an instrument fitter because the complainant would not provide Brown & Root with a social security number so that the company could comply with federal tax withholding laws. It was held that where the social security number was not requested for the purpose of preparing Section 2 of an I–9, there was no violation. Similarly, in *Lewis v. McDonald's Corp.*, 2 OCAHO 383 (1991), it was held that an employer's simple request for a social security number, where the card itself was not requested in lieu of another document, did not pose any issue justiciable under the Immigration Reform and Control

Act. As was observed in *Lewis,* "[n]othing in the logic, text or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment." *Id.* at 5.

Employers are understandably reluctant to accept representations of social security tax exemption in light of the fact that the Supreme Court has squarely stated that an employee may not simply choose unilaterally to opt out of participation in the social security program. In *United States v. Lee,* 455 U.S. 252, 257 (1982), the Court observed,

> The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security... would undermine the soundness of the social security program." S. Rep.No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S.Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.

The Court further observed that the tax imposed upon employers to support the social security system is uniformly applicable except insofar as Congress has explicitly provided otherwise, for example, the exemption granted from social security taxes for self-employed members of certain recognized religious faiths under 26 U.S.C. §1402(g). *Id.*, at 259.[6] Even this exemption does not apply to income taxation. These authorities provide a body of law which must guide decisions in this forum.

Jurisdictional Issues

The OSC charge form indicates that complainant checked the box indicating that respondent has 15 or more employees. According to

[6] 26 U.S.C. §1402 sets out the method by which application for exemption (Form 4029) may be made to the Commissioner of Social Security. If approved, the form is filed with IRS.

Nothing in the statutory scheme suggests that exemption may be obtained by unilateral declaration.

the answer filed in this case, AirTouch Cellular has approximately 3000 employees. How many are employed at the San Diego market office, the facility at issue in this matter, is not evident from the record. Accordingly the parties will be requested to address this issue with greater particularity.

If the charge form is correct and that number exceeds 15, this would appear to preclude the national origin claim on its face. 8 U.S.C. §1324b(a)(2)(B). Jurisdiction of OCAHO administrative law judges over cases alleging national origin discrimination claims is generally limited to those cases involving employers of more than three employees up to a ceiling of fourteen employees. 8 U.S.C. §1324b(a)(2). Where an employer has fifteen or more employees (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), national origin claims will generally be covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., as amended, and accordingly will fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

IRCA's provisions do not apply to "a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 2000e–2 of Title 42 . . ." 8 U.S.C. §1324b(a)(2)B. It is for this reason that the so called "no overlap" provision was enacted:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e et. seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

8 U.S.C. §1324b(b)(2).

The power of attorney filed on August 26, 1996 contains authority for Kotmair to represent Lee before the EEOC as well as before OCAHO. The record does not reflect, however, whether an EEOC charge has been filed based on these facts. Inquiry will accordingly be made as to this question as well.

Inquiries

I. *Both Parties*

1. Both parties are requested to provide any information in their possession and/or documentary evidence as to the number of employees at the San Diego market office of AirTouch Cellular in 1995 and in 1994.

2. Both parties are requested to address the question of what steps, if any, were taken for the purpose of completing Form I–9 in connection with the potential employment of complainant by respondent.

3. Both parties are requested to address:

a. Was any charge filed with EEOC against AirTouch based on the same facts and circumstances here alleged:

b. If so, is the EEOC charge currently pending based on these facts?

c. If such a charge was filed, indicate:

1. when it was filed,

2. where it was filed,

3. what disposition if any was made, and

4. what is the current status of the charge?

II. *Complainant*

1. Complainant's representative is requested to file a statement detailing his qualifications to undertake the representation.

2. Complainant is requested to answer the following:

a. Does complainant contend that non-citizens are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

b. Does complainant contend that persons having a national origin other than in the United States are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

c. Does complainant contend that AirTouch requested a social security number (or a social security card) for any purposes other than complying with relevant tax laws?

d. If so, does complainant contend that respondent requested his social security number or a social security card to establish his

1) identity?

2) eligibility to work in the United States?

3) both identity *and* eligibility to work in the United States?

Responses will be considered timely if filed before September 23, 1996.

SO ORDERED:

Dated and entered this 30th day of August, 1996.

ELLEN K. THOMAS
Administrative Law Judge

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

JAY S. MANNING, Complainant, v. CITY OF JACKSONVILLE, Respondent.	)))))))	Exhibit 24 8 U.S.C. § 1324b Proceeding Case No. 97B00126

FINAL DECISION AND ORDER TO DISMISS
(August 15, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., Complainant's Representative**
Joseph Clay Meux, Jr., Assistant General Counsel, City of Jacksonville, Florida, for Respondent

I. Introduction

Yet another frivolous[1] attack on the federal income tax and social security regimen couched as an immigration-related employment discrimination complaint! Jay S. Manning (Manning or Complainant) sues his employer, the City of Jacksonville, Florida (Jacksonville or Respondent) because Jacksonville refused to exempt him from federal income tax withholding and social security contribution obligations [2] on the basis of gratuitously tendered, unoffical, improvised, *sui generis* tax-exemption papers.

II. Factual and Procedural History

Following Equal Employment Opportunity Commission (EEOC) dismissal for lack of subject matter jurisdiction of a national origin discrimination charge based on the same factual predicate,[3] Manning, a Jacksonville employee, through his lay representative,[4] John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee (Committee), filed by letter dated January 29, 1997, a

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[1]A complaint is frivolous if it lacks an arguable basis in law or fact. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (*citing Nietzke v. Williams*, 490 U.S. 319, 327 (1989)). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d 315, 317 (5th Cir. 1993) (*citing Nietzke*, 490 U.S. at 327). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous position." *McKee v. United States*, 781 F.2d 1043, 1047 (4th Cir. 1968), *cert. denied*, 477 U.S. 905 (1986). U.S. citizen claims to be exempt from the income tax have been found to be frivolous *per se*. *LaRue v. Collector of Internal Revenue*, 96 F.3d 1450 (7th Cir. 1996),1996 WL 508567, at *1 (7th Cir. 1996) ("LaRue's argument that he should be treated as a nonresident alien -- one that is offered occasionally by tax protestors -- is patently frivolous"). For Eleventh Circuit disposition of frivolous tax suits, *see Woods v. Internal Revenue Service*, 3 F.3d 403, 404 (11th Cir. 1993) ("we would not hesitate to order sanctions if appellant had been represented").

[2]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source" -- i.e., in the workplace, through payroll deductions. 26 U.S.C. §§ 3101, 3102, 3402(a), 3403. Employers are immunized from legal liability for doing so by 26 U.S.C. § 3102, 26 U.S.C. § 3403, and the Anti-Injunction Act, 26 U.S.C. § 7421(a), which has been interpreted to prohibit suits against employers who withhold taxes. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

[3]In response to claims of this genre, EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000-e *et seq.* Memorandum, Ellen J. Vargyas, EEOC Legal Counsel, to All EEOC District, Area & Local Directors, July 13, 1995, "Clarification to April 13, 1995 Memorandum on Charges Alleging National Origin Discrimination Due to the Withholding of Federal Income or Social Security Taxes from Wages," at 1.

[4]In a matter unrelated to the case at hand, I note that on July 3, 1997, the Florida Supreme Court issued a proposed opinion, "The Florida Bar Re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration," which found that: "[N]on-lawyer representatives in securities arbitration who accept compensation for their services are engaged in the unlicensed and unauthorized practice of law, and that the public is actually being harmed and has the potential for being harmed in the future by this practice." 22 FLA. L. WEEKLY S388 (1997), 1997 WL 365462 (Fla. 1997).

charge with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Manning alleged that Jacksonville committed an ***immigration-related unfair employment practice*** proscribed by 8 U.S.C. § 1324b. He specified that Jacksonville refused to recognize for tax-exemption purposes two documents Manning gratuitously presented on September 10, 1996, *i.e.*, an Affidavit of Constructive Notice (that Manning "does [not] recognize a social security number in relationship to himself . . . [because] he has executed an Affidavit of Revocation and Rescission of his signature") and a Statement of (U.S.) Citizenship (Manning's contention being that only non-resident aliens are subject to withholding tax).

By determination letter dated April 2, 1997, OSC advised Manning that he had not "raised an issue within our jurisdiction" and that OSC would, therefore, take no action on his

behalf. OSC also advised Manning of his right to file a private complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). On June 16, 1997, Manning filed an OCAHO Complaint charging citizenship status discrimination and overdocumentation. On June 23, 1997, OCAHO issued a Notice of Hearing. On June 30, 1997, Kotmair entered his appearance.

On July 28, 1997, Jacksonville filed its Answer. While incorrectly asserting that natural-born U.S. citizens are not within the protective reach of 8 U.S.C. § 1324b, and failing to interpose the obvious affirmative defense of the Anti-Injunction Act, 26 U.S.C. § 7421(a), Jacksonville denies it committed an unfair labor practice by its compliance with the tax code.

On August 15, 1992, Manning filed a Reply to Respondent's Answer and Affirmative Defenses, correctly asserting that U.S. citizens are protected by 8 U.S.C. § 1324b.

III. Discussion and Findings

FED. R. CIV. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

See *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

The result reached here -- dismissal of Manning's frivolous tax protest -- is absolutely predictable and inescapable, given unanimous OCAHO precedent[5] and controlling federal tax law.[6] First, the Administrative Law Judge (ALJ) lacks subject matter jurisdiction over terms and conditions of employment, including tax compliance regimens, and Manning therefore fails to state a claim cognizable under 8 U.S.C. § 1324b. Second, the ALJ is statutorily prohibited from adjudicating tax matters, no matter how disingenously disguised, by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

A. The Complaint Is Dismissed Because This Forum Lacks Subject Matter Jurisdiction Over Terms and Conditions of Employment

It is a jurisprudential truism that 8 U.S.C. § 1324b, which forbids an employer to discriminate on the basis of citizenship status when hiring or firing, does not reach terms and conditions of employment.[7] Therefore, an employer who requires its employees to submit to lawful and non-discriminatory terms and conditions of employment commits no legal wrong. Among the terms and conditions of employment an employer may legitimately and nondiscriminatorily impose is the

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[5]*See Eldon Hutchinson v. GTE Data Systems, Inc.*, 7 OCAHO 954 (1997); *Hogenmiller v. Lincare, Inc.*, 7 OCAHO 953 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 948 (1997); *Hollingsworth v. Applied Research Assocs.*, 7 OCAHO 942 (1997); *Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications, Inc.*, 7 OCAHO 926, at 4-5 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97-70124 (9th Cir. 1997); *Toussaint v. Tekwood Associates*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

[6]*See* 26 U.S.C. §§ 3101, 3102, 3402, 3403, 6671, 6672, 7421, 7422.

[7]*See Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11; *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)).

requirement that its labor force submit to tax code[8] and social security[9] mandates. An employer may lawfully insist that employees comply with tax withholding and social security contribution regimens as a condition of employment.

Nothing in the text or legislative history of 8 U.S.C. § 1324b prohibits an employer from complying with the tax code or from asking for a social security number (the individual tax identification number).[10] Furthermore, 8 U.S.C. § 1324b cannot be construed so as to relieve an employer of

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[8]Contrary to Manning's assertion, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source" -- i.e., in the workplace, through payroll deductions. 26 U.S.C. §§ 3101, 3102, 3402(a), 3403.

[9]Manning argues that he may opt out of social security. The Supreme Court has held otherwise. The Supreme Court has long acknowledged the constitutionality of the SSA. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system":

> "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. CODE CONG. & ADMIN. NEWS (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

United States v. Lee, 455 U.S. 252, 258 (1982). Manning's recitation of *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935), is unavailing. *Alton* is inapposite, dealing with the Railroad Retirement Act and predating the Court's consideration of the SSA. Although an employee may decline benefits, he must submit to deductions. *Lee*, 455 U.S. at 258, 261 n.12.

Title 26 U.S.C. § 3101 imposes social security contributions "on the income of every individual" equal to certain percentages of wages "received by him with respect to employment." Title 26 U.S.C. § 3102 (Federal Insurance Contributions Act: Tax on Employees) explicitly commands that social security contributions "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." Section 3102(b) in terms certain indemnifies the employer who performs this statutory duty:

> Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

[10]*See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 9, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Winkler v. Timlin*, 6 OCAHO 912, at 11-12, 1997 WL 148820, at *7; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 8, 1997 WL 131346, at *6; *Toussaint v. Tekwood Assocs.*, 6 OCAHO 892, at 16-17, 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3-4 (O.C.A.H.O.).

statutory obligations to withhold social security contributions from ***all*** employees' wages.[11] Title 8 U.S.C. § 1324b simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. Jacksonville's decision to subject Manning to its tax and social security regimen is not discrimination.

B. Title 26 U.S.C. § 7421(a) ("The Anti-Injunction Act") Precludes ALJ Jurisdiction over Federal Income Tax Withholding

Manning attempts to restrain Jacksonville from collecting withholding tax and social security contributions. "[E]xcept in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Courts are barred from so doing by 26 U.S.C. § 7421(a), "The Anti-Injunction Act," which prohibits all suits restraining tax assessment, collection, and determination. *Woods v. Internal Revenue Service*, 3 F.3d 403, 404 (11th Cir. 1993).

> ***[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person*** . . . .

26 U.S.C. § 7421(a) (emphasis supplied). The purpose of the Anti-Injunction Act is "to preserve the Government's ability to assess and collect taxes expeditiously with 'a minimum of preenforcement judicial interference' and 'to require that the legal right to the disputed sums be determined in a suit for refund.'" *Church of Scientology v. United States*, 920 F.2d 1481, 1484-85 (9th Cir. 1990) (*quoting Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)), *cited in Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. 1 (1962). ***The Anti-Injunction Act enjoins suit to restrain all activities culminating in tax collection.*** *Linn v. Chivatero*, 714 F.2d 1278, 1282, 1286-87 (5th Cir. 1983). ***Such activities include employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

The gravamen of Manning's Complaint is a frivolous, oft-discredited tax protest altogether outside the scope of ALJ jurisdiction. Manning's claim, although expressed in immigration-related employment jargon, is essentially a collateral attempt to avoid or restrain federal income tax collection. Manning seeks redress in this forum of limited jurisdiction in lieu of appropriate forae.[12] This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment

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[11] *See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Boyd v. Sherling*, 6 OCAHO 916, at 18, 1997 WL 148820, at *13; *Winkler v. Timlin*, 6 OCAHO 912, at 11-12, 1997 WL 176910, at *10.

[12] U.S. District Court or Tax Court.

practice," is powerless to hear tax causes of action.[13] 28 C.F.R. § 44.300(a) (1996) (emphasis added).

IV. Conclusion

Taking all Manning's factual allegations as true, and construing them in a light most favorable to him, I determine that Manning is entitled to no relief under any reasonable reading of his pleadings. Even if, as Manning claims, he gratuitously tendered documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Jacksonville ignored these documents and insisted on making payroll tax and social security deductions, Jacksonville's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. § 1324b. The factual background Manning describes simply does not support the ***immigration-related*** cause of action he pleads. Manning's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside the scope of § 1324b.

Although leave to amend is favored in discrimination cases where subject matter jurisdiction is ineffectively pleaded, there is no conceivable way that Manning can transform this tax protest into an unfair ***immigration-related*** employment complaint. A complaint, even by a *pro se* Complainant (which Manning arguably is not), may be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *see Bankers Sec. Life Ins. Soc. v. Kane*, 885 F.2d 820, 822 (11th Cir. 1989).

Manning's claim is incapable of viable amendment: there is no material factual dispute between parties, only a bald tax challenge beyond this forum's jurisdictional reach. The Complaint cannot be amended to an ***immigration-related*** cause of action. Jacksonville 's insistence that all employees comply with tax code and social security requirements was entirely lawful. I am precluded from hearing this suit by the limited reach of § 1324b, by the Anti-Injunction Act, and by the tax code, which immunizes employers from liability when they withhold tax and social security contributions from wages.

V. Ultimate Findings, Conclusions, and Order

(a) Disposition

Manning's action lacks "an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Manning's Complaint, having no arguable basis in fact or law, is frivolous. *See* n.1, *supra.* Where a claim is based upon a party's discharge of statutory duties, it derives from an

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[13] *See, e.g., Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 235918, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 917, at 11, 1997 WL 242208, at *8; *Boyd v. Sherling*, 6 OCAHO 916, at 8, 1997 WL 176910, at *9.

indisputably meritless legal theory.[14] As an employer who complies with statutory obligations, Jacksonville is immune from liability under the very statutes conferring duties upon it.[15] Accordingly, I dismiss Manning's Complaint without leave to amend because his tax challenge cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice. The Complaint is dismissed because it fails to state a claim of immigration-related unfair employment practices in violation of 8 U.S.C. § 1324b and because this forum lacks subject matter jurisdiction over employment conditions and tax challenges.

The filing of this Complaint is patently frivolous, and, on the part of Kotmair, Manning's representative, disingenuous and irresponsible. He files this, the latest in a litany of tax protests, as recently as June 16, 1997, in the face of unanimous OCAHO precedents rejecting such collateral attacks on the tax code.[16] By reiterating identical, stereotypical charges without discussing or otherwise acknowledging those precedents, he abuses the process of this forum. Were Kotmair an attorney, his actions would be sanctionable. *Woods v. Internal Revenue Service*, 3 F.3d at 404. By this Final Order and Decision, Kotmair is cautioned that I may dismiss any further tax protests out of hand.

I have considered the pleadings of the parties. All requests not previously disposed of are denied.

(b) Appellate Jurisdiction

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Fluor*

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[14] "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton*, 1 F.3d at 317 (*citing Nietzke*, 490 U.S. at 327).

[15] *See* 26 U.S.C. § 3102 (immunizing employers who collect social security contributions from "the claims and demands of any person") and 26 U.S.C. § 3403 (providing that employers who withhold taxes "shall not be liable to any person").

[16] *See* n.5, *supra*.

Constructors, Inc. v. Reich, 111 F.3d 94 (11th Cir. 1997) (finding merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 15th day of August, 1997.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order to Dismiss were mailed postage prepaid this 15th day of August, 1997, addressed as follows:

Complainant's Representative

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

September 3, 1997

Exhibit 25

GREGORY OLSON, Complainant	)	
	)	8 U.S.C. 1324b Proceeding
vs.	)	
	)	OCAHO Case No. 97B00093
UNIVERSITY MEDICAL CENTER CORP., Respondent	)	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. Background

On October 8, 1996, Gregory Olson (Olson/complainant) filed a charge with the Office of Special Counsel (OSC), U.S. Department of Justice, alleging that on August 25, 1995, University Medical Center Corp. (UMC/respondent), by having refused to discontinue withholding federal taxes from his wages, committed unfair immigration-related employment practices namely, national origin and citizenship status discrimination, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324b(a)(1) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. § 1324b(a)(6).

More particularly, Olson, who is a U.S. citizen, was hired by UMC in February, 1987 as a polysomnography[1] technician in that firm's offices in Tuscon, Arizona.

On August 25, 1995, Olson presented a self-created document entitled "Statement of Citizenship" to UMC for the purpose of having UMC discontinue withholding income and social security taxes from his wages. On October 11, 1995, Olson presented a second self-created document entitled "Affidavit of Constructive Notice" for that purpose, also.

UMC refused to comply with Olson's request and continued to withhold taxes from his wages.

Resultingly, on February 8, 1996, Olson filed a Title VII charge of national origin

[1] Polysomnography is one of the most widely used tests to diagnose sleep disorders.

discrimination with the Equal Employment Opportunity Commission (EEOC) containing an allegation that "I have been denied exemption from withholding of income taxes by my employer".

On September 27, 1996, the EEOC, in lawful exercise of its jurisdiction over that charge, ruled that the charge failed to state a claim under any of the statutes enforced by the Commission.

Olson then filed his discrimination charges with OSC on October 8, 1996. It should be noted that ordinarily an individual who has allegedly been the subject of an unlawful immigration-related employment practice completes and files a standard OSC charge form (Form OSC-1).

In this case, however, OSC accepted for filing an eight (8)-page letter, dated October 8, 1996, and signed by John B. Kotmair, Jr., Olson's designated representative in this proceeding. In that correspondence, Kotmair alleged the following facts:

> On the date of August 25, 1995, Mr. Olson provided his employer, University Medical Center, in Tuscon, Arizona, with his Statement of Citizenship, since he is a Citizen of the U.S., who may claim to not be subject to the only law requiring the withholding from income taxes in the Internal Revenue Code as that law is only applicable to non resident aliens . . . [i]t was additionally communicated to Ms. Zabaleta, at University Medical Center, by service of an Affidavit of Constructive Notice, that Mr. Olson does not have, nor does he recognize a social security number in relationship to himself . . . [a]fter reviewing his position, Ms. Zabaleta informed him that they would not be following the law nor honoring his rights as asserted in the documents presented.

After completing its investigation, OSC provided complainant a determination letter, dated January 30, 1997, advising him that "there is insufficient evidence of reasonable cause to believe that any of these charges state a cause of action under 8 U.S.C. § 1324b," and that it also "appears that [the] charges . . . were not timely filed with this Office".

For those reasons, OSC informed complainant that it was declining to file an action on his behalf before an Administrative Law Judge assigned to this Office and that he was entitled to file a private action directly with this Office if he did so within 90 days of his receipt of that correspondence.

On April 14, 1997, complainant timely commenced this private action by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of IRCA.

Olson seeks reinstatement and back pay from August, 1995.

It can be readily seen that Olson's April 14, 1997 Complaint does not reallege the charge of national origin discrimination that was contained in his initial OSC charge. Complainant has not moved to amend his Complaint to add that allegation, which is ordinarily permitted under OCAHO's liberal amendment policy. 28 C.F.R. § 68.9(e); Fed. R. Civ. P. 15; United States v. Carter, 6 OCAHO 865, at 3 (1996); Monjaras v. Blue Ribbon Cleaners, 3 OCAHO 496, at 3 (1993); see also Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 7 (1992) (consideration is given to allegation not specifically alleged in the complaint, but described in OSC charge).

However, because this Office lacks statutory authority to hear a claim of national origin discrimination where, as under these facts, that claim has already been adjudicated on the merits by the Equal Employment Opportunity Commission (EEOC), consideration of a claim of national origin discrimination is precluded in this proceeding. 8 U.S.C. § 1324b(b)(2); Smiley v. City of Philadelphia, 7 OCAHO 925, at 25 (1997); Winkler v. Timlin, 6 OCAHO 912, at 5 (1997) ("once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act"); Wockenfuss v. Bureau of Prisons, 5 OCAHO 767, at 2 (1995); Adame v. Dunkin Donuts, 5 OCAHO 722, at 3-5 (1995).

Therefore, our inquiry is limited to assessing the two (2) remaining allegations at issue in the Complaint, that of citizenship status discrimination and document abuse.

On April 15, 1997, a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, were served on respondent by certified mail, return receipt requested.

On April 28, 1997, John B. Kotmair, Jr. filed a Notice of Appearance on behalf of the complainant.

On May 16, 1997, Sarah R. Simmons and D. Douglas Metcalf, Brown & Bain, P.A., filed a Notice of Appearance on behalf of the respondent.

On May 16, 1997, respondent filed its answer in which it denied having discriminated against Olson based upon his citizenship status and also denied having committed acts of document abuse. UMC also raised several affirmative defenses, including a statement that OCAHO lacks jurisdiction; that the Complaint fails to state a claim upon which relief can be granted; that complainant's Complaint is time barred under the applicable statute of limitations; and collateral estoppel.

On May 16, 1997, also, UMC filed a pleading captioned Motion to Dismiss for Failing to State a Claim, or In the Alternative, Motion for Summary Decision, together with a supporting memorandum.

On June 23, 1997, complainant filed a pleading captioned Motion to Strike Respondent's Answer requesting that UMC's answer be stricken for failure to comply with the pertinent OCAHO procedural rule governing answers, 28 C.F.R. § 68.9(c) (1996).

It is found that respondent's answer filed on May 16, 1997 complies in all respects with the procedural requirements set forth at 28 C.F.R. § 68.9(c). Accordingly, complainant's Motion to Strike Respondent's Answer is denied.

Complainant has not filed a response to UMC's dispositive motion.

II. Standards of Decision

OCAHO rules of practice and procedure authorize the Administrative Law Judge to dispose of cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief can be granted, 28 C.F.R. § 68.10 (1996), and motions for summary decision, 28 C.F.R. § 68.38(c) (1996).

In support of its motion, the respondent argues quite succinctly that the Complaint does not state a claim upon which relief can be granted since there is no allegation of an unfair immigration-related employment practice, rendering dismissal proper pursuant to section 68.10. Alternatively, respondent urges that the complainant did not timely file a charge with OSC, thereby barring this action under the statute of limitations.

To support those two (2) arguments, respondent has provided the sworn declarations of James Richardson (UMC's in-house counsel), Veronica Angulo (UMC's human resources manager), and Vina Keeling (UMC's human resources coordinator). UMC also has provided documentary evidence and referred to matters outside the immediate pleadings.

In OCAHO proceedings, if matters outside the pleadings are presented and not excluded by the Administrative Law Judge, a motion to dismiss is treated as one for summary decision. See Fed. R. Civ. P. 12(c); Toussaint v. Tekwood Assocs., 6 OCAHO 892, at 5 (1996); United States v. Italy Department Store, 6 OCAHO 847, at 2- 3 (1996).

The pertinent procedural rule governing motions for summary decision in unfair immigration-related employment practices cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this Office. United States v. Limon-Perez, 5 OCAHO 796, at 5, aff'd, 103 F.3d 805 (9th Cir. 1996).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact. An issue of material fact is genuine only if it has a real basis in the record and, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). If material factual issues exist for trial, summary decision is not proper. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, __ U.S. __, 116 S.Ct. 1261 (1996).

The party seeking summary decision assumes the initial burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. In determining whether the complainant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the respondent. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Id.; Fed. R. Civ. P. 56(e).

The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial." 28 C.F.R. § 68.38(b) (1996).

III. Analysis

For the reasons set forth more fully below, respondent's May 16, 1997 dispositive motion is being granted.

A. Citizenship Status Discrimination

With respect to complainant's initial claim of citizenship status discrimination, IRCA provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment . . . in the case of a protected individual, because of such individual's citizenship status." 8 U.S.C. § 1324b.

The burden of stating a prima facie case of citizenship status discrimination under IRCA is quite simple. A complainant must allege that: 1) he is a member of a protected class; 2) the employer had an open position for which he applied or was discharged; 3) he was qualified for the position; and 4) he was rejected or discharged under circumstances giving rise to an inference of unlawful discrimination. Lee v. Airtouch Communications, 6 OCAHO 901, at 11 (1996); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993).

Once a complainant states a prima facie case, the burden of production shifts to the employer to present a legitimate non-discriminatory reason for its employment action.

However, if the complainant fails to plead a prima facie case, the inference of discrimination never arises and the employer has no burden of production, and the complaint is dismissed. Airtouch Communications, 6 OCAHO 901, at 11. That is precisely the posture in which this case presents itself.

Although Olson is a U.S. citizen and therefore within the class which IRCA seeks to protect from unlawful citizenship status discrimination, the second and fourth elements of his prima facie case are wholly absent.

The Complaint does not contain an allegation of either discharge or refusal to hire. Moreover, the undisputed facts of this case also demonstrate quite clearly that those elemental facts cannot be pleaded. And complainant cannot cure that defect by amending his Complaint.

Olson was hired by UMC on February 21, 1987 for the position of polysomnography technician, respondent's answer at ¶ 6. On September 29, 1987, Olson properly completed a Form I-9 and tendered an Arizona driver's license to show identity and his social security card to show employment eligibility, Keeling Declaration at ¶ 4.

On August 25, 1995, Olson presented a self-created document entitled "Statement of Citizenship" to UMC for the purpose of having UMC discontinue withholding income and social security taxes from his wages, Richardson Declaration at ¶ 2.

On October 11, 1995, Olson presented another self-created document entitled "Affidavit of Constructive Notice" for the purpose of having UMC discontinue withholding federal taxes from his wages, Richardson Declaration at ¶ 2.

UMC did not discontinue withholding either income taxes or social security taxes from Olson's wages, Angulo Declaration at ¶¶ 6-7, and did not take adverse employment action against Olson, Angulo Declaration at ¶ 9.

Olson voluntarily resigned on March 8, 1997, and reapplied for a position with UMC and was rehired to an unspecified position on April 23, 1997, answer at ¶ 7. Olson completed a new Form I-9 and again tendered his Arizona driver's license as an identity document and his birth certificate as an employment eligibility document.

The conduct of which Olson complains, i.e. UMC's refusal to accede to his demands to discontinue federal tax withholding, is plainly not an unfair immigration-related employment practice proscribed by section 1324b, which limits relief to cases involving "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." Wilson v. Harrisburg School Dist., 6 OCAHO 919, at 8 (1997) (citing Tal v. M.L. Energia, 4 OCAHO 705, at 14 (1991)).

In OCAHO rulings involving parallel factual scenarios, an employer's act of withholding federal taxes from an employee's wages has been held to be a term or condition of employment which IRCA simply does not reach. Horne v. Hampstead, 6 OCAHO 906, at 5 (1997); Smiley v. City of Philadelphia, 7 OCAHO 925, at 6 (1997).

Absent facts showing that Olson was either discharged or refused employment by UMC, his claim of citizenship status discrimination is without foundation.

Accordingly, UMC has met its burden of demonstrating that it did not discriminate against Olson on the basis of his citizenship status. Olson has failed to offer specific facts showing that there is a triable issue of material fact which would preclude the entry of summary decision in UMC's favor.

Respondent's motion for summary decision is granted as it pertains to complainant's citizenship status discrimination claim, and that claim is hereby ordered to be and is dismissed with prejudice to refiling.

B. Document Abuse

Having disposed of complainant's first cause of action, a consideration of Olson's final cause of action, that of document abuse, is now in order.

The document abuse provisions of IRCA, 8 U.S.C. § 1324b(a)(6), provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system, 8 U.S.C. § 1324a(b).

The employment verification system, among other things, requires an employer to verify at the time of hire that its employees are eligible to work in the United States by inspecting identity and work eligibility documents provided by the employee.

That task is accomplished by the completion of a Form I-9, officially known as the Employment Eligibility Verification Form.

The documents which an employee may tender for purposes of establishing identity and work authorization are those specified in IRCA's implementing regulations, 8 C.F.R. § 274a.2(b)(1)(v) (1996). At the risk of engaging in document abuse, the employer may not request a particular document or demand more or different documents than are necessary to verify identity and employment eligibility, nor may an employer refuse to accept facially valid documents.

To state a prima facie case of document abuse, the complainant must allege at a minimum that the employer requested documents for purposes of satisfying IRCA's employment verification system. Olson has failed to make those elemental allegations. For example, Olson contends at ¶ 16 of his April 14, 1997 Complaint:

> The Business/Employer refused to accept the documents that I presented [to show I can work in the United States].
>
> a) The Business/Employer refused to accept the following documents: Statement of Citizenship/Affidavit of Constructive Notice

Olson has crossed out the language "to show I can work in the United States," thus clearly negating facts which are essential to prove that UMC engaged in proscribed document abuse.

Olson has alleged that he tendered two (2) documents, a Statement of Citizenship and an Affidavit of Constructive Notice, not to show that he can work in the U.S., but rather to demonstrate his purported exemption from participation in the federal social security system and from federal tax withholding.

If indeed Olson had shown that UMC requested documents for the purpose of verifying his identity and employment eligibility, a self-created Statement of Citizenship and an Affidavit of Constructive Notice are not among the documents prescribed at 8 C.F.R. § 274a.2(b)(1)(v), and thus are not satisfactory for that purpose.

IRCA simply does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures. Costigan v. NYNEX, 6 OCAHO 918, at 9-10 (1997).

As noted earlier, Olson was hired on February 21, 1987 for the position of polysomnography technician, respondent's answer at ¶ 6. On September 29, 1987, Olson properly completed a Form I-9 and tendered his Arizona driver's license to show identity and his social security card to demonstrate his employment eligibility, Keeling Declaration at ¶ 4.

Olson voluntarily resigned on March 8, 1997, and was rehired by UMC to an unspecified position on April 23, 1997, answer at ¶ 7. Olson completed a new Form I-9 and tendered his Arizona driver's license to show identity and his birth certificate to show employment eligibility.

There is no evidence that UMC requested documents to verify Olson's identity and employment eligibility either in August, 1995 or in October, 1995, and that evidentiary shortcoming cannot be remedied.

In summary, UMC has met its burden of demonstrating that it did not engage in acts of proscribed document abuse. Olson has failed to offer specific facts showing that there is a triable issue of material fact precluding the entry of summary decision in UMC's favor.

Accordingly, respondent's motion for summary decision is granted as it pertains to complainant's document abuse claim, and that claim is also hereby ordered to be and is dismissed with prejudice to refiling.

C. Subject Matter Jurisdiction

Administrative Law Judges assigned to this Office are under an obligation to examine the complaint and determine whether there is subject matter jurisdiction. Jarvis v. AK Steel, 7 OCAHO 930, at 8 (1997); Boyd v. Sherling, 6 OCAHO 916, at 7 (1997); Pena v. Downey Sav. and Loan Ass'n, 929 F. Supp. 1308, 1311 (C.D. Cal. 1996) (even if party had failed to raise the jurisdictional issue, court would be required to examine it sua sponte); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990). In the event none is found, the complaint should be dismissed.

This case is another in a series of cases involving individuals who purport to be exempted from the payment of federal taxes. Lee v. Airtouch Communications, 6 OCAHO 901 (1996); Horne v. Town of Hampstead, 6 OCAHO 906 (1997); Wilson v. Harrisburg School District, 6 OCAHO 919 (1997); Winkler v. Timlin Corporation, 6 OCAHO 912 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997).

Most of those complaints have advanced the same theories as those at issue and were filed by individuals represented by Kotmair, director of the National Worker's Rights Committee, and were dismissed at an early stage for want of jurisdiction and for failure to state a claim upon which relief can be granted.

As those rulings clearly instruct, this Office provides access only to those complainants seeking to resolve, among other things, disputes involving unfair immigration-related employment practices.

There is nothing in the provisions or IRCA, or in the pertinent implementing regulations,

which even remotely suggest that this forum has jurisdiction over disputes which involve the withholding of federal taxes from wages. Lee v. Airtouch Communications, 7 OCAHO 926, at 8 (1997) (order granting request for attorney's fees); Smiley v. City of Philadelphia, 7 OCAHO 925, at 21 (1997).

Complainant's allegations are based upon an "ideological dispute with the Internal Revenue Service over the method of withholding for taxes and over the constitutionality of the system of taxation in the United States" and do not implicate the immigration-related employment discrimination provisions of IRCA. Airtouch Communications, 7 OCAHO 926, at 4 (1997).

Accordingly, this Complaint is also being dismissed with prejudice for lack of subject matter jurisdiction.

In view of the foregoing rulings, respondent's remaining argument in support of summary decision, to the effect that complainant did not timely file his OSC charge, is rendered moot.

IV. Respondent's Request For Costs and Attorney's Fees

Respondent has requested its costs and attorney's fees in this matter. IRCA provides statutory authority for such fee shifting:

> In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

8 U.S.C. § 1324b(h).

It is clear that the respondent, in having its dispositive motion granted in its entirety, is the prevailing party in this case. Given that fact, it must now be determined whether complainant's argument has been shown to have been without reasonable foundation in law and fact.

In making that determination, prior OCAHO rulings have applied the standard established by the U.S. Supreme Court in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), wherein it was held that a court may award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Wije v. Barton Springs, 5 OCAHO 785 (1995); Jarvis v. AK Steel, 7 OCAHO 952, at 2 (1997). The purpose of this rule is to deter the filing of frivolous lawsuits.

The Supreme Court, however, has cautioned that the court must resist the temptation to conclude that, because the complainant did not ultimately prevail, the action must have been unreasonable or without foundation, logic that would discourage all but the most airtight claims. Airtouch Communications, 7 OCAHO 926, at 2.

It has been patently obvious from the very outset that complainant's dispute with UMC had nothing whatsoever to do with IRCA's purpose of remedying unfair immigration-related employment practices. Instead, this factual scenario clearly demonstrates that complainant's claim is ideological in nature and that his dispute is with the Internal Revenue Service concerning federal tax laws namely, the withholding of taxes from his wages.

Olson's theory has previously been reviewed in this forum numerous times and has been found to be totally without merit. See, for example, the list of cases cited by the Administrative Law Judge in the first footnote in Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997). Because Olson's claims bear no discernible difference, they are likewise being found to be without reasonable foundation in law and fact.

An award of attorney's fees to UMC would serve the purpose of deterring subsequent lawsuits of this nature while avoiding any chilling effect on the filing of meritorious IRCA claims.

Olson may not claim unfair surprise upon learning that he will be ordered to pay UMC's attorney's fees and costs since he was advised in OSC's January 30, 1997 determination letter and prior to having filed his OCAHO Complaint, that an administrative law judge may allow a reasonable attorney's fee to UMC in the event his argument is found to be without reasonable foundation in law and fact.

And Olson's chosen representative, Kotmair, is also aware that attorney's fees have been awarded against other individuals alleging similar tax-related claims in this forum. Lee v. Airtouch Communications, 7 OCAHO 926 (1997); Jarvis v. AK Steel, 7 OCAHO 952 (1997); Werline v. Public Serv. Elec. & Gas Co., OCAHO Case No. 97B00023 (August 1, 1997).

However, before an order can be entered directing Olson to pay attorney's fees and costs, it must also be determined whether the requested fees and costs are reasonable. In accordance with the pertinent procedural rule, 28 C.F.R. § 68.52(c)(2)(v) (1996), UMC will provide this Office an itemized statement of fees containing the actual time expended and the rate at which the fees and other expenses were computed.

In providing that information, UMC should identify the individuals (partners, associates, or paralegals) who incurred billable time on this matter and state whether the rates charged are comparable to those charged in similar matters handled by UMC's attorneys and by other law firms in the Tuscon, Arizona metropolitan area.

V. Order

In view of the foregoing, respondent's Motion for Summary Decision filed on May 16, 1997 is granted.

Further, complainant's April 14, 1997 Complaint alleging two (2) unfair immigration-related employment practices, that of citizenship status discrimination and document abuse, in violation of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324b(a)(1) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. § 1324b(a)(6), is hereby ordered to be and is dismissed, with prejudice to refiling, for lack of subject matter jurisdiction.

Respondent is ordered to provide this Office an itemized statement of fees stating the actual time expended and the rate at which the fees and other expenses were computed, and to have done so by Friday, September 12, 1997.

A final order will be entered following receipt of that information. All motions and requests not previously disposed of are hereby denied.

Joseph E. McGuire
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 a timely review of this 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 this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 1997, I have served copies of the foregoing Order Granting Complainant's Motion for Summary Decision to the following persons at the addresses shown, in the manner indicated:

Office of Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(original hand delivered)

Poli Marmolejos, Esq.
Office of Special Counsel for Immigration
Related Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728
(one copy sent via regular mail)

Mr. Gregory Olson
1020 East Waverly
Tucson, Arizona 85719
(one copy sent via regular mail)

Mr. John Kotmair, Jr.
National Worker's Right Commission
12 Carroll Street, Suite 105
Westminster, Maryland 21157
(one copy sent via regular mail)

Sarah Simmons, Esquire
D. Douglas Metcalf, Esquire
Brown & Bain, P.A.
One South Church Avenue, 19th Floor
P.O. Box 2265
Tuscon, Arizona 85702-2265
(one copy sent via regular mail)

Cathleen Lascari
Legal Technician to
Joseph E. McGuire
Administrative Law Judge
Department of Justice
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, Virginia 22041
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MARIA M. PARHAM, Complainant, v. UNITED STATES POSTAL SERVICE, Respondent.	8 U.S.C. § 1324b Proceeding OCAHO Case No. 97B00122 Judge Robert L. Barton, Jr.

Exhibit 26

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(November 13, 1997)

I. BACKGROUND AND PROCEDURAL HISTORY

On June 12, 1997, Maria M. Parham (Parham or Complainant), through her representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which she alleges that the United States Postal Service (Postal Service or Respondent) discriminated against her because of her citizenship status, Compl. ¶¶ 9-10, and committed document abuse by refusing to accept documents she presented, namely a Statement of Residence and an Affidavit of Constructive Notice, id. ¶¶ 16-16a. Complainant states that she filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on February 18, 1997. Id. ¶ 18. The OSC charge reveals that the two documents in question purport to show that Complainant is not subject to income tax withholding.[2] See C. OSC Charge at 3-4.

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[1] Since then, I have excluded Mr. Kotmair from participation in this proceeding for the reasons stated in my Order Excluding Complainant's Representative, entered August 27, 1997.

[2] Ms. Parham's Complaint echoes the allegations of a cornucopia of similar cases, all of which have been dismissed at early procedural stages. See Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), 1996 WL 670179, aff'd, Toussaint v. Office of the Chief Administrative Hearing Officer, No. 96-3688 (3d Cir. 1997); Hamilton v. The Recorder, 7 OCAHO 968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Olson v. University Medical Ctr. Corp., OCAHO Case No. 97B00093 (Sept. 3, 1997); Aguilar v. United Parcel Serv., OCAHO Case No. 97B00079 (Sept. 2, 1997); Benz v. Department of Defense, Defense Finance & Accounting

(continued...)

Complainant states that OSC sent her a letter that advised she could file a complaint directly with OCAHO. Compl. ¶ 19. Complainant enclosed the following three documents with her Complaint: (1) a paper entitled "Privacy Act Release Form and Power of Attorney," which is signed by Complainant and gives permission to John Kotmair to inquire of and procure from the United States Postal Service information and documents relating to the withholding of taxes; (2) a copy of the charge filed with OSC; and (3) a copy of the letter sent from OSC regarding the present controversy.

Respondent's answer to the Complaint was due not later than July 30, 1997.[3] On August 6, 1997, the United States Postal Service, through its counsel Suzanne H. Milton, entered an appearance in this case. However, because neither a motion for an extension of time was sought nor an answer had been filed within the requisite time period, on August 7, 1997, I issued an entry of default. The order entering the default warned Respondent that a default judgment would be entered unless Respondent filed an answer to the Complaint by August 25, 1997. Respondent filed its Motion for Leave to File Answer Late, accompanied by its Answer, on August 25. For the reasons

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[2](...continued)
Serv., OCAHO Case No. 97B00115 (Sept. 8, 1997); Lee v. AT&T, OCAHO Case No. 97B00031 (Aug. 26, 1997); Manning v. City of Jacksonville, 7 OCAHO 956 (1997); Hendrickson v. GTE Communication Systems Corp., OCAHO Case No. 97B00089 (Aug. 14, 1997); Gayle Davis v. GTE Florida Inc., OCAHO Case No. 97B00088 (Aug. 14, 1997); John Davis v. GTE Florida Inc., OCAHO Case No. 97B00087 (Aug. 14, 1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997), 1997 WL 562107; Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Winkler v. West Capital Financial Servs., 7 OCAHO 928 (1997); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923 (1997), 1997 WL 235918; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997), 1997 WL 242208; Costigan v. NYNEX, 6 OCAHO 918 (1997), 1997 WL 242199; Boyd v. Sherling, 6 OCAHO 916 (1997), 1997 WL 176910; Winkler v. Timlin Corp., 6 OCAHO 912 (1997), 1997 WL 148820; Horne v. Town of Hampstead, 6 OCAHO 906 (1997), 1997 WL 131346; Lee v. Airtouch Communications, 6 OCAHO 901 (1996), 1996 WL 780148, appeal filed, No. 97-70124 (9th Cir. 1997).

[3] A respondent must file a written answer to the complaint within thirty days after the service of the complaint. 28 C.F.R. § 68.9(a) (1996). Although service of all other pleadings is effective at the time of mailing, service of a complaint is not effective until it is received. See id. § 68.8(c)(1). The signed postal return receipt card does not indicate when Respondent received the present Complaint, but the signed card was returned to my office on June 30, 1997, so I know that Respondent received it by that date.

set forth in my Order of September 10, 1997, I set aside the entry of default and accepted Respondent's Answer for filing.

In its Answer, Respondent denies that it discriminated against Complainant because of her citizenship status. Ans. ¶¶ 9-10. Respondent admits that it "refused to accept documents submitted by Ms. Parham seeking to withdraw from the Social Security Program and claim non-resident status for tax withholding purposes." Id. ¶ 16. Specifically, Respondent admits that it refused to accept the document entitled "Affidavit of Constructive Notice," dated September 13, 1994, but states that it has insufficient information to admit or to deny whether it refused to accept a document entitled "Statement of Residence." Id. ¶ 16a. In addition, Respondent asserts two affirmative defenses in its Answer: lack of subject matter jurisdiction and failure to file the Complaint in a timely manner. Id. at 3-4.

Respondent filed its Motion to Dismiss, accompanied by a supporting memorandum (R. Mem.), on October 15, 1997. Respondent requests that I dismiss the Complaint for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to file a charge with OSC in a timely manner. See R. Mot. Dismiss at 1. Complainant's response to Respondent's Motion was due no later than October 31, 1997. See Order Granting C.'s Mot. for Leave to File Ans. and Accepting Ans. to Compl. at 6. Complainant, however, did not file a response until November 10, 1997, and included no request for permission to file a late response. Nevertheless, I will address the arguments Complainant makes in her Reply to Respondent's Motion to Dismiss.

II. STANDARDS GOVERNING DISMISSAL/SUMMARY DECISION

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 350 (11th Cir. 1996); ICA Constr. Corp. v. Reich, 60 F.3d 1495, 1497 (11th Cir. 1995). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Stephens v. Department of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir.), cert. denied, 498 U.S. 998, and cert. denied sub nom. Stephens v. Coleman, 498 U.S. 998 (1990); Bent v. Brotman Medical Ctr. Pulse Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[4] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5; see also Johannessen, 76 F.3d at 350 (trial court must construe the

[4] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

facts alleged in the light most favorable to plaintiff); ICA, 60 F.3d at 1497 (same). "Conclusory allegations and unwarranted deductions of fact," however, are not assumed to be true. See Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).[5]

Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Johannessen, 76 F.3d at 349 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Quality Foods, 711 F.2d at 995 (citing same); Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ." Fed. R. Civ. P. 12(c);[6] see D'Amico v. Erie Community College, 7 OCAHO 948, at 4 (1997), 1997 WL 562107, at *3 (citing Yosef v. Passamaquoddy Tribe, 876 F.2d 283 (2d Cir. 1989), cert. denied, 494 U.S. 1028 (1990), and United States v. Italy Department Store, 6 OCAHO 847, at 2-3 (1996), 1996 WL 312113, at *2). Respondent relies on several exhibits in support of its present Motion. Consequently, I will treat the Motion as a motion for summary decision.

The Rules of Practice and Procedure that govern this proceeding permit the Administrative

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[5] The U.S. Court of Appeals for the Eleventh Circuit "is bound by the caselaw of the former Fifth Circuit handed down before September 30, 1981 unless modified or overruled by [the Eleventh Circuit] en banc." Allen v. Newsome, 795 F.2d 934, 938 n.10 (11th Cir. 1986). Judicial review of this case may be had "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." 8 U.S.C. § 1324b(i)(1) (1994); see also 28 C.F.R. § 68.53(b) (1996). As the present cause of action arose in Florida, it appears that precedent from the U.S. Court of Appeals for the Eleventh Circuit is controlling in this case.

[6] The Rules of Practice and Procedure that govern OCAHO proceedings provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1996).

Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996). Only facts that will affect the outcome of the proceeding are deemed material. United States v. Aid Maintenance Co., 6 OCAHO 893, at 4 (1996), 1996 WL 735954, at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); United States v. Tri Component Product Corp., 5 OCAHO 821, at 3 (1995), 1995 WL 813122, at *3 (Order Granting Complainant's Motion for Summary Decision) (citing same and United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994), 1994 WL 269753, at *2). An issue of material fact must have a "real basis in the record" to be considered genuine. Tri Component, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587 and Primera, 4 OCAHO 615, at 2, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. at 4 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991),[7] 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b) (1996).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file

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[7] Citations to OCAHO precedents in bound Volumes I-III, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volumes I-III. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume III, however, are to pages within the original issuances.

as part of the basis for summary judgment. Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing Primera, 4 OCAHO 615, at 3, 1994 WL 269753, at *2, and United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991), 1991 WL 531744, at *3).

III. DECISION AND ORDER

A. Sovereign Immunity

"Sovereign immunity refers to the doctrine that the United States, as a sovereign, may not be sued without its consent." Kasathsko v. Internal Revenue Serv., 6 OCAHO 840, at 5 (1996), 1996 WL 281945, at *4 (citing United States v. Sherwood, 312 U.S. 584, 586 (1941); Raulerson v. United States, 786 F.2d 1090 (11th Cir. 1986)). The government's waiver of sovereign immunity must be unequivocal, id. (citing United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992)), and consent to be sued must be strictly construed in favor of the government, id. (citing United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992)).[8]

Contradictory authority exists regarding whether the anti-discrimination provisions of the Immigration Reform and Control Act of 1996 (IRCA), contained in 8 U.S.C. § 1324b, waive the federal government's sovereign immunity with respect to suits brought pursuant to those provisions. Two U.S. Courts of Appeals have ruled that section 1324b does not render consent for the federal government to be sued under its provisions. See Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505, 509 (10th Cir. 1994) (stating that "[p]etitioner has not demonstrated that the IRCA contains explicit and unambiguous language that waives the immunity of the United States"); General Dynamics Corp. v. United States, 49 F.3d 1384, 1385-87 (9th Cir. 1995) (finding that the United States was immune from a claim for attorney's fees under section 1324b because the section did not expressly waive sovereign immunity). On the other hand, some OCAHO case law supports the idea that IRCA's anti-discrimination provisions waive sovereign immunity. See Roginsky v. Department of Defense, 3 OCAHO 278, 291 (Ref. No. 426) (1992), 1992 WL 535565, at *10 ("Upon consideration of IRCA as a whole, its legislative history, its relationship to Title VII [of the Civil Rights Act of 1964], and its implementation by the responsible federal agencies, I confirm the earlier conclusion that Congress intended to and did waive sovereign immunity under 8 U.S.C. § 1324b."); Mir v. Federal Bureau of Prisons, 3 OCAHO 1073, 1083 (Ref. No. 510) (1993), 1993 WL 604446, at *8 (following Roginsky).

In light of the decisions of the U.S. Courts of Appeals that have considered the issue, and

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[8] Respondent has not raised the issue of whether, as a governmental entity, it is immune from suit. That fact does not restrict my authority to address the issue. "Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Therefore, it is appropriate for me to consider the issue sua sponte.

absent a "clear and explicit waiver," I previously have concluded that IRCA's anti-discrimination provisions do not waive the federal government's sovereign immunity. Kasathsko, 6 OCAHO 840, at 7, 1996 WL 281945, at *6. I have no reason in the case at hand to deviate from the conclusion that section 1324b itself does not provide consent for the federal government to be sued under its provisions. Therefore, if the federal government, in the form of the United States Postal Service, is amenable to suit in this case, waiver of sovereign immunity must come from another source.

"The Postal Service . . . is covered by a 'sue and be sued' clause,[9] which creates a presumption of waiver of sovereign immunity for all purposes." Nagy v. United States Postal Serv., 773 F.2d 1190, 1192 (11th Cir. 1985) (holding that the Postal Service is liable for interest on back pay dispensed pursuant to an employment discrimination claim under Title VII of the Civil Rights Act of 1964); see also Franchise Tax Bd. of Calif. v. United States Postal Serv., 467 U.S. 512, 520 (1984) (noting that Congress has launched the Postal Service into the world of commerce and that it must be presumed that the Postal Service's "liability is the same as that of any other business").

The broad presumption of waiver of sovereign immunity created by a "sue and be sued" clause may be rebutted in certain circumstances.

> [I]f the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Franchise Tax Bd., 467 U.S. at 517-18 (quoting FHA v. Burr, 309 U.S. 242, 245 (1940)); see also Nagy, 773 F.2d at 1193 (also citing Burr, 309 U.S. at 245). As the record and arguments have not been developed in relation to determining whether any of those exceptions apply in this case, and as a finding regarding sovereign immunity would not alter the result of this case, I decline to rule on whether the principle of sovereign immunity insulates Respondent from this suit. Cf. Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996) (noting that, although it is the usual practice to resolve jurisdictional issues before reaching the merits of a case, a court may "bypass jurisdictional questions and decide the case on the merits when [among other things] a decision on the merits favors the party who has raised the jurisdictional bar"). Instead, I move to a consideration of the issues Respondent has raised in its Motion to Dismiss.

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[9] The Postal Reorganization Act of 1970 "grants the Postal Service the power to 'sue and be sued.'" Nagy v. United States Postal Serv., 773 F.2d 1190, 1192 (11th Cir. 1985) (citing 39 U.S.C. § 401(1)).

B. Lack of Subject Matter Jurisdiction

1. Citizenship status discrimination claim

Respondent contends that I lack subject matter jurisdiction over Complainant's citizenship status discrimination claim because "the Complaint does not allege discrimination in hiring, firing, recruitment or referral for a fee." R. Mot. Dismiss at 1; see also Ans. at 3; R. Mem. at 3. Complainant alleges that Respondent discriminated against her because of her citizenship status, Compl. ¶¶ 9-10, but does not allege that Respondent either refused to hire or fired her, id. ¶¶ 13-14.

"It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment." Horne v. Town of Hampstead, 6 OCAHO 906, at 5 (1997), 1997 WL 131346, at *4 (citing Naginski v. Department of Defense, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *23). "Controversies over conditions of employment do not implicate the jurisdictional requirements of § 1324b." D'Amico v. Erie Community College, 7 OCAHO 948, at 10 (1997), 1997 WL 562107, at *7 (citing Costigan v. NYNEX, 6 OCAHO 918, at 5 (1997), 1997 WL 242199, at *3, and Horne, 6 OCAHO 906, at 6, 1997 WL 131346, at *4). Consequently, I do not have subject matter jurisdiction over Complainant's citizenship status discrimination claim. See, e.g., Lareau v. USAir, Inc., 7 OCAHO 932, at 13 (1997); Costigan v. NYNEX, 6 OCAHO 918, at 4 (1997), 1997 WL 242199, at *3; Horne, 6 OCAHO 906, at 4, 1997 WL 131346, at *3.

2. Document abuse claim

Respondent argues that I lack subject matter jurisdiction over Complainant's document abuse claim because

> the Complaint does not allege . . . document abuse pursuant to showing identity or employment authorization. Rather, the Complaint claims that the Postal Service unlawfully declined to accept her claim of exemption from federal tax withholding, a matter entirely outside the scope of the Immigration Reform and Control Act of 1986, as amended.

R. Mot. Dismiss at 1; see also Ans. at 3; R. Mem. at 3-4. Complainant alleges that Respondent refused to accept the following documents: a "Statement of Residence" and an "Affidavit of Constructive Notice." Compl. ¶ 16(a). IRCA, as amended by the Immigration Act of 1990, provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment

practice relating to the hiring of individuals.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements of the employment eligibility verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 28 C.F.R. § 274a.2(b)(ii) (1997).

Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization.[10] The documents Complainant asserts Respondent refused to accept, a Statement of Residence and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility. Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; accord, e.g., Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 17-18 (1997); Jarvis v. AK Steel, 7 OCAHO 930, at 7-8 (1997); Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6.

As Respondent points out, see R. Mem. at 3, Complainant does not even allege that she presented the documents to establish identity and/or work eligibility;[11] consequently, the Complaint itself shows that Complainant's claim fails to implicate the employment eligibility verification system. Respondent also notes that Complainant did not present the documents in question until she had been working at the Postal Service for almost ten years. Id. at 3-4. That point underscores the conclusion that Complainant did not present the documents in question to verify her identity and/or employment eligibility, which must be done within three business days of the date that an employee

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[10] For purposes of this case, acceptable documents are noted at 8 U.S.C. § 1324a(b)(1)(B)-(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C) (1997). Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996 enactment date. See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

[11] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [she] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [she] can work in the United States." Compl. ¶ 16.

begins work, see 8 C.F.R. § 274a.2(b)(1)(ii) (1997).[12] As a result of the foregoing, I am compelled to dismiss Complainant's document abuse claim because I lack subject matter jurisdiction over Complainant's particular allegations.[13]

C. Failure to State a Claim

1. Citizenship status discrimination claim

IRCA only governs claims by protected individuals of citizenship status discrimination when the individual is fired or not hired. See 8 U.S.C. § 1324b(a)(1) (1994); 28 C.F.R. § 44.200(a)(1) (1997); see also, e.g., D'Amico, 7 OCAHO 948, at 10, 1997 WL 562107, at *7; Horne, 6 OCAHO 906, at 5-6, 1997 WL 131346, at *4.

Assuming that the facts alleged in the Complaint are true, and construing those facts in the light most favorable to Complainant, Complainant nonetheless fails to state a viable claim of citizenship status discrimination under 8 U.S.C. § 1324b. Complainant states that she is a permanent resident alien, see Compl. ¶ 2, which means that she qualifies as a "protected individual" under the statute, see 8 U.S.C. § 1324b(a)(3)(B) (1994); 28 C.F.R. § 44.101(c)(2) (1997). As previously noted, however, Complainant does not allege that she either was refused employment or was fired from her job. See Compl. ¶¶ 13-14. Complainant has not alleged the type of treatment that constitutes discrimination under section 1324b and, therefore, fails to state a claim upon which relief may be granted with respect to citizenship status discrimination. See, e.g., Lareau, 7 OCAHO 932, at 13; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 15 (1997), 1997 WL 242208, at *12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6.

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[12] Additionally, Complainant was hired at the Postal Service on June 8, 1985. See Compl. ¶ 11; Ans. ¶ 11. Respondent notes that, when Complainant started working for Respondent in 1985, Respondent was not required to complete an employment eligibility verification form (I-9 form) for Complainant. R. Mem. at 1; Ans. ¶ 3. IRCA, which created the employment eligibility verification system, did not become law until 1986, and employers are required to complete I-9 forms only for those employees who are hired after November 6, 1986, see 8 C.F.R. § 274a.2(a) (1997).

[13] Complainant maintains that, "[d]ispite (sic) Respondents (sic) assertions, the legally mandated acceptance under 1324b(a)(6) is not in any way limited to 'for purposes of satisfying the requirements of section 1324a(b),' as Congress has studiously omitted any such limitation." C. Reply to Mot. Dismiss at 2. Contrary to Complainant's assertions, that language of limitation expressly appears in the statute, see 8 U.S.C. § 1324b(a)(6) (1994). Complainant reaps nothing from her argument because OCAHO Administrative Law Judges repeatedly and consistently have applied the phrase "for purposes of satisfying the requirements of section 1324a(b) of this title" as modifying "refusing to honor documents tendered that on their face reasonably appear to be genuine." See, e.g., Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6.

In addition, Complainant has not alleged that Respondent treated her differently from other similarly situated employees of different citizenship status. See Compl. ¶ 14(e) (inquiry regarding disparate treatment left completely blank). Complainant's failure to allege disparate treatment as part of her citizenship status discrimination claim provides additional grounds for dismissing the Complaint for failure to state a claim of citizenship status discrimination. See, e.g., Boyd v. Sherling, 6 OCAHO 916, at 23-24 (1997), 1997 WL 176910, at *20-21; Lee v. Airtouch Communications, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8-9, appeal filed, No. 97-70124 (9th Cir. 1997).

2. Document abuse claim

Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept her Statement of Residence and her Affidavit of Constructive Notice, but, as Respondent appropriately notes, see R. Mem. at 3, Complainant specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra note 11 and accompanying text. Also, those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra note 10 and accompanying text.

Assuming that all of Complainant's factual allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant still fails to state a claim of document abuse. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7; accord, e.g., Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).[14]

D. Lack of Timeliness

A complaint regarding an unfair immigration-related employment practice cannot be filed with OCAHO if the conduct giving rise to the complaint occurred more than 180 days before a

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[14] See supra note 13.

charge was filed with OSC. See 8 U.S.C. § 1324b(d)(3) (1994); 28 C.F.R. § 68.4(a) (1996). Respondent urges as additional grounds for its Motion to Dismiss that the present Complaint was untimely filed under that provision. See R. Mem. at 4.

Complainant states that she submitted her Statement of Residence to Respondent on July 11, 1994, C. OSC Charge at 3, but she does not reveal the date when she submitted her Affidavit of Constructive Notice. By letter dated September 15, 1994, Respondent unequivocally stated its position that it refused to recognize Complainant's claim to be exempt from income tax withholding. See R. Mem. Ex. 4. The letter is written on letterhead from the Postal Service's Law Department in its Atlanta Field Office, and is addressed to T. Paul Bell of the National Worker's Rights Committee, the organization directed by Complainant's former representative. The letter makes no specific reference to Complainant's Statement of Residence and Affidavit of Constructive Notice,[15] but it clearly rejects the proposition for which those documents were presented, i.e., that Complainant is not subject to having taxes withheld from her paycheck.

Complainant's own information reveals that she understood that Respondent had rejected her proffered documents. In her charge to OSC, Complainant's former representative asserts on her behalf that, "[a]fter reviewing her position, The Legal Staff of the United States Postal Service, in Atlanta, Georgia, informed her that they would not be honoring Ms. Parham's documents and thereby failed to treat Ms. Parham as a U.S. Resident possessing the protections and rights of a U.S. citizen." C. OSC Charge at 6 (emphasis added). Consequently, Respondent had rejected Complainant's documents as of the middle of September 1994.[16] Complainant, however, did not file her charge with OSC until February 18, 1997, Compl. ¶ 18, more than two years after the alleged discriminatory events. That falls well outside the 180-day period mandated by statute.

Complainant presents a plentiful crop of arguments as to why I should consider her charge

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[15] In fact, the letter purports to respond to an "August 25, 1994 letter regarding Ms. Parham's claim to be a non-resident alien and withdrawal from the social security program." R. Mem. Ex. 4 at 1.

[16] "It is axiomatic that the limitations period begins to run at the time of the alleged discriminatory act, provided that act is sufficiently clear to put Complainant on notice. Thus, an unequivocal notification of termination or rejection of employment delineates the commencement of the limitations period." Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 9 (1996), 1996 WL 670179, at *6 (citing Chardon v. Fernandez, 454 U.S. 6, 7 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980); and Lewis v. McDonald's Corp., 2 OCAHO 383, at 4 (1991), 1991 WL 531895, at *3 (Westlaw incorrectly lists the OCAHO citation for this case as "4 OCAHO 609")), aff'd, Toussaint v. Office of the Chief Administrative Hearing Officer, No. 96-3688 (3d Cir. 1997). As Complainant alleges acts of document abuse, and as Complainant's citizenship status discrimination charge hinges on Respondent's refusal to accept Complainant's proffered documents, the "unequivocal" act that marks the commencement of the limitations period in this case is Respondent's rejection of Complainant's documents.

filed with OSC in a timely manner. First, Complainant asserts that her OSC charge must have been timely because OSC accepted the charge. See C. Reply to Mot. Dismiss at 3. Specifically, Complainant states:

> Complainant has diligently pursued all known legal remedies in this case in a continuing effort to secure her rights under the Constitution and applicable federal law. If Complainant's complaint was not filed within the applicable statutes of limitation, then OSC would not have accepted the complaint. The complaint was clearly filed within the applicable statutes of limitation as evidenced by OSC's acceptance of the complaint. As 28 C.F.R. § 44.300 prohibits any overlap between charges filed with OSC and EEOC[17] complaints, and as OSC accepted Complainant's charge and did not dismiss it pursuant to 28 C.F.R. § 44.301(d)(1), the Complainant's charge was made within the 180 day limitation.

Id. As I stated in response to identical arguments presented by other complainants in cases with facts very similar to the ones in the present case:

> Complainant is mistaken as to the effect of OSC's acceptance of his charge. While 28 C.F.R. § 44.301(d)(1) does provide that "[i]f the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice," OSC's failure to properly dismiss an untimely charge is not determinative on the issue of timeliness. In fact, OSC has actually filed cases on behalf of charging parties where the case was dismissed due to the lack of timeliness in the filing of the initial charge. See, e.g., United States v. Hyatt Regency Lake Tahoe, 6 OCAHO 879, at 8-11 (1996). Pursuant to 8 U.S.C. § 1324b(c)(2), OSC is responsible for investigating charges and issuing complaints under Section 1324b and in prosecuting such complaints before OCAHO Administrative Law Judges. Accordingly, OSC's function is an investigatory and prosecutorial one, not a judicial one. Therefore, OSC's acceptance of an untimely charge does not [affect] the ability of an Administrative Law Judge to rule on the timeliness of such charge.

Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 12-13 (1996), 1996 WL 670179, at *9 (footnotes omitted), aff'd, Toussaint v. Office of the Chief Administrative Hearing Officer, No. 96-3688 (3d Cir. 1997); see also Gayle Davis v. GTE Florida Inc., OCAHO Case No. 97B00088, at 11-12 (Aug. 14, 1997); John Davis v. GTE Florida Inc., OCAHO Case No. 97B00087, at 11-12 (Aug. 14, 1997).

Complainant further argues that OSC's letter informing him of his right to file a complaint directly with OCAHO should "constitute a waiver of any applicable statutes of limitation and, at the least, call for some equitable modification or indicate that, under the doctrine of equitable tolling,

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[17] Equal Employment Opportunity Commission.

some tolling is appropriate in this case as OSC did not view Complainant's charge as being time-barred." R. Reply to Mot. Dismiss at 4. As discussed immediately above, Complainant erroneously assumes that a letter from OSC notifying a charging party of his or her right to file a charge directly with OCAHO indicates a belief on the part of OSC that the charging party has a meritorious claim.

Finally, Complainant argues that she previously filed a complaint with the Equal Employment Opportunity Commission, and, because of that filing, the filing deadline for the OSC charge should have been waived. See C. Reply to Mot. Dismiss at 4. Complainant correctly notes that the 180 day filing deadline generally is extended for periods in which (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) by misconduct or otherwise, the employer lulled the applicant into inaction during the filing period; or (3) the charging party timely filed his or her charge in the wrong forum. See id. (citing United States v. Weld County Sch. Dist., 2 OCAHO 326, at 17 (1991), 1991 WL 531749, at *13).

A Memorandum of Understanding (MOU) between EEOC and OSC also addresses the issue of the timeliness of an OSC charge that first is filed with EEOC. Under the MOU, OSC and EEOC each have appointed the other "to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits." Toussaint, 6 OCAHO 892, at 10, 1996 WL 670179, at *7 (quoting MOU, 54 Fed. Reg. 32,499, 32,500 (1989)). "A charge is timely filed under IRCA if it is filed with OSC, or an agency with which OSC has an MOU, at the most, 180 days after the alleged discriminatory event." Id. at 11, 1996 WL 670179, at *8 (citing Walker v. United Air Lines, Inc., 4 OCAHO 686, at 29 (1994), 1994 WL 661279, at *18, and Reyes v. Pilgrim Psychiatric Ctr., 3 OCAHO 529, at 2 (1993), 1993 WL 403248, at *1).

However, as the MOU predates the existence of the document abuse cause of action (which was created by the Immigration Act of 1990) and only refers to national origin and citizenship status discrimination, "the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline." Id. (citing United States v. Hyatt Regency Lake Tahoe, 6 OCAHO 879, at 11 (1996), 1996 WL 570514, at *8). Consequently, Complainant's filing of a charge with EEOC, even assuming that she filed it with EEOC within the 180 day period, does not render Complainant's document abuse charge timely. I dismiss Complainant's document abuse claim on the additional grounds that the OSC charge underlying it was not filed in a timely manner.

Because the record does not reveal when Complainant filed her EEOC charge, it is impossible to tell from the current record whether Complainant filed an EEOC charge in time to toll the running of the 180 day period for the purposes of filing a timely citizenship status discrimination charge with OSC. The inability to reach a conclusion regarding that issue, however, is immaterial because I already have determined that Complainant's citizenship status discrimination claim must be dismissed on two other independent grounds: lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

IV. CONCLUSION

After considering the parties' pleadings and supporting documents, I grant Respondent's Motion to Dismiss.[18] I find that there are no genuine issues of material fact precluding a ruling on the Motion, and that Respondent is entitled to judgment as a matter of law. I make the following specific findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims;

2. Complainant's allegations of citizenship status discrimination and document abuse fail to state causes of action upon which this forum may grant relief; and

3. Complainant's charge with OSC alleging document abuse was filed more than 180 days after the alleged violation of the document abuse provision.

For those reasons, Complainant's Complaint is dismissed.

As provided by statute and regulation, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b).

SO ORDERED.

Dated and entered this 13th day of November, 1997.

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[18] "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996) (quoting Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)) (emphasis added). Granting Complainant such an opportunity in the present case would be futile. The Complaint does not fail because it suffers from technical pleading errors; more careful drafting would not turn Complainant's allegations into a cause of action that this forum recognizes. The complaint in cases brought under section 1324b consists of a form that elicits the pertinent information from a complainant. The form complaint seeks information, many times with questions that demand simple "yes" or "no" answers, that set forth the elements of the causes of action that this forum recognizes. For example, paragraphs 13 and 14 of the form complaint demand affirmative or negative responses to the following statements, respectively: "I was knowingly and intentionally not hired" and "I was knowingly and intentionally fired." In this case, Complainant has checked the line marked "No" in response to each of those questions. As that example reveals, more careful drafting would not aid Complainant's cause before this forum.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1997, I have served the foregoing Decision and Order Granting Complainant's Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Maria M. Parham
16103 Ravendale Drive
Tampa, FL 33618
(Complainant)

United States Postal Service
5201 West Spruce Street
Tampa, FL 33630
(Respondent)

Suzanne H. Milton
Human Resources Counsel, Corporate Law
475 L'Enfant Plaza S.W.
Washington, D.C. 20260-1136
(Attorney for Respondent)

John D. Trasvina
Special Counsel
Office of Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(Hand Delivered)

_____

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No.: (703) 305-1739
FAX NO.: (703) 305-1515

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

December 24, 1997

GAYLON D. SHEPHERD Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO CASE NO. 97B00163
STURM, RUGER & CO., INC. Respondent.	)	Exhibit 27

FINAL DECISION AND ORDER OF DISMISSAL

PROCEDURAL HISTORY

Gaylon D. Shepherd of Prescott, Arizona, filed a complaint[1] with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 15, 1997, in which he asserted that on May 6, 1995, he applied for the job of shell removal with respondent Sturm, Ruger, & Co., Inc. of Southport, Connecticut. Shepherd checked a box on the complaint form indicating that respondent refused to accept the documents he presented to show he can work in the United States. The documents allegedly rejected were identified as "Statement of Citizenship" and "Affidavit of Constructive Notice." He also checked a box alleging that he had been discriminated against on the basis of his citizenship status but checked neither "yes" nor "no" in the boxes asking whether or not he was hired, fired, or retaliated against. He alleged further that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices on May 15, 1997 and that he seeks back pay from January 16, 1996. The significance of the latter date is unexplained. On June 9, 1997 OSC sent Shepherd a letter stating that he had raised no issue within its jurisdiction but authorizing him to file a complaint with OCAHO within 90 days. He did so.

On September 25, 1997 Sturm, Ruger & Co., Inc. filed an answer to the complaint together with a motion to dismiss and a motion for attorney's fees. The answer admitted accepting delivery of the referenced documents but refusing to accept them as authorizing Sturm, Ruger & Co., Inc. to discontinue withholding federal income and FICA taxes from Shepherd's pay. The motion to dismiss further states that Shepherd was hired by Sturm, Ruger & Co., Inc. on or about June 29, 1995, and that he has continuously been employed since that time. Sturm, Ruger further asserts that the complainant "is little more than a fishing expedition for the claimant and the National

[1] The complaint was signed by John B. Kotmair, Jr., Director of the National Worker's Rights Committee. Kotmair filed his Notice of Appearance for Shepherd on October 6, 1997 indicating that Shepherd was "an associate" of the Committee.

Worker's Rights Committee to find a forum to entertain their efforts to promote an apparent tax revolution." For this reason it requests that attorney's fees be awarded against both the claimant and the National Worker's Rights Committee, noting that

> If the complainant and the National Worker's Rights Committee have an argument with the way the tax laws are written by Congress or administered by the Internal Revenue Service, let them deal with Congress and the IRS. But, please, do not let them with impunity file such specious claims in administrative fora against employers who are merely following the laws as written. To do so would encourage further similar time consuming and expensive-to-defend complaints against other innocent employers.

THE APPLICABLE STATUTORY PROVISION

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. § 1324a, as well as a prohibition against certain unfair immigration-related employment practices based on the national origin or citizenship status of an applicant for employment. 8 U.S.C. § 1324b. In 1986 Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer has since then been obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a covered worker's identity and employment eligibility under § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v)(1996), and to complete a form I-9 for each such new employee.

The specific provision at issue in this proceeding, 8 U.S.C. § 1324b(a)(6), was added to the INA by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents, and to ensure that the choice among the documents on the approved list would be the employee's choice, not the employer's. It provides that certain documentary practices, informally referred to as "document abuse," may be treated as discriminatory hiring practices.[2]

> For purposes of paragraph (1),[3] a person's or other entity's request, for purposes

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[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 421, 110 Stat. 3009, 3670 (1996), made significant changes in this provision with respect to events occurring on or after September 30, 1996. Because the events in question here occurred in 1995, IIRIRA does not apply.

[3] Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

> of satisfying the requirements of section 1324a(b)[4] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§ 1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§ 274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS Forms N-560 or N-561, Certificate of United States Citizenship.[5] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, and various State Department or INS Forms. When a document from the lists set out in § 1324a(b)(1), 8 C.F.R. § 274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document for that purpose if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair immigration-related employment practice under this provision if: 1) a document from List A or one document each from both List B and List C are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

DISCUSSION

OCAHO case law has repeatedly addressed similar claims filed by the National Worker's Rights Committee and its associates protesting an employer's or prospective employer's refusal to honor a "Statement of Citizenship" and "Affidavit of Constructive Notice" as exempting the complainant from withholding, and/or an employer's legitimate request for a social security number as a condition of employment . In each instance, these claims have been dismissed as posing no issues cognizable under the INA. The cases are unanimous and unambiguous. Johnson v. Florida Power Corp., 7 OCAHO 981 (1997); Hamilton v. The Recorder, 7 OCAHO

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[4] Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

[5] IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105-54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction.

968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc.,[6] 6 OCAHO 892 (1996), aff'd sub nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997).

The documents to which Shepherd's complaint refers are not documents acceptable for the purpose of satisfying the requirements of the employment eligibility verification system and an employer therefore has no obligation to accept them for this purpose. The withholding of federal income tax and FICA deductions from an employee's pay is not an immigration-related employment practice at all. The filing of the instant complaint in this forum in the face of the overwhelming controlling authority to the contrary is frivolous, unreasonable, and without foundation.

Sturm, Ruger may submit its affidavit and related material in support of its request for attorney's fees by January 15, 1998. Shepherd's response will be timely if received on or before February 16, 1998.

SO ORDERED.

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[6] While neither Kotmair nor the National Worker's Rights Committee appear of record in Toussaint, the allegations are substantially similar.

Dated and entered this 24th day of December, 1997.

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, I have served copies of the foregoing Final Decision and Order of Dismissal on the following parties at the addresses indicated:

John D. Trasvina, Esq.
Special Counsel
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
P.O. Box 277728
Washington, D.C. 20038-7728

John B. Kotmair, Jr.
Director
National Worker's Rights Committee
12 Carroll Street, Suite 105
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Robert L. Danaher
Sturm, Ruger & Company, Inc.
One Lacey Place
Southport, CT 06490

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
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Cynthia A. Castañeda
Legal Technician to
Ellen K. Thomas
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 31, 1997

RAY D. STEPHENS Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00092
SAFE KIDS INC. Respondent.	)	

Exhibit 28

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This is an action purporting to arise under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA) in which Ray D. Stephens alleged that Safe Kids, Inc. discriminated against him on the basis of his citizenship status by failing to hire him as a telemarketer because he would not furnish a social security number. He also alleged that Safe Kids refused to accept his "Statement of Citizenship" and "Affidavit of Constructive Notice."[1]

On December 10, 1997, I issued an order of inquiry in this matter in which I requested that complainant Ray D. Stephens answer two specific questions and provide an explanation as to how, if at all, this case differs from those setting forth the unanimous and unequivocal adverse authority in this forum holding that neither employer's request for a social security number as a condition of employment, Westendorf v. Brown & Root, Inc., 3 OCAHO 477 at 811 (1992),[2] Lewis v. McDonald's Corp., 2 OCAHO 383 at 701 (1991), nor an employer's refusal to cease withholding from an employee's wages for federal income and FICA taxes, Hamilton v. The Recorder, 7 OCAHO 968 (1997); Cook v. Pro Source, Inc., 7 OCAHO 960 (1997); Horst v. Juneau Sch. Dist. City and Borough of Juneau, 7 OCAHO 957 (1997); Manning v. Jacksonville, 7 OCAHO 956 (1997); Hutchinson v. GTE Data Servs., Inc., 7 OCAHO 954 (1997);

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[1] The documents are attached to this order. The first purports to exempt Stephens from withholding for taxes and invokes the authority of the INA; the second purports to exempt him from the social security system.

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Hutchinson v. End Stage Renal Disease Network, Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); Werline v. Pub. Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Winkler v. West Capital Fin. Servs., 7 OCAHO 928 (1997); Smiley v. Philadelphia, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of Am., Inc., 6 OCAHO 923 (1997); Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997); Costigan v. NYNEX, 6 OCAHO 918 (1997); Boyd v. Sherling, 6 OCAHO 916 (1997); Winkler v. Timlin Corp., 6 OCAHO 912 (1997); Horne v. Hampstead, 6 OCAHO 906 (1997); Lee v. Airtouch Communications, 6 OCAHO 901 (1996), appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), aff'd sub nom. Toussaint v. OCAHO, 127 F.3d 1097 (3d Cir. 1997), poses an issue cognizable in this forum. The specific questions posed by the Order of Inquiry were whether it was Stephens' contention 1) that Safe Kids employed non-United States citizens from whose wages it did not withhold sums for federal taxes, or 2) that Safe Kids employed non-United States citizens who were not required to furnish a social security number as a condition of their employment.

In response, Stephens, acting through John B. Kotmair, Jr. of the National Worker's Rights Committee, offered vague general conclusions but failed to answer the two specific questions asked. Stephens requested in addition that the complaint be amended 1) to show that he no longer wishes to be employed by respondent because the employer is no longer in business, and 2) to restore the words "to show I can work in the United States" which had been previously crossed out in the form complaint, so that the complaint would read, "The Business/Employer refused to accept the documents that I presented to show I can work in the United States."

Attached to Stephens' response are the subject documents which complainant now seeks to assert the employer refused to accept "to show I can work in the United States." Because it is clear from examination of the subject documents that neither is a document acceptable under 8 U.S.C. § 1324a(b)(1)(B), (C), and (D) to show identity and/or employment eligibility under the employment eligibility verification system,[3] I decline to permit the amendment and dismiss the complaint.

DISCUSSION

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[3] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208 § 421, 110 Stat. 3009, 3670 (1996) amended the INA to narrow the list of acceptable documents after a date within one year after September 6, 1996. IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105-54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction. The amendments have no effect on this case.

Leave to amend a pleading is ordinarily freely granted. Applicable rules [4] provide that

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.

28 C.F.R. § 68.9(e) (1997).

Notwithstanding the failure to file an appropriate motion, amendment ought to be allowed if the underlying facts alleged by a complainant may be a proper subject for relief. Procedural rules are expressly designed to encourage decisions on the merits, not on the basis of technicalities. Cf. Conley v. Gibson, 355 U.S. 41, 48 (1957). Parties ordinarily ought to be afforded an opportunity to test their claims on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962).

Where amendment would be futile, however, there is no reason to permit it. Even were I to permit the amendment requested, the complaint would still have to be dismissed because, as has repeatedly been held in this forum, a prospective employer has no legal obligation to accept a document as evidence of employment eligibility other than those set forth in the applicable statute and regulation. An amended complaint alleging the facts which Stephens sets forth would still be legally insufficient to state a cause of action and would not survive a motion to dismiss. Amendment accordingly would not facilitate determination on the merits.

Stephens provides no explanation as to how this case may be distinguished from the adverse precedents set forth. Rather, he simply reiterates legal conclusions already repeatedly rejected in those cases, arguing that an employer may not require a social security number as a condition of employment and that an employer is obligated under 8 U.S.C. § 1324b to honor his "Statement of Citizenship" and "Affidavit of Constructive Notice" and cease withholding from wages for taxes. He is mistaken.

The complaint, like the many others cited, is based upon an "indisputably meritless" legal theory. Whitney v. New Mexico, 113 F.3d 1170, 1173 (10th Cir. 1997), quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989). Repetitious litigation of virtually identical causes of action is properly characterized as frivolous, McWilliams v. Colorado, 121 F.3d 573, 574-75 (10th Cir. 1997), cf. Schlicher v. Thomas, 111 F.3d 777, 781 (10th Cir. 1997), and need not be indulged.

Stephens' complaint is dismissed.

SO ORDERED.

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[4] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

Dated and entered this 31st day of December, 1997.

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 1997, I have served copies of the foregoing Order of Dismissal on the following persons at the addresses indicated.

John D. Trasvina, Esq.
Special Counsel
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
P.O. Box 277728
Washington, D.C. 20038-7728

Ray D. Stephens
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Mr. John B. Kotmair, Jr.
National Worker's Rights Committee
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_____

Cynthia A. Castañeda
Legal Technician to
Ellen K. Thomas
Administrative Law Judge
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 29, 1997

Exhibit 29

EARL W. WERLINE, III,
Complainant,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY,
Respondent.

) 8 U.S.C. §1324b Proceeding
) OCAHO Case No. 97B00023

FINAL DECISION AND ORDER
WITH SCHEDULE FOR BRIEFING ON ATTORNEY'S FEES

Procedural History

This is an action alleging unfair immigration-related employment practices in which Earl W. Werline, III is the complainant and Public Service Electric & Gas Company (Public Service or PSE&G) is the respondent. Werline alleged that Public Service engaged in conduct prohibited by the Immigration and Nationality Act, as amended, 8 U.S.C. §1324b (1994) (INA) when it refused to accept the documents that he presented to show he can work in the United States. The complaint is signed by John B. Kotmair, Jr., Director of the National Worker's Rights Committee.

Werline's complaint alleges that he was hired by Public Service Electric & Gas Company in July 1981, and that his current job as of February 1996 is as a Nuclear Control Operator. Although it appears that he has worked steadily in different capacities for the respondent since July 1981, Werline requests back pay relief from May 24, 1995, the date he presented PSE&G with the disputed documents. He checked the box on the form complaint stating "Yes" next to the description "the Business/Employer refused to accept the documents

that I presented to show I can work in the United States." The form complaint provides that, if the answer to that question is "yes," the complainant is to list the documents the employer allegedly refused to accept. Werline listed "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" and "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by (sic) revealing that I am not to be treated as an alien."

A copy of a letter dated February 28, 1996 addressed to the Office of Special Counsel for Immigration-Related Unfair Employment Practices accompanies the complaint, along with other documents. The letter is from the National Worker's Rights Committee and indicates the Committee's view of the factual and legal bases for initiating Werline's charge that PSE&G engaged in unfair immigration-related employment practices:

> On the date of May 24, 1995, Mr. Werline submitted a statement of Citizenship to Public Service Electric and Gas since he is a Citizen of the U.S. and has not lawfully applied for a social security number, he submitted a Statement of Citizenship, pursuant to 26 C.F.R. §1.1441–5, which states that he is a U.S. Citizen, and the IRS publication 515, which states that after receipt of the statement, the withholding agent is relieved from the duty of withholding the income tax. The relevant parts of the Treasury Regulation and the IRS publication are reproduced here in part:
>
> [omitted]
>
> The law makes no other statements concerning the required actions of the withholding agent. It is clear that there is no option given to the withholding agent, and it is the IRS's job to handle the claims of the U.S. Citizen from this point. Upon review of Title 8 §1324b, it is apparent that the law you enforce concurs. Our understanding of the law is based upon the recognized standards of statutory construction by the Federal Courts (*infra*). In short, the law means exactly what it says and nothing more.
>
> It was additionally communicated to Mr. Braun, at Public Service Electric and Gas, by service of an Affidavit of Constructive Notice, that Mr. Werline does not have, nor does he recognize a social security number in relationship to himself. This is due to the fact that he has executed an Affidavit of Revocation and Rescission of his signature on the SS–5 Application for a Social Security Account Number Card, since there is no law that requires a U.S. Citizen to apply for or possess such a number.

The remainder of the letter alleges that Werline has revoked and rescinded his social security number and is not subject to Subtitle C

of the Internal Revenue Code. He claims that his employer has no right to withhold sums from his wages for federal taxes. The allegations appear to be predicated upon the theory that United States citizenship insulates Werline from withholding for taxes and from participation in the Social Security system and that, in refusing his claim to be exempt from withholding, PSE&G treated him as a nonresident alien. It asserts that among the rights of a citizen, "[t]wo of such rights are the rights to claim not to be subject to withholding of income tax and the right not to make voluntary application for a social security number."

Also attached is a letter of August 20, 1996 from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the National Worker's Rights Committee stating with respect to Werline's charge and eight other charges filed by Mr. Kotmair that:

> Based on the information that we received, we feel that all of these charges are based on the charging parties (sic) requests that their employers' (sic) stop withholding federal tax from their wages, and the employers' refusal to comply with those request (sic). These refusals do not, in our view, constitute a violation of 8 U.S.C. §1324b. Therefore, this Office has decided not to file complaints with the Administrative Law Judge regarding the above referenced charges.

The letter authorizes Werline to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of the date thereof. Werline filed his complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on November 18, 1996.

A "Notice of Appearance" was subsequently filed by John B. Kotmair, Jr. together with a "Privacy Act Release Form and Power of Attorney" which authorizes not only Kotmair but also "any of his designees" the authority, *inter alia*,

> to represent me before the Equal Employment Opportunity Commission, the United States Department of Justice, Office of Special Counsel for Immigration-Related Affairs (sic), Office of Chief Administrative Hearing Officer (sic) (OCAHO), and in any proceeding before an Administrative Law Judge in OCAHO.

The document further authorizes Kotmair or his designee to obtain from Public Service,

> copies of the records pertaining to any matter involving: the withholding of taxes (including but not limited to a Statement of Citizenship) that either Public Service Electric and Gas Company, . . . or the Internal Revenue Service (IRS) alleges I may owe; any claim or levy authority submitted to Public Service Electric and Gas Company . . . by the IRS extra legem (sic) for the purposes of persuading the release of monies due me by the IRS.

On January 2, 1997 the complaint, along with a Notice of Hearing and transmittal letter were served upon respondent. An answer was therefore due on February 3, 1997.

On March 7, 1997, Public Service filed an answer, a motion to dismiss, and an affidavit. Respondent's answer denied that its actions violated 8 U.S.C. §1324b, stated its compliance with federal and state laws governing withholding for taxes, and stated further that the documents Public Service had refused to honor were proffered by the complainant as part of his efforts to avoid paying taxes, not to show that he could work in the United States. Respondent stated that on numerous occasions, including July 26, 1993, October 29, 1993, March 4, 1994, April 29, 1994, and May 16, 1995, complainant made the same request to be exempted from withholding for taxes. Respondent further denied that John B. Kotmair is qualified to represent complainant and alleged three affirmative defenses: failure to state a cause of action on which relief may be granted, good faith and no intent to discriminate, and unclean hands. Attorney's fees were requested. Several documents were appended to the answer, including various correspondence from Werline to Public Service's paymaster and other personnel which confirm that there is an ongoing and longstanding dispute between the parties over Public Service's withholding sums from Werline's paychecks for federal taxes. Some of the letters contained veiled or explicit threats; the demand in each is that Public Service cease withholding taxes from Werline's paycheck.

The facts in this case do not appear to be in dispute save for the specific question of the purpose for which the subject documents were tendered. The form complaint asserts that the documents were presented "to show I can work in the United States" but other exhibits demonstrate that the documents were presented in order to support a request to be exempted from withholding for taxes.

On March 10, 1997, Werline filed a Motion for Default Judgment and on March 13, 1997, a Motion to Strike Respondent's Answer. On March 19, 1997, counsel for respondent filed an affidavit in re-

sponse. There has been no response to Public Service's Motion to Dismiss.[1] For the reasons more fully set out herein, the Motion for Default Judgment is denied, the Motion to Strike Respondent's Answer is denied, and the Motion to Dismiss is granted.

The Applicable Statutory Provision

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. §1324a, as well as prohibitions against certain unfair immigration-related employment practices. 8 U.S.C. §1324b. Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer is obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a worker's identity and employment eligibility under §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(1996), and to complete a form I–9 for each new employee.

The specific provision at issue in this proceeding, 8 U.S.C. §1324b(a)(6), provides that certain documentary practices may be treated as discriminatory hiring practices.

> For purposes of paragraph (1),[2] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[3] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports

[1]Rules of Practice and Procedure for Administrative Hearings codified at 28 C.F.R. Pt. 68 (1996) provide that a party shall have ten (10) days following the filing of a motion to respond. 28 C.F.R. §68.11(b). Section 68.8(c)(2) provides that when service is had by ordinary mail, five (5) days shall be added to the prescribed period.

[2]Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[3]Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

showing work authorization and various INS forms, including INS Forms N–550 or N–570, I–151 or I–551, I–688, I–688A, I–688B, I–327, I–571, and N–560 or N–561, a Certificate of United States Citizenship.[4] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, various State Department Forms including FS–545 and DS–1350, and INS Forms including I–197 and I–179, or unexpired employment authorization documents issued by INS. When a document from the lists set out in §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document if it appears on its face to be genuine.

The underlying aim of IRCA itself is to deter illegal immigration of persons in search of jobs by imposing on employers the duty to verify the employment eligibility of employees to ensure that a prospective employee is not an unauthorized alien. The subject provision was added by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents, and to ensure that the choice among the documents on the approved list would be the employee's choice, not the employer's.

As was observed in *United States v. Zabala Vineyards*, 6 OCAHO 830 (1995),

> There is precious little legislative history undergirding enactment of §1324b(a)(6), but there can be no doubt in [the] context of the GAO and Task Force Reports that the seminal problem to be addressed was that of 'employers' refusal to accept or uncertainty about, valid work eligibility documents.'

Zabala Vineyards, 6 OCAHO 830, at 15 (citing General Accounting Office Report B-125051, at 86 (1990)).

[4]The source of Werline's "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" is unclear. The form is not part of the record and there is no assertion that it is related in any way to INS form N–560 or N–561 Certificate of United States Citizenship. The forms issued by INS do not purport to address issues of federal taxation.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair hiring practice under this provision *if*: 1) a document from List A or one document each from both List B and List C are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

Regulations implementing the employment eligibility verification system also make clear that the statute was to have prospective application only. Employers are required to examine documents and to complete Form I–9 only for individuals hired after November 6, 1986 who continued to be employed after May 31, 1987. 8 C.F.R. §274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. §274a.7.

Discussion

I. *Standards for Default Judgment*

Complainant cites 28 C.F.R. §68.9(b), which provides that lack of a timely answer shall be deemed to constitute a waiver of the right to appear and contest the complaint, to support his contention that he is entitled to the entry of a judgment by default. The Motion to Strike Respondent's Answer is similarly premised upon the contention that because the answer is untimely under 28 C.F.R. §68.9(b), it therefore must be stricken.

Default judgments are not favored in the law and should be used only where the inaction of a party causes the case to come to a halt. *United States v. R&M Fashion, Inc.*, 6 OCAHO 826, at 2 (1995), citing *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). The purpose of a default judgment, both historically and now, is to protect a diligent party from delay caused by an essentially unresponsive party. *See generally* 10 Charles Alan Wright, Arthur Miller and Mary Kay Kane, Federal Practice and Procedure §2681 (2d ed. 1983 & Supp. 1995). This is not such a case.

Although the answer was late, it does not appear either that the delay was inordinate or that Werline was prejudiced in any way by the late answer. The motion for default and the motion to strike the answer will be denied.

II. *Standards for Motion to Dismiss*

A motion to dismiss for failure to state a claim is also a disfavored motion. The usual caution is that dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). It is also true, however, that a complaint must set forth allegations of fact sufficient to establish the crucial elements of a claim. Even under the liberal pleading standard, a complaint must allege more than unsupported conclusions of law to defeat a motion to dismiss. *See Palda v. Gen. Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995). A party can also plead him or herself out of court by pleading facts showing the absence of a valid claim. *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085, (1994), *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992). While well pleaded factual allegations and inferences reasonably drawn from those facts will be taken as true in ruling on a motion to dismiss, there is no obligation to ignore facts in the complaint[5] which undermine the pleader's claim. *R.J.R. Servs., Inc. v. Aetna Cas. and Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989). Neither is there any obligation to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

As is by now well established in OCAHO jurisprudence, the activities prohibited by 8 U.S.C. §1324b include discrimination in hiring, firing, recruitment, referral for a fee, retaliation for engaging in protected activity, and document abuse. 8 U.S.C. §§1324b(a)(1), (a)(5), and (a)(6). *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929, at 9 (1997) (citing *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 18 (1997)); *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994).

[5]In considering a motion to dismiss, it is appropriate to limit review to the facts alleged in the complaint, but the complaint includes as well any written attachments or exhibits, and any statements or documents incorporated therein by reference. *Paulemon v. Tobin*, 30 F.3d 307, 308 (2d Cir. 1994).

Other terms and conditions of employment such as wages, promotions, employee benefits, and the like are beyond the reach of the INA. *See, Lareau v. USAir, Inc.*, 7 OCAHO 932, at 11 (1997) (citing cases). Thus a long term incumbent employee's complaints about the terms and conditions of his employment fail to state a claim under §1324b. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 3–4, 9 (1997), *Horne v. Hampstead*, 6 OCAHO 906, at 5–6 (1997). Similarly beyond the reach of the INA is a complaint which does not set forth either direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory. *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995).

Here it is apparent that notwithstanding the box checked on the face of the form complaint asserting that the documents were tendered "to show I can work in the United States, " the facts demonstrate otherwise. Because Werline has been steadily employed by respondent since 1981, he is not an employee hired subsequent to the enactment of IRCA in 1986. Consequently PSE&G never had any obligation to make inquiry as to his employment eligibility, to review any documents establishing his employment eligibility, or to complete an I–9 form for him. Indeed, the complaint does not allege that PSE&G ever requested any documents whatsoever for the purposes of establishing Werline's eligibility to work in the United States. The employment eligibility verification process never comes into the picture at all for an individual continually employed by the same employer since 1981. As respondent never had any need to verify his eligibility to work, the documents Werline presented cannot have been presented to show he could work in the United States.

Second, the documents tendered were not in any event documents acceptable to show identity and/or employment authorization for purposes of satisfying the requirements of the employment verification system set out at §1324a(b). Because Werline's documents are not documents acceptable to show he can work in the United States, the refusal of his employer to accept them, even had they been presented for that purpose, would not violate the INA.

Third, it is unclear whether documents which purport to exempt a person from the Internal Revenue Code or the Social Security Act could ever "reasonably appear to be genuine" when they are not issued by the agencies authorized to issue such exemptions. Neither the INS nor the Social Security Administration has exempted

Werline from withholding for taxes and no other entity, including the National Worker's Rights Committee, has any statutory authority to do so.

Jurisdiction of administrative law judges over allegations of document abuse is limited by the terms of the governing statute. The employment verification system is set out in 8 U.S.C. §1324a(b) which identifies the specific documents approved for the purpose of establishing identity and employment eligibility. Nothing in the statutory scheme permits much less requires an employer to accept documents other than the ones specifically approved to show eligibility to work in the United States. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. Rejection of an employee's unilateral claim of tax exemption is not an immigration-related employment practice. An employer's requirement that an employee furnish a social security number is not an immigration-related employment practice, and is not a request for a document within the meaning of §1324b(a)(6). *Lee v. Airtouch*, 6 OCAHO 901, at 12 (1996). The issues complainant raises have nothing whatever to do with immigration-related employment practices related to the hiring of individuals, and are simply beyond the reach of 8 U.S.C. §1324b(a)(6).

This case is one of a growing number of OCAHO cases premised upon the same or substantially similar allegations seeking to transform OCAHO proceedings into a forum for the advancement of the political agenda of the National Worker's Rights Committee. *Lareau v. USAir, Inc.*, 7 OCAHO 932 (1997), *Jarvis v. A.K. Steel*, 7 OCAHO 930 (1997), *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997), *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997), *Smiley v. Philadelphia*, 7 OCAHO 925 (1997), *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), *Costigan v. Nynex*, 6 OCAHO 918 (1997), *Boyd v. Sherling*, 6 OCAHO 916 (1997), *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), *Horne v. Hampstead*, 6 OCAHO 906 (1997), *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), *appeal filed*, No. 97–70124 (9th Cir. 1997), *Toussaint v. Tekwood Assocs., Inc.*,[6] 6 OCAHO 892 (1996), *appeal filed* No. 96–3688 (3d Cir. 1996). Each of these cases asserted similar claims that a respondent employer's re-

[6]While neither Kotmair nor the National Worker's Rights Committee appear of record in *Toussaint*, the allegations are substantially similar.

quirement for an employee's social security number and/or an employer's withholding of sums from an employee's wages for taxes, is an immigration-related unfair employment practice or otherwise discriminates in violation of 8 U.S.C. §1324b. All of these cases were dismissed at an early stage; none has survived preliminary motions to dismiss either on jurisdictional grounds or for failure to state a claim.[7]

Werline's assertion that citizens of the United States residing therein are not subject to federal taxation and are free to decline participation in the social security system appears to be based upon wishful thinking. For over 75 years, the Supreme Court and other federal courts have recognized the Sixteenth Amendment's authorization of non-apportioned direct income taxes upon United States citizens residing in the United States. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 12–19 (1916), *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984), *Parker v. Comm'r.*, 724 F.2d 469, 471 (5th Cir. 1984), *United States v. Romero*, 640 F.2d 1014, 1016 (9th Cir. 1981). Employers are required by 26 U.S.C. §3102(a) and §3402(a) to deduct and withhold income and social security taxes from the wages of their employees. It is also well established by the highest authority that one may not unilaterally opt out of the social security system. *United States v. Lee*, 455 U.S. 252, 258 (1982). These clear precedents are not vulnerable to overruling by an administrative tribunal with jurisdiction limited to specific provisions of the INA.

The complaint must be dismissed. Ordinarily the dismissal of a claim for failure to meet minimal pleading requirements should be accompanied by a grant of leave to file an amended complaint to

[7]Several additional cases of similar character are currently pending in this office. *Hogenmiller v. Lincare, Inc.*, OCAHO Case No. 96B00104, filed May 12, 1997; *Olson v. University Med. Ctr. Corp.*, OCAHO Case No. 97B00093, filed April 14, 1997; *Stephens v. Safe Kids, Inc.*, OCAHO Case No. 97B00092, filed April 14, 1997; *Cook v. Pro Source, Inc.*, OCAHO Case No. 97B00090, filed April 4, 1997; *Hendrickson v. Gen. Tel.Communication Corp.*, OCAHO Case No.97B00089, filed April 4, 1997; *Davis v. Gen. Tel. and Elec.*, OCAHO Case No. 97B00088, filed April 4, 1997; *Davis v. Gen. Tel. and Elec.* , OCAHO Case No. 97B00087, filed April 4, 1997; *Hollingsworth v. Applied Research Assocs.*, OCAHO Case No. 97B00085, filed April 2, 1997; *Hutchinson v. GTE Data Servs.*, OCAHO Case No. 97B00084, filed April 2, 1997; *Hutchinson v. End Stage Renal Disease Network of Fla., Inc.*, OCAHO Case No.97B00083, filed April 2, 1997; *Aguilar v. United Parcel Serv.*, OCAHO Case No. 97B00079, filed March 31, 1997; *Lee v. AT&T*, OCAHO Case No. 97B00031, filed November 25, 1996; *D'Amico v. Erie Community College*, OCAHO Case No. 97B00027, filed November 18, 1996; *Kosatschkow v. Allen-Stevens Corp.*, OCAHO Case No. 97B00025, filed November 18, 1996; and *Cholerton v. Hadley*, OCAHO Case No. 96B00046, filed May 14, 1996.

cure the defect. *Simmons v. Abruzzo*, 49 F.3d 83, 86–87 (2d. Cir. 1995), *Bransom v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (citing *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)). Where, as here, it appears to a certainty that amendment would be futile, there is no reason to permit such filing. Cf. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995).

Findings

1. Earl W. Werline, III was hired by Public Service Electric and Gas Co. in July 1981.

2. Earl W. Werline, III continued to work at Public Service Electric and Gas Co. from 1981 to the present, most recently since February 1996 in the capacity of a Nuclear Control Operator.

3. On May 24, 1995, Earl W. Werline, III presented to Public Service Electric and Gas Co. documents entitled "Statement of Citizenship proving my Citizenship and asserting my rights as a Citizen under Federal law, and affecting others linked to my status" and "Affidavit of Constructive Notice asserting my rights as a Citizen of the U.S. as seen by the U.S. Supreme Court, and there by (sic) revealing that I am not to be treated as an alien."

4. The precise origin of the documents is undisclosed.

5. The documents were presented to Public Service Gas & Electric for the purpose of persuading the employer to cease withholding sums from Werline's wages for federal taxes and social security contributions.

6. Public Service Electric & Gas Co. declined to honor the documents or to cease withholding sums from Werline's wages for federal taxes and social security contributions as Werline requested.

7. The documents were not presented in the process of hiring, recruitment, or referral for a fee.

8. The documents are not documents acceptable for the purpose of showing an employee's identity or eligibility to work in the United States.

9. The documents were not presented for the purpose of showing Werline's identity or eligibility to work in the United States.

10. Public Service Electric & Gas Company had no obligation to ascertain Werline's eligibility to work in the United States or to complete an I–9 form for him.

11. Public Service Electric & Gas Company's rejection of Werline's documents does not violate 8 U.S.C. §1324b.

Conclusion

Werline's complaint fails to state a claim upon which relief can be granted because it poses no issues cognizable under 8 U.S.C. §1324b. It is accordingly dismissed.

Respondent has requested $512.00 in attorney's fees. Complainant may file any opposing papers on or before June 20, 1997. Respondent may reply on or before July 7, 1997.

SO ORDERED.

Dated and entered this 29th day of May, 1997.

ELLEN K. THOMAS
Administrative Law Judge

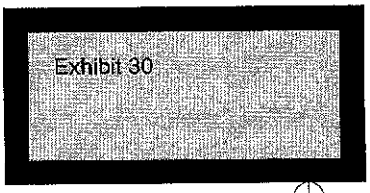
Appeal Informationx

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.

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

March 10, 1997

RONALD C. WILSON, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 96B00045
HARRISBURG SCHOOL DISTRICT, Respondent.	)	



DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr., on Behalf of Complainant Archie L. Palmore, Esq., Solicitor, Harrisburg School District, on Behalf of Respondent*

I. *Procedural History*

In January 1991 Complainant Ronald C. Wilson (Complainant or Wilson) applied for the position of school bus driver with the Harrisburg (Pennsylvania) School District (Harrisburg or Respondent). Harrisburg hired Wilson. On or about October 16, 1991, Wilson presented his employer with a self-styled "Statement of Citizenship,"[1] purporting to exempt Wilson from income tax withholding.

According to Wilson, Harrisburg acquiesced for three years to his demand not to withhold taxes from his wages. On May 14, 1994,

[1] The improvised "Statement of Citizenship," which Wilson offered to show that he was not subject to income tax withholding and social security deductions, is ***not*** to be confused with official INS Forms N-560 or N-561, which are INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2) (1997).

however, Harrisburg initiated tax withholding deductions. Wilson then confronted the employer with a second gratuitous document, an improvised "Affidavit of Constructive Notice" proclaiming that Wilson had renounced his social security number.[2] Wilson claimed that he was not liable for social security contributions or tax withholding because he had repudiated his social security number.

Apparently because Harrisburg would no longer accede to his demand, on a date unspecified Wilson filed a complaint of discrimination based on national origin with the Equal Employment Opportunity Commission (EEOC). The thrust of Wilson's complaint was that Harrisburg discriminated against him by disregarding his "Statement of Citizenship," presented on or about October 16, 1991, and his "Affidavit of Constructive Notice," presented on or about May 14, 1994. Wilson alleged that Harrisburg discriminated against him by treating him, a United States citizen, as a "non-resident alien." Wilson argued that a United States citizen, unlike a nonresident alien, is entitled "to the full fruit of his labor"— i.e., a paycheck from which neither taxes nor social security contributions are deducted. Wilson accused Harrisburg of discriminating by compelling such contributions as a condition of employment, "[o]r he could choose not to work for them." The EEOC dismissed his complaint.

After the EEOC dismissed his complaint, through his representative, John B. Kotmair, Jr. (Kotmair), by letter dated February 28, 1996, Wilson filed a charge with the U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). The OSC Charge was filed approximately two years after Harrisburg first withheld social security contributions and taxes from Wilson's wages. The OSC Charge alleged that Wilson had been discriminated against on the basis of national origin because, although he was a citizen, Harrisburg treated him like an alien by deducting social security contributions and withholding income taxes from his paycheck.

By an undated determination letter, OSC informed Kotmair that "there is insufficient evidence of reasonable cause to believe that these charges state a cause of action under 8 U.S.C. §1324b" and that Wilson's charge was untimely filed—i.e., not within 180 days of

[2] In the case of an individual wage earner, the social security number also serves as the taxpayer identification number, pursuant to 26 C.F.R. §301.6109-1(a)(1)(ii)(D), (b)(2), (d).

the alleged act of discrimination. Accordingly, OSC declined to file a complaint on Wilson's behalf and advised that he had the right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days after receipt.

On May 14, 1996, Kotmair filed a Complaint with OCAHO on Wilson's behalf. The Complaint alleged that although Harrisburg hired Wilson in 1991 and continued to employ him, Harrisburg discriminated against Wilson on the basis of national origin and citizenship status by refusing to accept his improvised proffered documents. The Complaint characterized as discriminatory Harrisburg's rejection of Wilson's gratuitously tendered "Statement of Citizenship to assert his right not to be treated as an alien for any reason or purpose in all matters regarding his employment and employability." Complaint at ¶16(a). The Complaint denied, however, that Harrisburg "asked for too many or wrong documents than required to show that I am authorized to work in the United States." Complaint at ¶17. Wilson requested back pay from October 16, 1991. Complaint at ¶21.

On June 12, 1996, OCAHO issued a Notice of Hearing (NOH), which informed Harrisburg that it had the right to file an Answer to the Complaint within 30 days of receipt of the Complaint.

No Answer having been received, on August 14, 1996, I issued an Order to Show Cause providing Harrisburg an opportunity to explain its failure to answer the Complaint.

On September 6, 1996, Harrisburg responded to the August 14, 1996 Order, explaining that the Complaint was served on an employee not authorized to accept service and that because the employee was on extended sick leave, no one knew the whereabouts of Wilson's Complaint. Harrisburg advised in effect that it would respond to the Complaint through its insurance carrier within 30 days.

On September 12, 1996, Kotmair filed a Notice of Appearance, perfecting a previously deficient authorization to represent Wilson, and also filed a Motion for Default Judgment, with Brief and Legal Authorities in Support. The Motion requested back pay from May 14, 1994, (the date as of which Harrisburg appears to have begun to deduct Wilson's payroll taxes) in the amount of "30%" (presumably representing income tax and social security deductions withheld).

On October 1, 1996, I denied the Motion for Default and ordered Harrisburg to file an Answer by October 7, 1996. No Answer or other pleading has been filed by Harrisburg.

The question whether default judgment may be entered where the forum lacks subject matter jurisdiction is one of first impression in OCAHO jurisprudence. This Order determines that a default judgment is not warranted where the forum is without jurisdiction, and dismisses the Complaint for lack of subject matter jurisdiction. I also find that the charge was untimely and fails to state a claim upon which relief can be granted under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), enacting Section 274B of the Immigration and Nationality Act, codified as 8 U.S.C. §1324b, pursuant to which this case is before me as the administrative law judge (ALJ) to whom it was assigned by the CAHO.

II. *Discussion and Findings*

A forum is without power to render default judgment where it has no subject matter jurisdiction over a complaint. *Williams v. Life Sav. & Loan,* 802 F.2d 1200, 1202 (10th Cir. 1986); *Doughan v. Tutor Time Child Care Systems, Inc.,* 1996 WL 502288, at 1 (E.D.Pa. 1996).

An incumbent employee's complaint regarding terms and conditions of employment fails to state a claim upon which relief can be granted under 8 U.S.C. §1324b. *Horne v. Hampstead*, 6 OCAHO 906, at 4 (1997).[3] This is so because ALJ's power under §1324b(a)(1) is limited to discriminatory failure to hire and discharge, and does not include terms and conditions of employment. A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege either refusal to hire or wrongful discharge compels a finding of lack of §1324b(a)(1) subject matter jurisdiction.

To the same effect, an incumbent employee who alleges that his employer refused to accept gratuitously tendered, improvised docu-

[3] Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws,* reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

ments purporting to prove that the employee is exempt from federal tax withholding and social security wage deductions fails also to state a legally cognizable cause of action under IRCA. "[N]othing in the employment eligibility verification system requires an employer uncritically to accept . . . [an] employer's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes . . . ." *Lee v. Airtouch Communications*, 6 OCAHO 888, at 5 (1996), 1996 WL 675579, at *4 (O.C.A.H.O.). There can be no 8 U.S.C. §1324b–(a)(6) cause of action where the employer does not request documents as part of the employment eligibility verification process, and where the employee tenders documents that are not statutorily prescribed for employment eligibility verification purposes. *Boyd v. Sherling,* 6 OCAHO 916, at 18–21 (1997); *Winkler v. Timlin*, 6 OCAHO 912, at 11–12 (1997); *Horne v. Hampstead,* 6 OCAHO 906, at 4; *Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *13 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10 (O.C.A.H.O.); *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *6 (O.C.A.H.O.).

A. *Wilson's Claim Is Untimely*

Filed at best two years after the alleged discriminatory event, Wilson's Complaint is substantially out of time. IRCA requires that a charge be filed within 180 days of the allegedly discriminatory event. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §68.4 ("An individual must file a charge with the Special Counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice"). The OSC Charge states that Wilson "on or about October 16, 1991" presented to Harrisburg a "Statement of Citizenship" which was subsequently disregarded on a date unspecified. The OCAHO Complaint requests back pay from October 16, 1991, the date on which Harrisburg presumably began to "discriminate" against Wilson. The motion for default, however, requests a sum equivalent to 30% of wages purportedly withheld after "May 14, 1994," presumably adopting that as the date of a discriminatory event. As OSC noted in its determination letter, "the charge was not filed within 180 days of the alleged discrimination." Whether the act of alleged discrimination took place on October 16, 1991, or on May 14, 1994, Wilson is out of time. A complaint not timely filed must be dismissed. *Riddle v. Dept. of Navy*, 1994 WL 547840, at 1 (E.D.Pa. 1994).

B. *Where a Forum Lacks Subject Matter Jurisdiction, Default Judgment Will Not Stand*

Although the forum's decision whether to enter a default judgment is within its sound discretion,

> when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the court . . . has an affirmative duty to look into its jurisdiction over the subject matter. . . .

Williams v. Life Sav. & Loan, 802 F.2d at 1202. When a forum lacks subject matter jurisdiction, a default judgment must be vacated and the case dismissed. *Doughan v. Tutor Time Child Care Systems, Inc.*, 1996 WL 502288, at 1.

Because I lack subject matter jurisdiction, I reaffirm my decision not to grant default judgment and I dismiss Wilson's Complaint.

C. *Where a Forum Lacks Subject Matter Jurisdiction, the Forum May Sua Sponte Dismiss the Complaint*

The Supreme Court has instructed that federal ALJs are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction, subject to identical jurisdictional strictures. *Boyd v. Sherling*, 6 OCAHO 916, at 6; *Winkler v. Timlin*, 6 OCAHO 912, at 4; *Horne v. Town of Hampstead*, 6 OCAHO 906, at 5.

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1350 (2d ed. Supp. 1995).

The party asserting subject matter jurisdiction bears the burden of proving it. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977).

Fed. R. Civ. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Fed. R. Civ. P. 12(h)(3); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426 (3rd Cir. 1983); *Doughan,* 1996 WL 502288, at *1; *Erie City Retirees Ass'n v. City of Erie,* 838 F. Supp. 1048, 1050–51 (W.D. Pa. 1993).

A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). In so doing, the forum is not free to expand or constrict jurisdiction conferred by statute. *Willy v. Coastal Corp.,* 503 U.S. 131, 135 (1992). To determine subject matter jurisdiction, the forum must "construe and apply the statute under which . . . asked to act." *Chicot*, 308 U.S. at 376.

Furthermore, federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)). A claim is "plainly unsubstan tial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans*, 415 U.S. at 535 (internal quotations omitted) (citing *Ex parte Poresky*, 290 U.S. 30, 31–31 (1933)). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction. In such cases, the forum should dismiss the complaint. *Erie City Retirees Ass'n*, 838 F. Supp. at 1049. Where it is "patently obvious" that, on the facts alleged in the complaint, the complainant cannot prevail, a forum may do so *sua sponte*. *Riddle v. Dept. of Navy*, 1994 WL 547840, at *1.

D. *The Immigration Reform and Control Act of 1986 (IRCA) Does Not Confer Subject Matter Jurisdiction Over Terms and Conditions of Employment*

1. *IRCA Governs Only Immigration-Related Causes of Action*

The relevant statutes this forum must construe are 8 U.S.C. §1324b, which prohibits unfair immigration-related employment

practices based on national origin or citizenship status, and §1324a(b) (Section 101 of IRCA), which obliges an employer to verify an employee's eligibility to work in the United States at the time of hire.

Section 102 of IRCA enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding Section 274B, codified as 8 U.S.C. §1324b. Section 102 was enacted as part of comprehensive immigration reform legislation to accompany Section 101, which, codified as 8 U.S.C. §1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by §1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[4]

President Ronald Reagan's formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result."[5]

Section 101 of IRCA, 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. §§1324a(b). As implemented by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS Form I–9 within a specified period of the date of hire. The employee must produce documentation establishing both identity and employment authorization.

The employment verification system established under §1324a provides a comprehensive scheme which stipulates categories of doc-

[4] See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

[5] Statement by President Reagan upon signing S. 1200, 22 Weekly Comp. Pres. Docs. 1534, 1536 (Nov. 10, 1986). *See Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872 (O.C.A.H.O.) ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). *Accord, Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798 (O.C.A.H.O.).

uments acceptable to establish identity and work authorization. 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v). When an employer hires an individual, the latter must sign an INS Form I–9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. List A documents can be used to establish both work authorization and identity. List B documents establish only identity and List C documents establish only employment eligibility. Employees who opt to use List B and List C documents to complete the I–9 process must submit one of each type of document. Only those documents listed may be used.

The employee completing the I–9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the person presenting them. The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provisions. *See* Immigration Act of 1990, P.L. 101–649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6).

2. *Section 1324b Proscribes Only Discriminatory Hiring and Firing and Document Abuse*

Title 8 U.S.C. §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (O.C.A.H.O.).

As understood by the EEOC (Notice No.–915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§1324b] only covers the practices of hiring, discharging or recruitment or

> referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

Wilson has been Harrisburg's employee since 1991. Wilson sues six years after hire. Wilson seeks IRCA redress not because Harrisburg refused to hire him or because Harrisburg fired him, but because Harrisburg withholds federal taxes and deducts social security contribu tions from his paycheck, thereby refusing to accept improvised, unofficial documents purporting to exempt Wilson from taxation. Wilson contests Harrisburg's mandatory statutory duty to withhold taxes, and denies his own obligation to pay taxes. Wilson even requests that his employer be assessed a monetary penalty equivalent to the tax withheld, in effect asking this forum, which has no jurisdiction over tax matters, to provide a tax refund! Wilson's request is without legal authority. Wilson's claim turns on a misguided contention that only non-citizens are subject to tax withholding.

Wilson sues because his longtime employer refused to treat him preferentially by excusing him from his tax and social security obligations. To refuse to prefer is not to discriminate. Where an employer treats all alike, he discriminates against no one. Nowhere in his pleading does Wilson describe any discriminatory treatment on any basis whatsoever. Wilson does not allege that other employees of different citizenship or nationality were treated differently, nor does he implicate the INS Form I–9 employment eligibility verification system. Among the terms and conditions of employment that an employer may legitimately and nondiscriminatorily impose is the requirement that the employee submit, as must the employer, to Internal Revenue Code (IRC) mandates. The Harrisburg School District's decision to subject Wilson to its tax and social security regimen is not discrimination under IRCA.

The administrative enforcement and adjudication modalities authorized to execute and adjudicate the national immigration policy IRCA evinces are not sufficiently broad to address Wilson's attacks on the tax and the social security systems. Where §1324b has been held to be available to address citizenship or national origin status discrimination without implicating the I–9 process, the aggrieved individual was found to have been treated differently from others, and, unlike Wilson, consequently discriminatorily denied employment. *United States v. Mesa Airlines*, 1 OCAHO 74, at 466–467 (1989), 1989 WL 433896, at *26, 30–31 (O.C.A.H.O.).

3. *IRCA Does Not Reach Terms or Conditions of Employment*

Section 1324b does not reach terms and conditions of employment. *Naginsky v. Depart. of Defense, et al.*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11; *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)). Nothing in IRCA relieves an employer of obligations conferred by the Internal Revenue Code (IRC) to withhold taxes and social security deductions from employees' wages. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8–16; *Winkler v. Timlin*, 6 OCAHO 912, at 8–12. Nothing in IRCA's text or legislative history prohibits an employer from complying with the IRC regimen or from asking for a social security number (the individual tax identification number). *Winkler v. Timlin*, 6 OCAHO 912, at 11–12; *Toussaint v. Tekwood Associates*, 6 OCAHO 892, at 16–17, 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3–4 (O.C.A.H.O.). Nothing in IRCA confers upon an employer the right to resist the IRC by accepting gratuitously tendered improvised documents purporting to relieve an employee from taxation. IRCA simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment does not violate IRCA. The gravamen of Wilson's Complaint, a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

E. *The Internal Revenue Code (IRC) Compels Withholding Taxes and Deducting Social Security Contributions from an Employee's Wages, Despite the Employee's Renunciation of His Social Security Number*

An employee cannot avoid tax liability by renouncing and revoking his social security number. *See United States v. Updegrave*, 1995 WL 606608, at *2 (E.D.Pa. 1995).

The IRC ***compels*** an employer "at the source" to withhold taxes and to deduct social security taxes from an employee's paycheck through IRS Form W–4. 26 U.S.C. §3402(a)(1); 26 C.F.R. §§31.3401(a)–1, 31.3402(b)–1, 31.3402(f)(5)–1(a). An employer who fails to collect the withholding tax is "liable for the payment of the tax required to be deducted and withheld." 26 U.S.C. §3403; 26 C.F.R. §31.3403–1.

IRS Form W–4 obliges an employee to disclose his social security number, which serves as the individual taxpayer identification number. 26 C.F.R. §301.6109–1(a)(1)(ii). A wage-earner entitled to a "social security number [must use it] for all tax purposes . . . even though . . . a nonresident alien." 26 C.F.R. §301.6109–1(d)(4). An employee who provides a statement related to IRS Form W–4 for which there is no reasonable basis "which results in a lesser amount of income tax actually deducted and withheld than is properly allowable" is subject to a civil money penalty of $500. 26 C.F.R. §31.6682–1 (False Information with Respect to Withholding).

IRCA does not restrict an employer's freedom to insist on compliance with applicable tax law as a condition of employment. *Boyd v. Sherling*, 6 OCAHO 916, at 12–15; *Winkler v. Timlin*, 6 OCAHO 912, at 8–10. An employer may also insist that the employee provide his individual taxpayer identification number because "[n]othing in the logic, text, or legislative history of the Immigration Reform and Control Act limits an employer's ability to require a social security number as a precondition of employment." *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 4, 1991 WL 531895, at *3–4. *See also Winkler v. Timlin*, 6 OCAHO 912, at 11–12; *Toussaint v. Tekwood Associates*, 6 OCAHO 892, at 16-17, 1996 WL 670179, at *14.

To challenge the validity of a withholding tax, employees, whether citizens or resident aliens, must follow stringent statutory procedures precedent. Before suing for a tax withheld, the employee must pay the tax, apply for a refund, and, if denied, sue in ***federal district court.*** *Cheek v. United States*, 498 U.S. 192, 206 (1991). Such procedures precedent do not violate the employee's right to due process. *Cohn v. United States*, 399 F.Supp. 168, 169 (E.D.N.Y., 1975). "[T]he right of the United States to exact payment and to relegate the taxpayer to a suit for recovery is paramount." *Id.*

Title 26 U.S.C. §§7421(a), 7422(a), and 7422(b) apply to ***everyone***:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in ***any court*** by ***any person*** . . . until a claim for refund or credit has been duly filed with the Secretary. . . .
>
> * * *
>
> PROTEST OR DURESS.—Such suit or proceeding may be maintained whether or not such tax . . . has been paid under protest or duress.

26 U.S.C. §§7421(a), 7422(a)(b) (emphasis added).

Non-resident aliens, like U.S. citizens and resident aliens, have long been subject to withholding tax. *Commissioner of Internal Revenue v. Wodehouse*, 337 U.S. 369, 380, 388 n.11, 391 n.13 (1949); *Korfund Co., Inc. v. C.I.R.*, 1 T.C. 1180 (1943). The IRC mandates that tax be withheld even from non-resident alien and foreign corporate income to the extent income is derived from U.S. sources. 26 U.S.C. §1441(a); C.J.S. Internal Revenue §§1149, 1151.

Wilson defines Harrisburg's refusal to accord him special tax-exempt status as discriminatory. Disparate treatment is the essence of discrimination. Nowhere in his Complaint does Wilson indicate that Harrisburg treated any other employee differently from Wilson. Harrisburg's insistence that Wilson be treated as are all citizen and resident taxpayers does not constitute discrimination. To define discrimination as the refusal to prefer, as Wilson seeks, turns discrimination law on its head.

F. *IRCA Does Not Confer Subject Matter Jurisdiction over Challenges to the Internal Revenue Code (IRC) and Social Security Act*

1. *This Forum Is Enjoined from Hearing Challenges to the IRC by Its Own Legislative Mandate and by the Anti-Injunction Act*

Wilson seeks to avail himself of this forum of limited jurisdiction in lieu of federal district court, the appropriate forum. This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action, whether or not clothed in immigration guise. 28 C.F.R. §44.300(a) (1996); *Boyd v. Sherling*, 6 OCAHO 916, at 8.

"[T]he general rule is that . . . federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). ***The Supreme Court construes "collection of taxes" to embrace employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974); *see also Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 (9th Cir. 1986); *Weatherly v. Mallinckrodt Medical, Inc.*, 1995 WL 695107, at *3 (E.D.Pa. 1995); *Barnes v. United States*, 1990 WL 42385, at *4 (W.D.Pa. 1990). "[A] suit to enjoin the . . . collection of

taxes can only proceed when 'it is apparent that, under the most liberal view of the law and facts, the United States cannot establish its claim,'" if the court in which relief is sought already exercises equitable jurisdiction over the claim. *Bordo v. United States*, 1996 WL 472413, at *1 (E.D.Pa. 1996) (quoting *Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. 1, 5 (1962)); *Sutherland v. Egger*, 605 F. Supp. 28, 30 (W.D.Pa. 1984).

Where a taxpayer has fulfilled statutory conditions precedent to a suit, i.e.—paid the tax, applied for a refund, and been denied, ***"[d]istrict court shall have original jurisdiction*** . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed." 28 U.S.C. §1346(a)(i) (emphasis added).

Except in these extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *Intern. Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. §7421(a), a statute popularly known as "The Anti-Injunction Act." ***The Anti- Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."*** 26 U.S.C. §7421(a) (emphasis added).

The purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of judicial interference." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The Anti-Injunction Act embodies "Congress' long-standing policy against premature interference with the determination, assessment, and collection of taxes." *Jericho Painting & Special Coating, Inc. v. Richardson*, 838 F. Supp. 626, 629 (D.D.C. 1993).

The Anti-Injunction Act enjoins suit to restrain activities culminating in tax collection. *Linn v. Chivatero*, 714 F.2d 1278, 1282, 1286-87 (5th Cir. 1983); *Hill v. Mosby*, 896 F. Supp. 1004, 1005 (D.Idaho 1995). ***"Collection of tax" under the Anti-Injunction Act includes tax withholding by employers.*** *United States v. American Friends Serv. Comm.*, 419 U.S. at 10. ***Suits to enjoin the collection of the withholding tax are therefore "contrary to the express language of the Anti-Injunction Act."*** *Jericho Painting & Special Coating, Inc. v. Richardson*, 838 F. Supp. at 629 (emphasis supplied).

The Anti-Injunction Act mandates anticipatory withholding of taxes from all potential taxpayers, foreign and domestic, and is not limited to actions initiated after IRS assessments. *Intern. Lotto Fund v. Virginia State Lottery Dept.,* 20 F.3d at 592. Even where the taxpayer is a foreign entity, possibly protected by an international treaty, and the collection of the tax may be legally dubious, the Anti-Injunction Act protects the collecting agent from suit. *Yamaha Motor Corp., USA v. United States,* 779 F. Supp. 610, 612 (D.D.C. 1993).

Where a taxpayer has not followed statutory conditions precedent to suit, courts are deprived of jurisdiction.

> Section 7421(a) of the Internal Revenue Code prohibits suits brought to restrain the assessment or collection of taxes.... The... contention that [a Complainant]... is entitled to a court determination of his tax liability prior to any collection action has been rejected by several courts. *See e.g. Kotmair, Jr. v. Gray*, 74-2 USTC P 9492 (Md. 1974), *aff'd per curiam* [74-2 USTC P 9843], 505 F.2d 744 (4th Cir. 1974). The plaintiff has an adequate remedy at law pursuant to the tax refund procedure set forth in Section 7422 of the Internal Revenue Code.... In order to contest the merits of a tax... a taxpayer may file an administrative claim for a refund after payment of the tax. Internal Revenue Code, §7422. The administrative claim must be filed and denied prior to filing... [an] action in the federal district court. *Black v. United States* [76 1 USTC P 9383], 534 F.2d 524 (2d Cir. 1976). [Where] the plaintiff failed to meet this jurisdictional prerequisite... the [c]ourt is without jurisdiction.

Melechinsky v. Secretary of Air Force, and Director, Internal Revenue Service, 1983 WL 1609, at *2 (D. Conn. 1983). *See also Tien v. Goldberg*, 1996 WL 751371, at *2 (2d Cir. 1996); *Humphreys v. United States*, 62 F.3d 667, 672 (5th Cir. 1995).

2. *This Forum of Limited Jurisdiction Is Not Empowered to Hear Challenges to the Social Security Act*

Challenges to the Social Security Act and the statutory requisites for its implementation do not properly implicate ALJ jurisdiction under 8 U.S.C. §1324b.

The constitutionality of the Social Security Act has long been judicially acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis,* 301 U.S. 548, 590 (1937). The Supreme Court has held social security's withholding system uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax system imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

United States v. Lee, 455 U.S. 252, 261 (1982) (statutory exemption for self-employed members of religious groups who oppose social security tax available only to the self-employed individual and unavailable to employers or employees, even where religious beliefs are implicated).

> We note here that the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits.

Lee, 455 U.S. at 261 n.12.

The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system." *Lee*, 455 U.S. at 258.

> "[W]idespread individual voluntary coverage under social security... would undermine the soundness of the social security program." S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national security program providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id.

Wilson argues that one may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, an employee must submit to deductions. *Lee,* 455 U.S. at 258, 261 n.12. In any event, social security challenges do not implicate immigration-related unfair employment practices and are therefore beyond this forum's limited reach.

G. *This Forum Lacks Subject Matter Jurisdiction over Wilson's National Origin Claim*

This forum's adjudication of Wilson's national origin discrimination claim is barred because the forum has no jurisdiction over employers of more than fourteen employees, such as the Harrisburg School District; because the claim has already been adjudicated by EEOC, the proper forum; and because it is legally insufficient.

I take official judicial notice of the fact that the Harrisburg School District is an employer of well over fifteen employees.[6] This forum's adjudication of Wilson's Complaint is therefore precluded, because it is well established that ALJs exercise jurisdiction over national origin discrimination claims only where employers employ more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. §1324b(a)(2)(B); *Huang v. United States Postal Service*, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd, Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990). This forum has no jurisdiction over Wilson's claim of national origin discrimination because the Harrisburg School District employs more than fourteen employees.

Wilson's pleadings confirm that he filed an EEOC claim which was dismissed, arising out of the same facts as in the present case. Although he provides no details, I understand that EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000-e *et seq.* Memorandum, Ellen J. Vargyas, EEOC Legal Counsel to All EEOC District, Area & Local Directors, July 13, 1995, "Clarification to April 13, 1995 Memorandum on Charges Alleging National Origin Discrimination Due to the Withholding of Federal Income or Social Security Taxes from Wages," at 1. Because dismissal for failure to state a claim is a merits disposition insofar as the parties are covered by Title VII, even though the underlying charge may fail to state a cognizable claim, Wilson's national origin claim is vulnerable also to the prohibition against overlap between §1324b and Title VII. 8 U.S.C. §1324b(b)(2). See *Winkler v. Timlin*, 6 OCAHO 912, at 5-6.

[6] According to the U.S. Dept. of Commerce 1990 Census, the city of Harrisburg public schools serve over 8,000 students, necessitating a commensurate workforce. 1990 Census of Population: Pennsylvania, Social and Economic Characteristics (Dept. Comm. 1993).

Even had I jurisdiction over Wilson's claim of national origin discrimination, however, the Complaint fails substantively to state a claim upon which relief can be granted. A complaint of national origin discrimination which fails to specify Complainant's national origin is insufficient as a matter of law. *Boyd v. Sherling*, 6 OCAHO 916, at 23; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15, 19 WL 670179, at *11. Remarkably, Wilson does not even identify his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against United States citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Wilson's argument that he was discriminated against on the basis of national origin, is based on Harrisburg's refusal to accept his improvised "Statement of Citizenship." This allegation, however, relates only to claims of document abuse and citizenship status discrimination. Because by its own terms the national origin discrimination claim is based solely on Complainant's citizenship status, it is dismissed on the additional ground of failure to state a claim upon which relief can be granted.

H. *Wilson's Citizenship Cause of Action Fails to State a Claim Upon Which Relief Can Be Granted*

Refusal to hire or discharge are the only citizenship status discrimina tion claims cognizable under §1324b. The entries, *seriatim*, on Wilson's OCAHO complaint format, as well as the tenor of pleadings, indicate an ongoing employment relationship, as confirmed by the motion for default which requests "back pay from May 14, 1994, to present . . . in the portion of 30% of his total pay" presumably taken for the purposes of income tax and social security withholding. The pleadings consistently point to Wilson as having been an employee of Harrisburg since 1991.

OCAHO jurisprudence makes clear that ALJs have §1324b citizenship status jurisdiction only where the employee has been discriminatorily rejected or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment. Here, although Wilson remains employed, claiming neither refusal to hire nor wrongful termination, he seeks recourse over his dispute concerning federal tax withholding and social security law compliance. See discussion at II.D.2 and 3, *supra*, pages 8-9.

This proceeding stems from what can at best be characterized as misapprehension that ALJ jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations im-

posed by federal revenue law. Such philosophical and political dispute is beyond the scope of §1324b. Complainant is in the wrong forum for the relief he seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit §1324b jurisdiction that turns on an employer's tax withholding obligations. Wilson's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

I. *Wilson's Document Abuse Cause of Action Fails To State a Claim Upon Which Relief Can Be Granted*

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)," a comprehensive system whereby an employer verifies an employee's eligibility to work in the United States by means of prescribed documents. 8 U.S.C. §1324b(a)(6). The pleadings in this case fail to disclose that Harrisburg asked Wilson to produce any documents whatsoever. Accordingly, there is no basis on which to posit §1324b document abuse.

Wilson's Complaint has nothing to do with the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. For example, Wilson explicitly denies that he tendered his "Statement of Citizenship" for the purpose of employment eligibility verification implicated by the §1324a(b) requirement. Complaint at ¶17. In fact, Wilson disclaims that Harrisburg asked for wrong or different documents than those required to show work authorization, denying in effect that he was the victim of document abuse in violation of §1324b(a)(6). Complaint at ¶17. Indeed, Wilson first presented a document *unrelated* to employment eligibility verification on May 14, 1994, years after the period in which the employer was required to verify his eligibility for employment. The document Wilson insists should have been accepted by the employer for tax exemption purposes—the "Statement of Citizenship to assert his right not to be treated as an alien for any reason or purpose in all matters regarding his employment and employability"—has no place in the §1324a(b) process.

The holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10 is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO 892 at 18-21 (1996) and cases cited therein.

Because nothing in the Complaint implicates obligations of an employer under §1324a(b), I lack subject matter jurisdiction over Wilson's §1324b(a)(6) allegations.

III. *Conclusion*

Where no set of facts can be adduced to support a complainant's claim for relief, and where the complaint affords a sufficient basis for the forum's action, the forum may dismiss the complaint *sua sponte*. *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3rd Cir. 1990).

The decision to grant or deny leave to amend is within the forum's sound discretion. *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 518 (3rd Cir. 1988) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The amendment of complaints is generally favored. *See Roman v. Jeffes*, 904 F.2d 192, 196 n.8 (3rd. Cir. 1990); *Weaver v. Wilcox*, 650 F.2d 22, 27-28 (3rd. Cir. 1981); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 923 (3rd. Cir. 1976); *Kauffman v. Moss*, 420 F.2d 1270, 1275-76 (3rd. Cir. 1970), *cert. denied*, 400 U.S. 846 (1970). As the Third Circuit instructs, the forum's reasons for denying leave to amend should be enumerated. *Coventry v. U.S. Steel Corp.*, 856 F.2d at 518. I dismiss Wilson's complaint without leave to amend because his tax challenge, though clothed in immigration-related labor law verbiage, cannot by any conceivable amendment be transformed into a *bona fide* immigration- related unfair employment practice; whatever currency it may have in other circles, as to this forum it is disingenuous and frivolous. Tax challenges, however disguised, are beyond this forum's jurisdictional reach. By its very nature, the Complaint cannot credibly be amended to an immigration-related cause of action.

Taking all Wilson's factual allegations as true, and construing them in a light most favorable to Wilson, I determine that Wilson is entitled to no relief under any reasonable reading of his pleadings. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd. Cir. 1988), *cert. denied, Upper Darby Township v. Colburn*, 489 U.S. 1065 (1989); *Rumfola v. Murovich*, 812 F. Supp. 569, 572 (W.D.Pa. 1992). Even if, as Wilson claims, sometime between 1991 and 1994 he gratuitously tendered to Harrisburg documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Harrisburg refused to honor these documents and insisted on making payroll tax and social security deductions, Harrisburg's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Wilson describes simply does not support the immigration-related causes of action he pleads. Wilson's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside of IRCA.

Furthermore, the ALJ is precluded from hearing this suit not only by the limits of §1324b powers, but by the IRC, which immunizes employers from suit when they withhold tax and social security contributions from wages, and by the Anti-Injunction Act, which prohibits courts from hearing such a claim where the taxpayer has not followed statutory conditions precedent. It follows that no default will be entered against Harrisburg notwithstanding that either through negligence, indifference or disdain it has failed to honor the process of this forum and to assist in resolution of the employee's claim.

(a) *Disposition*

Wilson's Complaint, having no arguable basis in fact or law, is before the wrong forum. The Complaint is dismissed because it is untimely, because this forum lacks subject matter jurisdiction over it, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. §1324b(g)(3).

(b) *Appellate Jurisdiction*

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED:

Dated and entered this 10th day of March, 1997.

MARVIN H. MORSE
Administrative Law Judge

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

January 30, 1997

Exhibit 31

CHRISTOPHER R. WINKLER,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 96B00065
TIMLIN CORPORATION,)
Respondent.)
)

DECISION AND ORDER TO DISMISS AND TO DENY APPROVAL TO AGREED VOLUNTARY DISMISSAL

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* on behalf of Complainant.
Terence L. Green, Esq., on behalf of Respondent.

I. *Procedural History*

Administrative adjudication of this case has its genesis in a proceeding initiated by Christopher R. Winkler (Winkler or Complainant) in June, 1995, when he filed a unitary Charge of Discrimination with the California Department of Fair Employment/Housing and the Equal Employment Opportunity Commission (EEOC), San Diego Area Office. He filed the charge on EEOC Form 5. Winkler alleged that on March 17, 1995 he was "denied hire" by the Timlin Corporation (Timlin or Respondent), which he identified on the EEOC charge as an employer of between 15 and 100 employees. Winkler alleged that Timlin failed to hire him because "everyone that works at this Company has to pay income taxes, and everyone has to complete a W–4 Form and have taxes deducted, if they want to work here," which he refused to do. Winkler alleged that Timlin's insistence on tax withholding constituted dis-

crimination against him because of his national origin and his U.S. citizenship.

On October 31, 1995, addressing the filing on the merits, the EEOC issued a Dismissal and Notice of Rights (Notice):

> Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes.

The EEOC informed Winkler of his right to sue in U.S. district court within ninety (90) days of receipt, and that failure to do so would waive his right to sue.

On November 21, 1995, Winkler filed a charge against Timlin in letter form with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, United States Department of Justice (OSC). In response, by letter dated November 22, 1995, OSC mailed Winkler a charge form on which he was advised to complete his submission. His charge, dated November 20, 1995 on the OSC form, is accompanied by an November 8, 1995 letter to OSC which acknowledged that "the EEOC dismissed . . . [his] complaint for lack of evidence."

Winkler's OSC charge alleged that, in violation of 8 U.S.C. §1324b, Timlin discriminated against him on the basis of citizenship status and national origin, and committed document abuse. Alleging that the discrimination took place on March 17, 1995, Winkler claimed that Timlin refused to accept "documents relating to my citizenship, after I was hired." (In contrast, Winkler's November 8, 1995 letter recites that on March 17, 1995 "I was denied hire to [sic] Timlin Corporation for an Inside Sales position. I was offered the job and requested to fill out certain IRS documents and documents requiring a social security number.")

Although Winkler signed his OSC charge, OSC's determination letter (undated)—advising that his charge and those of eight other listed individuals were rejected on the merits and as untimely—was addressed to John B. Kotmair, Director, National Worker's Rights Committee (Kotmair). The OSC letter, addressed to Kotmair "as the representative of the injured parties in each of the . . . referenced charges," recites that

> [T]he Special Counsel has determined that there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. §1324b . . . [or]

that they state a cause of action for document abuse under 8 U.S.C. §1324b(a)(6).

OSC, therefore, declined to file a complaint on Winkler's behalf.

On June 21, 1996, Winkler filed his Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). Winkler's Complaint was signed not by Winkler, but by Kotmair. The Complaint was accompanied by a "Privacy Act Release Form and Power of Attorney," dated June 11, 1996, by which Winkler designated Kotmair as his investigator apropos "the withholding of taxes (including but not limited to a Statement of Citizenship)," restricted to investigation with respect to Timlin. The obvious inadequacy of that power of attorney to provide representation before an administrative law judge (ALJ) is cured by the August 26, 1996 filing by Kotmair of a Notice of Appearance supported by an August 6, 1996 power of attorney by Winkler of sufficient breadth and specificity to authorize Kotmair to act as Winkler's attorney in fact. *See* OCAHO Rules of Practice and Procedure for Administrative Hearings, at 28 C.F.R. §68.33(b)(6) (1966).

The Complaint, set out on OCAHO's complaint format, comprises entries in response to inquiries at sequentially numbered paragraphs. Considered together, ¶¶8, 9, 13 and 16 characterize the employer's refusal to accept a "Statement of Citizenship" and to give credence to an "Affidavit of Constructive Notice" to exempt an employee from providing a Social Security Number and from tax withholding as discriminatory—i.e., as the result of discrimination on the basis of national origin and citizenship status, and document abuse, Winkler was "knowingly and intentionally not hired." Winkler requests back pay from March 17, 1995, to August 31, 1995. ¶¶20, 21.

OCAHO issued a Notice of Hearing (NOH) on June 28, 1996, in response to which Timlin filed its Answer on August 1, 1996. Describing itself as a telephone sales company with sixty-two (62) employees, Timlin contended that it did not refuse to hire Winkler because of his national origin; did not ask him to complete INS Form I–9 or to disclose his national origin; did not refuse to hire him because of his citizenship status; made no inquiry about citizenship status during his interview; and that Winkler left the citizenship inquiry section of the employment application blank.

According to Timlin, to avoid tax deductions, Winkler demanded to be hired as an independent contractor:

> When told that the Company would not offer Mr. Winkler the position as an independent contractor and [that] it would comply with the tax codes as published by various state and federal laws, Mr. Winkler became aggressively insistent that Timlin Industries retain him. Timlin Industries refused and made the decision not to hire Mr. Winkler.

Answer at 6.

Timlin asserts that Complainant was rejected because "the Respondent did not want to violate federal law by accepting the Complainants [sic] offer of employment service as an Independent Contractor and for no other reason." Answer at 9. Timlin denies asking Winkler to supply any documentation because "[document] requests are made after an offer and acceptance of employment" and "Respondent did not hire Complainant." Answer at 2–4. Timlin asserts that Winkler was adamant in his refusal to be hired as anything other than an independent contractor.

> We told Mr. Winkler that if he were to change his mind and consider being hired as an employee, we would seriously consider hiring him.

Answer, Exhibit E, Statement of Timlin's President.

On October 10, 1996, Kotmair filed a "Motion to Strike Respondent's Answer And Violation of Rule 11," and a brief in support. On October 31, 1996, Terence L. Greene (Greene), Esq., filed an entry of appearance as attorney for Respondent.

On December 23, 1996, by transmittal letter from Greene dated December 16, 1996, the parties and their representatives filed a joint voluntary dismissal, containing a signature block to be signed by the judge. The transmittal letter recites that "We have agreed with counsel for Mr. Winkler to withhold settlement funds until we have received the conformed copy." I understand the reference to a conformed copy as anticipating signature by the judge.

II. *Discussions and Findings*

A. *National Origin Discrimination Claim Must Be Dismissed*

1. The Forum Will Dismiss a Case Sua Sponte for Lack of Subject Matter Jurisdiction

The Supreme Court has instructed that federal ALJs are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures. *Horne v. Town of Hampstead*, 6 OCAHO 906, at 5 (1997).

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative oblgation to ensure that they are acting within the scope of their jurisdictional power." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1350 (2d ed. Supp. 1995).

A forum's "subject matter jurisdiction is not a waivable matter and may be raised at any time . . . *sua sponte* by the trial or reviewing court." *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988). A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). "[A] federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction" and to consider its jurisdiction *sua sponte*. *Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379, 385 (9th Cir. 1996); *see also Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995) (citing *In re Ferrante*, 51 F.3d 1473, 1476 (9th Cir. 1995)).

The forum is not free to expand or constrict jurisdiction conferred by statute. *Willy v. Coastal Corporation*, 503 U.S. 131, 135 (1992). It must, therefore, "determine whether or not . . . [it has] jurisdiction to entertain [a] cause and for this purpose . . . construe and apply the statute under which . . . asked to act." *Chicot*, 308 U.S. at 376.

Furthermore, federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine,* 415 U.S. 528, 536 (1974) (quoting *Newburyport Water Co. v. Newburyport,* 193 U.S. 561, 579 (1904)). A claim is "plainly unsub-

stantial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans,* 415 U.S. at 536 (internal quotations omitted) (citing *Ex parte Poresky*, 290 U.S. 30, 31–32 (1933)). Where, from the face of the complaint there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

The party invoking a forum's jurisdiction must demonstrate its existence. *Farmers Ins. Exchange v. Potage La Prairie Mut. Ins. Co.,* 907 F.2d 911, 912 (9th Cir. 1990).

2. *Complainant's National Origin Claim Is Dismissed Because The Administrative Law Judge Lacks Jurisdiction*

Complainant alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986, as amended, (IRCA), specifically, §274B of the Immigration and Naturalization Act, codified as 8 U.S.C. §1324b, was not intended to supersede EEOC jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three (3) and fewer than fifteen (15) individuals. §1324b(a)(2)(B); *Huang v. United States Postal Service,* 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at 2 (O.C.A.H.O.), *aff'd, Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990),[1] 1990 WL 512148, at 2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.,* 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at 3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at 20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990).

Once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act. *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 2

[1] Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

(1995), 1995 WL 509453, at 6 (O.C.A.H.O.). This is true even where EEOC errs in assuming jurisdiction. *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at 3 (O.C.A.H.O.).

Prior exercise of EEOC jurisdiction over Winkler's Complaint precludes present OCAHO jurisdiction. Section 1324b(b)(2) precludes liability for alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEO charge. *Wockenfuss*, 5 OCAHO 767, at 3, 1995 WL 509453, at 6; *Adame*, 5 OCAHO 722, at 3–5, 1995 WL 217517, at 3. Section 1324b provides in pertinent part:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000e *et seq*], unless the charge is dismissed as being outside the scope of such title.

8 U.S.C. §1324b(b)(2).

Appendix C to Respondent's Answer is the EEOC Notice of October 31, 1995. As Winkler acknowledged, he filed and lost his EEOC charge of national origin discrimination based on the same set of facts as alleged in his subsequent Complaint. The Notice makes unmistakably clear that the EEOC dismissed the charge as lacking in merit, not on jurisdictional or time-barred grounds, but because he did not establish a statutory violation.

Nowhere does Complainant's 25-page brief in support of its Motion to Strike Respondent's Answer rebut or refer at all either to the assertion in the Answer that Timlin employed 62 employees or to the Notice evidencing the EEOC's rejection of Winkler's Charge. It is undisputed that EEOC exercised jurisdiction over Winkler's national origin discrimination claim, and that Timlin employed more than fourteen individuals. Consequently, I necessarily find that at all times relevant to this action: (1) Respondent employed more than fourteen individuals; (2) that a charge with respect to national origin discrimination based on the same set of facts was filed with the EEOC under Title VII of the Civil Rights Act of 1964; (3) that such charge was dismissed on its merits; and that I therefore lack subject matter jurisdiction over Complainant's national origin discrimina-

tion claim. I therefore dismiss that portion of the Complaint alleging national origin discrimination. 8 U.S.C. §1324b(a)(2)(B).

B. Complainant's Claims of Discrimination on the Basis of Citizenship Status and Document Abuse Are Dismissed for Failure to State a Claim Upon Which Relief May be Granted Under IRCA and Because This Forum Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act

In order to state a citizenship status discrimination or document abuse claim upon which relief can be granted, a complaint must contain a *prima facie* recitation that the putative employer committed an unfair immigration-related employment practice as defined in 8 U.S.C. §§1324b(a)(1)(B) and 1324b(a)(6), respectively.

Winkler alleges that Timlin's refusal to hire him for his refusal to provide a social security number/card constitutes citizenship status discrimination. Specifically, as to citizenship status discrimination, Winkler alleges that he was not hired because "the company refused to accept and acknowledge his Statement of Citizenship and his claim that his Citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act." Complaint, ¶13b. Specifically, as to document abuse, he alleges that Timlin refused to accept his "Statement of Citizenship (which shows that he was a U.S. citizen and not subject to the withholding of Income Taxes pursuant to Federal Law)," and refused to accept his "Affidavit of Constructive Notice (explains that he can not provide a social security number)." *Id.* at ¶16a. Asked to identify the "too many or wrong documents than required to show that I am authorized to work in the United States," Complainant responded: "Social Security Number/Card." *Id.* at ¶¶17, 17a.

OCAHO precedent provides "for dismissal *sua sponte* by an administrative law judge, if he or she determines that Complainant has failed to state a claim upon which relief can be granted." *Mendez v. Daniels*, 2 OCAHO 392, at 7 (1991) (citing 28 C.F.R. §68.10, "If the Administrative Law Judge determines that the complainant has failed to state . . . a claim [upon which relief can be granted], the Administrative Law Judge may dismiss the Complaint"), 1991 WL 531903, at 5 (O.C.A.H.O.). This is so even where a complainant appears *pro se*. *Id.*

"'Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."' *United States v. Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Schwartzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984)), 1995 WL 367106, at 2 (O.C.A.H.O.); *United States v. Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at 3 (1994), 1994 WL 765377, at 2 (O.C.A.H.O.).

The purpose of summary decision is "to avoid an unnecessary hearing when there is no genuine issue of material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters." *United States v. Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (1995) (citing *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3 (1991)), 1995 WL 367106, at 2 ; *Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at 3 (1994), 1994 WL 765377, at 3. "A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994)), 1995 WL 367106, at 3; *Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at 3, 1994 WL 765377, at 2. In determining whether there is a genuine issue of material fact, all facts and inferences drawn from them are to be construed in favor of the non-moving party. *Id.* (citing *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986); *Primera Enters., Inc.*, 4 OCAHO 615, at 2)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue. . . ." *Matsushita*, 475 U.S. at 586. "Summary judgment may be based on matters deemed admitted." *Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 5 (citing *Primera Enters., Inc.*, 4 OCAHO 615 at 3; *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3-4 (1991)), 1995 WL 367106, at 4; *Anchor Seafood Distrib., Inc.* 4 OCAHO 718, at 5, 1994 WL 765377, at 4.

As an action under §1324b, Winkler's claim is so "obviously without merit . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans,* 415 U.S. at 536.

1. *The Complaint Fails to State Claim Upon Which Relief Can Be Granted Under 8 U.S.C. §1324b*

Winkler alleges that Timlin's insistence on completion of Form W-4 as a precondition for employment and Timlin's refusal to "accept and acknowledge . . . [Winkler's] Statement of Citizenship and his claim that his citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act" constitute discriminatory conduct that violates §1324b. Complaint ¶¶13 and 16. In order for Timlin's conduct to have violated §1324b(a)(1)(B), Timlin would need to have discriminated on the basis of citizenship status, and to have violated §1324b(a)(6) Timlin would need to have demanded Winkler's social security *card* for the purpose of satisfying the employment verification requirements of §1324a(b) under circumstances in which this demand would be for "more or different documents than are required." *Westendorf,* 3 OCAHO 477, at 10, 1992 WL 535635, at 5.

a. *Complainant Fails To Establish a Prima Facie Case of Discrimination Based on Citizenship Status*

It is a complainant's burden to prove citizenship status discrimination. *Toussaint*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at 12; *United States v. Mesa Airlines,* 1 OCAHO 462, 500 (1989), 1989 WL 433898, at 32 (O.C.A.H.O.), *appeal dismissed, Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991). In order to prevail on a claim of citizenship status discrimination a complainant must be able to prove less favorable treatment than others because of citizenship. *Westendorf*, 3 OCAHO 477, at 6-7, 1992 WL 535635, at 7. Here, however, Winkler's EEOC charge admits that Timlin intended to treat him the same as other employees:

> [E]veryone that works at this Company has to pay income taxes, and everyone has to complete a W-4 Form and have taxes deducted, if they want to work here.

EEOC "Charge of Discrimination," June 8, 1995.

The dispute between the parties concerns whether Winkler is subject to withholding for income tax and social security deductions. The dispute does not implicate the law prohibiting citizenship status discrimination. *See Horne v. Town of Hampstead*, 6 OCAHO 906, at 4-5 (1997); *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11 n.8

(1996). Winkler fails to allege one of the four essential elements of a *prima facie* case for citizenship status discrimination.

A *prima facie* case of citizenship status discrimination, adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973) and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

> (1) he is a member of a protected class;
>
> (2) the employer had an open position for which he applied;
>
> (3) he was qualified for the position; and
>
> (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Lee v. Airtouch, 6 OCAHO 901, at 11.

Where a complainant establishes a *prima facie* case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. *St. Mary's Honor Cntr v. Hicks*, 509 U.S. 502, 507 (1993). Where, however, a complainant is unable to present a *prima facie* case, "the inference of discrimination never arises and the employer has no burden of production." *Lee v. Airtouch*, 6 OCAHO 901, at 11 (citing *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)).

Winkler can satisfy the first of the four prongs for a *prima facie* case of citizenship discrimination. As a United States citizen, Winkler is a member of a class protected by §1324b from citizenship status discrimination. *Toussaint*, 6 OCAHO 892, at 17 n.11, 1996 WL 670179, at 13, n.11. As defined by §1324b(a)(3), the class of "protected individuals" entitled to benefit from the prohibitions of §1324b(a)(1)(B) includes United States citizens.

Winkler also satisfies the second prong: Timlin had an open position for which Winkler applied.

And he satisfies the third: He was qualified for the position.

Winkler, however, is unable to satisfy the fourth prong. Here, Winkler articulates in his own submission the reason for Timlin's ac-

tions: Accepting a characterization of events most favorable to Winkler, he chose not to comply with Timlin's demand that its employees make requisite tax and social security deductions. Winkler states that he:

> [W]as lawfully unable to provide a number, pursuant to the letter of the law as he has preserved his right as a U.S. Citizen to not be encumbered by the provisions of the Social Security Act by voluntarily obtaining a number.

Complainant's Brief in Support of Motion to Strike Respondent's Answer at 5-6. Winkler's challenge to the Social Security Act and to income tax withholding, however, is not properly within this court's jurisdiction, nor does it invite an inference that Timlin discriminated on citizenship bases in not hiring him. I do not credit Complainant's apparent theory that only non-citizens are subject to producing social security numbers and are amenable to compulsory tax withholding. But even if that were the law, Complaint's gripe is not with immigration law. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. And the call for entry of a social security number is in Section 1 of the Form I-9 in which the employee after hire—not a candidate for employment—is obliged by the government, not the employer, to provide that number. The Attorney General is authorized at 8 U.S.C. §1324b(1)(A) to establish an employment eligibility verification form; that is the Form I-9. 8 C.F.R. §274A.2(2). The Instructions accompanying the Form I-9 direct that "all employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for insuring that Section 1 is timely and properly completed.**" (Emphasis in original). U.S. Department of Justice, Immigration & Naturalization Service Form I-9 Instructions (Rev. 11-21-91) OMB No. 1115-0136 (detailing instructions for completing INS Form I-9).

It follows that under any conceivably reasonable reading of his Complaint, Winkler cannot establish a *prima facie* case of citizenship status discrimination. His Complaint is so attenuated and unsubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing. Therefore there is no call on Timlin to articulate a legitimate, non-discriminatory reason for not hiring Complainant. It is certain, however, Winkler's insis-

tence that he be exempted from Timlin's lawful and nondiscriminatory scheme of tax and social security compliance would be a legitimate, nondiscriminatory reason for not hiring him. The Ninth Circuit instructs that even where a complainant may be able to make out a *prima facie* case, pre-trial summary judgment is appropriate where there is no evidence to refute a respondent employer's legitimate explanation, "even though there has been no assessment of the credibility of [the employer] at this stage." *Wallis v. J. R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994).

Maximizing opportunities to amend discrimination complaints is generally encouraged. *See Fuller v. City of Oakland, Ca.*, 47 F.3d 1522, 1535 (9th Cir. 1995); *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083, 1085 (9th Cir. 1995). Because, however, Winkler relies exclusively on Timlin's refusal to accept his documents as the gravamen of his discrimination claim, the consequential lack of any discernible meritorious §1324b claim forecasts that amendment would be futile. Winkler's claim is therefore dismissed for failure to state a claim cognizable under IRCA.

b. *Winkler's Complaint Is Not Document Abuse Within the Meaning of IRCA*

Section 1324b(a)(6) makes it unlawful for employers to demand particular documents from among the Form I-9 catalogue of documents specified for satisfying employment eligibility verification obligations. *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 535635, at 5; *Lewis v. McDonald's Corp.*, 3 OCAHO 383, at 5 (1991), 1991 WL 531895, at 3 (O.C.A.H.O.); *United States v. Marcel Watch Corp.*, 1 OCAHO 143, at 1003 (1990), 1990 WL 512142, at 13 (O.C.A.H.O.), *amended*, 1 OCAHO 169, at 1158 (1990), 1990 WL 512157 (O.C.A.H.O.). For example, were a job applicant to produce one of the documents listed in "List A" of section 2 of Form I-9, or produce one of the documents listed in "List B" and one of the documents listed in "List C" of section 2 of Form I-9, but not an original social security card, and were an employer to demand that in addition or in lieu of the proferred documents the applicant produce a social security card as a precondition of employment, §1324b(a)(6) would be violated. *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 53565, at 5.

Winkler, however, does not allege that Timlin requested a social security card for purposes of establishing employment eligibility. Nor does Winkler contend that he was asked, as part of the I-9 process,

to produce a social security card in preference to, in lieu of, or in addition to other employment verification documents. Indeed, Timlin contends, and Winkler's lengthy motion in opposition to the Answer does not dispute, that the hiring process never reached the employment verification stage in which documents would be requested.

Instead, Winkler gratuitously engaged Timlin in a pre-employment philosophical and political colloquy that culminated in Timlin's refusal "to accept and acknowledge . . . [Winkler's] Statement of Citizenship and his claim that his citizenship effects [sic] the fact that he is not required to be subject to the Social Security Act." Complaint, ¶13. Most significantly, the face of the Complaint demonstrates the threshold deficiency in Complainant's effort to manipulate the §1324b prohibition against document abuse by cloaking challenges to United States Tax Code and Social Security Act compliance regimes in an unrelated cause of action against a prospective employer. That this is so is apparent from even a cursory review of the Form I-9 which identifies the documents acceptable for employment eligibility verification purposes, no one of which can be reasonably understood to embrace the two documents relied on by Complainant. Simply stated, characterizing the Complaint in a light most favorable to Winkler by assuming the *facts* in a light most favorable to him, as §1324b(a)(6) commands in *haec verba*, there can be no violation of the prohibition against document abuse where the documents tendered are *not* documents "required under" 8 U.S.C. §1324a(b).

Assuming that Timlin demanded Winkler's social security number, "there is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment." *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 535635, at 7. "OCAHO case law correctly holds that nothing in the logic, text or legislative history of the Immigration Reform and Control Act [IRCA] limits an employer's ability to require a Social Security number as a pre-condition of employment." *Toussaint*, 6 OCAHO 892, at 17 (citing *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 4, 1996 WL 670179, at 13). "[N]othing in IRCA limits an employer's ability to require a Social Security number as a precondition of employment . . . [unless an employer] applies this requirement in a discriminatory way." *Toussaint*, 6 OCAHO 892, at 18-19, 1996 WL 670179, at 14. "Because a request for a social security number is not a request for a document at all, this [request] . . . does not implicate any issues which come within the jurisdiction of OCAHO." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 7 (1996).

The INS Form I-9 is the document to be executed by employers and employees at the time of hire in compliance with the employment eligibility verification regimen established to implement the statutory imperative of §1324a(b). Although the Complaint refers to a "number/card," Winkler's pleadings demonstrate that Timlin did *not* request that Winkler produce his social security card in connection with the preparation of the employer's section, §2 of the Form I-9, but establish that during the job interview process Winkler initiated a confrontation implicating instead his tax and social security nullification documents, i.e., his "Statement of Citizenship" and "Affidavit of Constructive Notice." Because those documents are in derogation of the list stipulated on the Form I-9 which the Attorney General has prescribed for §1324a(b) compliance, the Complaint fails to state a cause of action for breach by Timlin of §1324b(a)(6). See *Horne v. Town of Hampstead*, 6 OCAHO 906, at 8-9.

I therefore dismiss the document abuse claim for failure to state a claim upon which relief can be granted.

2. *This Forum Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act*

In *Horne v. Town of Hampstead*, 6 OCAHO 906, refusal to comply with the income tax and social security regimen by an individual employed by the §1324b respondent was held insufficient to state an 8 U.S.C. §1324b cause of action against the employer. The present case holds that a §1324b claim against an employer that allegedly failed to hire a job applicant:

(a) who refused to comply with federal income tax and social security accountability requirements fails to state a §1324b(a)(1)(B) citizenship status discrimination claim on which relief can be granted, and

(b) who insisted on acceptance of documents other than those identified by the Attorney General for compliance with 8 U.S.C. §1324a(b) fails to state a §1324b(a)(6) claim on which relief can be granted.

The Complaint does not suggest that Winkler was treated differently than other job applicants. Winkler's contention—that judicial precedent supports the hypothesis that as a United States citizen he

is less amenable to tax withholding or to social security practice and procedure than is a non-citizen—is immaterial here where this tribunal of limited jurisdiction is powerless to respond to allegations that tax and social security compliance is offensive to any one or a number of individuals.

Complainant finds nourishment in *Equal Employment Opportunity Commission v. Information Systems Consulting*, Civil Action No. CA3-92-0169-T (D.C., E.D. TX) (1992) (a case arising from Title VII employer obligations to reasonably accommodate religious beliefs in the workplace). Correctly noting that a government agency supported an employee's refusal to obtain a social security number, Complainant fails to mention that the court's consent decree approving settlement of a Title VII Civil Rights Act contained a significant caveat: "This decree is being issued with the consent of the parties and does not constitute an adjudication or finding by this Court on the merits of the allegations of the complaint." *Id.* at 3. Moreover, that case, initiated by the EEOC, involved a freedom of religion claim by the employee seeking not to participate in the social security system.[2] This §1324b claim is one of citizenship status discrimination, and not that of free exercise of religion, over which in any event I lack jurisdiction.

Complainant relies extensively on *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935), one of the last of a line of cases fatal to acts of Congress premised on the commerce clause which held a compulsory retirement and pension plan beyond congressional powers to regulate interstate commerce. Complainant's reliance on *Alton* is misplaced. More to the point, as early as 1937 the Supreme Court affirmed Congress' power to enact social security legislation. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937), and *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

Winkler v. Timlin has nothing to do with the employer's obligations under 8 U.S.C. §1324b and everything to do with the job applicant's unwillingness to participate in federal income tax and social

[2] *But compare Bowen v. Roy*, 476 U.S. 693, 702 (1986) (rejecting a challenge on religious grounds to providing a social security number as a condition precedent to receiving food stamps, the Court found no violation of the First Amendment's free exercise of religion clause, notwithstanding plaintiff's belief that use of a number would impair Native American child's spirit, because "The statutory requirement that applicants provide a social security number is wholly neutral in religious terms and uniformly applicable").

security withholding. The Complaint is therefore dismissed for lack of subject matter jurisdiction.

C. *Approval of Agreed Voluntary Dismissal Denied*

Title 28 C.F.R. §68.14(a) provides that parties to a complaint who have entered into a proposed settlement agreement shall submit to the presiding ALJ the agreement containing consent findings and a proposed decision and order. 28 C.F.R. §68.14(a)(1). Alternatively, the parties may notify the ALJ that they have reached a settlement and agreed to a dismissal, *subject to the approval of the ALJ*. 28 C.F.R. §68.14(a)(2).

Winkler and Timlin have elected the latter option, asking that I enter an order in which the judge joins the parties in a stipulation captioned "Voluntary Dismissal," "all the parties" agreeing "that the entire matter be voluntarily dismissed with prejudice." The letter from counsel for Timlin transmitting the proposed order explains that "we have agreed with counsel for Mr. Winkler to withhold settlement funds until we have received the conformed copy." The term "conformed copy" necessarily refers to the "Voluntary Dismissal" if and when it is signed by the judge. I cannot approve the voluntary dismissal.

Title 28 C.F.R.§68.1 provides that for situations not covered by 28 C.F.R. Part 68, the Rules of Civil Procedure for United States District Courts are available as guidelines. Accordingly, it is necessary and appropriate to apply Fed. R. Civ. P. 41(a)(2). "[R]ule 41(a) . . . forbids voluntary dismissal without court approval once the defendant has answered." *Van Kast v. Bd. of Education of City of Chicago*, 1988 WL 142247, at 2 (N.D. Ill. 1988). *Compare Horne v. Hampstead,* 6 OCAHO 884, at 3 (1996), 1996 WL 658405, at 2 (O.C.A.H.O.). Voluntary dismissals under Rule 41(a)(2) are within the court's sound discretion. *Clark v. Tansy,* 13 F.3d 1407, 1411 (10th Cir. 1993).

Although the parties did not include their agreement in soliciting judicial participation in the voluntary dismissal, Respondent's transmittal confirms that it is predicated upon a payment by Respondent to Complainant, subject to judicial approval. Given this forum's inability to entertain Complainant's §1324b claim, I am unable to provide that approval.

Recent OCAHO cases deal with the types of claims alleged by Winkler. All were dismissed. *See Horne v. Town of Hampstead*, 6 OCAHO 906; *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13-14; *Toussaint v. Tekwood Associates, Inc.*, 6 OCAHO 892, at 21-23, 1996 WL 670179, at 17-18. As early as 1991, related issues were addressed extensively in *Lewis v. McDonald's Corp.*, 3 OCAHO 383, at 5, 1991 WL 5318895, at 3.

In light of OCAHO precedent, compelling the conclusion that the obvious infirmities are fatal to the pending claim, it would exceed the jurisdiction of the ALJ to place a judicial imprimatur on an award. Absent subject matter jurisdiction over a complaint which fails to state a cause of action on which the forum can grant relief, judicial power is unavailable to approve a settlement which implicitly assumes the employer's liability. A §1324b claim as insubstantial and lacking of merit as the present one cannot obtain a judicial blessing, whether by concurring in an agreed disposition or otherwise.

III. *Conclusion and Order*

The national origin claim is dismissed for want of jurisdiction.

The document abuse and citizenship status claims are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b.

Approval of the agreed voluntary dismissal is denied.

IV. *Appeal*

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1).

SO ORDERED:

Dated and entered this 30th day of January, 1997.

MARVIN H. MORSE
Administrative Law Judge

Exhibit 32

#91
1/10/03
JCM

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES,	:	**CIVIL NO. 1:CV-01-2159**
Plaintiff	:	
v.	:	**(Judge Conner)**
THURSTON PAUL BELL,	:	
Defendant	:	

FILED
HARRISBURG, PA
JAN 10 2003
MARY E. D'ANDREA, CLERK
Per _____ Deputy Clerk

ORDER

AND NOW, this 10th day of January, 2003, in accordance with the accompanying memorandum, it is hereby ORDERED that plaintiff's motion for preliminary injunction (Doc. 34) is GRANTED. It is further ORDERED that:

1. Thurston Bell and his representatives, agents, servants, employees, attorneys, and those persons in active concert or participation with him, are preliminarily enjoined from directly or indirectly, by means of false, deceptive, or misleading commercial speech:

   a. Organizing, promoting, marketing, or selling (or assisting therein) the tax shelter, plan, or arrangement known as "the U.S. Sources argument" (also known as "the section 861 argument") or any other abusive tax shelter, plan or arrangement that incites taxpayers to attempt to violate the internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities or unlawfully claim improper tax refunds;

   b. Further engaging in any conduct subject to penalty under 26 U.S.C § 6700, *i.e.* making or furnishing, in connection with the organization or sale of an abusive shelter, plan, or arrangement, a statement they know or have reason to know is false or fraudulent as to any material part;

c. Further engaging in any conduct subject to penalty under 26 U.S.C § 6701, *i.e.* assisting others in the preparation of any tax forms or other documents to be used in connection with any material matte arising under the internal revenue laws and which they know will (if so used) result in the understatement of income tax liability; and

d. Further engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws.

2. Bell shall forthwith send a letter to:

a. All persons to whom he gave, sold, or distributed any materials espousing or related to the U.S. Sources argument;

b. All persons for whom Bell prepared or assisted in the preparation or drafting of any federal returns or tax-related documents; and

c. All persons who contacted Bell regarding the U.S. Sources argument (in paper, via telephone, or through electronic means);

and inform those persons of the entry of the court's findings concerning the falsity of Bell's representations, the falsity of the tax returns based in whole or in part on the U.S. Sources argument, the possibility of the imposition of frivolous-return penalties against them, the possibility that the United States may seek to recover any erroneous refund they may have received, and the fact that a preliminary injunction has been entere against Bell (and attach a copy of this Order to the letter); and Bell shall simultaneously serve copies of all such letters (without attachment) to counsel for the United States at the address listed on the docket of this matter; and

3. Bell shall maintain the NITE website (www.nite.org) during the pendency of this preliminary injunction Order, remove from the aforementioned website all abusive-tax-shelter-promotional materials, false commercial speech, and materials designed to incite others to violat the law (including tax laws), and display prominently on the first page of the website an attachment of this preliminary injunction Memorandum and Order.

4. Bell shall mail to counsel for the United States, at the address listed on the docket of this matter, one copy of every federal tax return, amended return, or other document intended for the IRS that he prepares, or assists in the preparation of, on behalf of any other person or entity during the pendency of this preliminary injunction Order. The mailing shall be made on the same date the document is mailed to or filed with th IRS.

5. If Bell requires access to any file in the court's possession in order to comply with this order (e.g. paragraph 2), Bell shall promptly contact the court's deputy clerk, Ms. Kimberly McKinney, at 221-3920 to schedule an appointment for document access.

6. The parties shall file a request for a permanent injunction hearing within thirty (30) days. If no such request is filed, the Court will issue an order converting this preliminary injunction to a permanent injunction.

CHRISTOPHER C. CONNER
United States District Judge

ORIGINAL

original (4) 12-10-

Exhibit 33A

AFFIDAVIT OF DEFENDANT MR. THURSTON PAUL BELL

IN CIVIL NO: 1 CV 01-2159

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BEFORE THE HONORABLE YVETTE KANE

I, Thurston Paul Bell, of 1240 William Street, Hanover, Pennsylvania, being over the age of 21, do state and attest to the following in the form of this Affidavit:

1. In the between October of 1994 and July 18, 1997 Defendant worked at Save-A-Patriot Fellowship ("SAPF") in Westminster, Maryland under the direction of Fiduciary John B. Kotmair Jr.
2. In his work at SAPF, Defendant knew of and was asked to perform work on State of Wisconsin Income Tax matters for a particular Member of that Fellowship, one Raymond Berglund of Montello, Wisconsin.
3. In the Spring of 1997, Defendant was contacted by another Member of the Fellowship, one Richard Bryan Haraka of Clifton, New Jersey.
4. Mr. Haraka informed the Defendant that he had offered the internet name taxgate.com to Mr. Kotmair who most politely declined any interest.
5. Mr. Haraka suggested that Defendant start writing on everything that he knew as very little of his knowledge and ideas was published for all to read which would have freed up his ability to work on tax matters for members, as opposed to repeating his knowledge telephone call by telephone call.
6. Defendant was flattered but was too busy at that time, and deferred the opportunity for some other time when he was not busy.

7. Frustrated from the lack of support from the Fellowship in developing meaningful argument, effective strategy, applying a team effort for the sake of the Members, and feeling that no more good could come out of his efforts there SAPF, Defendant departed from SAPF at the end of the day Friday July 18, 1997, with every intent to leave the issue of income taxes and tax argument behind him.
8. While trying to pursue some other means of providing for his family Defendant was contacted by an SAPF Member who had kept the Defendant's telephone number.
9. The Fellowship member asked for the Defendant's help on a California Franchise Tax Board matter to which the Defendant referred him back to his successor at the Fellowship.
10. The Member stated that Defendant's successor did not know what to do and asked that he help him.
11. After some consideration Defendant agreed and proceeded to aid this individual who sought him out.
12. After some time passed Defendant received a shocking e-mail from the Fiduciary of the Save-A-Patriot Fellowship threatening him with the criminal charge of Theft of information.
13. Indignant, Defendant sought out chat groups on the internet to show the People interested in this issue that the Leadership of SAPF was not at all concerned about helping people resolve matters with the IRS and protect themselves, or seeing that people are helped, but instead proved itself to merely be serving its own existence.
14. Somewhere about that time Mr. Haraka drove down to Maryland from New Jersey, and spent a day with the Defendant discussing the issues and problems surrounding

the income tax issue and the groups claiming to be addressing it and trying to help people, as well as what might be posted on a website that could give people alternatives to the ineffective and legally dubious arguments of the "snake oil" peddlers of the tax resistance community.

15. After much consternation and thought of this injustice being marketed to the American People under the guise of Patriotism, Defendant sought to reveal all of his knowledge and expose the Save-A-Patriot Fellowship, by allowing everyone who cared to log on to taxgate.com to see what the law says, and see where the ideas that SAPF sells are wrong. Defendant was still being pursued by Mr. Haraka on the taxgate.com project, and seeing a noble cause agreed to dedicate himself full time to write the articles that would tell the people what he knew and understood about the law.

16. After observing threads of discussions on an unmoderated Tax Chat Group at "deja news", where individuals making constitutional arguments against the income tax and liability for same were being reproved with great consistency and accuracy using statutes, regulations, and U.S. Supreme Court case law, Mr. Haraka posted the Gross income argument to see it be attacked.

17. Defendant and Mr. Haraka watched as the tax experts on the chat group switched their argument from law and regulation to then completely build their position on the 16th Amendment, not wanting to talk about and engage them on the law as it was written.

18. Satisfied that the vocal professionals and one College Tax Professor were not able or willing to address the issue, the argument of the application of the Secretary's Rules

and Regulations which govern income from U.S. Sources which is subject to the income tax, with the exclusionary provision of 1.861-8T(d)(2)(ii)(A) as the ultimate point of question, was confirmed as the center piece for the Website taxgate.com.

19. In Late November 1997 Defendant met with Mr. Haraka at his home in Clifton, New Jersey, to discuss the final points of releasing taxgate.com to the public where the gross income argument using the regulations of the Secretary of the Treasury was to be shown to the public.

20. In that meeting Defendant came up with the name of the "National Institute for Taxation Education" as a First Amendment Association for those who supported the argument and the effort to join and be able to obtain help from the Defendant within the confines of the Membership Agreement and the Association.

21. In that meeting, Defendant, out of concern for helping Mr. Haraka receive some remuneration for his efforts assigned to Mr. Haraka 100% of the Membership fees for the construction and maintenance of the Website which was the home for the National Institute for Taxation Education.

22. Defendant determined that he would hold himself out to help the people with whatever REASONABLE and PRUDENT argument and logic that he could develop, learn all he could of the IRS' administrative procedures as he had learned from his experience with the State of California while at SAPF, settle the filing question that so many asked him about, press for COMPLETE compliance with the law for N.I.T.E. Members and IRS Officials alike, so that the administrative process could be used as designed to address his argument of law once and for all, and settle this argument which he sees as the final issue against the IRS.

23. Sometime in either late August or early September 1998, SAPF member Mr. Raymond Berglund of Montello, Wisconsin began to contact the Defendant and joined as a Member of N.I.T.E., sending his application and his membership fee of $165 to Mr. Haraka in New Jersey.

24. The fact in the previous paragraph is evidenced by the fact that on September 10, 1998, the Defendant worked on a letter for Mr. Berglund to Earl R. Munson of the State of Wisconsin Department of Revenue.

25. Defendant recalls that the substance of Mr. Berglund's letter which he created on September 10, 1998 is significant, as what is completely absent from the letter is the assertion of his administrative due process rights as set forth in the landmark case of *Goldberg v. Kelly* (1970). It was around this time that this case was provided to the Defendant just as he was needing an understanding of what the U.S. Supreme Court had to say about Administrative due process of law.

26. September 1998 is some 11 months prior to the refund check provided by the IRS to Mr. David Bosset, and thus could not have been an issue in Mr. Berglund's informed choice to become a member of the National Institute for Taxation Education, as an individual previously familiar with the likes of Save-A-Patriot Fellowship, John B. Kotmair, Jr., and attorney Lowell H. Becraft.

27. In the Spring of 1999 Mr. David Bosset, of the Tampa, Florida area became a Member of N.I.T.E.

28. In a telephone call to the Defendant, Mr. Bosset explained his problem with the IRS and the Department of Justice trying to obtain records from him regarding employment taxes.

29. Defendant explained to Mr. Bosset that if he claimed something to the government, that the government is entitled to make counterclaims and may compel him to prove that which he claimed to them, and must provide to them records supporting his claims.

30. Defendant explained that he should do that which the Federal Judge orders him to do, and that he should do that which the IRS and Department of Justice require of him in relationship to the production of documents.

31. Defendant explained that Mr. Bosset testified (against himself) when he filed employment tax returns, and his failure to pay that which he said that he owed was a simple matter that could easily be remedied by the Courts enforcing collection of the money.

32. Defendant explained to Mr. Bosset with direct reasoning that it appeared that he was the only witness in the case, and that he had created the testimony of record against himself.

33. Defendant pointed out that the Secretary of the Treasury of the United States of America must have created a form by which someone in his predicament could change their testimony and claim a refund.

34. Defendant called Mr. Bosset's attention to the form 941(c), and the proper use of the forms W-2(c) and even a 1099 corrected could be the possible key to the door out of his problem of his pending testimony against himself and the Judge's order that he provide returns to the IRS.

35. Later Defendant discovered that this process is supported by the statutes of the U.S. Congress at 26 U.S.C. §6402 and the regulations of the Secretary at 26 C.F.R. §301.6402-2.

36. Mr. Bosset asked how would he communicate an argument of law supporting his claims on the returns.

37. Defendant, not knowing anything about, or being only vaguely familiar with the IRS Disclosure form 8275 at that time, and still not trusting the use of Government forms could only offer conjecture that a letter of explanation could be the only means of good faith communication at that time when filing the return(s).

38. Mr. Bosset later decided to have the Defendant construct the letter containing the legal explanation and had it sent to him for his use.

39. Defendant warned Mr. Bosset that he did not know what would be the reaction of the IRS, the U.S. Department of Justice, or the Federal Judge, but that the response crafted by Defendant would be honest if nothing else, as it contained the position of Mr. Bosset.

40. Defendant confronted Mr. Bosset with the question as to whether or not he was absolutely positive that he wanted to make the arguments to cover the issues of the income and social security tax.

41. Mr. Bosset stated that due to the facts and the order of the Court, he could see that he had no choice.

42. Mr. Bosset implemented the legal explanation and provided it with his returns on June 10, 1999, some 10 months after SAPF Member Raymond Berglund became a N.I.T.E. member.

43. As shown by the Exhibits posted at the Results Page at nite.org, Mr. Bosset received a refund of all withheld taxes due to his reversal of his testimony against himself.

44. The check to Bosset Partners Marketing was dated August 24, 1999, some 11-12 months after SAPF Member Raymond Berglund became an N.I.T.E. member.

45. On July 2, 1999, Defendant attended the first Income Tax Symposium of the "We the People Foundation for Constitutional Education, where he gave a 45-50 minute speech which began with the statement that the "The best thing that the Media can do is not report on anything that I say here today."

46. Defendant spent the later half of the symposium day that day trying to get the 100 plus people attending to understand that the arguments proffered by their panel of speakers were res judicata frivolous, false, and nonsensical arguments that would never be re-addressed by the government, as they are so well decided.

47. Defendant tried his level best to bring the We the People group to reason and understanding that none of their issues were pertinent to the IRS claims of the earning of gross income by workers and entities, and that the voluntary tax arguments of Devy Kidd, the 5th Amendment Self-Incrimination Argument of William Conklin, the 16th Amendment issues of William Benson and Former IRS Special Agent Joe Bannister, and the arguments of constitutionality of the income tax as presented by notorious Patriot Attorney Lowell H. Becraft were all irrelevant to the duty and function of the IRS.

48. Defendant offered the group the opportunity to properly engage the government in the administrative process designed to address and handle issues in relationship to individual claims, as the IRS had constructed for itself an internal culture of ignoring

all groups with claims of grievance and Tax Rebels or frivolous malcontents, and exhibits no compunction to meet with anyone in good faith for meaningful discussion.

49. We The People leader Bob Schulz stayed his predetermined course for reasons unknown and chose not to heed the warnings of the Defendant and opted instead to continue to proffer the frivolous arguments noted above.

50. Defendant issued many warnings and articles on the internet to warn the public of the We the People Foundation and those that they were promoting.

51. As the second and third Symposiums were scheduled, Mr. Bosset, empowerd by his victory over his prior testimony against himself, became focal point for the We the People Foundation and spoke at their meetings.

52. Mr. Bosset unsuccessfully attempted to use his newly acquired knowledge to appear in a Federal Criminal Income Tax Matter in the Fall of 1999, in an effort to assist Ms. Wanza Mae Webb, before Judge Ann Conway.

53. Wanza Mae Webb is the mother of Mr. Gene Webb, a former Police Officer from Florida who was convicted of willful failure to file and sentenced to prison for two years, and was then released on parole.

54. It appears that since Mr. Bosset's knowledge of the law not imposing a tax on Ms. Webb's remuneration was not in the possession of Ms. Webb at the time of her filing returns, thus the information sought to be provided by Mr. Bosset in court was irrelevant and testimony was not taken.

55. Defendant met Mr. Bosset for the first time in a Hotel in Washington the night before the second Symposium. This was the first time they met and talked face to face, and the only time seen under amicable circumstances..

56. Mr. Bosset gave constant assurance that he was making progress, while the Public issues being presented were not moving away from the res judicata false, fraudulent and fallacious arguments of the old Tax Protest movement.

57. Defendant held his tongue while carefully watching Mr. Bosset being engaged in association with persons known by the Defendant to be promoters of con-men and street hustlers (We the people Foundation) who were peddling known frivolous and res judicata arguments which have gotten countless people into deep troubles with the IRS, costing homes, businesses, and marriages.

58. Defendant looked upon this behavior with GREAT suspicion, using the adage of guilt by association.

59. Defendant eventually heard through e-mails and telephone conversations that Mr. Bosset was telling People who talked to him that he developed the legal argument and that the Defendant was a "punk" who typed it out for him.

60. Seeing enough dishonesty, and having other evidence of Mr. Bosset's dishonesty prior to meeting the Defendant, specifically the Bankruptcy of a Mr. Gephart who sold Mr. Bosset his computer company in exchange for commercial paper in the name of the Company, Defendant played on as Mr. Bosset's friend for some time to see if the rumors would prove true.

61. One day, the date of which cannot be recalled, Mr. Bosset approached Mr. Bell with a marketing plan to promote N.I.T.E. Defendant was cautious, and listened for telltale

words of multi-level pyramid scheme marketing which Bosset Partners Marketing appeared to be associated with. None was forth coming.

62. After a few weeks Mr. Bosset approached Mr. Bell about selling N.I.T.E to him as his "investors" wanted to own the effort.

63. Defendant was told by Mr. Bosset that he would be paid in the form of commercial paper on N.I.T.E. and the pay off would come when it went to public offering, but that Defendant would work for Bosset. This was too similar to the Gephart case in the eyes of the Defendant.

64. Defendant returned with his offer of a lump sum, not recallable at this time, and 5% of gross remuneration for its nation wide operations.

65. Mr. Bosset returned with a rejection of Defendant's offer and explained that he was not even 1%.

66. Feeling slighted and placing all of the facts together between the Gephart Bankruptcy and Mr. Bosset's present behavior, and not wanting to sell N.I.T.E. to Mr. Bosset only to end up working for him, Defendant saw the con and that he was a future casualty which would deprive him of his clear right to complete the work that he had started with N.I.T.E.

67. Relationship between Mr. Bosset and Defendant ceased from that moment on.

68. Mr. Bosset never signed a Senior Fellowship Application/Agreement with N.I.T.E.

69. Mr. Bosset never paid Defendant any Senior Fellowship Fees to N.I.T.E.

70. Mr. Bosset only paid for the work done on the return explanation letter, posted at nite.org on the Results Page.

71. Defendant has no knowledge of Mr. Bosset's whereabouts, nor his activities, and cautions all not to associate with him.

72. Defendant has heard rumors of Mr. Bosset's association with a man of dubious character in Florida, doing seminars under the name Chad Pradder.

73. Mr. Pradder has sold people something on the premise that he had something to do with N.I.T.E. and the obtaining of the refund for Bosset Partners Marketing Inc., but Defendant does not know who this man is.

74. On January 28, 2000, Defendant discovered that Taxgate webmaster Mr. Haraka had failed to correct the N.I.T.E. applications from being "TAXGATE" applications as altered without his agreement in August of 1999. This after experiencing great amounts of pressure from Mr. Haraka in the fall and early Winter of 1999, to expand the organization of N.I.T.E. to include in its ranks and leadership the dubious arguments against the IRS of tax convict Dan Meador of Oklahoma, Pastor Richard Standring of Ohio, Former IRS Special Agent Joseph Banister, and a host of other tax malcontents who had not shown any effort to properly engage the IRS with reason bringing forth results, the Defendant terminated his association with Mr. Haraka seeing that he was in for nothing but a daily fight to keep N.I.T.E. free from entanglements with dubious characters and res judicata frivolous and irrelevant arguments.

75. Defendant has thus evidenced that he has endeavored at the cost of personal isolation to not be united with people who use ruses and off-point and frivolous issues to engage the IRS and profit from the misery of those unfortunates who have run amuck with the IRS

76. The United States should be well aware of the above facts as they are displayed on the website nite.org.

77. At this and no prior time before the filing of this Affidavit has the Defendant heard of any determination by the Federal District Court against the claim of Bosset Partners Marketing Incorporated.

78. It has only been learned by the filing of this Complaint against the Defendant has he learned that the basis for the government's claim.

79. It is now claimed by the United States that Mr. Bosset misrepresented the facts on his return and is being sued in Federal District Court for erroneous refund, as filed in March of 2001.

80. Defendant never completed any return for Mr. Bosset who claims to have an Accounting Degree, and did not see the return filed until after the fact.

81. Defendant has no reason to believe that the letter that he composed to support Mr. Bosset's exercising of his right to make contentions of factual nature of the face of his return and to amend his testimony, was not presented to the IRS to support Plaintiff's allegation that Mr. Bosset made any misrepresentations on the face of the return as claimed by the Plaintiff's suit against the defunct company.

82. Defendant takes no responsibility for the Administrative actions of the IRS or its failure to institute administrative actions to provide hearing of the claims of Bosset Partners Marketing Incorporated (BPMI).

83. Defendant expected that if the Plaintiff had any problems with the BPMI refund that action would be taken upon receipt as the matter of the returns for that particular year had been ordered to be presented by a Federal Judge.

84. Defendant has never been involved in selling any interest in N.I.T.E. that within itself makes someone or their money exempt from any taxation of their remuneration.

85. Defendant also notes that a refund of $10,399.00, as posted on the Results Page at nite.org, was provided to a N.I.T.E. member on June 29, 2001, which is subsequent to the filing of the unproven claim of erroneous refund against Bosset Partners Marketing Inc.

86. In January of 2000, Defendant was contacted by Mr. Gene Webb, son of Ms. Wanza Mae Webb, who was facing re-incarceration for violation of his probation agreement since he failed to file a return for the year 1998 while on probation.

87. Mr. Webb explained to the Defendant the problem of his not filing for 1998, in violation of the parole agreement, and informed the Defendant that he was going before the same Federal Judge who had just recently sentenced his mother to prison for 2 years.

88. Mr. Webb explained that he was placed in general population when he was originally incarcerated and the prisoners discovered that he was a Police Officer and practically maimed him. He feared for his life, and was equally afraid of filing a return.

89. Mr. Webb realized that his only viable option was to file a return for 1998, and he indicated that he wanted to make contentions of factual nature on his tax return and that he had read the Defendant's gross income article.

90. Defendant (without any payment) sent Mr. Webb via computer 4852 and 8275 forms, and an explanation of the strategy in implementing these forms to show the W-2 and 1099 forms to be incorrect, as section number 4 of the 4852 form allows, and the

means to explain how his claims of zero gross income concur with the regulations of the Secretary of the Treasury on form 8275.

91. Mr. Webb asked the Defendant what will he defend himself with as an argument should the judge not find the returns acceptable.

92. Defendant responded that he should hold his arms out with bewilderment and pray that the Court instruct him when he should make his contentions of factual nature if not at the time that he files his return?

93. Defendant received Exhibit O, the Transcript of Mr. Webb's January Hearing on his failure to file, from Mr. Webb showing what happened in Court before Judge Ann Conway when he presented his zero returns before this Judge who had very recent and related experience with a zero return in the case of Wanza Mae Webb. Exhibit O shows that the U.S. Attorney had a problem with the return that day, yet Mr. Webb was not required to make use of his only defense.

94. Exhibit P, Mr. Webb's Transcript of his Follow up Hearing in May was provided to Defendant. It plainly shows that the argument created by N.I.T.E. and presented by Mr. Webb passed the scrutiny of a Court and Judge well familiar with frivolous zero return arguments, a U.S. Attorney who originally had taken issue with the claims on the face of the return, and the IRS, which is no doubt familiar with the law and frivolous returns.

95. The success of Mr. Webb cued Defendant to review a N.I.T.E. Member's research and found that the case of *U.S. v. Sullivan* 274 U.S. 259 (1927) not only clearly discredited any 5th Amendment self-incrimination argument against filing a return, but on the other hand supported the right of Mr. Webb and all People of the United

Exhibit 33B

States to file a return making contentions of factual nature of its face, of course without altering the form.

96. Defendant became more confident and understanding of the proper means of complying with the instructions of the form 4852 and the form 8275 in this process, unbeknownst to him that 26 C.F.R. §1.6661-3 and 1.6662-4 reveal that the use of the 8275 form protects the individual from claims of failure to make adequate disclosure and/or understatement of liability.

97. Defendant finally found the cases of *Miranda v. Arizona* 384 U.S. 436 at 437 (1966) and *Miller v. U.S.* 230 F. 2nd 486 at 490 (1956) as judicial bars against criminal penalties being imposed against the exercise of a right.

98. Between January and May of 2001 Defendant accompanied his members Mr. Syl Cain, Bonnie Coles, Danny Brown, and Cevin Palmer, to visit the Offices of their respective elected legislative officials in Washington, D.C. (Senators Brownback, Robertson, and Congressman Ryun of Kansas, Eleanor Holmes Norton of Washington D.C., Senators Ensign and Reid and Congresswoman Berkley of Nevada, and Senators Lugar and Bayh and Congressman Burton of Indiana, respectively). The offices of the Senate Finance Committee and the National Taxpayer Advocate at 1111 Constitution Avenue also were stops on these visits where Defendant and his members sought to bring to the direct attention of those in position of oversight and authority a list of over 24 procedural violations which had respectively occurred in each members case. This list has grown to 31 procedural violations in the most extreme cases.

99. Despite the assurances of Ms. Gayle Harris, Taxpayer Advocate Liaison to the Senate Finance Committee, that these violations would be addressed, former Tax Counsel for Senate Finance Committee Dean Zerbe effectively informed Defendant and his members that individuals with uncommon argument are not able to make charges of procedural violations. Despite a February meeting at 1111 Constitution Avenue with Taxpayer Advocate Alphonso Essanason and Special Agent Jackie Colonna of the Treasury Inspector General's office for Tax Administration, at which both Treasury officials promised to investigate Defendant's allegations and charges, the IRS and TAS have failed to move these matters back into the Examination Process for the IRS to start over on the creation of its claims or remove its claims as the RRA of 1998 and the statutes governing the Taxpayer Advocate Service require.

100. Defendant asserts that the only time that these procedural violations have been addressed by the IRS was in the case of Mr. Ronald Laviolette (Exhibit V) where the IRS decided in a Collection Due Process Hearing that since the IRS Examination did not prove any consideration of his contentions of factual nature, that the Deficiency was nullified and collection action not appropriate at that time.

101. On February 10, 2001, an article written by David Cay Johnston was published in the New York Times, and that such article named sources within the IRS who stated that Nick Jesson, then a Member of the National Institute for Taxation Education was violating the law and that promoters of such illegal tax scams will be prosecuted (Defendant's Exhibit A).

102. That the article described as Exhibit A does not name Defendant specifically, but that it does name Mr. Nick Jesson of California, who at the time was associated with

Defendant and was using Defendant's methods with the IRS as well as the Franchise Tax Board of the State of California (FTB).

103. That after reading the article described as Exhibit A, Defendant reasonably feared that the IRS was considering him to be a promoter of "illegal tax schemes", not a shelter.

104. Defendant's response to the article described as Exhibit A, Defendant sent a letter to the Commissioner of the IRS on February 14, 2001 (Defendant's Exhibit B).

105. Defendant's letter described as Exhibit B explained the legality of his position and invited the IRS Commissioner to meet with the Defendant or send a delegation to meet with Defendant and discuss these issues rather than issue threats via the media.

106. Defendant's letter described as Exhibit B was edited and reprinted, without Defendant's prior knowledge or consent, in the USA TODAY newspaper in a full-page advertisement on March 2, 2001.

107. The IRS Commissioner did not respond to the letter described as Exhibit B.

108. On March 20, 2001 Defendant sent another letter to IRS Commissioner (Defendant's Exhibit C) suggesting that he respond to Defendant's invitation and meet with him in good faith.

109. On May 2, 2001 at approximately 10:00 AM, agents of the California Franchise Tax Board (FTB) and Huntington Beach police officers raided both the home of Nick Jesson and his place of business, No Time Delay Electronics, Inc. ("the Jesson raid"). (Exhibit S Affidavit of Nick Jesson)

110. During the raid on Mr. Jesson's office, the police and the California FTB agents present broke down unlocked doors, pointed loaded firearms in the faces of Mr.

Jesson's employees, seized equipment needed to perform the company's business, and took personal property from his home.

111. To this day, Mr. Jesson still has not been notified as to what was the actual legal purpose of the raid on his home and office, but was only verbally told by the agent in charge that it was because he did not pay his taxes.

112. Defendant asserts that an IRS internal document was authored by Romer O. Croasmun, Regional Commissioner for the Western Region, in 1973 ("Croasmun Report") (Defendant's Exhibit D) is very significant as to explaining what is going on in this case and the activity surrounding the Defendant Mr. Bell.

113. Defendant asserts that the Croasmun Report describes methods by which the IRS should use federal, state, and local law enforcement outside of the IRS to crack down on and legally harass and silence persons labeled as "tax rebels" by discovering and prosecuting any possible charge against them, by any means.

114. Defendant asserts that the Croasmun Report is evidence that state and local law enforcement may be called upon by officials of the United States of America for the purpose of striking at and harrasssing, by any means, persons whom the IRS in the Croasmun Report describes as "tax militants" and "tax rebels".

115. Defendant asserts that due to the California FTB failing for so long to state the purpose for its raid on the home and business of Mr. Jesson, and the existence of the Croasmun Report and government strategy contained therein, the possibility exists, and witnesses may exist within the State and Local governments who can attest, that such action was taken at the instigation of the IRS, and there may be evidence in the form of knowledge of Mr. David Cay Johnston of the New York Times, who

possesses contacts within the Treasury Department, that the IRS was well aware of the impending raid and may have caused it.

116. Defendant has seen no case law or judgments regarding the exclusionary provision of 1.861-8T(d)(2)(ii)(A), the unqestionability of W-2 and 1099 forms, the notion that persons cannot change their testimony through the procedures provided by law, and the criminalization of discovering, implementing or aiding in the implementation of same, in relationship to this argument of law to have any knowledge of any falsehood in his actions.

117. Defendant asserts that the above actions regarding Mr. Jesson, combined with this present action against the Defendant to attach civil penalties to his right to assert and aid others in asserting their right to make contentions of factual nature on the face of the return, is chilling his 1st Amendment right.

118. On May 8, 2001, Defendant sent a third letter to Defendant Commissioner in which Defendant again demands an open and honest discussion (Defendant's Exhibit E).

119. Defendant's letter described as Exhibit E, Defendant stated that the Croasmun Report and the Jesson raid gives him reason to fear retaliation by force of arms at the order of the IRS, for his exercise of his right to freedom of speech.

120. The IRS Commissioner did not respond to Defendant's letter described as Defendant's Exhibit E, unless the filing of this suit against the Defendant can be deemed a response to his cordial invitation.

121. Defendant had no reason to believe that his free exercise of his right to speak and share ideas about his understanding of the internal revenue laws, and to try and

publicly shame the Treasury Department into Publicly engaging him on this issue of law regarding the application of an exclusionary provision of law, and his efforts to secure redress of grievance, could be deemed an "illegal tax scheme," or the organizing of an "abusive tax shelter".

122. Defendant is shocked by the Plaintiff's action in this case to silence and defame dissidents who merely sought the engagement of Plaintiff in the administrative process to resolve legal and factual arguments, in a manner consistent with *U.S. v. Sullivan* (1927).

123. Defendant finds further support for his efforts and position as the Complaint of the United States of America filed against him on November 15, 2001, discloses two very substantial refunds obtained for NITE members, of which he had no prior knowledge, which brings the refund and credit total from the IRS, due to Defendant's law argument and discovering of the IRS forms 4852 and 8275 to properly implement it in the process, to be over $818,000.

124. On or about June 7, 2001, Defendant received an advance copy of IRS Notice 2001-40 (Defendant's Exhibit F), which was reportedly not to be released to the public until a later date.

125. Defendant saw the IRS' issuance of this Notice as a means to try to address him without meeting him face to face to delineate the actual issues between the IRS and his organization of Citizens in free association (N.I.T.E.).

126. Defendant wrote a response to IRS Notice 2001-40 and posted it on his websites for all visitors to read on June 12, 2001 (Exhibit V).

127. Since that date the IRS has issued other Public Notices that attempt to refer to the Defendant's argument and claim that the courts have deemed the legal argument to be "frivolous."

128. Defendant has found the IRS claims that the courts have ruled on his argument to be fallacious, illegitimate, and fraudulent, as not one case that has been presented mentions the exclusionary provision of 26 C.F.R. §1.861-8T(d)(2)(ii)(A), as being neither applicable to U.S. Citizens nor U.S. Source income, nor that it is inapplicable to the legal definition of gross income in 26 U.S.C. §61(a).

129. Defendant has also found national Press Releases of the United States Department of Justice, specifically the November 15th 2001 Release of Eileen J. O'Connor, Assistant Attorney General, Tax Division, to be salacious and specious attacks of invective to slander and defame him, as she publicly accused him of defrauding his members, while not charged with any acts of fraud in the lawsuit that was filed against him on the above noted date, as I.R.C. §6700 charges lack any element of fraud. (Exhibit T Article From York Daily Record, November 20, 2001)

130. Defendant has also found national Press Releases of the United States Department of Justice, specifically the November 15th 2001 Release of Eileen J. O'Connor, Assistant Attorney General, Tax Division, (as evidenced by Exhibit U) to be salacious and specious as she publicly stated that his "theory... has been rejected as frivolous by every judge who examined it.", without having shown, nor being able to show, a single citation of case law which Defendant and N.I.T.E. have not addressed to date where the exclusionary provision of 26 C.F.R. §1.861-8T(d)(2)(ii)(A) was specifically cited by the Courts.

131. Defendant denies "recruiting" one Mr. Hal Hearn of Atlanta Georgia.

132. Defendant has never personally met Mr. Hearn to his recollection.

133. Defendant denies that Mr. Hal Hearn is an actual Senior Fellow of the N.I.T.E. Senior Fellowship program, as he has never paid any Senior Fellowship fee, and has never signed a Senior Fellowship Application.

134. Defendant denies having ever sold Mr. Hearn any right, franchise, area, district, zone, in which he could use the NTIE argument.

135. Defendant insisted that Mr. Hearn only make the N.I.T.E. arguments for N.I.T.E. members who have read and signed the N.I.T.E. membership application/agreement.

136. Defendant never provided Mr. Hearn any promotional plan or materials, and never developed any promotional materials, and thus never implemented any promotion.

137. Defendant and Mr. Hearn have no relationship through any promotional effort.

138. Defendant admits to liking the idea of an active CPA or Accountant being in N.I.T.E., and chose to try and provide Mr. Hearn with some guidelines of mutual respect and consideration, as Mr. Hearn voiced the intent to use the N.I.T.E. argument for his standing clientele, as opposed to demanding that Mr. Hearn absolutely comply with every aspect of the Senior Fellow Program.

139. On July 30, 2001, Defendant's associate Hal Hearn received a letter from IRS agents asking for an interview to aid an investigation regarding possible violations of 26 U.S.C. §6700 and §7408 for promoting abusive tax shelters (Defendant's Exhibit G).

140. Defendant has no knowledge of Mr. Hearn's affairs to be able to confirm or deny his actions, but possesses no reason to believe that Mr. Hearn had promoted N.I.T.E. arguments in a manner related to investments or the taking of deductions or tax write-offs.

141. In the letter described as Exhibit G, the IRS threatened Mr. Hearn with civil penalties as well as with an injunction preventing him from preparing tax returns in the future.

142. Defendant understands that Mr. Hearn placed numerous phone calls to various personnel within the IRS attempting to discover why the IRS believed that he was promoting an abusive tax shelter.

143. Defendant understands that Mr. Hearn never received an answer from anyone in the IRS to the question of why it believed that it was correct that he be investigated for involvement with an abusive tax shelter.

144. Defendant understands that on September 5, 2001, Mr. Hearn met with an IRS Examiner at the request of the IRS.

145. Defendant understands that upon his arrival for that meeting Mr. Hearn found himself faced with two IRS attorneys, one of which assumed control of the meeting and asked a myriad of questions.

146. Defendant understands that at this conference, Mr. Hearn demanded that the IRS produce evidence that he is promoting an abusive tax shelter.

147. Defendant understands that at this conference, no evidence was presented that would show that Mr. Hearn was promoting an abusive tax shelter.

148. It is Defendant's understanding that Mr. Hearn is now charged in a suit filed in Federal District Court in Atlanta, Georgia, on November 15, 2001 with the same basic charges as set forth in the complaint of the United States against Mr. Bell.

149. Defendant has recently learned to his dismay that there is further evidence that Mr. Hearn was not carrying out his actions in consistency with N.I.T.E. doctrine, as it has been communicated to the Defendant that he was requiring individuals to execute Exempt W-4 forms prior to his working with them.

150. Defendant has never suggested such actions to be any kind of requirement per N.I.T.E. arguments, and in light of his article warning people of the dangers of such tactics does not know how anyone could construe such a notion from his writings.

151. Defendant cannot understand how his efforts regarding the exclusionary provision of 1.861-8T(d)(2)(ii)(A) falls within the scope of 26 U.S.C. §6700 when all he was trying to do was shame the Plaintiff into talking with him face to face about a section of law that no courts appear to have addressed at this time.

152. On September 4, 2001, Defendant received three copies of a letter from Chris Roginsky, an Internal Revenue Agent ID #23-03528, and that such letters were addressed to Defendant, to NITE and to Tax-Gate.com, to his home and office addresses respectively (Defendant's Exhibits H, I and J).

153. Each letter began with the fraudulent sentence "We have reviewed certain materials with respect to your tax shelter promotion. We are considering possible action under Sections 6700 and 7408..."

154. The letters invited the Defendant to carry the burden of proof by meeting with the Agent Roginsky to demonstrate that penalties and injunction are not appropriate.

Exhibit 33C

155. The letters and Defendant Roginsky failed to present any evidence that such action, proceeding, or invitation was appropriate or grounded in any fact at that time, and was not merely sent out to harass the Defendant and chill his exercising of his First Amendment Right to speak, be heard, and to effectuate meaningful redress of greivance.

156. Agent Roginsky's letter failed to inform the Defendant that the Secretary of the Treasury bears the burden of proof in such claims, in ANY proceeding, per 26 U.S.C. §6703(a).

> (a) Burden of proof
> In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

157. Not one piece of evidence was contained within the letter to the Defendant that could demonstrate that Defendant is operating an abusive tax shelter by his public speaking and internet websites communicating his ideas about the tax laws, and knowledge of the IRS administrative Examination process, which gave rise to any appearance of any need for Defendant to make a defense against an apparent burden that the Secretary had carried.

158. Agent Roginsky's letter contained no inclusion of a statement of the administrative procedures of the IRS in regards to the investigation under §6700 as set forth in the Internal Revenue Manual at §§ 8.11.1.10.1 and 8.11.1.7.

159. Agent Roginsky's letter contained no mention of a 26 U.S.C. §6701 investigation against the Defendant, which the Defendant is now charged with violating.

160. Agent Roginsky's letter contained no statement of the Defendant's Rights within the administrative process as well, as well as right to Counsel.

161. Defendant saw this as a completely illegitimate letter, not protected nor sanctioned under existing federal tax law, and in fact due to the suggestion that he must come in and bear the burden of proof against evidence that he has not been presented, he found the whole action to not be protected by nor concurrent with 26 U.S.C. §6703(a).

162. On September 5, 2001, Defendant responded by faxing a letter to Defendant Roginsky (Exhibit K).

163. That the letter described as Exhibit K informs Defendant Roginsky that Defendant does not engage in promoting tax shelters or any other illegal activity, and that Agent Roginsky must apologize in writing and admit that no such evidence of wrongdoing exists.

164. Defendant asserts that minutes after faxing the letter described as Exhibit K, Defendant called Defendant Roginsky on the telephone.

165. That during their brief telephone conversation, Defendant Roginsky indicated that he had no intention of relenting from his investigation and threats.

166. Agent Roginsky sent Defendant three more letters on September 6, 2001 in much the same fashion as the letters of September 4, 2001, where he informed Defendant that the investigation into Defendant's alleged tax shelter would continue. (Defendant's Exhibits L, M and N).

167. On September 7, 2001 Defendant spoke with IRS Manager Kathleen Lennon, who oversees Agent Roginsky, and asked her if she was aware of Agent Roginsky's actions and was approving of them.

168. Defendant Lennon stated that she was aware and approved of Agent Roginsky's actions and that she was aware of the fax.

169. Defendant informed Agent Lennon that Defendant operates no such tax shelter which could come under the purview of §6700, and that Defendant would pursue litigation if these threats did not cease as they were threats against his right to speak about the law.

170. Defendant suggested that Agent Lennon contact the Office of the Commissioner to check with the Commissioner and see if they were not making a huge mistake and Defendant had his invitation to a meet with the Commissioner published in the national new paper USA Today, back in March 2, 2001.

171. Rather than make a simple apology to Defendant, Agents Roginsky and Lennon willfully chose to continue the harassment of Defendant without any known evidence and without any justification in fact or law for their actions.

172. Defendant refused to be party to this unregulated and illegal information 'fishing expedition' of Agent Roginsky, as the Defendant understood that he was being invited to do something that he cannot be required by any law to do in "any proceeding", as the statutes state at 26 U.S.C. §6703(a).

173. On September 10, 2001, Defendant filed suit for a Declaratory Judgment stating that Defendant's actions are not in violation of §6700 or any other provision of law and that the so-called "investigation" by Agent Roginsky was in reality nothing more than harassment of a citizen exercising his right to freedom of speech regarding federal tax law matters, which he exercises to force the IRS to perhaps one day be shamed into addressing the exclusionary provision of 26 C.F.R. §1.861-

8T(d)(2)(ii)(A), to which the statutory definition of gross income as defined in 26 U.S.C. §61(a) is wholly subjugated to, as well every other exclusionary and exemption provision of the IR Code, as set forth by 26 C.F.R. §1.61-1(a).

174. Defendant did not attend any clandestine meetings with the IRS to be voluntarily subjugated to illegal and illegitimate intimidation and threats in the presence of an IRS Attorney as scheduled by the IRS to be on September 20, 2001.

175. On October 4, 2001 Internal Revenue Service revenue agent Chris Roginsky (Employee ID: 23-03528) sent a letter to Mr. Larken Rose of Hollywood, Pennsylvania, the owner of the internet site at www.taxableincome.net, which is a location where Mr. Rose posts the results of his research and understanding of the tax laws.

176. The Letter of Defendant Roginsky to Mr. Rose claims that he had "*reviewed certain materials with respect to tax shelter promotion,*" and saying that the IRS was "*considering possible action under Sections 6700, 6701 and 7408 of the Internal Revenue Code relating to penalties and an injunction action for promoting abusive tax shelters.*" (Exhibit Q Affidavit of Larken Rose)

177. This letter reveals that the Defendant Roginsky was sending letters out to people who were merely exercising their freedom of speech in publishing their understanding and determinations regarding the contents of the United States tax law, and that the IRS equates promoting a tax shelter with exercising one's right to freedom of speech.

178. Agent Roginsky's letter insisted that an interview occur with Mr. Rose at 9:00 a.m. on the morning of October 18, 2001 at the IRS Offices in Jenkintown, Pennsylvania.

179. Agent Roginsky's letter was accompanied by an IRS Form 4564 which demanded that Mr. Rose provide a number of things to the IRS.

180. Agent Roginsky sought copies of all "*promotional material*" related to the definitions of gross income and taxable income and the taxing power of the Federal government, as if merely talking about the law constituted a promotion of an abusive tax shelter per 26 U.S.C. §6700.

181. Agent Roginsky sought all documents in Mr. Rose's possession relating to federal taxes or federal tax administration, as if possession of knowledge of the federal tax laws and administration could somehow constitute a promotion of an abusive tax shelter per 26 U.S.C. §6700.

182. Agent Roginsky sought the location of the computers containing the files which make up Mr. Rose's Website and copies of all of the files on the server that were his as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

183. Agent Roginsky sought copies of any "opinions" in Mr. Rose's possession on which he had based his "conclusions or opinions regarding Federal income taxes and Federal income tax administration" as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

184. Agent Roginsky sought "complete education background" including copies of any diplomas and degrees as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

185. Agent Roginsky sought information regarding any speeches, presentations, or interviews that Mr. Rose had given as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

186. Agent Roginsky sought information about all meetings Mr. Rose had attended with the IRS as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

187. Agent Roginsky sought the identification of all IRS personnel to whom Mr. Rose had spoken or written regarding any tax matter as if such things comprised any component of an abusive tax shelter per 26 U.S.C. §6700.

188. On October 18, 2001 Mr. Rose attended a meeting with Agent Roginsky which he audio-recorded (as did the IRS) and was transcribed and published on the Internet Exhibit R.

189. Chris Roginsky (ID #23-03528); Jim Beyer (ID #23-07179), an attorney with the office of Chief Counsel; Charles Judge (ID #23-01632), revenue agent group manager at the local office; and Kathleen Lennon (ID #23-05860), Chris Roginsky's group manager attended the meeting as representatives of the IRS.

190. In the meeting Agent Roginski agreed with Mr. Rose' characterization of the penalty provision the meeting was regarding in that "*...some tax exemption or benefit is claimed by reason of holding an interest in the entity or participating in the plan or arrangement....*".

191. Mr. Rose asked Agent Roginsky what plan or arrangement he thought Mr. Rose was involved in that might fit that description.

192. Agent Roginsky then admitting to sending Mr. Rose a false and fraudulent letter through the U.S. Mail, claiming that the IRS had no evidence to support an investigation, but in the meeting with Mr. Rose stated that "If we had the information we needed to make a determination, we would not need to consult you."

193. Mr. Rose confronted Agent Roginsky what the basis for the investigation was for an investigation since there was admittedly no evidence.

194. Agent Roginsky admitted that the only evidence was Mr. Rose's possession of a "website" where he proposed "certain conclusions of law", and advocacy of such "conclusions," and the acceptance of "donations."

195. Agent Roginsky made no effort to reveal to Mr. Rose how any of these elements of thought and speech constituted components in their separate parts or the sum of the parts could constitute an abusive tax shelter per 26 U.S.C. §6700.

196. Agent Roginsky was requested by Mr. Rose to present any evidence even remotely hinting that Mr. Rose had ever organized or sold "any entity, plan or arrangement, [telling] people that they can become entitled to some tax exemption or benefit, quote, by reason of holding an interest in the entity or participating in the plan or arrangement, end quote"

197. Agent Roginsky was unable to make presentment of any evidence despite the fact that the Secretary statutorily bears the burden of proof in ANY Proceeding under the law per 26 U.S.C. §6703(a).

198. Agent Roginsky was asked by Mr. Rose what it was that the IRS was considering requesting an injunction against under 26 USC § 7408, and Agent Roginsky was unable or unwilling to answer.

199. Agent Roginsky would not say whether the IRS was intending to silence Mr. Rose's web site, which is admitted to being closely constructed upon the argument of Mr. Bell and NITE, and covers significant legislative history and intent should there be any contentions that the law regarding gross income is vague or that the conclusion of the N.I.T.E. application of the U.S. Source Rules is somehow inconsistent with the construction of the law.

200. Mr. Rose refused to provide all of the information Agent Roginsky requested, as many of the items requested would be irrelevant to a valid investigation.

201. Agent Roginsky spent about 100 minutes trying (unsuccessfully) to argue against the validity and accuracy of Mr. Rose's conclusions and research.

202. Agent Roginsky never even made an attempt to identify any plan or arrangement that Mr. Rose was involved in that might fit the definition of an "abusive tax shelter" found in 26 USC § 6700.

203. This proves that Agents Roginsky and Lennon, as well as Jim Beyer (ID #23-07179), Attorney with the IRS Office of Chief Counsel were well aware of their lack of substance, authority of law, and official immunity to support fraudulent letters sent out in support of their statutorily unsupported evidence hunt.

204. After about 100 minutes of discussion with Agent Roginsky, where Agent Roginsky unsuccessfully (as noted by his multiple applications of the order "Let's move on" as his flawed logic cornered him where he could not address Mr. Rose) Mr.

Rose realized that Mr. Roginsky, Ms. Lennon, and Counselor Beyer were conducting what is generally called a "fishing expedition" or witch hunt.

205. Such government behavior in regards to "fishing expeditions" are not supported by any statute or known law in America.

206. The government never presented any evidence supporting Agent Roginsky's accusation that Mr. Rose was engaged in any "abusive tax shelter," and instead abused their authority and office to use the threat of injunction for operating an abusive tax shelter to meet with Mr. Rose, and try to intimidate him while attempting to prove fault in his legal conclusions as stated in his "Taxable Income" report.

207. Defendant understands that 26 U.S.C. §6700 makes no mention of organizing concerned citizens together in a group for support and information proliferation to be legally defined as an abusive tax shelter, and thus an activity subject to penalty under 26 U.S.C. §7408.

208. Defendant understands that 26 U.S.C. §6700 makes no mention of merely speaking in public of a legal argument or conclusion of law to be legally defined as an abusive tax shelter, and thus an activity subject to injunction under 26 U.S.C. §7408.

209. Defendant understands that the Rules and Regulations of the Secretary of the Treasury at 26 C.F.R. §1.6661-4 and 1.6662-4, which N.I.T.E. Members' use by their employment of the Form 8275 as promulgated by the Secretary of the Treasury, protect Defendant from Plaintiff's charges that an understatement has occurred in a case, and thus the specified activity is not prohibited by 26 U.S.C. §§6700-6701.

210. Defendant understands that 26 C.F.R. §1.6662-4(g)(2)(ii) explains that the tax shelter definition does not apply if the ("plan") strategy has as its purpose the

claiming of exclusions from income consistent with the statute or Congressional Purpose.

211. Because of the right and ability of the U.S. Congress to be involved in the creation of the Regulations of the Secretary of the Treasury, the Defendant has every reason to believe that the exclusionary provision 1.861-8T(d)(2)(ii)(A) is written in full compliance with the Congressional Purpose of the statute that it supports.

212. Defendant has never sold investments in himself, N.I.T.E., or any other entity.

213. Defendant cannot be involved in any understatement activity, the final component of 26 C.F.R. §1.6661-4 and 1.6662-4 since at least May of 2000, when he learned of the legal success in the matter of Mr. Gene Webb, as from that day forth he has recommended that N.I.T.E .Members use the form 8275 to make full disclosure to the IRS pursuant to the regulations of the Secretary of the Treasury.

214. Others in this country are leading other people to file zero returns making an understatement of income and thus liability, and are not using the 8275 form, they are not even trying to follow the procedures under the law, they are not even using any exclusionary provision of law, YET they are not being prosecuted for promoting, organizing, or creating abusive tax shelters.

215. Such people are using Books and Trusts, and are really getting wealthy doing so, and have radio programs, but they are not being prosecuted for promoting, organizing, or creating abusive tax shelters.

216. Defendant understands and publicly states that the income tax is imposed on all individuals with taxable income by 26 U.S.C. §1.

Exhibit 33D

217. Defendant understands and publicly states that the regulation at 26 C.F.R. §1.1-1, governs § 1 of the Internal Revenue Code.

218. Defendant understands and publicly states that the regulation at 26 C.F.R. §1.1-1(b) states that U.S. Citizens are taxed on their taxable income from sources within the U.S. as well as sources without, thus proving that he could not be claiming that only foreign sources are taxable income.

219. Defendant understands and publicly states that the statutes at 26 U.S.C. § 861 and 862 independently cover the issues of what is income from a U.S. Source and what is not.

220. Defendant understands and publicly states that just like the income tax imposed in §1 of 26 U.S.C., other taxes are also imposed in the same manner in 26 U.S.C. §§ 11, 3101, 3201, and 3301 by the employment of the phrase, "there is hereby imposed..."

221. Defendant understands and publicly states that the income tax is imposed on "taxable income" as defined at 26 U.S.C. §63.

222. Defendant understands and publicly states that 26 U.S.C. §63 is not free standing and is wholly constructed upon the existence of 26 U.S.C. §61, and a prior determination of "gross income".

223. Defendant understands that 26 U.S.C. §61 is subject to the IRS' regulations as set forth in 26 C.F.R. §1.61-1(a).

224. Defendant understands and now publicly states that both the Internal Revenue Manual at [4.2] 7.2.3.4 ("Authority of the Regulations") as well as the Federal courts in ***United States v. Newell***, 578 F.2d 827, 828 (9th Cir. 1978), both require the IRS to comport to its own established procedures and the regulations of the Secretary.

225. Defendant understands and publicly states that 26 U.S.C. §61, at 26 C.F.R. §1.61-1(a) is completely subject to ALL exclusionary and exemption provisions as found within the Statutes and the Regulations governing the IRS.

226. Defendant understands and publicly states that the statutes at 26 U.S.C. § 861 govern U.S. Sources just as pointed out in 26 C.F.R. §1.1-1(b).

227. Defendant understands and publicly states that the regulations of the Secretary of the Treasury at 26 C.F.R. §1.861-8T)(d)(2)(ii)(A) contain a legal definition of "exempt income" in relationship to gross income from within the U.S.

228. Defendant publicly states that he knows of no law or case law presented by the Plaintiff or anyone else that shows that any Court of law and competent jurisdiction has passed any ruling or determination on the inapplicability of U.S. Source Rules of the Secretary of the Treasury to U.S. Citizens.

229. Defendant publicly states that he knows of no law or case law presented by the Plaintiff or anyone else that shows that any Court of law and competent jurisdiction has passed any ruling or determination that 26 C.F.R. §1.861-8T(d)(2)(ii)(A) either not being an exclusionary provision of law, or that this section of law does not exist and thus reference to it is false and/or fraudulent, or that it does not apply to U.S. Citizens or U.S. Source income.

230. Defendant understands and publicly states that the Plaintiff claims that 26 U.S.C. §861, entitled, "Income from sources within the U.S." is regarding foreign earned income.

231. Defendant does not claim that the U.S. Sources as covered in 26 U.S.C. §861 and its regulations in 26 C.F.R. 1.861 et. seq. are regarding foreign sources. Such a

position has been rejected by the Courts. Any attempt by Plaintiff to attribute such a position to the Defendant is an exercise in fabrication.

232. Since the United States of America, in its November 15, 2001 press release regarding its actions against the Defendant state that the U.S. Source Rules under §861 have to do with foreign earned income, the Plaintiff has taken a frivolous position against the Defendant which has been rejected by the Courts.

233. Defendant understands and publicly states that this might be due to the title of the "Part" of Subchapter N that §861 is contained in, as that is called "Part I -- Source rules and other general rules relating to foreign income."

234. Defendant understands and publicly states that belief and construction of the Plaintiff's argument, using the title of a section, part, chapter, or subchapter, lacks any statutory authority or significance in light of 26 U.S.C. §7806(b) which states that the words in the law mean what they say and that no inference is to be drawn from descriptive matter, location, or grouping of a statute.

235. Defendant understands and publicly states that 26 U.S.C. §7806(b) is a statutory statement of the U.S. Congress that the Internal Revenue Code is required by law to comport to over 100 years of Court rulings by the Federal Judiciary, on the Federal Rules of Statutory Construction.

236. Defendant understands and publicly states that the government's false, fallacious, specious, and frivolous argument, made with complete disregard of 26 U.S.C. §7806(b), as publicly promoted by Ms. Eileen J. O'Connor, Assistant Attorney General in Charge of the Tax Division of the U.S. Department of Justice, while mixed with claims of "fraud" against the Defendant, do not overcome his argument using the

application of the words of the laws, and prove the lack of any statutory elements to support prior threatened, or present day actions and argument of the Plaintiff against the Defendant.

237. Plaintiff has avoided any meeting and final confrontation on this point of law despite the invitation of the Defendant by failing to respond to his multiple invitations and issuing the IRS Notice 2001-40 among other fallacious and specious notices not certainly directed at the Defendant.

238. Defendant posted IRS Notice 2001-40 on his website nite.org to give the Plaintiff equal time on the issue that it continues to avoid, and to show the public what the Plaintiff had to say about his legal argument.

239. Defendant responded to the substance of the IRS Notice 2001-40 (Exhibit U), and distinguished all of the case law cited therein, as none are found to address the legal argument of the Defendant, on which he seeks a cordial confrontation with the IRS, as none of the case law presented contain any language addressing the single exclusionary provision of law that is being asserted by the Defendant and his members (26 C.F.R. §1.861-8T(d)(2)(ii)(A)).

240. The above effort of the Plaintiff proves an established cross Departmental pattern of avoiding engagement of the Defendant, his members, and others of the Public who are spreading the word of the government's illegitimate efforts to avoid this issue of the application of a lone exclusionary provision of law, and are thus taking political action that embarrasses the IRS and shows that its avoiding the issue by means of deceptive and off-point responses and mischaracterizations of the legal argument that is being successfully implemented.

241. This avoidance by the Plaintiff appears to prove that the Plaintiff has no legal position against the application of the U.S. Source Rules of the Secretary of the Treasury as developed, discussed, and published by the Defendant.

242. In defense of this public embarrassment, the Plaintiff has executed a plan and/or arrangement to avoid the issue by trying to change the issue of individual's actions of asserting their right to speak, be heard, and seek redress of grievance on an issue of law, to now be a punishable offense under the law called an "abusive tax shelter" which is punishable by fines and injunction that could permanently muzzle said individuals from being able to make a public spectacle of the IRS' failure and refusal to engage these citizens in the redress of their grievances in any good faith or meaningful manner.

243. Plaintiff's failure to find fault with Mr. Rose's legal position as discussed on October 18, 2001 proves that the Plaintiff has no actual and legally substantive argument against the Defendant's argument which comports to the Secretary's own rules on Substantive Authority as set forth in 26 C.F.R. §1.6661-3.

244. Plaintiff's failure to present evidence of a tax shelter being operated by Mr. Rose while in or prior to that meeting proves that the Plaintiff has no actual and legally substantive argument against the Defendant's argument which comports to the Secretary's own rules on Substantive Authority as set forth in 26 C.F.R. §1.6661-3.

245. Plaintiff's failure of the IRS 2001-40 Notice to reveal any decision which has addressed the exclusionary provision of 26 C.F.R. §1.861-8T(d)(2)(ii)(A), proves that the Plaintiff has no actual and legally substantive argument against the Defendant's

argument which comports to the Secretary's own rules on Substantive Authority as set forth in 26 C.F.R. §1.6661-3.

246. Plaintiff's combined failure in the alleged investigation of Mr. Rose, as well as its failure to make presentment of any evidence of an abusive tax shelter in support of their investigation of the Defendant, as revealed in both the letters of September 4, 2001 and the Complaint against him dated November 15, 2001, proves that the Plaintiff has no evidence to support any claim of his operating a "abusive tax shelter" as defined in 26 U.S.C. §6700, and that it is on a nation wide evidence 'fishing expedition'.

247. Plaintiff's failure to show any error in the legal argument of Mr. Rose, and its failure to address Defendant's response to the IRS Notice 2001-40 (Exhibit V) proves that the Plaintiff has no actual and legally substantive argument against the Defendant's argument which comports to the Secretary's own rules on Substantive Authority as set forth in 26 C.F.R. §1.6661-3, to defeat the legal argument of the Defendant.

248. Plaintiff's filing suit in a United States District Court to enjoin the Defendant (and his Members) from talking about the law proves that the Plaintiff is so desperate about its legal circumstances as it has no actual and legally substantive argument against the Defendant's argument which comports to the Secretary's own rules on Substantive Authority as set forth in 26 C.F.R. §1.6661-3, that is must fabricate charges under an inapplicable section of law in order to speciously construct a claim for relief before a court which tells the Court that the most powerful nation on Earth

cannot afford to provide meaningful and established due process of law to the Members of N.I.T.E. who are a threat to the U.S. Treasury.

249. The overwhelming preponderance of evidence in the form of IRS admissions of over $818,000 in refunds and credits given to N.I.T.E. members, who have applied Defendant's arguments and IRS procedures, prove the clear lack of falsehood or intent on the part of the Defendant to mislead or misstate the law to anyone.

250. Plaintiff's failure to prove that any of the refunds posted are fraudulent or erroneous demonstrates the clear lack of falsehood or intent on the part of the Defendant to mislead or misstate the law to anyone.

251. Plaintiff's failure to prove or even allege that the 8275 forms completed by N.I.T.E. members, and filed with their returns, are in some way improperly completed proves that there is no basis in any charge of the Defendant being involved with any sort of understatement of either income or liability, as the protection of 26 C.F.R. §1.6661-4 and 1.6662-4 shield and protect those who submit such forms from claims and penalties regarding understatement.

252. Plaintiff is flagrantly twisting the law to allow it to seek injunction against legitimate association of Citizens to engage the IRS in administrative, legal, judicial, and political action, so that it could continue to avoid the issues, and is now asking this Court to ignore the First Amendment to the Constitution because there is some unspoken fear of publicly talking about certain exclusionary provisions of the tax law that govern gross income.

253. Defendant will always be open to publicly meet with QUALIFIED, officials from the Plaintiff who are DELEGATED with the authority to make determinations of law

to settle this controversy with intelligent, good faith, civil, on-point and legitimate discussion.

254. Plaintiff plainly possesses the fiscal and intellectual means to support any valid argument against the reason and law being presented to the Plaintiff and the public by the Defendant. However, Plaintiff lacks any case law or presentment thereof that specifically addresses the legal argument of the Defendant to legitimately call it frivolous under the Substantial Authority Rules of the Secretary of the Treasury (26 C.F.R. §1.6661-3), and instead Plaintiff makes the claim to this Court that the Defendant, and his Members, are a threat to the Treasury of the United States.

255. Plaintiff has made it clear in its Complaint against Defendant that Plaintiff believes administrative remedy is no longer reasonable process and cannot be equally afforded to the American people. Defendant can only ascertain that the Plaintiff would have this Court shred the 1st, 5th, and 6th Amendments because they no longer wish to provide the People of the United States of America with reasonable and established remedy for their contentions of factual nature and redress of grievance.

The above is my statement of facts in this case. I present it under the pains of the penalties of perjury to be true, correct, and complete to the best of my knowledge information and belief.

Thurston Paul Bell

December 6, 2001

Thurston Paul Bell Date

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. 8: 01-CV-2154-T-17TBM

DAVID T. BOSSET,

Defendant.

Exhibit 34

PERMANENT INJUNCTION

This cause is before the Court sua sponte. The Court has stricken Defendant's Answer, enters judgment in favor of the United States of America, and enters this permanent injunction.

I. Facts

The following facts are taken from the Complaint and Preliminary Injunction Motion:

1. David Bosset has used the frivolous Sec. 861 argument to prepare and file frivolous federal income tax returns that understate his clients' tax liabilities. The Sec. 861 argument falsely posits that a regulation promulgated under 26 U.S.C. (IRC) Sec. 861 (26 CFR Sec. 1.861.8(f)) provides the exclusive list of sources of income subject to federal income tax. Since that list is narrow, and focuses on foreign income of U.S. citizens and similar international tax issues, Sec. 861-argument proponents assert that domestic income earned by U.S. citizens is not subject to income taxation. Using the Sec. 861 proposition, Bosset listed his clients' domestic income as $0 on amended

income tax returns. The amended returns constituted claims for refund of all or most taxes paid for the year at issue. There was no realistic possibility that the Sec. 861 position taken by Bosset would be sustained on the merits. Bosset knew or should have known that the Sec. 861 position was unrealistic, and although the Sec. 861 position advanced by Bosset was disclosed on the tax returns, the position was frivolous.

2. Bosset also has sold documents to others, claiming that the documents provided a "roadmap" to using the frivolous Sec. 861 position to file claims for refund of previously-paid income taxes. Bosset used these materials, among other things, to solicit clients for his tax-advice and return-preparation business.

3. Bosset assisted in preparing returns for at least one client and did not identify himself as a paid return preparer on the tax returns. Bosset also failed to supply an identifying number on those returns.

4. Bosset also appeared on behalf of clients before the IRS, even though he did not qualify as a representative under IRS Circular 230. At the meetings, Bosset tried to advance frivolous arguments on behalf of his clients, including the Sec. 861 argument, the position that the IRS lacks jurisdiction to assess taxes, and the position that IRS revenue agents lack authority to perform their jobs.

5. The documents, advice and other services provided by Bosset in advancing the Sec. 861 argument constitute assisting in the organization or organizing a plan or arrangement for avoidance of

taxation. In connection with organizing and promoting this plan or arrangement, Bosset made false or fraudulent statements regarding the excludibility of wages and other items from income. Bosset knew or had reason to know his statements were false or fraudulent.

6. Bosset has prepared tax returns and/or has assisted in the preparation of tax returns or other documents for other people that were intended to be used (and were in fact used) in connection with material matters arising under the internal revenue laws. These documents include letters and tax returns prepared by Bosset for at least two clients. Bosset also knew that these returns and other documents (if so used) would result in understatements of tax liabilities of these other persons.

7. Bosset failed to turn over to the IRS a list of his clients for the preceding three years, despite requests to do so. Bosset eventually provided the list of clients to the Department of Justice, after being ordered to do so by the Court.

II. Legal Conclusions

Based on the above facts, the Court finds that an injunction is appropriate under IRC Sec. 7402 for the enforcement of the internal revenue laws. Further, the Court finds that David T. Bosset violated IRC Secs. 6700, 6701, 6694, and 6695. Bosset violated IRC Sec. 6700 by: 1) organizing and selling an interest in a plan or arrangement; 2) making false statements-which Bosset knew or had reason to know were false-about the excludibility of income from taxation by reason of participating in the plan or arrangement. Bosset violated IRC Sec. 6701 by: 1) preparing or

assisting in the preparation of returns and other documents; 2) knowing or having reason to believe that the return or document would be used in connection with a material matter arising under the internal revenue laws; and 3) knowing that the return or document, if so used, would result in an understatement of tax liability for another person. Bosset violated IRC Sec. 6694 by: 1) being a return preparer as defined in IRC Sec. 7701(a)(36); 2) asserting an unrealistic position on a tax return that he prepared; 3) knowing (or having reason to know) that the return contained the unreasonable position; and 4) the unrealistic position was frivolous. Bosset violated IRC Sec. 6695 by failing to sign returns prepared by him, failing to furnish an identifying number on returns prepared by him, and failing to turn over a copy of the returns or a list of clients to the IRS upon request.

Since the Court finds that David Bosset's conduct is subject to penalty under IRC Secs. 6700, 6701, 6694 and 6695, the Court has authority to enjoin Bosset under IRC Secs. 7407 and 7408 if an injunction is appropriate to prevent the recurrence of the penalty conduct. The Court finds that an injunction is appropriate, after weighing the following factors: 1) "the gravity of harm caused by the offense;" 2) "the extent of the defendant's participation and his degree of scienter;" 3) "the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions;" 4) "the defendant's recognition of his own culpability;" and 5) the sincerity of his assurances against future violations. United States v. Raymond, 228 F.3d 804, 813 (7th Cir. 2000) (citing Kaun 827 F.2d 1144, 1149-50 (7th Cir. 1987)), cert. denied, 553 U.S. 902 (2001).

Further, Bosset's repeated violations of Sections 6694 and 6695 show that a limited injunction, i.e. banning him only from preparing abusive tax returns, would not be sufficient to prevent the recurrence of penalty conduct.

III. Order

A. The Court **ORDERS** that, pursuant to IRC Secs. 7402, 7407 and 7408, David Bosset and his agents, servants, employees, attorneys and those persons in active concert or participation with him who receive actual notice of this Order are enjoined from:

1. preparing federal income tax returns, amended returns, and other related documents and forms for others;

2. failing to sign federal tax returns that he prepares;

3. failing to furnish his social security number on tax returns he prepares;

4. failing to retain and produce to the Internal Revenue Service upon request, a list of all clients for whom he has performed return-preparation services;

5. engaging in activity subject to penalty under IRC Sec. 6700, including organizing a plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to any material matter;

6. engaging in activity subject to penalty under IRC Sec. 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that he knows will result in the

understatement of tax liability;

7. engaging in any other activity subject to penalty under IRC Secs. 6694, 6695, 6700 or 6701; and

8. engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

B. Pursuant to IRC Sec. 7402, Defendant is ordered to contact the people for whom Defendant has phone numbers and/or addresses. Defendant must contact:

1. All persons to whom Defendant gave, sold or distributed any materials espousing the "Section 861" or "U.S. Sources" argument, as well as any other false or frivolous exclusion from income tax;

2. All persons for whom Defendant prepared or assisted in preparing any federal income tax returns or tax-related documents; and

3. All persons who contacted Defendant regarding the "Section 861" or "U.S. Sources" argument, as well as any other false or frivolous exclusion from income tax (in correspondence, by personal or telephone conversations or through electronic means);

and inform those persons that domestically-earned income of U.S. citizens is not tax-free based on the Section 861 argument or any other false or frivolous position; the falsity of the tax returns prepared on those persons' behalf; the possibility of the imposition of frivolous-return penalties against them; the possibility that the United States may seek to recover any erroneous payment they may have received; and the fact that a permanent injunction has been entered against Defendant. The

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Defendant must mail a copy of this permanent injunction to every identified person described in subsections 1, 2 and 3.

C. The Defendant David T. Bosset is also required to file certification, made under oath, that he has fully complied with all of the requirements contained in Paragraph B, within 30 days of entry of this order.

D. The Court shall retain jurisdiction over this case to compel compliance with this injunction.

E. The Government may engage in discovery, pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure, after the entry of the injunction to monitor compliance with the injunction.

DONE and ORDERED in Chambers, in Tampa, Florida on this 27th day of February, 2003.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

Exhibit 35

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff(s),

v.

JACK COHEN,

Defendant(s).

No. C04-0332P

ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS (Nos. 1-5) AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

The Government brings this case against Jack Cohen in order to secure a permanent injunction against him, which will require him to refrain from disseminating information and products via the internet that encourage people to stop paying taxes. Mr. Cohen never responded to the Government's Complaint. This Court issued an Order granting a Preliminary Injunction against Mr. Cohen on May 6, 2004. (Dkt. No. 8). In that Order, the Court noted that Mr. Cohen was technically in default on this case.

The Government now brings a Motion for Summary Judgment, asking the Court to grant a permanent injunction against Mr. Cohen under 26 U.S.C. §§ 7408 and 7402.[1] (Dkt. No. 18). In response, Mr. Cohen has filed a Motion to Strike Plaintiff's Motion for Summary Judgment, a Motion for Enlargement of Time that requests that the Court hold an evidentiary hearing on this matter, and

[1] Hereinafter, this Order will refer to sections of the tax code as I.R.C. _____, e.g. I.R.C. § 7408.

Motions to Dismiss Plaintiff's case for Lack of Equity Jurisdiction, Lack of Venue, Lack of Subject Matter Jurisdiction, Lack of a Taxing Statute, and Obfuscation of any Alleged "Taxing Statute." (Dkt. Nos. 19-24). Additionally, Mr. Cohen has filed a thirty-eight page affidavit, where he explains his legal theories and objections to the government's case. (Dkt. No. 25). Having reviewed all of the pleadings and documentation associated with these motions and after having heard oral argument on these matters, the Court hereby DENIES Mr. Cohen's Motions and GRANTS the United States' Motion for Summary Judgment.

BACKGROUND

Internal Revenue Agent Sean Flannery notified Mr. Cohen in September, 2003 that the United States Government was considering taking action against him for promoting an abusive tax shelter under I.R.C. §§ 6700 and 7408. In February, 2004, the Government filed a formal action in this Court against Mr. Cohen under I.R.C. §§ 6700, 6701, 7408, and 7402. The Government charges that Mr. Cohen had been engaged in operating a website that he calls "The Tax Ax." (www.taxax.org), from which he disseminated false information regarding the U.S. tax system. Even after the preliminary injunction in this case issued, Mr. Cohen admitted that he did not immediately refrain from these activities. (P's Mot. at 7, ¶ 16). Nonetheless, as of the date of oral argument on this matter, Mr. Cohen had removed all information from this website. The Government alleged, however, that Mr. Cohen has moved his operation to a new website, but did not provide this Court with the URL to the new website.

Through the internet, Mr. Cohen has promoted the idea that the U.S. tax system is a "hoax" and that the payment of federal income taxes is voluntary. (Pl's. Ex. 1). Additionally, Mr. Cohen advertised a number of products on his website aimed at "educating" people about their "right" to not pay taxes. Examples of these products are his book American Liberty vs. Forced Withholding and a Custom Letter, which is designed to "build a solid foundation to reverse the government's presumption that we are 'taxpayers' pursuant to the Code, instead of 'tax payers' in the ordinary sense of the term," and to "keep the IRS scrambling. . ." (Pl's Ex. 24). The distinction that Mr.

Cohen draws between "tax payers" and "taxpayers" is based on his contention that the I.R.C. is not a real "code of laws," that the Secretary of the Treasury does not have authorization to operate outside of the territorial confines of Washington, D.C., and that the only people subject to tax are foreign nationals. (Cohen Dep. At 24, 30; Cohen Aff. at 13, 15).

ANALYSIS

I. Defendant's Motions to Dismiss

The Court will first address Mr. Cohen's motions to dismiss, because they would preclude consideration of the Government's motion for summary judgment if they are granted.

A. Motion Number 1–Dismissal based on Lack of Equity Jurisdiction, Constituting a Failure to State a Claim for Which Relief can be Granted, Pursuant to Rule 12(b)(6)

Mr. Cohen argues that the Government cannot pursue an injunction against him because it has not shown an irreparable injury for which there is no adequate remedy at law. The government responds by noting that although I.R.C. §§ 6700 and 6701 do provide monetary relief for the Government against those who promote abusive tax shelters, the legislature specifically envisioned injunctive relief to also apply to these cases. I.R.C. §7408; U.S. v. White, 769 F. 2d 511, 516 (8th Cir. 1985). Additionally, there is precedent that holds that the Government need not meet all the traditional requirements for equitable relief under §7408 because the legislative process already took these requirements into account. Id. at 515; U.S. v. Estate Preservation Servs., 202 F. 3d 1093, 1098 (9th Cir. 2000). For this reason, Mr. Cohen's first Motion to dismiss for lack of equity jurisdiction must be DENIED.

B. Motion Number 2–Dismissal based on Lack of Venue

Mr. Cohen also argues that this Court does not have venue in this action because various provisions of the U.S. Code authorize the Secretary of the Treasury and the Attorney General to exercise their offices only within the District of Columbia. He also contends that this Court may only operate in the District of Columbia. Under 28 U.S.C. §1340, this Court has jurisdiction to hear civil

actions "arising under any Act of Congress providing for internal revenue." Additionally, this Court has jurisdiction where the United States Government is a plaintiff. 28 U.S.C. §1345. More to the point, 28 U.S.C. §1391(b)(1) allows an action where jurisdiction is not based on diversity of citizenship to be brought only in "a judicial district where any defendant resides. . ." I.R.C. §7408 also specifically allows actions under that statute to be brought "in the district court of the Untied States for the district in which such person resides. . ." Here, Mr. Cohen is the only Defendant in this case. He currently resides in Fircrest, Washington, which is inside this Court's geographic jurisdiction. Thus, Mr. Cohen's Motion to Dismiss for Lack of Venue must be DENIED.

C. Motion Number 3–Dismissal for Lack of Subject Matter Jurisdiction

Mr. Cohen argues in this motion that this Court has no subject matter jurisdiction over him in this action because Congress' intent, in enacting I.R.C. §§ 6700 and 6701, was only to punish those individuals who create unlawful *investments* that constitute tax shelters. In support of this argument, he cites a Department of Treasury White Paper from July 1999. (Def's Mot. #3, at 1-3). Plaintiff's reply, however, cites to a Senate report that indicates that §§ 6700 and 6701 were also intended to address not only investment-type shelters, but also "other abusive tax avoidance schemes." (Pl's Resp. at 3). Defendant Cohen's argument ignores precedent, which holds that a tax protest organization can constitute an "abusive tax shelter" under §§ 6700 and 6701. U.S. v. Kaun, 827 F. 2d 1144, 1149 (7th Cir. 1987). In Kaun, the Court found evidence that the group in question was trying to stop the filing of tax returns, stop the filing of W-4s, and attempting to circumvent the IRS, persuasive that that group constituted an illegal tax shelter under the meaning of I.R.C. §§ 6700 and 6701. Based on the evidence submitted by both parties, Mr. Cohen's activities are geared toward achieving these same goals. This Court's Order Granting Preliminary Injunction in this case found that Cohen "has engaged in conduct subject to penalty under § 6700 by organizing and promoting an abusive tax scheme. . ." (Dkt. No. 8 at 3-4). For these reasons, Mr. Cohen's third motion must be DENIED.

D. Motion Number 4–Dismissal for Obfuscation of any Alleged "Taxing Statute"

In Mr. Cohen's Fourth Motion to Dismiss, he states that he has never been shown the taxing statute that may be applicable to him or to his customers, despite several requests by him to the Government on this subject. Therefore, he concludes, he cannot be found to have willfully broken any law because he has no knowledge of such a law. As pointed out by Plaintiff, however, I.R.C. §§ 6011(a) and 6012(a) set forth an individual's requirement to file a tax return. As noted in the Court's Preliminary Injunction Order, Mr. Cohen has extensively studied the U.S. tax code. He is college-educated. (Cohen Dep. at 9). His deposition and affidavit provide further evidence of his knowledge in this area. Other courts have held that the claims regarding the voluntary nature of the U.S. tax system are meritless. E.g. U.S. v. Gerads, 999 F. 2d 1255 (8th Cir. 1993). Therefore, the Court must DENY Mr. Cohen's Fourth Motion for Dismissal.

E. Motion Number 5–Dismissal for Lack of a Taxing Statute

As stated above, I.R.C. §§ 6011(a) and 6012(a) set forth an individual's requirement to file tax returns. This Court should find, therefore, that the U.S. taxing statute does exist and cannot dismiss Plaintiff's claims for a lack of one. Mr. Cohen's Fifth Motion for dismissal is DENIED.

II. Motion for Summary Judgment

A. Summary Judgment Analysis

Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an

element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324.

B. Defendant's Motion to Strike Plaintiff's Motion for Summary Judgment and Defendant's Motion to Expand Time

Mr. Cohen asks this Court to strike Plaintiff's Motion for Summary Judgment because, he states, Plaintiff has only brought the Motion under Fed. R. Civ.P. 56(c). He contends that Plaintiff was required to bring the motion under Fed. R. Civ. P. 56(a) or (b) because these two sections of Rule 56 set forth who may bring what kinds of motions for summary judgment. Unfortunately, Mr. Cohen has misapprehended the procedural requirements for a motion for summary judgment. There is nothing deficient about Plaintiff's motion under Rule 56(c). The Court DENIES Mr. Cohen's Motion to Strike.

Mr. Cohen also asks that this Court continue oral argument on this motion until after an evidentiary hearing can be held on the issues of the Plaintiff's alleged injury and whether or not Defendant is subject to a valid tax law. The latter issue has already been addressed by the Court, *supra*, so no hearing will be necessary on this issue. As for whether or not Plaintiff has been injured, this Court may determine whether or not to grant summary judgment on this issue without an evidentiary hearing. The summary judgment process is intended to streamline the judicial process by only allowing claims based on a genuine factual dispute to reach a jury. Additionally, whether or not Plaintiff can show that individuals actually relied on Mr. Cohen's tax advice, the Government's expenditure of resources responding to "false and frivolous tax arguments," such as Mr. Cohen's, can still be considered an injury. White, 769 F. 2d at 513, 516. For these reasons, it would be inappropriate for the Court to hold an evidentiary hearing before deciding whether or not to grant summary judgment. The Court DENIES Mr. Cohen's motion for an enlargement of time.

C. Conduct Subject to IRC §6700

Section 6700 of the I.R.C. penalizes anyone who:

> (1)(A) organizes (or assists in the organization of)
>
> (I) a partnership or other entity,
>
> (ii) any investment plan or arrangement, or
>
> (iii) any other plan or arrangement, or
>
> (B) participates (directly or indirectly) in the sale of any interest in any entity or plan or arrangement referred to in subparagraph (A), and
>
> (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)--
>
> (A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter. . . I.R.C. § 6700(a).

In order to show a section 6700 violation, the Government must establish by a preponderance of the evidence that Mr. Cohen: "(1) organized or sold an entity, plan, or arrangement; (2) made or furnished statements concerning tax benefits to be derived from the entity, plan or arrangement; (3) knew or had reason to know that the statements were false or fraudulent; and (4) that the false of fraudulent statements pertained to a material matter. Raymond, 78 F. Supp. 2d at 876. As noted above, this Court has already found that Mr. Cohen's activities fall within the confines of punishable activity under this statute. Other courts have also found that a defendant need not be operating a traditional investment tax shelter to run afoul of §6700, but that the organization or participation in a tax protester scheme or group, which is based on false or fraudulent conceptions of the U.S. Tax Code, will suffice. See e.g. Kaun, 827 F. 2d 1144, 1148 (7th Cir. 1987).

As already noted, Mr. Cohen knew or should have known that the theories under which he urged others to oppose taxation did not hold water. The Government has demonstrated that Mr. Cohen's misleading statements about the benefits of his plan are material because such statements could have substantially impacted a potential purchaser's decision-making process. Smith, 657 F. Supp. At 655. Mr. Cohen did not file a formal response to the Government's motion. However,

even when the Court construes his various filings as an aggregate response to the government, he does not succeed in raising a material issue of fact as to the nature of his anti-tax activities, his knowledge of the plan's falsity, or the materiality of the statements he made on his website. For these reasons, the Court GRANTS the government's motion for summary judgment on Defendant's §6700 violation..

D. Conduct Subject to IRC §6701

Section 6701 of the I.R.C. provides monetary fines for any person,

> (1) who aids or assists in, procures, or advises with respect to the preparation or presentation of any portion of a return, affidavit, claim, or other document,
>
> (2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and
>
> (3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person. . . I.R.C. §6701(a).

The United States claims that Mr. Cohen violated I.R.C. §6701 by furnishing articles on his website that falsely claim that the IRS is a hoax, and by providing customers with products to hinder the collection of taxes. Mr. Cohen's website also contained a first-hand narrative by a man named "Dave" who Defendant purportedly "aided" in stymying an IRS agent during an in-person meeting. (Pl's. Ex. 22). Evidence of this type of activity, combined with the products sold and the advice dispensed via the website satisfy the first prong of §6701. Defendant has raised no issue of material fact that he did not provide this information or assistance. The Court has already decided that Mr. Cohen was savvy regarding tax matters and knew or should have known that the "help" he was distributing was, in fact, detrimental. Likewise, he also had enough information about the tax system to know that his advice would likely lead people to understate their tax liability. Mr. Cohen responds to this claim by stating that to "the best of [his] knowledge and belief, none of [his] 'customers' is a taxpayer." (Cohen Aff. at 15). However, there is no requirement under §6701 that a person to whom the false advice was furnished actually use it. I.R.C. §6701; White, 769 F. 2d at 516. Moreover, Mr. Cohen's assertion does not make sense because a person normally would not seek this type of advice

if he were not required to pay taxes. The Court should GRANTS summary judgment as to the Government's §6701 claim.

E. Injunction under IRC §7408 and §7402

I.R.C. §7408 grants the Court power to grant an injunction against an individual who has been found to have violated I.R.C. § 6700 or §6701, provided that "injunctive relief is appropriate to prevent recurrence of such conduct." I.R.C. §7408(b)(2). I.R.C. §7402 allows the Court to "render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. . " I.R.C. § 7402(a). As noted above, where injunctive relief is provided for legislatively, the normal equitable factors need not be taken into account. Estate Preservation Servs., 202 F. 3d at 1098. Instead, the Court may consider: "(1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition or non-recognition; and (6) the likelihood that the defendant's occupation would place him in a position where future violations could be anticipated." Id., at 1105. All of these factors weigh in Plaintiff's favor: Mr. Cohen's activities have caused injury to the Government by causing the unnecessary expenditure of valuable resources; Mr. Cohen was deeply involved in this scheme because it was of his own creation; the Court has already decided that Mr. Cohen knew or should have known the falsity of the tactics he was selling; Mr. Cohen did not fully comply with the Court's Preliminary Injunction Order and persisted in operating his website for a time after that Order was issued; Mr. Cohen does not acknowledge his wrongdoing; and, finally, Mr. Cohen admits in his deposition that this project is his life's work, so his occupation would likely put him in a position to commit future violations. (Cohen Dep. at 8-10). In light of these strong indicators favoring issuance of a permanent injunction against Mr. Cohen, the Court GRANTS the Government's Motion for an injunction under I.R.C. §§7408 and 7402.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motions for Dismissal of Plaintiff's case are DENIED. The Case is hereby DISMISSED in Plaintiff's favor.

Mr. Jack Cohen, his employees, agents, and all other persons in active concert or participation with the Defendant who receive actual notice of this Order, are HEREBY PERMANENTLY ENJOINED, until the Court orders otherwise, from:

1) Engaging in activity subject to penalty under I.R.C. §6700, including organizing or selling a plan or arrangement (including, without limitation, the Section 861 argument that U.S. citizens with domestic income are not subject to taxation, the argument that Congress cannot tax U.S. citizens, and the argument that wages are not taxable) and making a statement regarding the excludability of income which constitutes commercial speech that they know or have reason to know is false or fraudulent as to any material matter;

2) Engaging in activity subject to penalty under I.R.C. §6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position (including, without limitation, the U.S. Sources argument and the Section 861 scheme) that they know will result in the understatement of tax liability;

3) Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws, including engaging in false, deceptive or misleading commercial speech, or engaging in other false speech which is directed to incite the imminent evasion or attempted evasion of federal taxes and is likely to produce such action.

Further, and in addition to the above prohibition against engaging in conduct subject to penalty under I.R.C. §§ 6700 and 6701, the Court ORDERS that, **within 12 days** of the date of the entry of this Order, Mr. Cohen must mail (by U.S. mail and, if an e-mail address is known, electronic mail) a copy of this Order to: (1) every current and former customer for whom Mr. Cohen has

performed any tax-related service or provided any tax-related advice; and (2) all persons to whom Cohen otherwise sold or distributed any tax-related products, documents, services or advice.

The Court further ORDERS that **within 15 days** of the date of the entry of this Order that Mr. Cohen shall serve the United States with a list of physical and electronic mail addresses to which he sent a copy of this Order. Mr. Cohen shall file a certificate of service with the Court that same day evidencing his compliance with this paragraph of the Order.

The Court further ORDERS that Mr. Cohen must, **within 15 days** of the date of the entry of this Order, serve the United States with a list of Mr. Cohen's customers which sets forth their names, addresses and social security numbers. Mr. Cohen shall file a certificate of service with the Court that same day evidencing his compliance with this paragraph of the Order.

The Court further ORDERS that Mr. Cohen must, **within 30 days** of the date of the entry of this Order, remove from his website www.taxax.org, or any other website to which he has been posting information in contravention of I.R.C. §§6700 and 6701, all false and fraudulent statements concerning the meaning and application of the internal revenue laws, including (but not limited to) any statement regarding I.R.C. §861 (or the corresponding Treasury Regulations) which Defendant knows or has reason to know is false. Mr. Cohen shall also post on the first page of his website www.taxax.org, or any other website to which he has been posting information in contravention of I.R.C. §§6700 and 6701, for a period of six months from the date of the entry of this Order, a complete copy, in not less than 12-point type, of the Order granting a permanent injunction in this case. Mr. Cohen must file a sworn certificate of compliance stating that he has complied with this portion of the Order, **within 35 days** of the date of the entry of this Order.

Finally, the Court ORDERS that the United States may conduct discovery to ensure Mr. Cohen's compliance with this permanent injunction.

The Clerk of the Court shall direct a copy of this order be sent to all counsel of record.

Dated: May 13, 2005.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

RECD FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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Exhibit 36

UNITED STATES of AMERICA)
)
Plaintiff,)
)
v.) Civil No. 8: 02-CV-1742-T-26TBM
)
EVERTE FARNELL)
)
Defendant.)

STIPULATED PERMANENT INJUNCTION (~~Proposed~~)

Plaintiff, the United States, has filed a Complaint for Permanent Injunction against the defendant, Everte Farnell. Farnell does not admit the allegations of the complaint except that he admits that the Court has jurisdiction over him and over the subject matter of this action. By his Consent, which has been previously filed, Farnell waives the entry of findings of fact and conclusions of law, and consents to the entry of this Permanent Injunction.

A. The Court has jurisdiction over this action under 28 U.S.C. Sections 1340 and 1345, and under 26 U.S.C. Sections 7402 and 7408.

B. The Court finds that Farnell has neither admitted nor denied the United States' allegations that Farnell is subject to penalty under 26 U.S.C. Sections 6700 and 6701.

Order

Therefore, the Court ORDERS that the defendant, Everte Farnell, and his representatives, employees, agents and all other persons in active concert or participation with Farnell who receive actual notice of this Order are enjoined, until the Court orders otherwise, from:

1. engaging in activity subject to penalty under IRC § 6700, including organizing and/or selling a plan or arrangement (including, without limitation, the U.S. Sources Argument and the Section 861 scheme) and making a statement regarding the excludability of

income which constitutes commercial speech that they know or have reason to know is false or fraudulent as to any material matter;

2. engaging in activity subject to penalty under IRC § 6701, including preparing and/or assisting in the preparation of a document related to a matter material under the internal revenue laws that includes a position (including, without limitation, the U.S. Sources Argument and the Section 861 scheme) that they know will result in the understatement of tax liability;

3. engaging in any other activity subject to penalty under IRC §§ 6700, or 6701;

4. preparing federal income tax returns for other persons or entities, or engaging in conduct subject to penalty under IRC §§ 6694 and 6695;

5. interfering in the IRS's examinations of other taxpayers by taking frivolous or groundless positions, including but not limited to making arguments during tax examinations of other taxpayers based on the Section 861 scheme, demanding that the IRS summons witnesses in administrative proceedings, and requesting that clients be allowed to cross-examine witnesses in IRS audits;

6. engaging in other, similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws, including but not limited to engaging in false, deceptive or misleading commercial speech, or engaging in other false speech which is directed to incite the imminent evasion or attempted evasion of federal taxes or other violations of the federal tax laws and is likely to produce such action.

It is further **ORDERED** that Farnell shall submit to a deposition upon oral examination at the United States' request, so that the United States can monitor compliance with this injunction. No further order of the Court shall be required. In so stating, however, Farnell may raise the Fifth Amendment's privilege against self-incrimination in response to the Government's questions without violating this order. If necessary, the Court will determine whether Farnell is permitted to avail himself of the privilege after a record has been made in deposition.

It is SO ORDERED this 20 day of May, 2003.

United States District Judge

Submitted by:

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United States Attorney

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Exhibit 37

v. **Case No. 8:02-cv-2052-T-23MSS**

PRATER, *et al.*,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS MATTER is before the Court for consideration of Plaintiff, the United States of America's Motion for Summary Judgment Converting Preliminary Injunction to Permanent Injunction (the "Motion") (Dkts. 143 and 144) and Defendants' response thereto (Dkts. 145 and 146). The District Court Judge referred this matter to the Undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 6.01(b) (Dkt. 39). Based on the evidence in the record and being otherwise fully advised, the Undersigned reports and recommends that the Court **GRANT** Plaintiff's Motion, convert the preliminary injunction to a permanent injunction and award the United States its costs.

I. Brief Procedural History

Plaintiff, the United States, brought this action for preliminary and permanent injunctive relief pursuant to 26 U.S.C. §§ 6700, 6701, 7401, 7407 and 7408 (2003), against individual Defendants Carel Prater (a/k/a Chad Prater) and Richard Cantwell and corporate Defendants Tax Escape Service and New Found Freedom, among others (collectively "Defendants"), to enjoin them from promoting allegedly abusive tax-avoidance schemes based on the so-called "§ 861 argument," a meritless position that domestic income is not subject to the federal income tax, and from making

other false and fraudulent representations regarding tax laws.

Plaintiff alleges, inter alia, that Defendants prepared, promoted and marketed tax-avoidance schemes (through seminars, newspaper advertisements, a book and a website) purporting to exempt Defendants' clients from federal income taxation and advising clients how to conceal their assets and income from the Internal Revenue Service (the "IRS") (Dkt. 1). On November 7, 2002, Plaintiff moved this Court for issuance of a preliminary injunction (Dkt. 2). On December 19, 2002, this Court entered an Order granting Plaintiff's preliminary injunction request finding that Defendants' conduct violated the Internal Revenue Code (the "IRC"), specifically 26 U.S.C. §§ 6700, 6701, 6694 and 6695 (Dkt. 23). Defendants did not appeal the entry of the preliminary injunction. Now, Plaintiff moves this Court for summary judgment converting the preliminary injunction into a permanent injunction (Dkts. 143 and 144), and Defendants oppose that motion (Dkts. 145 and 146).

Plaintiff claims that summary judgment is appropriate in this case because:

> There are no genuine issues of material fact in this case. Defendants did not dispute the factual allegations in the United States' motion for preliminary injunction, but instead argued their frivolous interpretation of IRC § 861. They introduced no evidence at the preliminary injunction hearing other than testimony regarding their § 861 argument. They admitted the salient allegations in the United States' complaint regarding Prater's book and website, their "*nihil dicit* judgment" scam, their trust and limited liability corporation scams, their withholding tax scam, their "Pre-Paid Tax Solution" scam, and their letters to the IRS. While they denied in their answer that they prepared federal income tax returns and amended returns, they produced no evidence to rebut the United States' declarations and exhibits showing that they do prepare returns and amended returns.

(Dkt. 144, pp. 2-3 (internal citations omitted)).

Plaintiff claims further that it is entitled to a permanent injunction based on the findings of fact made in support of the preliminary injunction because these findings clearly establish the United States' entitlement to a permanent injunction under IRC §§ 7407, 7408 and 7402(a). Plaintiff also

claims that:

> Despite the preliminary injunction, the United States continues to suffer irreparable injury, as Prater and his associated entities have ignored the preliminary injunction and continued to promote their abusive tax schemes . . . [and] the United States has no adequate remedy at law to halt defendants' continued interference with the administration of the internal revenue laws. The only other civil remedy available is the imposition of penalties under IRC §§ 6700, 6701, 6694, and 6695. As Prater has been undeterred by the monetary sanctions the Court entered against him for his contempt, there is no reason to expect that penalties will stop him. Rather, a permanent injunction is necessary.

(Dkt. 144 at 5 (internal citations omitted)).

In the "Proposed Order" attached to its Motion, the United States sets forth twenty-one proposed findings of fact (Dkt. 144). These proposed findings of fact are nearly identical to the findings of fact set forth by the District Court's Preliminary Injunction Order (Dkt. 23) with the following exceptions: in paragraph 18 the term "has prevailed" is substituted for "will likely prevail;" the word "permanent" is substituted for "preliminary" throughout; certain footnotes or portions thereof have been deleted; and paragraph 21 has been added. The proposed findings of fact, as discussed below, support Plaintiff's position that summary judgment is appropriate in this case.

Defendants do not contest the United States' allegations or attempt to refute any of the proposed findings of fact by the submission of contravening affidavits or argument. Instead, Defendants challenge the Court's "territorial jurisdiction," as they have in the past (Dkt. 19) and also claim that because there is no "basis for the original complaint claiming violation of the 'Income Tax' law sections identified . . . there can be no legal and lawful basis to grant a summary order of permanent injunction" (Dkt. 145 at 4). Finally, Defendants demand that the preliminary injunction be lifted and that the Court "[o]rder an Evidentiary Hearing" where monetary damages to Defendants can be determined and where evidence can be presented to permit the Court to determine

meaningful sanctions to be applied to the "offending Agencies and its [sic] agents" (Dkt. 145 at 4).

II. Standards for Summary Judgment and Permanent Injunction

A Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c); see also Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.2d 1317, 1318 (11th Cir. 2004)(stating that summary judgment is appropriate where there are no genuine issues of material fact).

The burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The "movant bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record that] it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must demonstrate to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325. However, after the movant has met its burden under Rule 56(c), the burden of production shifts and the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). According to Fed.R.Civ.P. 56(c), the non-movant "**may not rest upon the mere allegations or denials of the adverse party's pleadings, but rather must provide the Court with "specific facts showing that there is a genuine issue for trial.**" Fed.R.Civ.P. 56(c); Matsushita, 474 U.S. at 587 (emphasis added).

Although the findings of fact made in support of a preliminary injunction are not controlling

at a later hearing for a permanent injunction, E.Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc., 756 F.2d 1525, 1527 n.1 (11th Cir. 1985), where there is no triable issue of fact, the court may convert a preliminary injunction to a permanent injunction without an evidentiary hearing. United States v. McGee, 714 F.2d 607, 613 (6th Cir. 1983); Socialist Workers Party v. Illinois State Bd. of Elections, 566 F.2d 586, 587 (7th Cir. 1977), *aff'd other grounds*, 440 U.S. 173 (1979); United States v. Byrd, 609 F.2d 1204, 1208-09 (7th Cir. 1979). The Court issuing the permanent injunction must "recast" its findings of fact and conclusions of law in terms of the permanent injunction standard, which is essentially the same as the standard for a preliminary injunction. Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 847 (3d Cir. 1984). The exception is that the plaintiff must show actual, rather than likely, success on the merits. Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 546 n.12 (1987).

Because IRC §§ 7407 and 7408 set forth the criteria for injunctive relief, the United States need only meet those criteria, without reference to the traditional equitable factors, for an injunction to issue under these sections. See United States v. Estate Pres. Servs., 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since Section 7408 expressly authorizes the issuance of an injunction.").

To obtain a permanent injunction under IRC § 7407 the United States must show: (1) that the defendant is an "income tax return preparer" within the meaning of IRC § 7701(a)(36); (2) that he engaged in conduct described in § 7407(b)(1)(A)-(D); and (3) that injunctive relief is appropriate to prevent the recurrence of such conduct. United States v. Fernandez, 2005 WL 1332312, *1 (M.D. Fla. May 4, 2005)(citing United States v. Ernst & Whinney, 735 F.2d 1296, 1303 (11th Cir. 1984)).

IRC § 7408(a) gives the district courts power to issue an injunction under IRC § 7408(b) if

it finds that 1) the person has engaged in any conduct subject to penalty under section 6700 . . . or section 6701 . . . and 2) the injunctive relief is appropriate to prevent recurrence of such conduct. See United States v. Ratfield, *et al.*, 2004 WL 3174420, *12 (S.D. Fla. Nov. 30, 2004).

IRC § 7402 gives the district courts power to issue injunctions as may be necessary or appropriate for the enforcement of the internal revenue laws of the United States. Ernst at 1300. Congress has expressly stated that injunctive relief under IRC § 7402(a) is "in addition to and not exclusive of any and all other remedies." See IRC § 7402(a). In Ernst the Eleventh Circuit held, however, that for an injunction to issue under IRC § 7402(a) the United States must meet the traditional equitable standard for an injunction. Ernst at 1301 ("the decision to issue an injunction under § 7402(a) is governed by the traditional factors shaping the . . . use of the equitable remedy."). Those factors are: (1) the likelihood of continuing irreparable injury to the United States, (2) the harm to the United States without the injunction outweighs any harm to the defendant if a permanent injunction is entered, (3) success on the merits of the case, and (4) the public interest favors entry of a permanent injunction. United States v. Fernandez, 2005 WL 1332312, *1 (M.D. Fla. May 4, 2005); See also Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003) (citing Newman v. Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982)).

III. Findings of Fact and Conclusions of Law

Plaintiff presented support for its motion for preliminary injunction in the form of case law and supporting declarations (Dkts. 2-4), which Defendants failed to rebut during the preliminary injunction hearing. When Plaintiff moved for summary judgment converting the preliminary injunction into a permanent injunction, Defendants were again afforded the opportunity to proffer rebuttal evidence; however, Defendants failed to take advantage of this opportunity as well.

Defendants' response does not delineate proposed findings that are in dispute (Dkts. 145 and 146). Rather, as noted above, Defendants simply reiterate arguments (Dkts. 19, 146, 148 and 149) that this and other Courts have found to be frivolous and without legal merit (Dkt. 152).

In support of its Motion, Plaintiff filed twenty-one (21) proposed findings of fact. Evidence support for the findings of fact exists in the declarations and attachments submitted in support of Plaintiff's Motion for Preliminary Injunction (Dkt. 4), which are not controverted by Defendants, and in the evidentiary (Dkt. 23) and contempt hearings (Dkts. 34-40) held before the Court. Because Defendants failed to rebut or contradict Plaintiff's evidence or to raise a single genuine issue of material fact, the Undersigned recommends that Plaintiff's twenty-one proposed findings of fact, as modified below, be accepted as true. See United States v. Raymond, 228 F.3d 804, 809 (11th Cir. 2000) (citing Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832, 835 n.10 (7th Cir. 1976) for the proposition that at the summary judgment stage uncontradicted affidavits are taken as true).

Findings of Fact:

1. Defendants, Carel E. "Chad" Prater ("Prater"), individually and through his associated entities Aero Investments, Goldcoast Enterprises, Goldencoast Enterprises, Bartholomew Enterprises, C.A.P. Enterprises, Tax Informer Enterprises, Family Values International, Tax Escape Service, New Found Freedom ("associated entities") and Richard Cantwell ("Cantwell") promote abusive tax schemes based on the so-called "§ 861 argument," a meritless position that domestic income is not subject to the federal income tax, and make other false and fraudulent representations regarding tax law. Defendants promote their schemes through seminars, newspaper advertisements, a book and a website, and charge clients for products and services

related to their abusive tax schemes.

2. Prater, Cantwell, and the associated entities promote, and Prater and the associated entities file, putative legal documents, which are actually nullities but which Prater calls "*nihil dicit* judgments" against the IRS, by which judgments Defendants falsely claim to bar the IRS from collecting taxes from their clients.

3. Prater and Cantwell falsely advise clients, individually and through seminars and written materials, to cease filing federal income tax returns (IRS Forms 1040) and paying federal income tax.

4. Prater, Cantwell, and the associated entities sell sham trusts, called Unincorporated Business Trust Organizations ("UBTOs") or Unincorporated Personal Trusts ("UPTs"), and falsely advise their clients that by placing the clients' assets and income into these trusts the clients can avoid federal income tax.

5. Prater, Cantwell, and the associated entities promote, and Prater and the associated entities set up, limited liability corporations ("LLCs") structured to obscure their clients' identities. Prater, Cantwell, and the associated entities falsely instruct their clients that by moving the clients' assets and income between these LLCs and the UBTOs the clients can avoid federal income tax.

6. Prater and the associated entities prepare and file federal income tax returns (IRS Forms 1040), falsely claiming that their clients have no taxable income and are not liable for federal income tax. Prater and his staff fail to sign their own names to these returns and fail to provide their identifying numbers, in violation of 26 U.S.C. § 6695.

7. Prater and his associated entities prepare and file amended federal income tax returns (IRS Forms 1040X), falsely claiming that their clients' previous returns were filed in error and requesting a refund of paid taxes. Prater and his staff fail to sign their own names to these returns and fail to provide their identifying numbers to them.

8. Prater and his associated entities prepare and submit to their clients' employers Employee's Withholding Allowance Certificates (IRS Forms W-4) and statements in lieu of IRS Form W-4 falsely claiming that their clients are exempt from withholding tax.

9. The returns, amended returns, and W-4s that Prater and his associated entities have prepared are based on an unrealistic position, the § 861 argument, which concludes that Defendants' clients are not liable for tax on domestic-source income, and which yields a gross understatement of his clients' tax liability.

10. Prater misleads his clients and the IRS by claiming that he is qualified to represent clients before the IRS; Prater induces his clients to execute Power-of-Attorney and Declaration of Representation Forms (IRS Forms 2848), purportedly granting him authority to represent them by falsely asserting that he is his clients' full-time employee.

11. Prater interferes with the administration of the internal revenue laws by attempting to block IRS examination and collection efforts through frivolous correspondence and mock legal documents.

12. Prater and Cantwell have continued to promote their abusive tax schemes even after learning that they are under IRS investigation and after the IRS executed a search

warrant on their business premises. Cantwell has stated his intention to continue his abusive tax activity after learning that he is under IRS investigation for promoting abusive tax schemes.

13. Absent this permanent injunction, Prater and Cantwell will continue to promote the abusive tax scheme.

14. If this injunction if not granted, the United States will suffer irreparable harm because Prater advises his clients not to file returns, to file returns falsely claiming no income, to file amended returns demanding a refund of paid taxes, to stop their employers from withholding taxes from their paychecks, and to hide their income from the IRS in sham trusts and LLCs. Further, substantial resources of the United States are expended reviewing and dealing with Prater-prepared returns, amended returns, and correspondence.

15. The § 861 argument is frivolous and without merit.[1] Prater and Cantwell knew or should have known that their representations regarding the § 861 argument and the tax benefits to be derived from participation in their scheme are false because: (1) the § 861 argument is frivolous on its face; (2) numerous judicial decisions reject the § 861 argument and abusive trusts such as Prater's; (3) the IRS has issued numerous public documents explaining the invalidity of th § 861 argument; (4) Prater and Cantwell kept copies of an IRS public notice regarding frivolous tax arguments and a press article describing injunction actions against others who promoted schemes

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See United States v. Rosile, No. 8:02-cv-466-T-24MSS, 2002 WL 1760861, at *2 (M.D. Fla. June 10, 2002); United States v. Bossett, No. 8:01-cv-2154-T-17TBM, 2002 WL 1058105, at *3 (M.D. Fla. Mar. 26, 2002).

similar to his own; and, (5) Prater holds himself out (that is, "palms himself off") as an expert in tax law.

16. Prater and his associated entities have filed with the IRS documents, including frivolous W-4 Forms, 1040 Forms, 1040X Forms, that relate to a material tax matter and that Prater knew would, if accepted, result in an understatement of tax liability. Prater's submission of these forms and other frivolous documents to the IRS has substantially interfered with the administration of the internal revenue laws.

17. Prater and the associated entities have substantially interfered with the administration of the tax laws by pressuring employers to cease withholding taxes from their clients' wages and by pressuring others to reject IRS collection efforts.

18. In sum, the record reveals that Prater, Cantwell, and the associated entities have engaged in conduct in violation of IRC §§ 6700, 6694, 6695, and 6701. Therefore, the United States has prevailed on the merits. Further, the records demonstrates that Prater, Cantwell, and the associated entities will continue to violate IRC §§ 6700, 6694, 6695, and 6701 absent the entry of a permanent injunction.

19. This injunction is tailored to prevent Prater, Cantwell, and the associated entities from causing further injury and from further violating the law. Thus, the threatened injury to the United States outweighs any injury an injunction might cause to Defendants.

20. The public interest is served by granting this injunction. This permanent injunction helps stem the spread of, and protects the public from, Defendants' frivolous arguments and fraudulent tax schemes.

21. The United States has no adequate remedy at law to stop Defendants' abusive tax schemes.

Findings 12, 13, 18 and 19 warrant additional discussion, as they are the findings that have the most impact on the Court's decision whether to convert the preliminary injunction into a permanent one.

Findings 12 and 13

With respect to Findings 12 and 13, the record is replete with evidence that Defendants "continued to promote their abusive tax schemes even after learning that they are under IRS investigation . . ." and that "absent this permanent injunction, Prater and Cantwell will continue to promote the abusive tax scheme." For example, Plaintiff provided evidence that even after the IRS executed a search warrant on Prater's business premises on March 7, 2002, Prater held a seminar promoting his tax scheme on October 10, 2002 (Dkt. 3 at 2, n.4 (citing to the Matthews Decl.¶ 24, Exs. 5-6)). Further, evidence can be found in the affidavits, declaration and documentary exhibits (Dkts. 34-40 and 55-56) submitted by Plaintiff in support of its Motion to Hold Defendants in Contempt (Dkt. 30) much of which was used by the Court when granting Plaintiff's Motion to Hold Defendants in Contempt (Dkts. 67 (Report and Recommendation) and 75 (Order adopting Report and Recommendation)). Specifically, Plaintiff submitted evidence that even after the issuance of the preliminary injunction, Defendants continued to promote their tax avoidances schemes via their newsletter and also continued to send letters and other documents to the IRS on behalf of clients. (Dkt. 67, pp. 4-9 (internal citations omitted)). After an evidentiary hearing and review of the documentation in support provided by both parties, the Undersigned issued a Report and Recommendation, which was accepted by the District Court Judge, that Defendants (with the exception of Mr. Cantwell, whom the Undersigned found was not involved in the allegedly

contemptuous conduct at issue (Dkt. 67 at 12)), through certain conduct, had violated the December 19, 2002, preliminary injunction and should be held in contempt.

As discussed in detail below, Defendants, even after the entry of the preliminary injunction, persist in filing documents in this case asserting the validity of the § 861 argument and contesting the jurisdiction of the Court. These documents indicate that Defendants have not accepted the findings by this (and other courts) that the tax scheme they promote is unlawful.

Finding 18

As noted above, under IRC §§ 7402, 7407 and 7408 the standards for the issuance of a preliminary injunction do not change when a permanent injunction is sought, with the exception that under § 7402 Plaintiff must demonstrate actual as opposed to the "substantial likelihood of success" on the merits. If the District Court accepts Plaintiff's proposed findings of fact as true, and grants summary judgment, Plaintiff will have succeeded on the merits of this case. Because Defendants failed to provide the Court with any specific facts showing that there is a genuine issue for trial in this case, the Undersigned recommends that the District Court grant summary judgment.

Plaintiff's success on the merits in combination with Defendants' demonstrated unwillingness to abide by the terms of the preliminary injunction leads to the incontrovertible conclusion that the issuance of a permanent injunction is appropriate, and in fact necessary, in this case. Evidence that Defendants continue to engage in behavior that led the Government to file this suit is provided by the findings of the Special Master assigned to this case that were filed on December 5, 2003, as well as the affidavits and documents referenced above that were filed in support of Plaintiff's Motion to Hold Defendants in Contempt (Dkt. 30). The necessity for a permanent injunction becomes especially clear upon review of Defendants' post-preliminary injunction filings in opposition to Plaintiff's Motion (Dkt. 145) and Defendants' Demand for

Dismissal and Removal of Temporary Injunction (Dkt. 148) in which Defendants, undaunted and undeterred by the issuance of the preliminary injunction and other court sanctions, continue to assert their frivolous arguments about the legality of the tax code and jurisdiction of this Court.

Finding 19

By law, an injunction order must be narrowly tailored and cannot be impermissibly vague. Federal Rule of Civil Procedure, 65(d) provides, in pertinent part that, "[e]very order granting an injunction . . . shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained...." Fed.R.Civ.P. 65(d). Under this rule, "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." Id. (citing Hughey v. JMS Dev., 78 F.3d 1523, 1531 (11th Cir. 1996)). The language recommended below for inclusion in the permanent injunction mirrors the language included in the preliminary injunction (Dkt. 23) and, thus, has already been determined to be narrowly tailored.

The recommended language is straightforward and designed specifically and carefully to prevent Defendants from continuing to violate the law and from causing further injury. As of the filing of the request for preliminary injunction, Defendants had already cost the United States roughly $18 million in tax losses (Dkt 3 at 13, n.81(citing to the Matthews Decl.¶ 20)) and further caused the United States to devote substantial time and resources to detecting Defendants' tax schemes and prosecuting Defendants for engaging in this fraudulent conduct (Dkt 3 at 13, n.81(citing to the Matthews Decl.¶ 11)). In addition, as noted above, there is no indication on the record thus far that Defendants have acknowledged that the tax scheme they promote is unlawful. Thus, the continuing injury to the United States outweighs any injury a permanent injunction might cause to Defendants.

IV. Conclusion

Accordingly, the Undersigned reports and recommends that the District Court **GRANT** the United States' motion for summary judgment converting the preliminary injunction into a permanent injunction and award the United States its costs. Based on this recommendation, the Undersigned suggests that District Court incorporate the following language into any final order in this case:

Pursuant to IRC §§ 7402, 7407, and 7408, Prater and Cantwell, both individually and doing business through any entity, their representatives, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order are enjoined from:

a. Engaging in activity subject to penalty under IRC § 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that they know will result in an understatement of tax liability;

b. Advocating, through seminars, websites, consultations, and the preparation of income, employment, and corporate tax returns and claims for refund, the false and frivolous position that United States-source income is nontaxable (the "§ 861 argument");

c. Filing so-called judgments *nihil dicit* or default judgments against the IRS, the United States of America, or any agency, department, or instrumentality of the United States of America;

d. Selling any type of trust, limited liability corporation, or similar arrangement, which advocates noncompliance with the income tax laws or tax evasion, misrepresents the

tax savings realized by using the arrangement, or conceals the ownership or receipt of income;

e. Representing, offering to represent, or claiming an ability to represent any other person in any tax matter before the IRS or any court;

f. Corresponding with, or assisting in the preparation of any correspondence or other documents to be sent to the IRS on behalf of any other person in exchange for payment (including for those who paid for any other tax-related services);

g. Preparing or assisting in the preparation of any tax-related document to be sent to any other person in exchange for payment (including for those who paid for any other tax-related services);

h. Preparing or assisting in the preparation of federal tax returns for any other person or entity;

i. Promoting, marketing, organizing, or selling any plan or arrangement regarding the excludibility of income that they know or have reason to know is false or fraudulent as to any material matter. Accordingly, Defendants shall remove from their website(s) all abusive-tax-scheme promotional materials and materials designed to incite or induce others imminently to violate the tax laws;

j. Engaging, directly or indirectly, in any other activity subject to penalty under IRC §§ 6694, 6695, 6700, or 6701; and

k. Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

Further, the Court **ORDERS** that Prater and his associated entities display prominently on

the first page of their website(s) a complete copy of this permanent injunction; certify to the Court within eleven days of this permanent injunction that they have complied with this provision; and maintain their website(s) for one year with a complete copy of this permanent injunction so displayed throughout that time.

Further, the Court **ORDERS** that the United States may conduct post-judgment discovery to monitor Defendants' compliance with this permanent injunction.

Further, the Court **ORDERS** that Prater and his associated entities pay the United States its costs, including the cost of the Special Master. The United States is to submit a bill of costs for consideration and approval by the Court.

RESPECTFULLY RECOMMENDED in Tampa, Florida, on this 30th day of August 2005.

MARY S. SCRIVEN
United States Magistrate Judge

NOTICE TO THE PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report by **September 12, 2005**, shall bar an aggrieved party from attacking the factual findings on appeal.

10
CLOSED

FILED

MAR 28 2003

AT 8:30 M
WILLIAM T. WALSH, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

UNITED STATES

Plaintiff,

v.

RICHARD HARAKA, a/k/a
RICK BRYAN, d/b/a TAXGATE,

Defendant.

Civil No. 02-5340 (JAP)

Exhibit 38

ENTERED
ON
THE DOCKET

MAR 31 2003

WILLIAM T. WALSH, CLERK
By _____ (Deputy Clerk)

ORDER OF PERMANENT INJUNCTION

Plaintiff, the United States, has filed a Complaint for Permanent Injunction against the defendant, Richard Haraka, a/k/a Rick Bryan d/b/a Taxgate. Haraka does not admit the allegations of the complaint, except that he admits that the Court has jurisdiction over him and over the subject matter of this action. By his Consent, which has been previously filed, Haraka waives the entry of findings of fact and conclusions of law, and consents to the entry of this Permanent Injunction.

A. The Court has jurisdiction over this action under 28 U.S.C. Sections 1340 and 1345, and under 26 U.S.C. Sections 7402 and 7408.

B. The Court finds that Haraka has neither admitted nor denied the United States' allegations that Haraka is subject to penalty under 26 U.S.C. Sections 6700 and 6701.

C. It is hereby ORDERED that Richard Haraka, a/k/a Rick Bryan d/b/a Taxgate, and, in addition, his associates, senior members, purported "tax experts," representatives and other affiliates, and all others in active concert or participation with him who receive actual notice of

this Order, are permanently restrained and enjoined from directly or indirectly:

1. Organizing, promoting, marketing, or selling (or assisting therein) any tax shelter, plan, or arrangement known as the "Section 861 argument" or any other abusive tax shelter, plan, or arrangement that advises or encourages taxpayers to attempt to evade the assessment or collection of their correct federal taxes;
2. Engaging in any conduct subject to penalty under IRC § 6700, *i.e.*, making or furnishing, in connection with the organization or sale of an abusive shelter, plan, or arrangement, any statement they know or have reason to know is false or fraudulent as to any material matter;
3. Engaging in any conduct subject to penalty under IRC § 6701, *i.e.*, assisting others in the preparation of any tax returns, forms or any other documents to be used in connection with any material matter arising under the internal revenue laws and which they know will (if so used) result in the understatement of income tax liability;
4. Making false statements about the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by the reason of participating in such tax plans or arrangements;
5. Instructing or advising taxpayers to understate their federal tax liabilities; and
6. Engaging in any conduct that unlawfully interferes with the administration and enforcement of the internal revenue laws, including, but not limited to, any unlawful interference with the assessment and collection of federal taxes.

D. It is further ORDERED that Haraka shall contact by electronic mail, within 10 days

days of the date of this Order, at Haraka's expense:

1. all persons to whom he gave, sold, or distributed, or caused any other person to give, sell or distribute, any materials espousing or relating to the Section 861 argument, "third-party contracting" arrangements, or similar shelters, plans, or arrangements;

2. all persons for whom Haraka prepared or assisted in preparing any federal or state income tax returns or tax-related documents; and

3. all person s who contacted Haraka or Taxgate regarding the schemes marketed through the Taxgate website (in correspondence, verbally (including but not limited to telephonically), or through electronic means);

and shall provide each of those persons with a copy of this permanent injunction.

E. It is further **ORDERED** that Haraka s hall immediately, upon entry of this order, use best efforts to determine the mailing addresses and telephone numbers for all of the following:

1. all persons to whom he gave, sold, or distributed, or caused any other person to give, sell or distribute, any materials espousing or relating to the Section 861 argument, "third-party contracting" arrangements, or similar shelters, plans or arrangements;

2. all persons for whom Haraka prepared or assisted in preparing any federal or state income tax returns or tax-related documents; and

3. all persons who contacted Haraka or Taxgate regarding the schemes marketed through the Taxgate website (in correspondence, verbally (including but not

limited to telephonically), or through electronic means).

Haraka shall then mail to the United States by first class mail and via electronic mail within 30 days of the date of this order all information in his possession evidencing the mailing, e-mail addresses and telephone numbers of any of the persons described in this paragraph 'D.'

F. It is further **ORDERED** that Haraka shall contact, in writing by email and first class mail, within 120 days of the date of this Order, at Haraka's expense, all persons who sold, marketed or assisted in the sale of marketing of the Section 861 Argument, "third-party contracting" arrangements, or any other similar plan, arrangement, or scheme on behalf of Taxgate and provide those persons with a copy of the Court's order of permanent injunction.

G. It is further **ORDERED** that Haraka shall file a declaration under penalty of perjury stating that he has complied with the requirements set forth under paragraphs 'D,' 'E' and 'F' above, and including a list of all persons to whom Haraka has sent the required Order and memorandum. Haraka shall file this declaration within 31 days of the date of this Order.

H. It is further **ORDERED** that Haraka shall post this Court's Order of Permanent Injunction beginning at the top of the Taxgate website home page (www.taxgate.com) in 12-point type or larger within 10 days of the date of this Order, for a period of not less than one year. Haraka shall bear all expenses associated with posting the Court's order and maintaining the website during that period.

I. It is further **ORDERED** that Haraka shall, within 15 days of the date of this Order, produce to counsel for the United States Department of Justice, all records in his possession, custody, or control or to which he has access that identify:

(1) the persons to whom he or any of his associates, senior members, purported "tax

experts," representatives or other affiliates gave or sold or otherwise provided, directly or indirectly, any materials related to the Section 861 Argument, "third-party contracting" arrangements, and any other similar plan, arrangement, or scheme;

(2) any persons to whom he or any of his associates, senior members, purported "tax experts," representatives or other affiliates provided materials which may have been used to hinder or delay the assessment or collection of taxes;

(3) all persons who assisted in preparing or selling materials sent to Taxgate clients or potential clients;

(4) all individuals or entities for whom Haraka or his associates, senior members; purported "tax experts," representatives or other affiliates prepared or assisted in preparing any tax-related documents, including without limitation, claims for refund or tax returns,

(5) all persons who purchased or used any other tax shelter, plan, or arrangement in which Haraka has been involved;

(6) all persons who at any time have held themselves out as Taxgate "senior members," "associates" or "tax experts"; and

(7) all persons who sold, marketed or assisted in selling or marketing the Section 861 argument, or any other similar plan, arrangement or scheme in collaboration with or in connection with any affiliation with Taxgate.

J. It is further ORDERED that Haraka shall submit to a deposition upon oral examination, so that the United States can inquire regarding the nature and extent of Taxgate's schemes, the identity and location of all persons who at any time have organized or assisted in the organization of Taxgate, the identity and location of all persons who at any time have sold or assisted in the sale of any interest in any of Taxgate's shelters, plans and arrangements, the identity and location of all persons who at any time have prepared or assisted in the preparation of documents calculated to understate federal tax liabilities, the identity and location of all persons who at any time have assisted other persons who have used baseless arguments and materials to hinder or delay the assessment and collection of federal taxes, the identity and location of all persons who at any time have employed any of Taxgate's shelters, plans and arrangements, the identity and location of all persons who at any time have been Taxgate members, associates, senior members, representatives, agents or other affiliates, the identity and location of all persons who at any time have used Taxgate materials (including documents) which understate such persons' federal tax liabilities, and the identity and location of all persons who at any time have employed any of Taxgate's arguments and materials which may hinder or delay the assessment and collection of federal taxes. In so stating, however, Haraka may raise the Fifth Amendment's privilege against self-incrimination in response to the Government's questions without violating this order. If necessary, the Court will determine whether Haraka is permitted to avail himself of the privilege after a record has been made in deposition.

K. It is further ORDERED that the United States may, without further order of this Court, conduct discovery under the Federal Rules of Civil Procedure to monitor compliance with this injunction.

L. Further, the Court ORDERS that Haraka, and, in addition, his associates, senior members, purported "tax experts," representatives or other affiliates, and any other persons in active concert or participation with Haraka who receive actual notice of this Order, are enjoined from destroying, hiding, dissipating, or altering any documents, including electronic records, that relate in any way to this lawsuit, Taxgate, and/or Taxgate or Haraka's clients.

M. This Court shall retain jurisdiction over this action for the purpose of implementing and enforcing this Permanent Injunction.

The case is closed.

Approved by:

Christopher J. Christie
United States Attorney

Donald N. Dowie
Evan J. Davis
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Richard Haraka
338 Grove Street
Clifton, New Jersey

Martin S. Goldman, Esq.
Harkavy, Goldman, Goldman & Caprio
1140 Bloomfield Avenue, Suite 106
West Caldwell, NJ 07006-7126

It is so ORDERED.

Dated: 3/27/03

United States District Court Judge

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FILED

02 JUN 10 AM 10:04

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 8:02-CV-466-T-17MSS

DOUGLAS P. ROSILE, SR.,

Defendant.

_____/

Exhibit 39

ORDER

This cause is before the Court on the following:

Dkt. 12 Motion for Preliminary Injunction And Expedited Hearing
Dkt. 19 Motion to Assert Fifth Amendment Protections
Dkt. 21 Motion to Take Judicial Notice

Plaintiff seeks a preliminary injunction preventing Defendant Douglas P. Rosile, Sr. from:

1. Preparing federal tax returns or other documents to be filed with the IRS that understate taxpayers' liabilities using the Sec. 861 argument or other frivolous positions;

2. Failing to retain and produce to the Internal Revenue Service upon request, a list of all clients for whom her performed return-preparation services;

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3. Engaging in activity subject to penalty under IRC Sec. 6700, including organizing a plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to an material matter.

4. Engaging in activity subject to penalty under IRC Sec. 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that he knows will result in the understatement of tax liability;

5. Engaging in any other activity subject to penalty under IRC Secs. 6694, 6695, 6700, or 6701; and

6. Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

I. Standards for Preliminary Injunction

In order to obtain a preliminary injunction under 26 U.S.C. Sec. 7402, Plaintiff must show that the following four factors weigh in favor of granting a preliminary injunction against Defendant Douglas P. Rosile, Sr.:

1) there is a likelihood of irreparable injury to the United States as a result of the conduct complained of;

2) there is a likelihood of little or no harm to the counterclaim defendant if the temporary injunctive relief is granted;

3) there is a likelihood that the United States will prevail

on the merits;

4) an injunction will serve the public interest.

In order to obtain a preliminary injunction to 26 U.S.C. Secs. 7407 and 7408, Plaintiff must show that Defendant Rosile either: 1) engaged in conduct subject to penalty under IRC Secs. 6694 or 6695, or engaged in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws; or 2) Rosile engaged in conduct subject to penalty under Sec. 6700 or 6701; and 3) injunctive relief is appropriate to prevent the recurrence of such conduct.

II. Plaintiff's Argument

A. Irreparable Injury

Plaintiff argues that Defendant continues to prepare frivolous Sec. 861 returns, and refuses to turn over his client list or copies of clients' returns. Plaintiff argues that, as a result, it is impossible for the IRS to detect all improper Rosile-prepared returns and bogus refunds. Plaintiff argues that Defendant has prepared frivolous returns for at lease 174 taxpayers in 34 states. The processing of the frivolous returns consumes substantial resources of Plaintiff. Plaintiff argues that Defendant is harming his clients, the Government and all law-abiding taxpayers.

B. Likelihood of Prevailing on the Merits

Plaintiff argues that the Sec. 861 argument is completely without merit.

C. Threatened Injuries to Plaintiff Outweigh Injuries to Defendant

Plaintiff argues that the requested injunction will prevent Rosile from causing further irreparable injury to the Government and to future customers who will be liable for penalties if they file frivolous returns. Plaintiff requests an injunction to prevent Defendant from continuing to violate the law, not to prevent Defendant from preparing tax returns.

D. Public Interest

Plaintiff argues that the issuance of the injunction will stem the spread of the frivolous Sec. 861 argument, and taxpayers paying for worthless tax advice will be protected from the fraudulent scheme and associated tax penalties.

III. Defendant's response

Defendant denies that the Sec. 861 argument is frivolous (Dkt. 21). Defendant also asserts the Fifth Amendment as a defense (Dkt. 19). This is a civil proceeding, and the effect of the Defendant's assertion of the Fifth Amendment is that Defendant has brought forth nothing to weigh against Plaintiff's arguments.

IV. Discussion

Plaintiff has filed Exhibits and Affidavits in support of Plaintiff's request for preliminary injunction. The Court makes the following findings, based on the pleadings and supporting documents:

1. Defendant Rosile promoted and continues to promote the IRC Sec. 861 argument, a frivolous position that domestic income is not subject to the federal income tax.

2. Rosile knew or should have known that the Sec. 861 argument is frivolous because 1) the argument is absurd on its face; 2) judicial decisions dating back to 1993 have universally rejected the argument; and 3) the IRS issued numerous public documents describing the invalidity of the argument. Also, Rosile continued to advance the argument even after the IRS informed him that he was being investigated for promoting an abusive tax plan.

3. Rosile prepared tax returns on behalf of client that advocated the Sec. 861 argument. He charged fees for this service.

4. Rosile was asked by the IRS to provide a list of his clients or copies of returns he prepared, but he refused to comply with this request, in violation of IRC Sec. 6107.

5. Rosile admitted to preparing tax returns based on the Sec. 861 argument.

6. The Sec. 861 argument, if used, results in an understatement of liability for tax and requires the user to list fraudulent and false information concerning the amount of income earned.

7. Absent this injunction, Rosile will continue to promote the Sec. 861 argument.

8. If this injunction is not granted, the United States will suffer irreparable harm because Rosile, by refusing to turn over his client lists or copies of his clients' returns, makes it virtually impossible for the IRS ro catch all of the incoming, improperly prepared Rosile returns. Further, considerable government resources are spent reviewing and dealing with returns and correspondence advocating the frivolous Sec. 861 argument. This injunction will prevent the expenditure of some of those resources.

9. The Sec. 861 argument is frivolous and without merit. The Government, therefore, will likely prevail on the merits.

10. The injury to the United States caused by Rosile's conduct outweighs any injury an injunction might cause.

11. The public is served by granting this injunction. If a preliminary injunction is granted, it will help to stem the spread of the frivolous Sec. 861 argument. Rosile's clients will be protected from Rosile's fraudulent scheme and from the tax penalties resulting from participation in the frivolous scheme.

V. Conclusion

The Court finds that the United States has presented sufficient evidence to obtain a preliminary injunction, based on the factual findings listed above. Accordingly, it is

ORDERED that the Motion for Preliminary Injunction (Dkt. 12) **is granted**. Defendant Douglas P. Rosile, Sr. is enjoined from:

1. Preparing or helping to prepare federal tax returns (or other documents to be filed with the IRS) for others;

2. Failing to produce to the Internal Revenue Service either: 1) a list of all clients for whom he has performed return-preparation services, or 2) copies of all federal income tax returns he has prepared for other from September 17, 1998 to the entry date of this Order.

The Court also **ORDERS** Defendant Douglas P. Rosile, Sr. and his agents, servants, employees, attorneys and those persons in active concert or participation with him who receive actual notice of this Order are enjoined from:

3. Engaging in activity subject to penalty under IRC Sec. 6700, including organizing the Sec. 861 argument or any other plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to any material matter;

4. Engaging in activity subject to penalty under IRC Sec. 6701, including preparing and/or assisting in preparing a document related to a matter material to the internal revenue laws that includes a position, including the Sec. 861 argument, that he knows will result in the understatement of tax liability;

5. Engaging in any other activity subject to penalty under IRC Secs. 6694, 6695, 6700, or 6701; and

6. Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

Further, the Court **ORDERS** that Defendant Rosile, within ten days of the date of this Order, mail to counsel for the United States, at the address listed on the Complaint, either: 1) a complete list, including names, addresses, phone numbers and social security numbers or employer identification numbers) of all persons and entities for whom he has prepared, or assisted in preparing, federal tax returns or amended tax returns from September 17, 1998 to the entry date of this Order, or 2) complete copies of all federal tax returns or amended tax returns that he has prepared, or assisted in preparing, on behalf of any other person or entity from September 17, 1998 to the entry date of this Order.

As to Defendant's Motions (Dkts. 19, 21), the Court has noted the contents of the Motions in considering the Motion for Preliminary Injunction. To that limited extent, the Motions are **granted.**

DONE and **ORDERED** in Chambers, in Tampa, Florida on this 10th day of June, 2002 at 9:00 A. M.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

F I L E C O P Y

Date Printed: 06/10/2002

Notice sent to:

✓ Evan J. Davis, Esq.
U.S. Department of Justice, Tax Division
Civil Trial Section, Central Region
Washington, DC 20530

✓ Michael R. Pahl, Esq.
U.S. Department of Justice
Tax Division
Ben Franklin Station
P.O. Box 7238
✓ Washington, DC 20044

___ Douglas P. Rosile Sr.
494 E. Shade Dr.
Venice, FL 34293

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 00-4139

EDWARD LOUIS KOTMAIR,
Defendant-Appellant.

Exhibit 40

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CR-97-123-BO)

Submitted: March 30, 2001

Decided: April 19, 2001

Before NIEMEYER, TRAXLER, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Gregory J. Ramage, LAW OFFICE OF GREGORY RAMAGE, Raleigh, North Carolina, for Appellant. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, David J. Cortes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION

PER CURIAM:

Edward Louis Kotmair was charged with willful failure to file tax returns for the years 1990, 1991, and 1992, in violation of 26 U.S.C.A. § 7203 (West Supp. 2000). Kotmair stipulated that he did not file tax returns for those years and that he had income in excess of the exemption amount. The only issue at trial was whether Kotmair's failure to file was willful. Following his convictions and sentence, Kotmair appeals. We affirm.

Kotmair first argues that counsel was ineffective for failing to call his father as a defense witness and that the district court erred in denying his motion for a new trial on this basis. Because Kotmair failed to present argument supporting his challenge to the court's denial of his motion for a new trial, it is waived on appeal. See Fed. R. App. P. 28(a)(6); Edwards v. City of Goldsboro, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

As for Kotmair's challenge to counsel's failure to call his father as a witness, because the record on appeal does not conclusively demonstrate ineffective assistance of counsel, we do not now address this issue. See United States v. Richardson, 195 F.3d 192, 198 (4th Cir. 1999), cert. denied, 528 U.S. 1096 (2000). Rather, Kotmair may raise this claim in the district court in a 28 U.S.C.A.§ 2255 (West Supp. 2000) motion, if he so chooses.

Kotmair next challenges the sufficiency of the evidence to support his convictions. Kotmair stipulated that he did not file tax returns for 1990, 1991, and 1992, and that his income exceeded the exemption amounts. The only issue before the jury was whether Kotmair's failure to file was willful. See Cheek v. United States, 498 U.S. 192, 201-02 (1991). The trial evidence, viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942),

showed that Kotmair had large amounts of income for the years in question, he failed to keep business records, he conducted business largely on a cash basis, he attempted to hide income and assets by requiring payments in amounts less than $10,000, he belonged to a tax protest organization, namely Save a Patriot Fellowship, he was notified by the IRS of his duty to file a return, and his father--founder of Save a Patriot--went to jail for his failure to file. This evidence was sufficient for the jury to infer that Kotmair's failure to file was willful. See Spies v. United States, 317 U.S. 492, 499-500 (1943) (finding that inference of willfulness may arise from attempts to conceal income or assets, failure to keep books or records, and conducting business largely on cash basis); United States v. Turano, 802 F.2d 10, 12 (1st Cir. 1986) (inference of willfulness from tax protest activities); United States v. Shivers, 788 F.2d 1046, 1048 (5th Cir. 1986) (inference of willfulness from disregard of notices informing of duty to file); United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir. 1967) (allowing inference of willfulness from pattern of failure to file). We find that, taking the evidence in the light most favorable to the government, any rational juror could have found Kotmair guilty beyond a reasonable doubt. Glasser, 315 U.S. at 80; United States v. Saunders, 886 F.2d 56, 60 (4th Cir. 1989) (holding that in resolving sufficiency of evidence, appeals court does not weigh evidence or review credibility of witnesses).

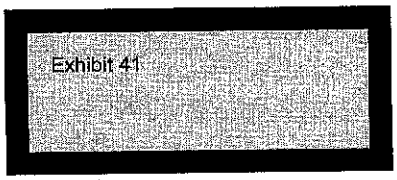
Kotmair next argues that the district court clearly erred in determining that the amount of tax loss exceeded $350,000. He asserts that applying the tax loss computation rules in U.S. Sentencing Guidelines Manual § 2T1.2(a) (1992), for the years 1990, 1991, and 1992, yields a tax loss of $166,889.21. In computing the tax loss, however, Kotmair failed to include all relevant conduct. The tax loss computation should include losses suffered by the federal and state governments in the years of conviction as well as other years in which the defendant's failure to file was "part of the same course of conduct or common scheme or plan," unless clearly unrelated. USSG § 2T1.2, comment. (n.3); see United States v. Bove, 155 F.3d 44, 47 (2d Cir. 1998); United States v. Powell, 124 F.3d 655, 663-65 (5th Cir. 1997). We find that the district court properly considered losses from years other than the years of conviction and losses to the states in computing the tax loss attributable to Kotmair, and therefore did not clearly err in adopting the recommendation in the presentence report that the

total tax loss exceeded $350,000. See United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989).

The final issue Kotmair raises is whether the district court clearly erred in enhancing Kotmair's offense level by two for the use of sophisticated means to impede the discovery of the nature or extent of his offense. "Sophisticated means" includes"conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case." USSG § 2T1.2, comment. (n.2). The district court applied the enhancement after noting that Kotmair engaged in structuring and laundering of his income to prevent the creation of currency transaction reports. Because Kotmair failed to offer any evidence to refute the findings in the presentence report, there was no clear error by the district court in adopting these findings. See United States v. Love, 134 F.3d 595, 606 (4th Cir. 1998); United States v. Terry, 916 F.2d 157, 162 (4th Cir. 1990).

In conclusion, we affirm Kotmair's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED



TO: Interested Media
FROM: H. E. "BUD" CUMMINS, United States Attorney
DATE: February 19, 2004
CONTACT: Bud Cummins, U.S. Attorney (501) 340-2600

LITTLE ROCK, AR--Bud Cummins, United States Attorney for the Eastern District of Arkansas, announced that George W. Frye, a resident of Ash Flat, Arkansas, pleaded guilty today to four counts of failing to file income tax returns with the Internal Revenue Service. According to the indictment, Frye earned over $500,000 from 1995 to 2002 which he failed to report to the Internal Revenue Service.

Frye was first a member of "Save-a-Patriot" and then became a member of the "Freedom & Privacy Committee," both anti-government and anti-income tax organizations. These groups and others wrongfully contend that filing of income taxes is voluntary and collection by the United States is unconstitutional, and often challenge the Internal Revenue Service's authority to administer the tax system. Such groups charge considerable fees and most often appeal to the gullible who believe they will never get caught. U.S. courts for decades have repeatedly rejected these arguments.

Sentencing is set for May 24, 2004 before United States District Judge William R. Wilson, Jr.. Frye faces a maximum sentence of not more than four years in prison and a fine of not more than $200,000 on the four counts. However, any sentence will be

determined by the United States District Court in accordance with the United States Sentencing Guidelines.

This investigation was conducted by IRS Criminal Investigation, Little Rock office.

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PRESS RELEASE

Office of the United States Attorney
Middle District of Florida

PAUL I. PEREZ
UNITED STATES ATTORNEY

400 North Tampa Street Suite 3200 Tampa, Florida 33602 813/274-6000 813/274-6300 (Fax)	300 North Hogan Street, Suite 700 Post Office Box 600 Jacksonville, Florida 32201 904/301-6300 904/301-6310 (Fax)	80 North Hughey Avenue, Room 201 Orlando, Florida 32801 407/648-7500 407/648-7643 (Fax)	2110 First Street, Suite 3-137 Fort Myers, Florida 33901 239/461-2200 239/461-2219 (fax)

Contact: Steve Cole ♦ Public Affairs Specialist ♦ 813/274-6352

For Immediate Release

February 25, 2003

Exhibit 42

JACKSONVILLE DENTIST PLEADS GUILTY TO FAILURE TO FILE TAX RETURN

United States Attorney Paul I. Perez announced that a Jacksonville dentist, Dr. Charles E. Schutt, age 66, pled guilty to a one count criminal information after three days of trial in the U.S. District Court.

Dr. Schutt pled guilty to failing to file a 1994 federal income tax return after receiving $121,829 in gross income from various dental insurance companies during that year. At trial, witnesses testified that Dr. Schutt was a long time member and local representative of a national anti-federal income tax organization known as the Save-A-Patriot of Westminster, Maryland.

Failure of to file a federal income tax return is punishable by a maximum term of imprisonment of one year and up to $100,000 in criminal fines, or both imprisonment and fines. Schutt is scheduled to be sentenced on May 8, 2003.

unincorporated First Amendment association.
Q: And can I give you — I'm sorry. Can you hand that one — what is marked as Exhibit 1. And this is just an attachment to the Save-A-Patriot Fellowship handbook that was supplied during discovery in this case from you.
Are you responsible for —
A: Wait a minute.
Okay.
Q: Are you responsible for the contents of what is written here?
A: What, this here?
Q: Yes.
A: No. I didn't write that.
Q: Did you edit it?
A: No.
Q: Did you review it before it was released?
A: I don't — sometimes I review them and sometimes I don't, but I didn't write that one.
Q: So who would have reviewed this?

A: Well, if it went in the newsletter, it would just be the person who wrote the newsletter.
Q: I'm sorry. It's not in a newsletter.
A: What is this from?
Q: This is in the handbook.
A: And the handbook was written by a man by the name of Tom Brissey.
Q: And he works for you?
A: No. He's just a member. He's a fellowship member.
Fellowship members do different things.
Q: And some of the fellowship members write the materials in the fellowship handbook?
A: Most of it was written by Tom Brissey and another guy by the name of Gordon Phillips.
Q: And after it was written, did you review it?
A: I read it.
Q: And edited it?
Did you edit it?

A: No, I didn't edit it.
Q: You didn't edit it.
A: No, I didn't edit it.
Q: Who organized the structure of Save-A-Patriot?
A: The fellowship? Oh, I proposed that with the membership agreement, and then people joined according to the agreement.
Q: And did you — when you first founded the fellowship, you recruited the staff that works at the fellowship?
A: Did I what?
Q: Recruit the staff.
A: No. It just evolved. At first it was just myself.
Q: And then you got others to join?
A: Then people just come there and volunteered to do different things, and it evolved that way.
Q: But that was out of your request?
A: I'm still talking as the fiduciary; right?

Exhibit 43A

Q: Yes.
A: No, that was not my request. People just come forward. We don't even go out and sell anything. They come to us.
Q: Well, out of word of mouth or however the fellowship was —
A: People. Yeah. People talk, word of mouth.
In other words, when we mailed out the — I started out with a mailing list and I mailed out the program agreement. Okay? And then people responded to the program agreement. And they wanted to join this fellowship.
Q: So you originally drafted the program agreement —
A: Yes.
Q: — and all of the original materials from the fellowship as it began.
A: Well, that's the only material that they join with.
Q: The membership agreement.
A: The membership agreement, right.

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Q: And you decided on where the fellowship was going to be located?
A: Well, it was natural that it was located in my house at the time.
Q: And then it moved into the current location.
A: Right.
Q: And you decided on the building?
A: No.
Q: For the current location?
A: No. One of our members had a little business there, and he gave me a room there, and then finally we just spread from that room.
Q: But you ultimately decided on where it was going to be located, that your members suggested this and then you moved the fellowship to that location?
A: Yeah.
Q: And I noticed in the response that Save-A-Patriot gave to the discovery requests served by the United States that you were the only person with a supervisory role in

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Save-A-Patriot. Is that right?
A: Supervisory role?
Q: That's how it was responded to, supervisory or authoritative role, that you were the only person —
A: Authoritative role in what sense? In overseeing to make sure that the assessments are mailed out?
Q: No. That's not what I mean. In the response to the United States' discovery requests, that's what it says, that you're the only person with supervisory —
A: But I'm trying to clarify what the supervisory role is. There's only one supervisory role there, and that's just to make sure that the — that we have a valid claim, and then the assessments are mailed out to the members. That's the supervisory role. Yes.
Q: And it isn't — you don't manage the staff?
A: Manage the staff? I don't manage the paralegals. No.

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Q: The staff in general.
A: The staff in general? They — the receptionist and the mail, yes, the mail that comes in to make sure the mail that comes in is handled properly.
Q: And independent representatives that you have, who decides —
A: The independent representatives just join to be an independent representative.
Q: And who decides that they become an independent representative?
A: They take a test.
Q: And then who decides that they pass the test to become a independent representative?
A: The national rep, not me.
Q: So it's the national rep just decides that their score was good enough so that they can become —
A: An independent rep. And then they sign the agreement.
Q: To become an independent rep?

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A: Yes. Saying that they won't do certain things, such as misrepresent the law or things like that.
Q: And who ultimately started the test or who wrote the test to become an independent representative?
A: That was the national rep, Gordon Phillips. He's no longer the national rep.
Q: And the independent representative's role is to recruit more members?
A: Yes.
Q: And spread word about the organization.
A: Well, of course. The purpose of the organization is to become the fellowship.
Q: Right.
A: Right.
Q: I'm going to give you what's a copy of what I've marked as Exhibit 2.
Can I ask you to look at that, what's marked as Plaintiff's Exhibit 2?

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A: Okay. Yes.
Q: Would your answers be the same for this, that you did not look at the revised copy of this or edit it in any way?
A: I read it. I did not edit it, no.
Q: And you didn't write any of the materials contained in this?
A: I didn't write any of this. I may have used an article in here, but I don't even think I wrote the article. This was all written by the independent reps.
Q: But this is based on the materials that you started writing before the fellowship grew.
A: Based on the materials? I don't follow you.
Q: Did anything that you've written as far as the application of the tax laws or any articles —
A: I wrote the original application and I wrote some articles in the newsletter.
Q: And that information is now contained

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in the fellowship handbook?
A: How — I guess it's in the fellowship handbook, yes, because we always send out an application. I originated the original application. A fellow up in — as far as the Save-A-Patriot Fellowship is concerned.
The Patriot Defense Fellowship was started by a man by the name of Rock Smith up in Alaska, and then he couldn't keep it up and he asked if I would take it over. And I put it to the membership, and they all voted to take it over and make it part of the Save-A-Patriot Fellowship.
So I didn't even write that one except for some editing that showed that they had to be members of the fellowship before they can become members of that.
Q: But you decided that — I'm sorry. You and the fellowship decided to take over the Patriot Defense Fellowship?
A: Yeah. We put it out, and they wrote back and — the majority of the members wrote

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back and said yes.
Q: So you asked the members before adopting the Patriot Defense Fellowship?
A: Yep.
Q: I'm going to ask you to look at what's marked as Exhibit 3.
A: All right.
Q: This is again part of the membership handbook.
A: Right.
Q: And you're saying that you've reviewed this material.
A: I read it. Right.
Q: And you're aware of all the information that's contained in here.
A: I imagine over time. I — I can't sit here and say I memorized it verbatim. There's no way I could say that.
Q: But you ultimately approve —
A: There's 31 pages there. It was — it was approved by the fellowship, by the independent reps.

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Q: And you.
A: Well, of course. I'm part of the fellowship. But it wasn't by me just myself.
Q: No. I understand that.
A: Right.
Q: It was approved by you and the fellowship.
A: And members of the fellowship. Right. Other members of the fellowship I should say.
Q: And this is a correct statement that SAPF is a national association of individuals who are aware of the various government agencies and that —
A: Yeah, we're aware of government agencies.
Q: I'm sorry. I didn't finish the question.
A: I'm sorry. I thought you did.
Q: And that part of the knowledge that you gain —
A: Where are you at?

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Q: In the third — fourth — excuse me — fourth paragraph down.
What you're saying is the government employees are inadequately trained in the law?
A: Well, that's been our experience. In other words, I went to some hearings representing some members for when they had an assessment, deficiency, and I had experience where I opened up the law pertaining to deficiencies and the hearing officers never saw it before.
And I've experienced that stuff clear on through when we write to them. They don't seem to know the law.
Q: And let me ask —
A: They have no knowledge of it, so that there is why we wrote that, because we — that was through experience.
Q: The statement that you're making, though, you may limit it to those things, but let me ask you if you would say it applies to not just deficiency proceedings but deficiency

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if there was a proposed assessment, a request for a return — let me finish — notice of lien or a levy or your right to request a collection due process hearing, in all those circumstances you've attended meetings.
A: I've attended meetings on assessments.
Q: And that's it?
A: Yeah. Just assessments. And as far as whatever you're talking about levies, 6331 —
Q: I'm not asking you to look at the code section. I'm just asking —
A: I'm just going to show you that what we're doing is following the code section, and evidently, if they don't come back and follow it along with us, as long as the reg is in the manual, then we can come to a conclusion like that, because the law speaks for itself. It's written in English.
Q: I'm only asking what meetings you attend at the IRS.
You've attended —

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A: I told you I've attended meetings representing people in assessment hearings.
Q: For proposed deficiencies or deficiencies?
A: Right. Deficiencies, right. Uh-huh, at a hearing for a deficiency. And that —
Q: And collection due process hearings?
A: Right — no. I guess you could call them that. I forget. It's been so long ago.
Q: So you have or you may have attended a meeting —
A: Well, I have. I have. Several.
Q: For a collection due process hearing.
A: It was a hearing on the assessment, right, and we would go there and I would show them — I forget what the exact title of the hearing was. But we would go there and show them —
Q: That's okay. You don't have to tell me the section. I understand what you're saying, that you went there and actually —
A: Well, no. I'd like it to be in the

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record.
You know, I would show them like 6212 here, where it says very clearly that in general — well, it says — wait a minute.
I got 6211, but that would be just as pertinent.
Here's 12: In general, if the secretary determines that there is a deficiency in respect of any tax imposed by subtitle A, subtitle B or chapters 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.
Q: Okay.
A: Now, the only ones that we did petition for abatement were the ones in C, subtitle C, because subtitle C is not authorized for them to send out a deficiency.
So we did abatements under 6404(a)(3). Evidently it was not authorized and it must have been sent in error. And that's what our letters say, particularly that one you sent to

Page 21

me as an exhibit. That's what it's talking about.
Q: Okay.
A: Right?
So evidently all we're doing is following the law and we're asking them to do the same thing.
Q: And you're saying that the IRS employees individually misapply the law?
A: I'm saying they misapply that, because if they send out a deficiency which falls under the tax in subtitle C and that's not authorized within the law, then they're misapplying the law.
I mean, it don't take a rocket scientist to figure that one out, does it?
And under 6404(a)(3) — all right — it says: 6404. General rule. The secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof which, under (3) — 3 — in such assessment — no. Wait a minute.

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(Pause in the proceedings.)
Here it is. It's been a while since I did this.
Oh.
(Pause in the proceedings.)
Oh, here it is. (A)(3). I said (e). It's (a)(3).
It's 6404(a)(3), which says "is erroneously or illegally assessed."
Evidently it's erroneously assessed if it's not authorized by the code.
So I would go to the meetings to show the law. Anything wrong with that?
Q: No. I was just asking you —
A: Okay. If there's not anything wrong with it and I don't think anything illegal about it, using the law to deal with the IRS — do you?
Q: My only question was what meetings you attended, and that was it.
A: Well, that's...
Q: But it would seem that the IRS

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employees are very consistently rejecting the things that you —
A: I can't help what they reject, Mr. Newman. All I can do is show them the law.
And these people are giving me power of attorney to do this, ask me to show them the law, and that's what I do, and I don't think that's illegal.
Q: That isn't what I asked.
A: Well, I understand that, but that's my answer.
Q: But in all of these meetings that you've attended you have presented this argument and —
A: Not the argument. I showed them the law.
Q: Please let me finish the question —
and pretty much uniformly the IRS employees have not been receptive to this argument.
A: No. Everyone that I went to and showed them the law, we never heard any more from them about it. The only ones that they continue on

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with is the ones when we write to them and they don't answer us. We never get an answer from the IRS.
Q: You don't or the taxpayer that you're representing doesn't get an answer?
A: Well, I would get it as his representative.
Q: I'm sorry. You would get what?
A: I would get the answer. Don't you think? Or even they don't get an answer.
Q: Why would you get an answer?
A: I said I would. I would surely get an answer because right here the mission of the IRS — are you familiar with the mission of the IRS?
Q: Yes. You don't need to show me that.
A: Well, I can read it to you.
Q: That's fine.
A: They're supposed to answer our questions or show us the law where we're wrong, and they have never done that.
Q: I understand that.

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A: Oh, they have never done — they have never lived up to their mission in the manual.
Q: Why would you assume that the IRS representative or appeals officer would send you notice of any adverse determination?
A: If I'm representing them, don't you think that he would do that? Shouldn't he do that? If I was representing the person, had power of attorney, don't you think it should come back to me?
Q: And what if they didn't accept your power of attorney as being valid?
Do you think that they aren't accepting —
A: Well, that's an argument. Hold on.
Q: Please let me finish the questions.
A: I know where you're going and I can answer it.
Q: I just want to make sure just so that she's —
A: Oh, I understand it.
Q: — one voice at a time. Let me finish

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the question, and then you answer it.
A: Go ahead.
Q: I asked the question. It was just that, don't you think that they are rejecting some of these powers of attorney and that you are not getting —
A: I understand that.
Now — do you want me to answer it now?
Q: Yes.
A: Okay. I first started representing with a power of attorney from our members. Philadelphia sent me a representative number. They told me to use that number, which I did. They said you can only use one, so I sent the one back to Philadelphia and kept the one from Ogden. Okay?
So I represented people with that number, oh, a dozen times maybe. Then I get a letter saying that they sent it to me in error.
So then I said, well, according to the rules, you're supposed to get a hearing.

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So I told — they said that I didn't have the right to represent them at all. Then I showed them in the circular where it said that an officer of the organization can represent the organization.
Well, in a fellowship, the members are the organization, and I'm an officer of that organization and I have a right to represent them.
So that's where it stands. I never got a hearing. I never got due process. That's the end of it. It just lays there.
Q: I think what you're telling me is that your right to practice or that your CAF — it's C-A-F — number was revoked?
A: No. It wasn't revoked. In order for it to be revoked they'd have to charge me with something and give me a hearing. They never did. I'm still waiting for my due process. It isn't — it never came.
Q: They didn't send you a letter stating you're —

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A: They never gave me a hearing. I went back to them — hold on. They're supposed to give me a hearing. That's not a hearing. I'm supposed to have due process, and they didn't give it to me.
Q: They —
A: A letter is not a hearing, because I have a right to be heard and give my arguments. That there was no hearing.
Q: But you received a letter stating that —
A: I received a letter saying that it was issued in error.
Q: Mr. Kotmair, please let me finish the question before you answer.
You received a letter stating that it was — that you received two numbers in error, but you never —
A: No, no, no. I only used the one.
Q: And then you received the letter saying the other one was revoked.
A: No. They said it was issued in error.

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Q: Some years ago —
A: Some years ago they said it was issued in error. Then I told them that I had a right to represent these people, and we argued about that through the mail, but they never — they never gave me a hearing.
Q: So you do understand that the IRS may not send you any of this information —
A: They may not, but the thing of it is they never gave me a hearing as far as that number was concerned.
Q: You have to let me finish asking the question before you answer.
A: Go ahead.
Q: And we cannot both speak at the same time.
A: All right. Go ahead.
Q: You do understand that the IRS may not be sending you these letters because your representative number is not valid.
A: That's a possibility. But I still have the right to represent these people and power of

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attorney as the circular says.
Q: I understand that. I understand exactly —
A: All right. So — and you still have to — should — have to accept that according to their own circular. The number I was told only kept track of the —
Q: The organization.
A: And the mail.
In other words, it was a number to track everything that was coming in so it could be all put in one file folder. I was told that was the purpose of the number.
Q: Okay. And I'm going to refer just to the second page of what I marked as Exhibit 3.
A: All right.
Q: And what you have described here or what is described in the handbook is that one of the membership assistance programs that began —
A: Which page are you on?
Q: 5.
A: Okay. Where at on 5?

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Q: This insurance-like coverage that offers repayments for civil and criminal violation —
A: No, no. We don't offer repayments.
Q: The fellowship does.
A: No.
Q: Collectively?
A: No. Well, the fellowship pays one another, but we don't have any fund. We don't collect anything.
Q: That wasn't my question. The fellowship does, the individual members —
A: The individual members do.
Q: — repay a member —
A: One another.
Q: You have to let me finish.
A: Go ahead.
Q: The individual members will send payments to the fellowship and —
A: No. No.
Q: That is not what's written inside the

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handbook?
A: No. No. They send them to one another, not to the fellowship. The fellowship always doesn't receive any payments whatsoever.
Q: The fellowship then, what, it distributes —
A: The fellowship sends out —
Q: You have to let me ask the question.
A: I thought you were asking me. Go ahead.
Q: The fellowship distributes the envelopes then in order to send the money to the member or the money must go through the fellowship in some way.
A: The fellowship sends out with the assessment paper in the envelope that they use to send to the member. In fact, the envelope has our address on it, which they send along, and the member sends us back proof that they lived up to their obligation in that envelope that comes back to us. The money don't come back to us.

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Q: It goes to the individual member —
A: The individual member receives the small envelope and uses it to send back to us proof that the other member paid his obligation.
Q: And who was the one that instituted the first insurance-like coverage for civil and criminal losses?
A: I did.
In other words, I set the whole thing up where they paid one another, that we didn't receive any money at all.
Q: And this is only available to associate members or it's available to associate and full members?
A: What do you mean?
Q: The insurance coverage.
A: It's available to every member who has a valid claim.
Q: So it's available to any member, associate and full?
A: Who has a valid claim. It's available

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to all members who have valid claims.
Q: Who determines if the claim is valid?
A: Well, we just determine that through the — whether they live up to the program agreement.
Q: Who determines if the claim is valid?
A: They — the girl that — the receptionist at the office goes down the program agreement, and if they — if they have lived up to that, then — then she says it's a valid agreement.
Q: Now, if someone sends in a claim for a loss, who determines that it's a valid claim and they can be compensated?
A: That's what I just told you. All they have to have is that they did what the agreement said, and if they did that, then we issue the claim, we issue the — mail the claim out.
Q: And the agreement says that they have to —
A: The agreement says that they have to

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give a defense. That's what "assistance" means, it means defend themselves. They just don't lay down and roll over and expect us to send out an assessment. They have to defend themselves according to the law, which they do.
Everything we do is according to the law, the regs, the manual, the procedure. That's all that means. It means nothing else.
Q: And what it actually —
A: Legal defense using the law.
Q: What it actually says is that members must prove that they use every court and delay proceeding and delay tactic as possible?
A: Yeah. Using all of their appeal procedure given to them by Congress and the regulations written by the agency.
Q: But this is what is actually written —
A: But that's what it means. I'm telling you what it means.
Q: This is — I'm just reading to you —
A: I understand what you're reading, and I'm explaining to you what it means. I'm giving

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you the definition of it.
Q: Which is that the members must prove that they used every court proceeding —
A: That they used all the regs in the manual.
Q: And delay tactics?
A: Well, that's — when — you say that was a delay tactic, but it doesn't mean it in that sense. It means — the reason for that is is just what I've told you. We can't expect them to get an assessment and make a claim. We expect them to do what they're supposed to do. That's all it means.
Is that a recorder (indicating)?
Q: It's my phone. I was just seeing what time it is.
A: Okay. Fine. I'm just checking with you.
Q: And the second type of support that's offered other than the insurance coverage is the work that the National Workers Rights Committee does and the paralegal service; is that right?

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A: The paralegal service does these court pleadings.
Q: The court pleadings, which include what?
A: Any pleading that they would go to court with, in other words, third-party summonses or anything like that. Any service that the members need using a paralegal. They even work for lawyers.
In other words, they even do research for lawyers —
Q: What kind of —
A: — who are representing our members.
Q: What kind of work would they do in a third-party summons?
A: They would draft the summons for the member.
Q: A summons for the member?
A: No, not a summons. But a motion for the member.
Q: A motion to quash?
A: Yeah. Whatever.

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Q: So the paralegals would draft the motion to quash for the member to use to quash the third-party summons?
A: Is that illegal?
Q: That wasn't my question. I was just asking —
A: Well, I'm asking you. Of course it's not illegal. Of course it's a paralegal thing.
Q: All I'm asking is what they do.
A: I'm telling you, they draft pleadings for court.
Q: Do they draft tax court petitions?
A: No.
Q: Motions in district court?
A: We don't do any — we don't do anything dealing with questioning figures. When you go to tax court, you're arguing figures. We don't do anything involving figures.
We don't do any tax court petitions, no.
Q: But your members have petitioned the

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tax court?
A: I guess they have, but they do that. We don't do anything with that.
Q: But you don't assist them with any kind of petition to the tax court?
A: No. No tax court at all.
Q: In your materials you say that the paralegals assist in drafting bankruptcy petitions, but you're saying —
A: No. We did bankruptcy — we had a member who was a paralegal there up until maybe around '93 or '94 and he was an expert at bankruptcy. He did bankruptcy. When he left, we haven't done bankruptcy since then.
Q: Okay. So you just don't do that anymore?
A: No. If members call in and ask us about bankruptcy, we tell them that this person does it or that person does it, but we don't do it.
Q: And the other kind of work is the power of attorney work that you already

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described.
A: Yeah.
Q: And for that work, is that — does it mainly consist of the letters that you send to the IRS —
A: No. What it is mainly is questioning the assessment procedure that the IRS is using and moving for an abatement under 60 because they're subtitle C taxes which are not covered by the law. That's all it is.
And then the Privacy Act requests are asking for assessment documents that the IRS is supposed to have, it's supposed to use, that we can investigate their assessment, period. That's all it is.
Q: These letters that you sent that are responsive to requests for tax returns from taxpayers, notices of deficiency, proposed assessments, notices of intent to levy, notices of intent to —
A: We go back with legal arguments. Yes.
Q: And your position in all of them, even

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though the letters vary, then is the assessment is not correct?

A: Not if they ask them about a return. We ask them where the OMB number is for this request.

Q: With the exception of the return then, your position is just that the assessment is not correct, therefore the levies —

A: No. No. Our position is that they have no right to make the assessment for that particular tax because — it isn't that the numbers are incorrect. It's that there was no authority for it in the first place under 6212.

In other words, the law — I just read you the law. It clearly shows that.

Q: And this is because the income is U.S. sourced?

A: No. It has nothing to do with that. It has to do with they cannot assess a deficiency under 6212. The law doesn't allow it.

I read it to you. Do you want it

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again?

Q: No, no, I don't want it again.

A: Let me read it again. Maybe you didn't understand it.

Q: I don't want to understand it.

A: Evidently you didn't understand it if you ask me that question.

Q: I don't need to understand it, Mr. Kotmair.

A: Well, listen, it says —

Q: I'm just trying —

A: — if the secretary determines that there is a deficiency in respect of any tax imposed under subtitle A or B or chapters 41, 42, 43 or 44, which are in D, not C, then he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

What they send us is from subtitle C, and it's not authorized by law. And we notified them of that. Is that a crime?

Is that a crime, Mr. Newman? You can't

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answer that, can you? Is that a crime?

Q: Whether or not it's a crime to send letters?

A: No. Whether it's a crime to ask them to obey the law.

Q: Let me ask the questions.

A: Right.

Q: It's your position then that —

A: It's not my position. I'm reading the law.

Q: — it's because the assessment is based on wages?

A: It's because that's subtitle C, employment tax.

Q: Okay.

A: Here (indicating). Now, let's look at the definition of "employment tax."

Do you want to see that?

Q: And that the assessments aren't valid because they're assessed on wage income and employment taxes?

A: It's because they're erroneously sent

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because they didn't come under the law. I didn't say they're not valid. I said they're erroneously sent.

Let me go back here, and we'll find — all right. The definition of employment, employment tax — "employment" means generally any service covered by Social Security performed by an employee for his or her employer. That's subtitle C.

Q: Okay. That's fine.

A: All right. Well, that's the definition if you want it. It's right out of your own regs. That's all we use as the law. Evidently they don't know the law.

Evidently they don't know the law because this man is sitting over here and he's not saying a word about what I'm reading, and you can't contradict what I'm reading (indicating).

So evidently it's the law.

Q: The only purpose is to ask questions today and it's for me to ask the questions.

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A: Go ahead.
Q: Who decided that both civil and criminal coverage would be covered in the insurance programs that you offered?
A: Who decided that — if somebody is incarcerated?
Q: Yes.
A: That was the agreement that I wrote originally.
Q: For civil and criminal coverage?
A: It wasn't decided. It was proposed, not decided.
Q: And you decided that it was —
A: No. I proposed it, and the rest of them agreed to it. It wasn't decided.
When I sent out that agreement, it was a proposal. They either accepted or rejected it.
Q: And how do you send that information out to the fellowship members?
A: By mail. The agreement is sent out by mail.

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Q: Can you look at what is marked as Plaintiff's Exhibit 4.
Would it be accurate to say that your ideal patriot member is someone that individually comes to his own conclusion that he's not obligated to file a tax return?
A: We don't tell anybody to file or not file.
Q: That's not what I said.
A: I didn't say anybody is ideal. I don't have any opinion about what's ideal and what isn't ideal.
Q: That your ideal member independently comes to his own conclusion through reading whatever, whether your materials or not, that he is not obligated to file a tax return. I didn't ask you if you told him not to file.
A: No. I understand. Now, to answer that, I have no ideal member.
Q: Okay.
A: I have no ideal member. As long as a

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member is in good standing and pays his assessments, I have no ideal member.
Q: So regardless of whether the member files a tax return or not, it doesn't matter?
A: It's not my business. It's his business. It's his personal business.
We have members who file returns and we have members who don't file returns. That's their business. We have nothing to do with that.
Q: And whether the member files a return or not, you are willing to offer assistance — and by "you" I mean the fellowship — should there be any kind of controversy with the IRS.
A: What does that — I see no relevance as to why we should turn anybody down whether they file a return or not.
Q: I was just asking —
A: Well, I'm telling you I don't see any relevance of that there, if they're a member and they ask for assistance and we give them assistance by citing the law to whomever is

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questioning them.
Q: Well, for instance, if a member filed a return containing all zeros, would you assist that member —
A: No. We don't — no.
Q: You would not assist that member —
A: No.
Q: — in any proceeding, even if it was an administrative one — let me finish the question —
A: Well, in an administrative one we might assist them in telling the — we have a regular letter we send out telling the IRS that it was sent in error, that I was misled.
Q: That you were misled?
A: Telling the member — we have a letter that helps the member by telling the IRS he was misled in doing such a thing. We don't — we don't tell members or even — we can't help a member that does that. We can't help a member that files an exempt W-4. We have nothing to do with those things.

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Q: And you haven't assisted members to file —
A: No. We don't do any of that. Nothing to do with W-4s. We don't assist members with any of that.
Q: That wasn't the question that I was going to ask.
A: But — go ahead.
Q: You haven't helped a member that filed a zero return?
A: No.
Q: You haven't ever?
A: Not that I'm — not to my knowledge, no. Not in any way, no.
Q: Not in any tax —
A: I don't know how you can help a member who filed a zero return.
Q: Well, sending letters requesting that the assessment be abated is one way.
A: Well, that — the assessment would be under subtitle C. Then we would cite the law. But that would be it. The return would have

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no — nothing to do with whether or not it was under subtitle C.
The only reason for abatement is because it was sent being from subtitle C, which there's no authority for. That's it. The return we wouldn't — probably wouldn't even have knowledge that he did a — such a return. I don't know.
Q: So you may assist a member that filed a zero return and just requesting an abatement and sending a letter that —
A: Because the return has no relationship to the reason for the abatement.
Q: Okay.
A: Right. It would have nothing to do with that.
Q: And getting to these letters, are you responsible for the content of all of the letters that you have sent to the IRS under your power of attorney?
A: I guess I am under my power of attorney.

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Q: And have you reviewed them all?
A: I understand that — I made the first letters, and then the caseworkers who know the law and who I trust follow the same procedure.
Q: But the letters haven't changed so much that they would need to change any of the law in them but —
A: If the law doesn't change, the letters don't change.
Q: Right. But how much have the letters changed since you originally drafted them?
A: Well, just any minor change. I think the only change that I know of would be 6330 for this appeal there for a hearing.
Q: Right.
A: That's the only thing I would know.
Q: But you —
A: And I'm really not up that much on that, so —
Q: But you drafted the original letter for request for a due process hearing?

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A: Well, request for a due process hearing, yes.
Q: So all of these letters originated from something that you wrote, and they may have been adapted to if the law had changed, but the only —
A: Yeah. Slight adaptions, yes.
Q: But the letters are almost invariably the same in that —
A: Of course because we're handling — the law is the same. The law hasn't changed.
In other words, we should stop and if the law is not changed? I don't understand.
Q: I'm just asking you about the letters.
A: Okay. Go ahead.
Q: I'm not asking you about whether or not the law changed.
A: Go ahead.
Q: And it seems like these letters are sent out in very large numbers because —
A: Whenever — whenever a member calls in and says, We need help, will you help us, that's

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when they're sent out.
Q: And then you send a letter out.
A: Right. It's just the members, whoever wants us to do that, we do that. But they request it.
Q: And the letters — I know this is stated differently in the handbook, but they range from — it ranges from $38 to about $48 —
A: No. It's 40 and 5 for certified mail.
Q: And that's just for the letters.
A: Yeah.
Q: And the other court filings like the motions —
A: Well, the paralegals of course, you being a lawyer, you understand that that couldn't be 40 bucks. You don't know how much research has got to go in a pleading. You have to go to the law library, look up the case law.
Q: Now you're speaking about pleadings and briefs.
A: Right.
Q: And it could cost much, much more?

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A: Okay. It would cost more than 40 bucks for a letter. Of course.
Q: But you don't know how much?
A: Of course. How would you know. Of course I don't charge for them.
Q: Who does charge?
A: Huh?
Q: Who charges?
A: Whomever. Whoever writes the thing.
Q: The paralegal charges?
A: Well, yeah. The paralegal would have to charge for them.
Q: So the paralegal charges for either the brief or motion or whatever is filed in the court, and then they receive the payment from the member?
A: I would say.
Q: How often —
A: They would give us 25 percent for using the office and our equipment and the paper and what have you, which covers that.
Q: So however much they charge, and then

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the fellowship is given some part of that of 25 percent?
A: Just for the use of the office and the equipment and the time.
Q: Right. I understand.
A: Right. That's it.
Q: Who would be responsible for changing the letters that are sent to the IRS, the ones that you're saying are —
A: Well, that's casework. That's the $40 letter.
Q: Right.
A: Well, if there is a change, then the caseworkers would bring it to me, and we would go over it.
Q: The only thing that really changes in there is the person's name?
A: Obviously.
Q: And where it's being sent?
A: Right.
Q: So who would do that?
A: Change the person's — the caseworker.

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Q: And how are they paid?
A: They're paid per letter.
Q: From the member.
A: Yeah.
Q: And then the fellowship receives the entire amount, this is not individually being paid to the caseworker; right?
A: Well, no. No. The caseworker would get that, and the fellowship would get a portion of it for the expenses.
Q: So of these thousands of letters that are being sent, the caseworker retains some of the payment and the fellowship retains the remaining portion of whatever amount.
A: Is this relevant, George?
MR. HARP: He can ask.
THE WITNESS: But is it relevant? I don't think it's relevant.
I don't think it's relevant at all because this is a far cry from being an abusive tax shelter. It has nothing to do with that. It's not relevant.

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BY MR. NEWMAN:
Q: I'll move on to something else.
A: Go ahead.
Q: I ask you to look at what I marked as Exhibit 5.
The organizational chart, when this was first conceived, did you also design this?
A: No.
Q: Someone else designed this.
A: Yeah.
Q: Who would that be?
A: A fellow by the name of Scott Huckleberry.
Q: So he decided to put membership services as some kind of supervisory part?
A: Yeah, he did this. It's nothing but a chart to put in the handbook.
Q: I don't mean the chart. I mean the actual organization of the fellowship.
Who decided that the membership services will be composed of telephone consultation, case development, paralegal

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services?
A: Well, what I'm telling you, this never materialized.
Q: This isn't —
A: We never grew that big.
Q: But you do have these different sections, the —
A: We have caseworkers, paralegals, a mail clerk and a receptionist.
Q: And there's employees in the national workers rights section?
A: No.
Q: Or that's not a separate distinction?
A: No.
Q: Everybody is commingled; is that right? There's not really a separate section?
A: No. No, there's not a separate section.
Q: So everyone in the fellowship essentially does membership services work, national workers rights work or administrative work, and I don't mean —

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A: No. No. The receptionist obviously doesn't do anything like that but answer the phone.
Q: There really isn't separate departments, is what I mean. There are paralegals, but they're not a separate department —
A: I don't see where this is relevant to being an abusive tax shelter.
Q: I'm just trying to —
A: No, no. That's it. I'm not going to go on with that. That's it. Talk about abusive tax shelters.
Q: In Exhibit 6 you refer to yourself as the founder and fiduciary.
Exactly what is your role as fiduciary? Is that —
A: I answered that before.
Q: As fiduciary?
A: Yeah. I answered that when we first started out. It's asked and answered.
Q: Exactly what you are as a fiduciary?

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A: I've told you that before.
Q: What your responsibilities are as fiduciary.
A: Yeah. I've told you that.
Q: You did?
A: Yes.
Q: I don't —
A: It was asked and answered. I think it was.
Q: On the next page of Exhibit 6, the fellowship is described as having a print shop, copy room, paralegal room, casework area and video production facility, and this is to make all of the different publications and videos and books that you print?
A: Yes.
Q: And these are all sold but not sold online I understand.
A: Not sold online.
Q: That they're sold —
A: In other words, if somebody wants one, they order it from the office.

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Q: And that's it. It's just not sold through the Web site, but it's advertised on your Web site.
A: It's — it's — yeah. I guess you could call it advertised. It's on the Web site as if you want this, you call the office. But it's not sold through the Web site, no. We don't sell anything over the Internet.
Q: How often do the paralegals prepare motions?
A: I don't know. I can't answer that.
Q: Who reviews them?
Who reviews them?
A: Who reviews them? I don't review them, no.
Q: Who does?
A: That would be the lawyer they're working for or the member himself or whomever. I don't know.
Q: So they may prepare them and then provide it directly to the member.
A: You'd have to ask them that.

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Q: And the membership services division is the only division that exclusively generates correspondence to the IRS on behalf of members?
A: There is no such thing as that. There's a case — I told you that we never advanced that far.
Q: That never materialized?
A: No. No. We don't have the hundreds of thousands of members that would require that.
Q: In order to do that.
A: Right.
Q: And in responding to the United States' discovery requests, I understand that you're solely responsible for the content of the Web site.
A: As the fiduciary, I guess.
Q: Are you also responsible for the contents of the Reasonable Action newsletter?
A: As the fiduciary I guess I am.
Q: But not the membership handbook. You just —

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A: Well, I told you that that came about through the individual reps and the national rep and the — one of the independent reps.
Q: Do you want to finish up now? It's almost 5:00.
A: It's up to you.
(Time noted: 4:52 p.m.)
(Reading and signature not waived.)

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STATE OF MARYLAND, to wit:
I, Josett F. Whalen, before whom the foregoing deposition was taken, do hereby certify that the within-named witness personally appeared before me at the time and place herein set out, and after having been duly sworn by me, according to law, was examined by counsel.
I further certify that the examination was recorded stenographically by me and this transcript is a true record of the proceedings.
I further certify that I am not of counsel to any party, nor an employee of counsel, nor related to any party, nor in any way interested in the outcome of this action.
As witness my hand and notarial seal this 24th day of February, 2006.

JOSETT F. WHALEN
Notary Public
MY COMMISSION EXPIRES: 10/1/08

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professor at Bowie State University. His name is Kennedy. Of course, when we started asking him questions about the constitution after his speech, he got a little embarrassed and left.

Q: I'd like to give you a copy of what is marked as Exhibit 7. And this is page 27 of the membership handbook.

A: All right.

Q: Do you recognize this page?

A: All right.

Q: Yes or no, do you recognize this from the handbook?

A: Well, it's just a page. It appears to be. I have no doubt about it.

Q: And what's written in here is that you were the author for the book Piercing the Illusion.

A: Right.

Q: That's right; right?

In that book you detailed two things essentially — I don't know if you want to say that there's more — but your views on the

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income tax laws and then details of your life; right?

A: I suppose.

Q: Sorry?

A: Go ahead.

Q: And the statements about your life where you describe what has happened to you, whether it relates to the income tax laws or not, they're accurate statements that you present in there?

A: I suppose. To my knowledge. I didn't thought I told any lie about my life.

Q: No, that's not what I was implying. I just want to make that clear.

And the other thing the fellowship produces, as indicated on Exhibit 7, is the Reasonable Action newsletter and the fellowship's Web site?

A: Right. Just one Web site.

Q: Just one — right.

A: save-a-patriot.org. That's the only site we have.

Exhibit 43B

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Q: Right.

A: Right.

Q: And you already indicated that you're responsible for the content of what's on the Save-A-Patriot Web site and only Save-A-Patriot, not the other Web sites that are indicated —

A: Not the other Web sites. One site is not even a member and the other one is an independent rep.

Q: Which one — can you distinguish between —

A: "Tax Truth 4 U" is not even a member.

Q: It's not a member.

A: You sent us the — in the exhibits that you sent, you had the search in there where you searched to find out who they belonged to, and I think her name is Penny-something or other. I don't recall.

Q: I think that you sent an affidavit from them. Is that —

A: Yeah. She gave us an affidavit saying

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that.

Q: Right.

I'm going to give you a copy of what I've marked as Exhibit 8.

A: All right.

Q: Is the information on here correct, that the membership fee for a full membership is 697 — and you refer to them as Federal Reserve notes — for a full member?

A: Right.

Q: And 99 Federal Reserve notes for an associate membership?

A: Right.

Q: And then there's an annual renewal fee for either membership?

A: For both of them, but they're not 697, just 99.

Q: Right.

A: The renewals are 99 a year.

Q: It's 99 for each.

And the only — or the major distinction between the two types of membership

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is an associate is only entitled to fax questions to the membership?
A: No.
Q: I'm sorry. To the fellowship.
A: No.
Q: What is the distinction?
A: The distinction is that we don't do any work for the associate members. They have to upgrade to have work done for them.
Q: But they can fax questions to the fellowship; is that correct?
A: No.
Q: Because I think that is written —
A: Well, they can fax questions, yeah.
Q: They may not be answered?
A: Well, they — right. Anybody — you know, you could fax a question to us, too.
Q: So essentially the associate members are really getting what you refer to as educational-type information from the fellowship?
A: You have to understand, it is

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getting — these people join to support.
Q: Right.
A: Right.
So it's not getting. Some people just join as an associate member and don't buy any materials or anything else. All they do is they get the monthly, little four-page thing that we send on it, the Liberty Tree, and a Reasonable Action when it goes out.
Q: And that's it?
A: That's it.
If they want to buy something, they'll buy something.
Q: Right.
And the full members are entitled to the different types of support, which would be —
A: Casework and paralegal.
Q: Yeah. But both memberships — excuse me.
Both types of members do have available to them the insurance coverage?

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A: Yes.
Q: They do.
A: Right. As the paralegal work or the casework has no consequence on that.
Q: Right.
A: It has nothing to do with it.
You have to understand how this all evolved. We started out with just the membership program agreement.
Q: Right.
A: And then certain members would call in and say, Can you help me with this? And that sort of evolved a couple years after that.
Q: What, the insurance coverage you're referring to?
A: Well, it isn't insurance. It's insurance-like because we don't have a fund and we don't pay it out.
Q: No. I understand that. I think that we explained how it works or you explained how it works.
A: Right.

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Q: But you're saying that that evolved sometime after the fellowship was created by —
A: We didn't do any paralegal or casework in the beginning. It evolved that way.
Q: Right. The paralegal work and the casework evolved, and you didn't start doing that and the fellowship didn't start doing that —
A: It was a few years later that that started evolving. We had members calling in and saying, Can you help me with this? And of course the only way we told them we could help them is if they give us power of attorney.
Q: I just wanted to clear that up because I think I was misunderstanding.
But from the beginning of the fellowship with the insurance coverage —
A: The insurance-like program.
Q: I keep referring to it as insurance. I understand what you're saying. I don't mean to — it's insurance-like coverage for clients, and you don't have a fund. I don't mean to

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imply that.
A: Right.
Q: And the fund, I think that we already covered this, but it's — excuse me — the insurance-like coverage covers both criminal and civil liabilities?
A: Just like the agreement says. Right.
Q: Right.
A: It's been that way since day one.
Q: Has the membership agreement that you originally drafted, has it substantially changed over the years?
A: Not substantially. It had to change as to the rate of inflation and things like that.
Q: So just the cost of membership and —
A: Basically, yes.
Q: But it's basically stayed the same throughout the years?
A: Right.
I understand it's nine billion a day now.

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Q: The national debt?
A: Yeah. The government is going into debt nine billion a day. Some people are becoming alarmed.
Q: They have every reason to be.
A: Huh?
Q: I'm going to give you a copy of what's marked as Exhibit 9.
A: Okay.
Q: And what's referred to in Exhibit 9, which is page 29 of the fellowship handbook —
A: Right. You're talking about the independent reps.
Q: Yeah.
A: On item 6? It's underlined. I suppose that's what you want to talk about.
Q: I actually didn't underline it. That was underlined in the copy that I got.
A: All right. Well, somebody thought that was significant I guess.
Q: And what is described in what is marked as Exhibit 9 is the benefits that are available

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to associate members?
And this begins on what is marked as Exhibit 8. It says the —
A: Associate and full members can become independent representatives.
Q: No. I'm not referring just to independent representatives. I'm referring to this entire exhibit with — it starts on number 1, which is page 28, and then goes on.
And what is available is consultations with you?
A: Yeah.
Q: The ability to purchase IRS publications?
A: Yeah. Yeah, we — well, we don't sell them anymore, but we used to sell codes. Because the only way we can get codes is to buy a whole case and it got so because of the Internet nobody buys the code books anymore, they just go to the code on the Internet, and so we can't pay for a whole case — I think it's six hundred and some odd bucks for a case — and

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have them sitting around.
Q: And what is listed here in number 5, which is what I was referring to earlier, is that associate members have the privilege of faxing questions, but you're saying that the fellowship may not necessarily answer the questions.
A: Well, that's right. Because we tell them straight off, we don't give advice. We never give advice. If they have questions about other things, yeah, fine.
Q: Okay.
A: But we tell everybody that we don't give any advice. We announce it everywhere.
Q: And what is referred to in number 6 on Exhibit 9 is the opportunity to become an independent representative?
A: Right.
Q: And what's stated in number 6 is that the independent representatives receive commissions and full —
A: Yeah. They keep a part of the fee for

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what they — the people they recruit.
Q: So when they get new members and recruit them, they get part of the fee, which would be —
A: Yeah. They deduct their part of the fee and send the rest in.
Q: Okay. And full members —
A: I still don't see what this has to do with 6700. I think this line of questioning has nothing to do with 6700, which — are you trying to say that this is some kind of a — I don't understand this questioning.
Q: I'm just trying to gain relevant facts for the case. If part of the case relates to gathering an organization, that is — and I'm not stating anything more than that — then this is relevant to that because you're increasing a membership to do —
A: To disseminate information under the First Amendment.
Q: Right.
A: That's our purpose, is to educate.

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Q: Well, that's what you're saying the purpose is.
A: Well, that's it. It is our purpose, to educate.
Q: And I'm just trying to understand how you gain more members and —
A: Well, we gain it — well, the reps program is a dismal program.
Q: The — I'm sorry?
A: The independent reps program.
Q: Is a failure?
A: Is a dismal failure. We get very few recruits through the reps program.
Most people come to us because they bounced across our Web site, somebody told them about us and they call up and ask for an information packet, which is nothing more than the program agreement and the newsletter to be sent to them.
Q: So more often you gain new members through someone coming across the Web site?
A: Referrals and Web site.

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Q: But the referrals —
A: But most of them are referrals.
Q: The referrals come from just members —
A: Word of mouth.
Q: Right.
A: Not only members. You have people who are not members who tell people to call us up. It could be anywhere.
Q: So it isn't necessarily the independent representatives, and they're really not sending that many people to become members of the fellowship.
A: That's right. I mean, if it's a couple a year, it's a lot.
Q: A couple of year for the —
A: Yeah. It would be a lot.
Q: For the independent representatives?
A: Yeah. I mean, they just — most of these guys are truck drivers or whatever. You know,

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they're not into stuff like that.
Q: The independent representatives?
A: Yeah. Right. You know, we — most of the people that belong to the fellowship are blue-collar. I guess. It's my — that's my perception. I don't know them all of course. It's plausible.
Q: I'm going to give you a copy of what is marked Exhibit 10. And this is one of the links in the Web page for the fellowship.
Do you recognize this?
A: One of the links in the fellowship Web page.
Q: So this is part of the fellowship's Web page.
A: I'd have to check with what we have downloaded. We downloaded the whole thing since we got the complaint. I'd have to check with that to tell you the truth.
Q: You don't recognize this?
A: Well, I couldn't tell you everything on the Web site. I don't go on the Web site that

often.
Q: Well, can you look at this and tell me whether or not you recognize it as being part of the Web page?
A: No. I couldn't tell you unless I've checked back with the office to find out if they downloaded this. I'm not disputing it. I haven't even read it.
Q: Could you take a minute to look at it and see if you recognize this.
A: Oh, sure. It's things that we say.
(Pause in the proceedings.)
It looks like it's factual to me. Some of the stuff I showed you yesterday.
Q: Right.
A: I mean, it's right here in the regs and the code (indicating).
Q: And this is under the fellowship's Web page in the section discussing federal tax law basics.
A: Well, it would be, yeah, I guess.
1461 is the only liability I can find,

unless they can show me another one. We've asked them. Nobody has come up with another one.
And 6012 just talks about filing returns through subtitle A, and then when you go there — I got a copy of the returns — it tells you right here, the OMB control numbers.
Are you familiar with the OMB control numbers?
Q: Yes.
A: This is the regulation. Well, the OMB control numbers takes you right to the return to be filed for subtitle A, and I'll show it to you.
It has OMB control number 0067. Right?
(Pause in the proceedings.)
The 1040 is 0074 and the 0067 is a 2555, Foreign Earned Income, and you go to — that's for section 1.
And then for section 6012 —
Q: What are the numbers you're referring to?

A: The OMB control numbers.
Q: Just hold it one second. Just so that — no. I understand what you're saying about the OMB control numbers. But just to be clear, Mr. Kotmair handed me a copy of the Form 1040.
A: Oh. Right.
Q: And the OMB control numbers that you're referring to on the Form 1040 —
A: Is right up there. See them right up here, the top right corner (indicating).
Q: And the document you're referring to there —
A: And the document I'm referring to is the Internal Revenue regulations —
Q: Just one second, Mr. Kotmair. The document you're referring to is a Form 2555.
A: Yes. The form number. Called Foreign Earned Income.
Q: Right. I just wanted that to be clear for purposes of the record.

A: So right here it says for 6012 it's 0067 again, Foreign Earned Income. That's according to the IRS regulations and the OMB control numbers which identifies the information request, which is this (indicating).
So evidently what we've put on here is factual.
Q: Right.
And what it's saying then is the factual basis that relates to — and this is the underlined portion of what I gave you in Exhibit 10, which is that the statement made — and please correct me if I'm reading inaccurately in any way — that the W-2 and 1099 wage information commonly reported by employers is a function of the tax on wages under subtitle C —
A: Right.
Q: — not income tax, for the purposes of building credits towards social security. The tax —
A: Well, that's correct.

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Q: The tax on wages has absolutely nothing to do with the income tax under subtitle A.

A: Subtitle A, right.

Q: Okay. I just wanted to make sure that that's accurately stated from this.

A: Well, that's totally correct.

Q: And this goes on to state that the income tax —

A: Let me see. 14.

Q: — under subtitle A is an indirect tax in the form of an excise tax imposed on certain activities or occupations and a liability to pay the tax must arise from statute.

A: Supreme Court. There's a Congressional Research Service report. Supreme Court. We're just quoting the Supreme Court, the law. That's it.

Q: Okay.

A: It's political speech.

Q: I'm not doubting it. I'm just asking you to verify the correctness of the statement,

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that I'm accurately reading —

A: Well, what I'm telling you is the statement is based on these things.

Q: Right.

I'm just asking you if I read this accurately from your Web page.

A: Yeah, the statement is — well, I'd have to check. It appears to be, but I'd have to check the Web page. I don't have this, everything committed to memory.

Q: And this Web page goes on to state that the only statute under subtitle A, income tax, making anyone liable is section 1461 which applies to withholding agents who are required to withhold only from foreign entities like nonresident aliens and foreign corporations?

A: All right. I'll take you right to it, and we'll read it.

Here's the withholding and the withholding agent and the only section which you can find for the withholding agent in chapter 3, which is withholding, and it says 1441 is

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withholding on nonresident aliens; 1442, withholding of tax on foreign corporations; 1443, foreign tax-exempt organizations; 1444, withholding on Virgin Island income source — source income — if I had Virgin Islands source income, it would be withheld from me obviously — and 1445, withholding of tax on dispositions of U.S., United States, real property interest; and 1446, withholding tax on foreign partners' share of effectively connected income.

And then you go to the liability of the withholding agent, which is 1461, liability for withheld tax: Every person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

Q: And to be clear —

A: So when you file a return, what are you

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doing? You're filing a return. You get back any overpayments that he paid.

So the liability is here for the collection of the — he's the tax collector. It says it right in the manual.

Q: And I just want to be clear that what you're reading from is section —

A: The Internal Revenue Code.

Q: — section 14 —

A: 1461 of the Internal Revenue Code.

Q: Of the Internal Revenue Code, that's right.

A: And the other one is the withholding. Who he withholds from is 1441, 42, 43, 44, 45 and 46.

Q: Right. I just wanted to be clear for the record, Mr. Kotmair, where you are reading this information from, so it's clear.

A: And we're just publishing that.

Q: Uh-huh.

A: And that's all this is doing is publishing that.

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MR. HARP: By "this" you're referring to the Web page?
THE WITNESS: The Web page, yeah.
BY MR. NEWMAN:
Q: And the next statement on the Web page — and I just want to again make sure that I'm accurately stating what is printed on the Web page — is that the only requirement for an individual to file a return under subtitle A, income tax, is section 6012(a).
"The Internal Revenue Service identifies the imposition of the income tax and the type of income that is considered taxable income for the purpose of this filing requirement in their request to the U.S. government's Office of Management and Budget (OMB)," which is what you're referring to —
A: We just went through that.
Q: Let me just finish the quotation, Mr. Kotmair — "which must approve the administration and enforcement of the applicable regulations. Taxable income for purpose of this

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section is limited to certain income that has been earned while living and working in certain foreign countries or territories. According to the OMB, the return that is required under this section of the Internal Revenue Code is Form 2555," which you gave me a copy of, "(not the 1040) and it is entitled Foreign Earned Income. According to the regulations, 26 CFR part 600 to end, the 1040 return is merely a supplemental return or worksheet for the required Form 2555."
A: That's what it says. Right here (indicating).
The tax form is 1040. This is the primary according to the OMB control number the IRS submitted, and it has it right on the form.
Q: I'm going to give you a copy of what I've marked as Exhibit 11.
MR. HARP: Before we move on, can we maybe mark these as defendant exhibits for the deposition? Do you have any objection?
MR. NEWMAN: Do you want them marked?

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MR. HARP: Well, we'll mark this for later. I was just going to mark the 2555 and the 1040, mark the 2555 D-1 and the 1040 D-2.
MR. NEWMAN: Sure.
So what we agreed to is that the Form 1040 will be marked as Defendant's Exhibit 2 and the Form 2555 is going to be marked as Defendant's Exhibit 1.
Okay?
MR. HARP: I don't think we have an extra copy of them. Just take those.
MR. NEWMAN: They're available to everyone, so I don't see the problem.
THE WITNESS: Right. No problem.
MR. HARP: Okay. All right.
BY MR. NEWMAN:
Q: Do you have a copy of Exhibit 12?
MR. HARP: No. We've got — I think you just handed us 11 there.
MR. NEWMAN: I'm sorry. 12 — or 11. Right.
THE WITNESS: Right.

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BY MR. NEWMAN:
Q: And this is a copy of a letter that you signed and sent to the Internal Revenue Service service center in Holtsville, New York?
A: All right.
Q: Do you recognize this? And —
A: Well, I send out a lot of letters. I mean, you know —
Q: This — I realize you may not recognize this particular letter. And to be clear, the information that would identify the specific individual has been redacted.
A: Yeah. I've noticed that, yes.
Q: But this is typical of the numerous letters that you're saying that you've sent out?
A: Citing code sections.
Q: Right.
A: Right.
Q: I'm just asking you, you recognize this generically as one of several letters that you sent out, with the exception of the identifying

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information has been removed.
A: Yeah.
Q: But it isn't different than the other letters other than that those would be different in that they would identify different individuals.
A: Every one of these letters, like I said yesterday, all it talks about is the code, the regs and the manual. And all they got to do — if we're wrong in any of those things, all they got to do is come back and tell us, which the mission says they're supposed to do. They're supposed to explain the law to us if we're in error, but nobody has ever done that. Nobody has ever come back to show us where we're in error, what we're doing is in error.
Q: And Mr. Kotmair, this letter that's marked as Exhibit 12 —
A: 12?
Q: — this is — I'm sorry. 11. I keep saying 12. I'm trying to jump ahead here.
What's marked as 11, this is a written

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protest I assume for a proposed assessment?
A: Normally a protest is the proper way of addressing a proposed assessment.
Q: And for this individual it would be because a return was not filed?
A: Well, if they didn't file a return, they didn't file a return. It's talking about the section 6020(b) — you're familiar with section 6020(b)? Do you want me to read it for you?
Q: No, I don't need —
A: Well, if a return is not filed, the secretary is supposed to file one for them.
And it also shows — it's — 6020 is very interesting in that (a) is really an audit, 6020(a), because — and it even says that the person who they're assisting to file a return has to consent and it has to be subscribed by them, signed by them. All right?
Now, they're talking about their substitute for returns which they generate for — these substitute returns which they

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generate for these so-called assessments that come under 6020(b). But yet the manual doesn't say that at all.
Q: You're referring to the Internal Revenue manual?
A: Yes.
Q: Okay.
A: 5200, delinquent return procedures, doesn't say that at all.
Q: And —
A: So I mean, they're not even following their own manual.
Q: And this letter would be responsive to a request for a return or a proposed assessment because this —
A: If somebody didn't file a return, then this letter would be appropriate. You know they're supposed to file a return for them.
Q: And if you review this letter, this would address that, what you're saying, is that this —
A: According to the law. If we were wrong

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on the law, then they should have come back and showed us we were wrong on the law.
Q: That's not what I'm asking. Let me ask my question.
A: All right.
Q: This letter is responsive to what you're saying, that this individual in particular did not file an income tax return —
A: If I took power of attorney from this individual and they told me they hadn't filed a return and they received a proposed assessment — right?
Q: Uh-huh.
A: — then there had to be some authority for that proposed assessment.
Now, all this says, like I showed you yesterday, 6211 and 6212 handles assessments. 6201 — so it's very clear that subtitle C is not within those code sections.
Q: My only question is that that is the situation that this letter is responsive to.
A: Right.

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Q: Yes.
A: Right.
I mean, it's factual. If it wasn't
factual, then they should have told us where it
was wrong.
Q: No. I understand what you're saying.
But I just wanted to make it clear
that this letter is responsive to the fact that
this individual did not file an income tax
return.
A: No. It's responsive —
Q: To that situation.
A: Yeah. The proposed assessment and they
said they didn't file a return, right.
Q: And that's why it was sent to the
operations manager for the Automated Substitute
for Return Division, which is abbreviated ASFR
in the —
A: Right.
Q: Okay. Can I ask you to look at the
last paragraph on the page of Exhibit 11.
A: The first page or the second page?

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Q: The first page, the last paragraph on
the first page.
A: All right.
Q: What is written here — and please
correct me if I'm inaccurately stating this —
is that first — and then it refers to the
individual which I have redacted — had no
requirement to file any tax returns pursuant to
subtitle A of the Internal Revenue Code, IRC,
for the years at issue.
"According to the regulations published
with respect to subchapter N of that subtitle,
particularly 26 CFR Section 1.861-8(f), income
must be derived from one of the specific sources
listed therein (for citizens, such sources are
primarily limited to foreign-earned income)
before it is considered gross income for
purposes of the tax laws. None of the amounts
shown in the tax calculation summary
accompanying your letter has been derived from
any of those sources. Therefore, no filing
requirement was triggered," and this would be

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for the individual which is redacted.
A: Well, did you go look at the regs
section?
Q: No. I'm just asking you, Mr. Kotmair,
if that accurately states what is written in
that last paragraph.
A: Well, of course it's accurate according
to the regs and the law.
Q: My only question again is —
A: I understand. That's of course exact.
MR. HARP: He's saying is it accurately
stating what's in the letter.
BY MR. NEWMAN:
Q: I'm not asking you if you believe you
are accurately stating the law. I'm not asking
you that. I'm just asking you — or to justify
your position.
A: Hey, look, the law is written in
English. Okay? It is written in English and
it's not void for vagueness.
Q: And on the third page of this letter
which is marked as Exhibit 11 — and these

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letters have been numbered. There's a 485 at
the bottom.
A: All right.
Q: And the page number that you have
written on here is page 3 of 4.
A: Yeah.
Q: You signed this letter?
A: Yeah.
Q: And you sign all of these letters which
are sent to the IRS?
A: Yeah. Under power of attorney, yes.
Q: Right.
And they —
A: By the way, I — you know, I brought
this down here, a circular.
Q: Circular 230?
A: Yeah. You're familiar with this?
So they didn't give me any appeal, no
administrative judge. I had no, you know, no
right to appeal rights coming forward, so it
was not revoked. They just claimed it was
revoked.

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Q: And I don't understand that again. Can we talk about that for a minute?
A: All right. Go ahead.
Q: You didn't apply for a CAF number?
A: No. They sent me two of them.
Q: And you describe this in your book. You received one from the Ogden service center and you received another one from another service center, and I don't know where that is.
A: In Philadelphia.
Q: You returned the one from Ogden?
A: Because in the letter they say I can only have one.
Q: Because you know you can only have one, so you sent one back, you kept one?
A: They told me the reason for it was to track everything because I was using the power of attorney and claiming to have that because I'm an officer of an association.
Q: Right. I understand that. I understand. I'm familiar with the section of

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circular 230 you're referring to.
A: Okay.
Q: A director of an association can represent the association before the IRS.
A: An officer I think it says.
Q: But what you're referring to now with not having a hearing, did some years ago you receive a letter that said you cannot —
A: They said it was issued in error. Yes.
Q: But that would be referencing the second one or both of the letters that you received authorizing you to practice?
A: No. They sent me — they sent me a letter telling me to use this number. I got power of attorney from the individual.
Q: I just want to understand this. They sent you two letters and you returned one?
A: Right.
Q: So now there's still one left?
A: Right.

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Q: And you're saying that with respect to that one that you kept, which is the number that you're probably to —
A: According to the circular, which — like I was arguing with them, is according to this circular, I should have a hearing to show where I violated any of the regs. That's what it says here.
Q: Is that with respect to the representative number that you're referring to at the top which is 26 —
A: I suppose because they sent it to me. Now they want to take it away without giving me a hearing.
Q: But this happened some years ago? Because you discuss this in your book.
A: Yeah. Sure, it happened some years ago. It happened — I don't know where it — it might have even happened before they raided us.
Q: And that was — so that was —
A: '93.
Q: '93.

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It may have happened before 1993?
A: It may have.
In fact they still send us letters talking about representation that the caseworkers get.
Q: The IRS sends you letters?
A: Yeah. They have our number still listed there.
In fact, one told us yesterday she's receiving —
Q: Can I ask you to clarify that? You're saying the IRS sends you letters that have taxpayer information because you sent in a power of attorney?
A: I don't know exactly. I'd have to check it out. In fact I didn't — we'll try to locate the letters and send them to you.
Q: I'm just asking you about the statement that you just made.
Are they sending you letters saying that you're not authorized to practice?
A: No.

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Q: Or is it they're sending you information as if you sent in a power of attorney?
A: As if the number was — they still look at it. Some offices still look at the number; some don't.
Q: That's what I was asking.
A: Right.
Q: So they still send you information as if there's a representative number or not.
So with respect to this second CAF number, at some point in time — and it may have been more than 15 years ago, it may not have been, but sometime between 10-15. We don't know really know when — you got another letter saying that you are not authorized to practice or send letters in —
A: Then I went back to them — no. I got a letter saying that the number was sent in error.
Q: Oh, okay. You got a letter saying —
A: Then I went back to them and said,

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well, I have the right to represent as an officer of an association, and we started arguing about that. But they never gave me any hearing. They just said you can't represent anybody, but I'm saying I was representing them as an officer of the association. That's what the letters say.
Q: And this is —
A: So they never did revoke that ability under that section. They just — just stopped.
Q: Right.
A: They stopped writing to me. They wouldn't argue anymore. They wouldn't give me a hearing.
Q: I only — I refer to it that way, Mr. Kotmair, because you in your book — excuse me —
A: A book is not a law brief.
Q: No. But that's how you refer to it —
A: I understand.
Q: — as being revoked.
A: Well, them saying — not that it was

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revoked, them saying it was revoked.
Q: So they told you that it was revoked?
A: No. I don't — I'm not even — I think that they said — I'm thinking back all these years — that the number was issued in error. "Revoked" is just a figure of speech to make it simple for the reader.
Q: Okay. But that's how you refer —
A: I'm not sure if they said that or not. I'm just — it's just a way of expressing it to the reader in the book.
Q: No. I understand that.
A: Okay.
Q: And I'm just explaining to you that that's how I'm expressing it because you refer to it as being revoked in your book.
A: But I'm telling you don't put real credence on that.
Q: You received a letter saying —
A: To the best of my recollection, they said it was issued in error.
Q: Okay.

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A: To be revoked, obviously, according to this circular, I'd have to make some kind of an act against the regs or commit some kind of a fraudulent act for the revocation, which I would have to have a hearing for it, which I never had a hearing. I never had any due process.
Q: And when you write these letters where you're taking power of attorney or when you sign them, this would be how you're referring to acting as the fiduciary for the fellowship.
A: No. No.
Q: No?
A: Not at all.
Q: Whereas a director —
A: No, not at all. Not at all. The — as I just take power of attorney, not as the fiduciary, but just by — they gave me power of attorney just like if they give anybody else a power of attorney. I have the right to use that power of attorney, is what I'm saying, under this circular, being an

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officer of an association.
Q: Right.
But under the —
A: But not as the fiduciary. Somebody else could become an officer —
Q: Oh, okay. Then —
A: — and do the same thing, but it's not conditioned on being a fiduciary.
Q: Right. Okay. Then let me clarify. Then what you're doing is taking the power of attorney as a director or officer of the fellowship.
A: Right.
Q: Because you're reading the circular 230 as authorizing you to do that because you're an officer.
I didn't mean to — when I'm referring to fiduciary, I meant that that is — in some way that you're acting as some kind of officer of a corporation.
A: Okay.
Q: So it is in that capacity, that you're

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acting as some kind of officer or authoritative role?
A: Right.
Q: And you're taking the power of attorney to represent these individuals before the IRS?
A: Right.
Q: And this is —
A: Well, because the circular says that.
Q: Right.
A: Right.
Q: And this is separate from — and you've made this distinction — you acting as an individual.
A: I wrote letters to them saying this, you know, when — back — way back when.
Q: To who? To the IRS?
A: To the IRS, yes.
Q: That you're acting in a representative capacity as —
A: Officer of the association. Right.
Q: And these letters — particularly this

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one which is marked as Exhibit 11, this is referencing a dispute with respect to this person's individual proposed tax liability, it's not actually a liability at this point?
A: No. It's a proposed assessment.
Q: For their individual and it's proposed —
A: Right. It hasn't gone to deficiency yet.
Q: Can I ask you to look at page 2 of Exhibit 11. And I think that we've already talked about this enough just now, but I think that I'm going to ask the questions anyway.
You are representing here that you're authorized to represent this individual —
A: According to the circular, right.
Q: — using your power of attorney which you have listed on this second page as number 3.
A: Right. I even cite the circular.
Q: In number 4 you cite the circular 230 section, which is section 10.7(c)(1)(iv)?
A: Right. Unless we're using this one

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here, took it out of that (indicating).
Q: Can I ask you to look at page 4 of Exhibit 11, or it's what you have marked as page 4.
And as we already talked about, this letter is responsive to an individual that has not filed a return and the dispute between the individual and the IRS is over the proposed assessment based on the — I believe a substitute for return?
A: Right.
So it's citing all the code sections that I'm relying on here saying that.
Q: So this would — the schedule of disputes, would you have drafted the original this is now incorporated from or this was written —
A: Not all of it. Some of it was a cumulative act. Some of the old paralegals we had and all came up with a lot of research and what have you, and we put it together.
Q: For the sections, the section

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references?
A: Right.
Q: And the first item of dispute is that the individual has no requirement to file any tax returns for the year at issue because he received no income from the sources listed in 26 CFR Section 1.861-8(f)?
A: That's what it says. And then when you go there, you'll see that the sources are all foreign.
Q: The sources that you're referring to in section 861 —
A: When you go there, the sources are all foreign.
Q: All foreign source income?
A: Right.
So we're just going by what the code says.
Q: And this is —
A: The same way with 2, about reg 6212, which it says subtitle E.
Q: You're referring to —

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A: Item 2 —
Q: — item 2, which says —
A: — which is 6212, which we read into the record yesterday.
Q: — that this individual —
A: So a person — if they're claiming a proposed assessment under subtitle C, it's not covered. Subtitle C is not authorized.
Q: And to be clear, what section 2 of the schedule of disputed issues reads is that this individual has not filed a tax return that could be examined.
"Without this a deficiency in the tax shown by the taxpayer on his return under 26 USC 6211 cannot be justified, nor can an deficiency assessment be made under 26 USC 6212?"
A: If it's employment tax, that's right, under subtitle C. And that's — this letter would only go out if the person was a wage earner.
Q: A wage earner —

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A: For subtitle C. That's for subtitle C, is the wage tax.
Q: With foreign source income?
A: With foreign source income? No. It has nothing to do with foreign source income. Subtitle C is employment tax.
Q: I'm sorry. The only — I should rephrase my question, is that the only way that the letter, the proposed assessment, would be valid, I think you're saying, is if it was —
A: If it was an income tax under A. But if it's a wage tax, which is in C, it's not authorized under those code sections which I read to you yesterday.
Q: Right.
A: C is not there. He's not authorized to send out a proposed assessment under C.
I mean, that's what the law says. If the law is wrong, maybe Congress should rewrite it.
Q: Can I ask you to look at the Privacy Act release form and power of attorney

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attached to the letter which is marked as Exhibit 11.
This power of attorney — this individual is giving his power of attorney to you?
A: For the purpose of investigating whatever. Right.
Q: And what it states is that pursuant to 26 CFR 301.6103(c)-1 and also Treasury Department Circular Number 230, this form gives John B. Kotmair, Jr. permission to investigate this matter for me.
And the matter that's being investigated is his own personal income tax liability or proposed liability; is that right?
A: To investigate the assessment thereof, the — not the figures or the liability as such, the —
Q: The appropriateness?
A: The appropriateness, right, of the assessment.
Q: And as is indicated in this power of

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attorney, the matters that it relates to are any and all of the records pertaining to income taxes, to include income tax returns, 1040, 1040A, related forms and assessment records, for this individual's, I'll call it, proposed liability because there hasn't been an assessment yet.
That's right?
A: Right.
Q: And this was signed by the individual, but I redacted that information.
A: They gave me power of attorney to do those things.
Q: Okay. Mr. Kotmair, I'm going to give you a copy of what is marked as Exhibit 12.
A: All right.
Q: Do you recognize this letter?
And again, I realize that —
A: Yeah. It's a petition for abatement under 6404(a)(3) because that obviously was erroneously sent, like we went through yesterday.

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Q: And this letter is similar to other letters that you send, and there's a lot of them, but this one is — again, the individual's information has been redacted, but you are familiar with the form and the content of this letter.
A: Yes. It's a petition for abatement, which we went through thoroughly yesterday. Right?
Q: I think that we did, yeah.
A: Yeah.
Q: But I just want to address it with specifically looking at the letter.
A: That's a petition for abatement that we put together. It's —
Q: And the reason for that is that this individual was sent a notice of deficiency.
A: And it was wage tax.
Q: And it was a tax on his wages.
A: Right. Which is not covered under the code section. Subtitle C is not there. It's not authorized.

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Q: And so this letter would be responsive to this individual receiving a notice of deficiency, and then you sent him —
A: And the law not allowing that notice of deficiency.
Q: And in these circumstances would you request a meeting with an appeals officer or with the exam unit?
A: We can't get anything with them. They won't talk to us at all about anything.
Q: They haven't —
A: Like I told you yesterday, when I would go to these hearings before, the assessments never went forward. They just ended.
Q: Can I stop you there.
So at one point you were going to hearings with appeal officers?
A: Before the controversy. We figured that's why the controversy came up over my representation.
Q: So this is some time that may have been

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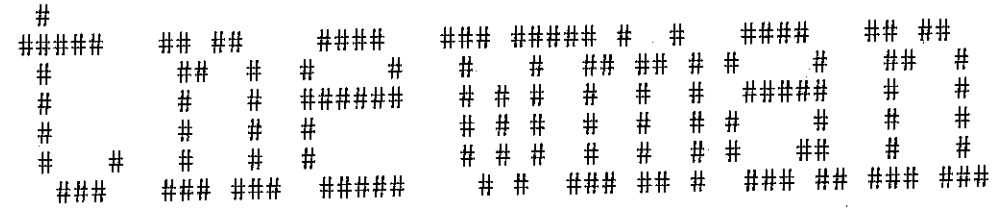
some 15 years ago that you —
A: Yeah, years ago. Right. I don't know how many years ago.
Q: — that you were going to meetings, which is with appeal officers or were they exam meetings?
A: Yeah, appeal officers. Right.
Q: And sometime after that the appeals officers weren't meeting with you?
A: Well, we had a couple I think. I'm talking about years ago, and my memory is sketchy, but I think we had one or two. But in the main, no, they won't do that, because they put the word out not to have meetings with me.
Q: So at this point — well, the meetings that you're talking about, though, that you had with an appeals officer —
A: I mean, what we would do is we would take the explanation that they would send with the notice of deficiency which would show that it's a subtitle C tax —
Q: And this would be a Form 886A?



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Time: 7:10:41 PM

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A: Right.
And we would take that up there, and I would show the appeals officer that, according to that form, it's a subtitle C tax, which we would go through and I would show them 6212 and I'd say obviously it was sent in error like my petition says because there's no authority for a deficiency under subtitle C. It's not there in the code.
Q: Uh-huh.
A: And then he would be all flustered. Every one of them were, because they never saw or read that before.
I think this — there's another guy that come wandering in our office out of Frederick. His name — I think I mentioned it when we had that meeting in 2003. Stone? Was there a Stone in Frederick?
MR. GREENSTEIN: Something like that.
THE WITNESS: Yeah.
And he didn't. He came in there, you know, questioning — wanting to question

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somebody and the fellow wasn't there, and I said to him, I says, You know, it isn't a question — I said, Why do you want to question him?
And he said, Why's that?
And I said, Do you know what your authority is to question him?
And he said, No.
So I showed him his authority under the code, and he couldn't believe it. I gave him a copy of it to take along with him because he had no authority to question him. He only had authority in subtitle E, alcohol, tobacco and firearms revenue officers. That's it. Everything other than subtitle E is CID. You know?
Q: I want to turn back to this letter.
A: All right. Go ahead.
Q: This letter again would be adapted from some letter that you had originally drafted at some point and may have changed throughout the years?

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A: Well, the only thing that would change I guess is if the code or the regs changed through a different paragraph or whatever.
Q: Right.
So this letter is substantially —
A: But substantially the laws haven't changed and, to my knowledge, they're the same.
Q: So this letter stayed the same for the probably some twenty years that it's been mailed to the IRS?
A: Well, whatever. If it was changed, as soon as we were notified of the change, the cites would be changed.
Q: The code sections would be changed?
A: Right.
Q: But —
A: Right.
Q: And these are sent to virtually every service center that the IRS has in the country?
A: Well, wherever it comes from, we would respond to them.
Q: And you must get a lot of requests from

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members to send these types of responses because these are —
A: Well, they don't all come to us, but the ones that do come to us and we get a request from them to do this.
Q: But these are received in the service centers at the rate of about a letter a day.
Does that surprise you —
A: No.
Q: — that there may be about a letter a day in the different IRS service centers that —
A: That wouldn't surprise me. You know, if you have a couple thousand members or whatever — I don't know how many members there are, but you know, if the IRS is sending these things out, would that surprise you it would be one or two a day?
Q: It surprised me.
A: Well, it doesn't surprise me because I know how active the IRS is. They're very active.

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Wouldn't you say so, Mr. Greenstein?
MR. GREENSTEIN: "Greenstein."
THE WITNESS: I'm sorry.
Mr. Greenstein.
BY MR. NEWMAN:
Q: So these letters, there's about a thousand letters sent to the IRS responsive to these types of inquiries a year?
A: I don't know if it's a thousand. I don't know. I don't know how many it would be, but I doubt if it's a thousand. I very seriously doubt if it's a thousand. I'd have writer's cramps.
Q: From signing your name?
A: Yeah.
And I don't have writer's cramps.
Q: Can I ask you to look at page 2 of what's marked as Exhibit 12.
A: All right.
Q: The paragraph that you have listed under the indented quotation for 26 CFR 1.861-8.
A: Right.

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Q: What you have written in the letter there is: "On the worksheets enclosed with the alleged notice of deficiency, wages is listed under the heading Adjustments to Income. However, no specific sources" —
A: Where — maybe I'm at the wrong place. Where are we at now?
Q: This is Exhibit 12, what's marked as page 2 by your numbering system.
A: All right. I'm on page 2. And what paragraph? Where are we at?
Q: (Counsel indicating.)
A: Oh, right here (indicating)?
Q: Yes.
A: "On the worksheets enclosed..."
Q: "...with the alleged notice of deficiency, wages is listed under the heading Adjustments to Income. However, no specific sources or payers are shown, so I am unable to determine whether or not the wages are derived from the taxable sources listed in section 26 CFR 1.861-8(f)(1) and are therefore taxable

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income as defined in the Internal Revenue Code."
A: Well, that's a factual statement I guess.
Q: That the income that's listed on I guess what will be the Form 886A is derived from sources —
A: From wages, which would be subtitle C.
Q: Okay. And they aren't listed in section 861, so —
A: Wages are not listed there, no.
Q: So the dispute ultimately is the taxability of this person's wage income?
A: Well, if they would dispute it. They don't dispute anything. They won't discuss the law.
So I don't know if you want to call it a dispute. It's just me making these allegations which they never answer.
Q: Between this individual and the IRS, the dispute is —
A: Well, if — yeah, between this individual and me having the power of attorney.

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So I'm arguing for the power of attorney.
Q: No. I understand.
A: Right. Okay. If they would just come back and give us some kind of an answer, you know, it would be great.
Q: And would you please look at the power of attorney, and you have it titled Privacy Act Release Form and Power of Attorney, which is the last page of this document.
A: All right.
Q: This power of attorney is substantially the same for this type of letter —
A: I believe it is the same, isn't it?
Q: — in that, again, this individual is giving you permission to investigate for him matters relating to all records pertaining to income taxes, to include income tax returns, Form 1040, 1040A and related forms and assessment records.
A: Right.

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Q: And I had one question with respect to this one.
I realize the powers of attorney are all the same, but what's noted on the bottom where the individual signed under the part that says "I hereby certify" and it's dated — this would be the last paragraph before the notary.
A: All right.
Q: My first question is: Did you draft this power of attorney?
A: Did I draft it?
Q: Did someone in the fellowship draft the power of attorney that this person signed?
A: To send to them.
Q: Yes.
A: Yes.
Q: And what is listed here and it's in quotations is: "I have a material interest in the information within the documents sought."
And the "I have" is referring to the individual —
A: The individual, right, has a material

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interest.
Q: And the material interest, just because I want to clarify that because I don't understand exactly what it is at this point —
A: Where are you at here?
Q: It's the final paragraph.
A: Okay. Material interest. Okay.
Yeah.
Q: And the material interest they would have obviously would be —
A: Pertains to them.
Q: It pertains to their proposed individual income tax liability?
A: Or whatever the circumstance is.
Q: Filing requirements, anything of that sort?
A: Whatever, whatever the circumstance is.
Q: But that's their material interest? I just want to understand because it's in quotes here and if there was a particular reason —

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A: I don't know why this is in quotes. They have a material interest, you know.
Q: But that would be their material interest?
A: That would be their material interest.
Q: It relates to their income tax liability?
A: To them personally. Right.
Q: Okay. Mr. Kotmair, I'm going to give you a copy of what's marked as Exhibit 13 now.
This letter is similar to the other ones, but this one is responsive to a notice of intent to levy; is that right?
A: Yes.
Q: And the levy or the proposed levy in this case where the notice was sent out would be a levy on this individual's either wages or whatever source the IRS has identified.
A: Yeah, whatever.
Q: And the information contained in the letter, that was originally drafted by you and changed over the years just like the other

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letters, but this one pertains to levies?
A: Right.
Q: So if the code changed, the letter will change —
A: Relying on the code section itself, which said no levy may be levied upon — but you read the code section.
Q: Yes.
A: In 6331.
Of course when they send these things out, they start with B, they never put A on there, on the reverse side of the form. I always wondered about that. I wonder why they do that.
You got that in there, too; right?
THE REPORTER: Uh-huh.
BY MR. NEWMAN:
Q: Can I ask you to turn to the power of attorney form for this letter, which is on the last page. These pages aren't numbered.
A: All right.
Q: Okay. For this letter, although it is

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different than the other letters which are Exhibits 11 and 12, the power of attorney is the same. This person —

A: Right. The powers of attorney are the same for everything. It's —

Q: It's this person giving you permission to investigate this particular activity, which is a notice of intent to levy on whatever source the IRS identified.

A: Right.

Q: And he's giving you permission, or he or she, to investigate, inquire —

A: Right.

Q: — about records pertaining to income taxes, to include income tax returns, Form 1040A and related forms and assessment records, with respect to any dispute with the IRS.

A: Right.

Q: And again, this person is referring to the fact that they have a material interest in the information sought because it's a liability

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that they would incur because it's an assessment or proposed assessment by the IRS?

A: Or the collection thereof. Right.

Q: For some tax related to their own liability; right?

A: Well, it is their liability. It's not mine.

Q: Right. No. I understand that. I just wanted to identify that —

A: Right.

Q: — last paragraph.

Can we take a break for a minute?

A: Oh, I don't care. It's up to you.

(Recess)

BY MR. NEWMAN:

Q: I just want to ask you some general questions unrelated to any exhibits.

But you mentioned earlier that the appeals officers won't meet with you anymore.

A: Evidently.

Q: And the information that you've sent in, you know that it isn't received well and it

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seems to be consistently disregarded by the IRS?

A: They never settled a dispute yet. I think, you know, I said under the circular I'm the officer of this association, and they just won't give me a hearing.

Q: No. What I'm referring to is the information that you sent in — and these would be the arguments that are presented in the letters that are marked as Plaintiff's Exhibits 11, 12 and 13.

A: Yes.

Q: And those would be with respect to a substitute for return for an individual that didn't file —

A: Right.

Q: — a notice of deficiency that an individual received and that you have power of attorney for, or a proposed levy.

But those letters, although you're sending a lot in to the IRS to dispute on behalf of the member, the IRS itself or the

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appeals officers, they aren't meeting with you and they're really just disregarding the letters.

A: They're stonewalling.

Q: And they're also not responding to the arguments.

A: They're not responding. They're not giving me any response to anything. They won't — like I told you, the mission says that they're supposed to answer questions. They're supposed to show you where you're wrong on the law. They don't do any of that. They don't do anything.

Why don't they come back and show me where it's wrong. See? That's it.

Q: In some circumstances — and I've seen this, but I don't have any of the papers — they are responding to the individual.

A: But not showing me where we're wrong.

Q: No.

A: They're responding to the individual, yeah.

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Q: They're responding to the individual, regardless of whether or not I —
A: But they don't address anything.
Q: — the correctness of the arguments that you are presenting in the letters, they just respond to the individual. I don't know what the letters say.
But they are — they may or may not be responding, only to the individual —
A: But they don't respond to —
Q: — to you?
A: — what I'm saying to them. They don't respond to it.
Q: To the arguments that you're presenting?
A: Right. They don't show us where the arguments are wrong.
Q: Right. That's what I was asking.
A: Right. If they'd come back and just show us where we're wrong, show us what we're overlooking —
Q: Yeah. I understand.

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A: Really.
Q: So if they are responding to these arguments, they would send it to the individual?
A: But the individual sends it to us.
Q: So the individual keeps you apprised of any —
A: Oh, yeah. Of course.
Q: Any document that they're receiving from the IRS, they would send it to you then to respond?
A: They would send it in. Yes.
Q: Okay. So the caseworkers individually signed to a particular individual would be aware of any document that the IRS sends them?
A: Well, whatever, whatever the individual sends to us. You know, you get some — you know, you have — individuals are individuals. Some people will say they'll take care of that tomorrow and they never do, you know.
Q: And it's their — they're responsible for it, but the individual members — say it's one that is very diligent. Then he would send in any response and every response that he's receiving from the IRS?
A: Right.
Q: And if one is not so diligent?
A: Normally that's what they do.
Q: So it's up to them, but on average —
A: Yeah. We don't instruct them, but they do.
Q: On average, if it's, you know, the range of a particular person, but they are sending you the responses that they receive from the IRS?
A: Right.
Q: And on the most part all of the responses from the IRS disregard the arguments —
A: We have never, have never had anything from the IRS disputing what we're saying, showing where we're wrong. Never. They ignore and go forward as though we hadn't said

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anything.
Q: So the arguments that you're presenting aren't — and I think you can say that you probably agree with this — isn't appealing to the IRS and they don't agree with it?
A: I imagine. If they had something to show us where we're wrong, I imagine they would send it.
Q: And I know that you state in the handbook — and I can't refer to the specific section right now — that there's an adverse political climate with respect to any kind of judicial proceeding.
A: Adverse political climate to judicial proceedings? In what respect?
Q: That if someone were to go to court with one of these arguments, that they may expect an adverse ruling if they were to present this argument in court, would that be accurate?
A: Well, you know, I think the word — to answer that, I think the word "frivolous" is

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overused without any substance to it.
You know, "frivolous" is defined in the legal dictionary, in Black's dictionary, and it's being misused. Yes, that's what I would say. That's what we're talking about.
Instead of coming back with a ruling showing where the law is wrong that's being cited, even some courts just use the word "frivolous."
Q: You're saying if someone were to go to court with these arguments —
A: That quite possibly it could come back saying this is frivolous without showing where it's wrong.
Q: That's what you would expect would happen, is that a court —
A: Well, not expect. I'd say we have cases.
I don't know what to expect. I believe in my Lord God Jesus Christ and that hopefully — you understand what I'm saying. I can't look into the future.

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Q: No. I understand what you're saying. I'm just —
A: All we can do is disseminate what we've found out about the law. If it's wrong, hey, tell us it's wrong. That's all we can do. And all we can do, if people want to give us power of attorney, is cite that to the Internal Revenue Service.
Q: No. I understand.
A: Okay.
Q: So you're aware that there are cases where individual members have —
A: We have read cases where the law was not addressed and then they use the word "frivolous," yes.
Q: Let me just finish that. I think you answered the question I was going to ask, but I just want to have the question presented, is that you are aware that there are members that petitioned courts generally and specifically the tax court where the situation —
A: No. Well, members. We're not — no.

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I'm not aware of what members do in the tax court.
Q: Oh, you aren't aware of what members do in the tax court?
A: No. What they do in the tax court is what they do. We don't do tax court.
Q: So if someone were to petition —
A: Well, if they go, they petition the tax court, the tax court, according to the regs, 601.102, classification of tax — I'm just going down trying to find it.
Q: You could just tell me — you don't have to cite the section, Mr. Kotmair. If you want to tell —
A: It says the tax court doesn't have jurisdiction for subtitle C.
Q: Oh, okay. So you're just saying that —
A: It's in the regs. Right. So if they have a wage tax and they petition the tax court and they're not making a legal argument about the code, they're going in

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there to talk about numbers, trying to reduce the liability through arguing numbers. And we don't do that.
Q: I understand.
A: So for that reason we don't do anything in tax court. Tax court, as you're probably aware, is a fact case, it's not a law court.
It's the old appeals board; right? Tax appeals board renamed.
Q: So if an individual member petitioned the tax court, it was really their own prerogative?
A: That's right. We don't do tax court petitions or anything like that.
Q: No. I know you don't do petitions.
A: Right. And we don't even talk about it because we don't give any advice.
Q: Right.
A: So unless we take power of attorney, we don't tell them what to do. You know, we'll take power of attorney and do it. But we don't

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tell them that — to do this or to do that or how to do this or how to do that. We don't do that.

Q: But the caseworker that would be assigned to a particular individual, would they be aware if the individual petitioned the tax court —

A: Only if the individual would tell them.

Q: Right.

A: Other than that, we wouldn't be aware.

Q: And does that ever happen?

A: I don't know. Nobody tells me that people told them.

Q: I understand. Yeah, they may never tell you.

A: I think there was one guy who went to tax court and argued a couple years ago or a year ago or so, and we found out about that because they called us up and told us about it.

Q: So he told you what the —

A: In Tennessee. Because the government

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backed off or something and they thought, Wow. But we didn't go there with him.

Q: That's not what I was asking you, if you went there with him.

But you understand that members have presented the argument that you're presenting in these letters —

A: No. No. I doubt it. If they did that, they're wrong.

Q: If they presented it in tax court?

A: If they presented a legal argument to the tax court, they're wrong. You can't —

Q: Just to make this clear, if they presented the legal argument presented in your letter, they would be wrong, but you're also saying —

A: Yeah. Because the tax court doesn't have the jurisdiction to hear it.

Q: Because the tax is on wages?

A: No. It has nothing to do with that. The tax court is a fact court.

Q: So that's the reason why —

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A: You don't argue law to a court that has no authority to hear law. And you don't file a petition to the court and then ask to have it dismissed. You're the one bringing the petition.

Q: No. I understand that.

A: I mean, it's illogical. I'm saying it's just illogical. It doesn't make sense.

Q: But you are aware that individual members —

A: If they do it, they do it on their own.

Q: But you are aware that they have petitioned and that the outcome of all the —

A: I imagine, but I'm — like I said, I'm not aware as such.

Q: I understand. Just generally —

A: If they just happen to tell us, we would be aware, and we wouldn't even give any significance to it because it has nothing to do with what we do. It would be in passing.

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Q: No. I understand that.

A: We wouldn't even retain the information that they did that.

Q: So to the extent that you would retain the information would really be up to the administrative level with disputes with the IRS?

A: Just power of attorney and Privacy Act requests. That's it.

Q: Right.

A: Nothing else.

Q: But you are aware that individual members have presented these arguments in tax court?

A: No, I'm not aware of that, is what I'm telling you.

Q: Oh, you're not aware of it?

A: If somebody told me that they were going to present these arguments in tax court, I would say, Why? Just like I told you, it's a fact court. It's not a law court. You don't — you don't give this to the tax court.

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The tax court — the only person — reason you go to the tax court is to appeal the numbers, try to reduce the numbers of the liability. You accept the liability and argue about the numbers.

Q: Okay.

A: That's what you go to tax court for.

Q: And what about district court? Are you aware of any members that petitioned any district court for any proposed liability?

A: Not off the top of my head. I don't know. I'm —

Q: Just generally.

A: No. I couldn't answer that truthfully.

Q: No.

A: No. I couldn't give you any idea on that.

Q: Not a specific person. I guess I was just asking generally.

But would the caseworker be aware if they were petitioning the district court?

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A: No.

Q: With respect to —

A: No. They just work with the agency.

Q: With the IRS?

A: Yeah.

Q: Oh, okay. But they wouldn't ask about what they need to do if they wanted to petition district court or tax court, any court?

A: What they — no.

Q: What the procedures were or where they needed to go. No?

A: No. They would — if somebody — I don't understand your question.

Q: If it ended with the administrative appeal with the IRS, if —

A: If somebody called in and just a general conversation?

Q: No.

If someone called in — this is a member, and you've pretty much exhausted all the administrative remedies.

A: All right.

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Q: And the IRS is not responsive and they're not accepting these arguments.

A member would not call and ask, you know, what do I do next, what court do I go to? They don't answer questions like that?

A: Well, if they called in and said, What do we do next? then we would send them back to the paralegals. And if they wanted to go to court, then the paralegals would draft a brief for them.

Q: So then they would go to district court?

A: Yeah. But all we'd be doing is the paralegals would draft the brief for them if they wanted to do that. If they wanted to hire the paralegal to draft the brief to go to court, then the paralegal would probably do that.

Q: I understand. And they would draft it for them and then they would go to court?

A: Right.

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Q: So would the paralegal then —

A: They would either — well, I guess — I guess it could happen either way. It could happen where they hired an attorney and the paralegal would do the work for the attorney.

We've found that most attorneys don't understand the tax code, so a lot of them are glad for us to do the paralegal work for them.

So if a member hired an attorney, then the paralegal would work for the attorney.

Q: So the paralegal would then be assigned to the case and be aware if the person was actually filing a complaint in district court?

A: I imagine.

Q: And they individually would just have that knowledge?

A: If they did the complaint and sent it to the individual, I'm sure the individual would come back to them.

Q: And keep them aware of what's happening in the case?

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A: Oh, of course. If they don't, I think they're crazy or just wasting their filing fee; right?
Q: If you don't —
A: If they file a petition and don't follow it through on anything, then they're wasting their filing fee.
Q: What you're referring to, though, is them keeping —
A: The individual.
Q: — the individual keeping the fellowship apprised of what's happening with the litigation?
A: Oh, sure. Because they're the ones handling it either pro se or through a lawyer.
Q: And just to change topics here for just a moment, one of the documents that you offer is a rescission or revocation —
A: Revocation and rescission.
Q: You don't charge for that, that's just available to members; is that right?
A: They might charge a fee for printing it

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out.
Q: So it's just printing it out?
A: Yes.
Q: And the person, it's up to them to deal with it in any way that they can?
A: Right.
Q: But I'll ask you explain that. That's revoking your own —
A: No. It doesn't revoke anything.
Q: Explain it to me then so it's in your words.
A: In other words —
Q: And can I ask you first —
A: You watched Just the Facts. We address it in Just the Facts.
Q: I didn't watch the whole thing.
A: Oh, now you confess.
Q: No. I told you I didn't watch the whole thing.
A: That's all right. I'm kidding you.
Q: What you're referring to is the social security number. I just want to make it

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clear — or if you could just explain if you're referring to the social security number?
A: Well, first off, there's no requirement for any citizen to make an application for a social security number. Right? You're familiar with the Alton case.
Q: Yeah.
A: Right? Which has never been overturned.
And if you go to section — Title 42 section 405, it says right in there that the secretary of social security shall issue a social security number to all aliens when entering the country and to all their applicants, because they can't force citizens to get a social security number.
The Social Security Administration will tell you that. If you write them, they'll write back and tell you. If you don't use a social security number, then you can't build credits towards benefits to retire on.
So anyway, because when I became 18 —

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right? — and I wanted to get a job, I go to the grocery store and the grocer says, Well, before I can hire you, you've got to have a social security number. Well, to an 18-year-old kid, I'm thinking, well, I guess I have to have this number to go to work. So I get it, bring it back to him. Right? But that's not the law at all.
So you know, you know it's a settled fact of law that if you do something as a minor — right? — and you — and it's in error, you're not bound by that as a minor. You've got to be an adult.
So any act that's committed like that, according to the courts, which we cite in the affidavit, that act can be revoked, so you're actually revoking the application and rescinding your signature from it.
Q: So you're revoking your application for a social security number?
A: Your act that you committed in error as a minor.

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Q: Is getting and applying for a social security number?
A: The application. Right. And they don't want to have that number, so they revoke their act and rescind their signature from that application. That's all -- that's it.
Q: Okay. And then following through on that, then revoking your application for a social security number then would --
A: No. It revokes -- yeah. Okay. Go ahead. You're right.
Q: Then that would allow you to --
A: Allow you to what?
Q: I want to put it in a way that we're both on the same page as far as what you're requesting.
Is that --
A: I'm not -- it's not requesting anything.
Q: Not you. The individual --
A: He wouldn't request anything.
Q: Well, if he was revoking his

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application for a social security number --
A: He's giving notice of that.
Q: Okay. Then his social security tax would not be required to be withheld by his employer; is that right?
A: Well, I guess if he doesn't have a number -- did you ever look on the application for a W-7 for a TIN?
Q: Yes. I'm just asking you what the effect of this is. I don't want to take too long --
A: Well, the effect of it is he's telling the government, the secretary of the treasury and whomever else that he's revoking that and he's no longer going to use that social security number.
Q: And the effect of that would be that he wouldn't have to have social security tax withheld at any point?
A: Well, anything in subtitle C requires the number.
Q: So the revocation --

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A: The fact that -- as I went over before, right here it tells you employment taxes are social security taxes and everything in employment is in there.
Q: So the revocation would also apply to income tax that was withheld by the employer?
A: Well, there's no income tax withheld in subtitle C.
It's titled that, but if you go to 7806, it says the titles are not the law.
Q: I just want to ask you --
A: You're talking about 3402.
Q: No, I'm not. I'm asking you about the revocation, because you -- you have argued before employers that --
A: Argued before employers?
Q: In disputes between an employee and an employer that may have been --
A: We have -- we have shown the employer the law.
Q: Where they may have terminated the individual because they have not provided a

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social security number?
A: Well, I guess some employers will do that.
Q: Okay.
A: Right.
Q: So this revocation, it would apply to the income tax that is withheld, whether it's correctly or incorrectly withheld in your position --
A: Well, in subtitle -- every tax in subtitle C requires a W-4 and a number.
Q: That's what I'm asking. It's just that the result of the revocation would also apply to the wage taxes that are withheld by the employer; is that right?
A: What is generally called the income tax, but that's just in the heading, which is not law, because if you go to section 7806, it says headings are not law, not to be considered as law.
Q: I understand that. I'm just asking the

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effect of the —
A: When it says "wages." If you go to here and you see the — you want to hear what wages are?
Q: No, no, Mr. Kotmair.
A: Let me give you the definition of "wages" because that's what you're getting to.
Q: It isn't.
A: Here it is.
The term "wages" means remuneration paid to you as an employee for employment, which is social security, unless specifically excluded. Wages are counted in determining your entitlement to retirement survivors and disability insurance benefits.
That's the wages in 3402 that you're talking about.
Q: It is —
A: Which is for social security.
Q: No. My question isn't just specifically related to the revocation form or rescission form.

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A: That's talking about nothing else but what I told you it did.
Q: So — but it would relate to what is commonly referred to as the income tax withholding by the employer. It would eliminate that.
A: If the employer requires a number that the citizen is not required to have, then it's obvious. The answer is obvious. It speaks for itself.
Q: I don't know if that responds to my question.
I'm just asking, it would eliminate the obligation to withhold social security tax and any employment tax; that's right?
A: Well, the employment tax is the social security tax. It tells you right here.
Q: Right.
And in addition, the revocation or rescission would also eliminate the obligation —
A: No. That doesn't eliminate anything.

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How can it eliminate?
Q: Not having a social security number and this rescission document —
A: If you're not required to have a social security number, you're not required to have it.
Q: But this rescission document —
A: That speaks for itself.
Q: Let me just ask my question.
A: The rescission document, all it does is what I just told you it does. It revokes the application, rescinds your signature from it.
If you're required to have one, then the secretary should issue one to you.
Q: No. I understand that.
My question now relates to the income tax that is withheld on —
A: What income tax? Income tax is not withheld. What I read you said the income tax is withheld through sections 41, 42, 43, 44, 45 and 46. That's the withholding of income tax.

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Q: Okay.
A: Now —
Q: The taxes that are generally withheld by an employer —
A: — under subtitle C —
Q: Mr. Kotmair, I want to stop you because I just want to ask this question and I think it's a very simple one and I don't want to take too much time because the more time that we take now, the less time we're going to have this afternoon.
It only relates to the other taxes other than FICA and FUTA that are withheld by an employer when wages —
A: If someone doesn't — the affidavit of revocation and rescission does nothing more than what I said it does. That's it.
Q: But applying it —
A: It doesn't apply. It does nothing more than what I said it did.
Q: So what you're saying, though, is if you don't have a social security number, you

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don't need social security taxes or employment taxes withheld; is that right?
A: What I'm saying is the Supreme Court held that citizens are not subject to those taxes (indicating).
Q: Okay.
A: And that the law reflects that because you're not required to have a number. The number is only issued to an alien.
That's where that — and I'm saying is all of — they — they don't have the number anymore. If they have to have the number to pay the tax, then the number should be issued to them, and they probably would have a requirement for the tax.
Q: Okay. And you —
A: I mean, that speaks for itself. There's nothing else to it. We're not saying anything other than they don't want the number.
Q: No. I understand that. I was just asking you what —
A: And whatever the consequences are are

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by law.
Q: I understand, Mr. Kotmair.
A: Okay. Well, I mean, I can't answer it any other way.
Q: No.
A: That's it. I mean, if the law required them to have the number, then quite possibly they would have to have the number given to an employer. But evidently the law doesn't require that. Nobody can show me anywhere where it does, and the court said it can't (indicating).
MR. NEWMAN: Okay. I'm going to suggest now that we take a break for lunch now.
THE WITNESS: Okay.
(Whereupon, at 12:00 p.m., a lunch recess was taken.)

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AFTERNOON SESSION
(12:50 p.m.)
BY MR. NEWMAN:
Q: I'm going to ask you to look at, Mr. Kotmair, what's marked as Exhibit 14.
A: You're up to 22.
Q: I gave you up to 22.
MR. GREENSTEIN: That's right. We gave them to him.
THE WITNESS: Just 14.
BY MR. NEWMAN:
Q: I'm asking you to look at Exhibit 14.
A: Where is this?
Q: Page 10 of the handbook. Do you recognize this as being the fellowship's handbook page 10?
A: I suppose, you know. Like I said, I don't have this thing memorized. I don't have photographic memory either.
Q: I understand that. Would you look at the fourth paragraph down on what's marked as Plaintiff's Exhibit 14.

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A: In order to become the legally defined taxpayer.
Q: That paragraph goes on to read that in order to become the legally defined taxpayer as defined in subtitle F —
A: Right.
Q: — under code section 7701(a)(14) and required to pay a particular class of tax, a liability for the tax must arise from written statute within an applicable subtitle.
A: Subtitle, right.
Q: "The tax on income under subtitle A is an indirect tax in the form of an excise imposed on certain privileges and defined by the U.S. Supreme Court as gain separated from capital."
That accurately represents what's written there?
A: Yes.
Q: And that's also the substance of what's written on the Web page; is that right?
A: Yes. It's like I said, it's in this

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Congressional Research Service report.
Q: Right.
Mr. Kotmair, would you turn to what's
marked as Plaintiff's Exhibit 15.
A: All right.
Q: Do you recognize this document?
A: The same answer.
Q: It's the — it's page 11 of the
handbook, and you're giving the same answer as
you did before?
A: Right, right.
Q: That you haven't looked at it recently,
but —
A: Well, I don't —
Q: I understand. It's the same answer.
The second to last sentence in the
first paragraph, is this accurate that it's
written that neither party, employee or
employer, can be compelled to participate in the
entitlement programs — and this is referring to
social security —
A: Right.

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Q: — hence compliance under subtitle C is
correctly said to be voluntary for citizens.
A: That's what the IRS says, voluntary
compliance, self-assessment.
Q: That's what's written in the handbook
then?
A: Yeah.
I mean, it's — we just went over that
before. It's factual.
Q: I understand that. I don't mean to be
repeating. I just want to make that clear.
The third paragraph down states, "In
closing, if you are a citizen or resident alien
working within one of the 50 union states, not
the federal states, you have never been made
liable by Congress for the payment of the
income tax under title 26 subtitle A"; is that
correct?
A: Well, that's what subtitle A says as we
went through before.
Q: I understand. I'm just asking if I'm
representing correctly what's stated there.

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A: I'm saying what the federal states
are.
Q: Go ahead.
A: Possessions and territories.
Q: Of the United States?
A: Right, of the United States.
Q: And that would be those under the
50 states?
A: The 50 states are the only ones that
the constitution applied to, so the federal
states would be considered, as far as the tax
laws are concerned, as foreign countries or
governments.
Q: Okay. The fourth paragraph — and
again, I just want to make sure that I'm
accurately representing what is written here —
reads: "One who quits the social security
entitlement program (via affidavit) will not
receive back any monies already paid in and by
the submission of the affidavit will be
ineligible to receive any future federal
benefits. The Social Security Administration,

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ignoring the affidavit, will accept an
application for benefits from those who have
submitted the affidavit and have enough credits
recorded within the agency records.
Is that correctly stated?
A: Yes.
Q: And what's written here in reference to
the affidavit is what we spoke about earlier,
which is the rescission document?
A: Well, that's exactly what I was talking
about.
Q: Right.
A: Right.
So you can revoke your affidavit just
by applying for benefits — right? — any
affidavit you do, and you violate it. Right?
That's all that's saying.
Q: Okay. Would you please turn to what's
marked as Plaintiff's Exhibit 16.
A: Page 12.
Q: And I'm going to ask the question
again. I know you're going to give the same

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answer, but do you recognize this document?
A: I guess it's part of it. You know, like I don't have it committed to memory.
Q: Okay. In the first paragraph, it's the second — the third sentence — and again, I just want to make it clear that the only question I'm asking is whether or not I'm accurately stating what is written here — is that caseworkers and paralegals assist members in developing cases and can provide the facts and the evidence that will allow a member to seek administrative and judicial remedy.
A: That's their purpose.
Q: Okay. Would you please turn to what's marked as Plaintiff's Exhibit 17.
Okay. I'm going to ask you to refer to the portion under the heading Breaching/Overcoming Employer Obstacles.
A: All right.
Q: I know that we've already discussed this, but what is written here — and again just tell me if I'm accurately stating what's

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written — "If your employer will not accept your statement of citizenship or comply with the laws pertaining to citizens who claim their lawful exemption from income tax, contact the National Workers Rights Committee for assistance. They will provide you with a response."
A: They respond with the laws that we've covered so far.
Q: That — I'm just asking if that's accurately —
A: Yes.
Q: — written — or I read what is accurately written there.
A: Right.
Q: And the response they provide is sent to the employer?
A: Yes. We recite the law to the employers as we showed you before.
Q: Right.
A: What the employer does is his business.

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Q: And the statement of citizenship, that relates to the social security revocation or —
A: No. The statement of citizenship is from the social security regs.
Q: My only question is: Is that separate from the revocation of the social security number? Is that a separate document?
A: Well, that has nothing to do with it. There are two. One is pursuant to the IRS regs, and the other one is an affidavit generated by the member himself, whoever else does it.
Q: So the affidavit would simply state that they are a citizen of this country?
A: As it's — well, it's cited — it used to be in the 515 publication where it would tell them that, you know, that's what you do.
And it comes out of 1441 and it says, if you're a resident or a citizen of the United States and not subject to withholding, you give the withholding agent a statement of citizenship, and he's relieved from withholding

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the tax.
Q: Is this a form that you prepared or is this —
A: No. It's from the Internal Revenue Service regs. It's from the regulations.
Q: The regulations don't have forms.
A: Oh, no, there's no form. It just tells them to do a statement of citizenship, so it's just a statement saying that they're a citizen.
Q: That's what I'm asking.
A: Right.
Q: Is it — you're referring to the regulations, but this is — this isn't a federal form that they're submitting.
A: No. The regs tell them to just tell them, the withholding agent, that you're a citizen.
Q: Right.
So it's an affidavit that you — did you prepare the affidavit?
A: No.

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Q: It's a statement. I'm sorry.
A: It's just a statement. It's a statement that they're a citizen.
Q: Who prepares the statement?
A: I don't know if they do them at the office or not, because normally we just tell people it's a statement.
Q: You just tell them to prepare a statement?
A: Yeah. It's just a statement saying that we're a citizen.
Q: But you don't know if the National Workers Rights Committee, if they prepare them?
A: I don't think the National Workers Rights Committee would do that. No.
Q: No?
A: They would answer any questions that might arise from it just by citing the law itself.
In other words, if a question arose, the National Workers Rights Committee would

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probably send the regulation, a photocopy of the regulation showing the statement of citizenship to the employer. What the employer does with that is his business.
Q: They would send it directly to the employer?
A: If the employer has any questions, right, then — and the member would ask us to do that for him.
Q: So is it incumbent upon the individual fellowship member to write the statement themselves?
A: I couldn't answer that. I don't know if there's a statement there or not.
Q: Okay. I think I asked you that.
A: Yeah. But any which way, it's merely a statement that I'm a citizen.
Q: No. I understand.
A: Right.
Q: So really the National Workers Rights Committee with respect to these statements would really just be answering

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questions if there was a dispute between the employer and employee?
A: Well, a dispute, if any questions arise. Well, I guess the word "dispute" could be used clear across the board as it's descriptive. It doesn't mean that we're going to interfere with the employer's business.
Q: I understand.
A: The employer, you know, if they have any questions about this, then we send them the regulations. That's all it amounts to.
Q: So it would really just be responsive to questions —
A: To any questions that the employer would have about the statement.
Q: Or the member.
A: Well, the member wouldn't have any or he wouldn't have sent the statement of citizenship to his employer or given it to him, one or the other.
Q: But it would be assisting him in following up in the procedures in order to send

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the statement of citizenship —
A: It's merely explaining the law —
Q: — to the employer?
A: — by giving them the law.
Q: But explaining it to the employer.
A: Yeah.
Q: Okay.
A: The employer says, you know — you know, most people have a mindset, including, you know, I mean, when we lecture about the law. We have these lectures which — you saw Just the Facts. And sometimes — it's from the mindset that you have all your life — it takes some people to sit there three or four times through that before they start saying, you know, I understand what you're talking about.
So if an employer all his life has done this and he thought that's all there is and you show him the law that says opposite, then they're going to say, Whoa, what is this?
And that's all that is.
So we send them the law and explain it

to them.
Q: And if there —
A: They might even — the National Workers might even include 42405s, title 42, section 405, showing about the numbers, you know. They might even show them that because most people think that you're required to have a social security number when you're not.
Q: If there was a dispute between the employee and employer over this or the social security —
A: No. We don't get involved in any dispute as such.
In other words, if the employer and them — if the employer says, I don't want to fool with this, that's none of our affair.
Q: But you have represented employees in administrative hearings before administrative law judges; is that right?
A: But that's not employers, nothing to do with employers.
Q: Well, between the employer and

employee?
A: No. Never.
Q: No, you haven't?
A: Not that I recall.
Q: Oh, okay.
A: No. The only — the only —
Q: If they were terminated —
A: No. The only way I've represented anybody was with the IRS and these assessments.
Q: Okay.
A: To my knowledge, I've never represented anybody between an employer and employee dispute.
Q: So if — not an employer-employee dispute, but if — I guess it would be an employer-employee dispute.
A: Yeah.
Q: But covering either the rescission of the social security number —
A: Rescission?
Q: The revocation, however you want to put it —

A: Well, no, no, it isn't — you don't — all you do is make an application for the number.
Q: I understand that.
A: The agency in response to the application issues the number. It's their number to revoke; it isn't ours.
Q: I understand that. No. You fully explained that. I don't want to take up too much of your time explaining it.
A: I just wanted to —
Q: I understand it. And I apologize if I'm misrepresenting it.
But if there was a dispute over what I am calling a revocation or rescission of the social security number, the application for it —
A: No. Why would there be a dispute? It's been our experience that either an employer says, Well, this is the law; I'm going to obey it, or they will say, No, if you want to work here, I'm going to withhold from you.

Exhibit 43D

Q: But if there was a dispute, then you don't represent people in that kind of dispute?
A: No.
Q: Okay.
A: I don't get involved in that.
Q: Okay. Under the subtitle of what's written on Plaintiff's Exhibit 17, the subtitle Breaching/Overcoming —
A: 17?
Q: Yes.
A: Where is 17 — oh. I have 18 here. You got 17 there, George? I thought you were through with it. Okay. Now where are you at?
Q: The heading Breaching/Overcoming Social Security Number Obstacles.
A: Okay.
Q: And what's written there — and I just want to ask you if this is an accurate representation — is: "If you experience a problem obtaining a driver's license or any other problem having to do with the revocation

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of your social security application, contact the National Workers Rights Committee."

A: Yeah.

Q: That's what's written?

A: We write the department of whatever vehicle department it is to show them that the number is, you know, not required.

In fact, I — my Maryland license doesn't have a social security number on it. All I did was take the affidavit of revocation and rescission and the response from the director of the service center in Philadelphia to the Motor Vehicle Administration, and they issued my license.

And that's all that is.

Q: Okay. I was just asking you about the statement.

A: Right. There you go.

Q: Would you please turn to Plaintiff's Exhibit 18.

A: All right.

Q: And I'm going to ask you the same

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question again, if you recognize this document.

A: Where are we at?

Oh, yeah. The same answer.

Q: Yeah.

A: All right.

Q: And I'm only asking again if this is an accurate representation of what's written here in the fellowship's handbook.

A: All right.

Q: The second sentence in the first paragraph, it reads: "These administrative remedies ensure that a person, like yourself, will receive what is called due process. And they exist in the form of legal requirements that are imposed on the IRS so that the law will be applied properly. But of course, whether or not those requirements prevent the IRS from hurting someone depends entirely upon whether or not the individual in question makes the proper responses, protests and/or requests that are necessary to obtain relief."

Is that right?

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A: Yeah. By using the law, just like we said.

Q: And this is just addressing any kind of dispute that the person may have with the IRS and the representation that the —

A: Well, it's — it's doing the letters that we covered here earlier.

Q: And what's written in the last part of this paragraph with respect to disputes with the IRS, it says: When we represent you, that is exactly what we do. We request that the remedy that is available —

A: Wait a minute.

Q: — under the law is given.

A: I'm missing that.

In the same paragraph?

Q: Yeah, in the same paragraph. It's about three-quarters of the way down.

A: Oh, okay.

Q: And it goes on to read — there's a colon there if that helps you find it.

A: It starts with the word "when." Okay.

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Halfway down.

Go ahead.

Q: And this says, "Does this make the IRS go away?"

And this is referring to the letters I assume that you're sending to the IRS?

A: Yeah. People think that we write the letters and make the IRS go away, and we tell them no, it doesn't.

Q: And it says: No, not necessarily. But then it is not intended to make the IRS go away either.

A: No. It's intended to cite the law.

Q: Right.

And the fellowship and you know that despite the letters, the IRS is going to continue to either try and enforce the collection activity that they're imposing or —

A: Well, that's up to the IRS. All we can do is cite the law to them.

Q: No. I understand that.

But despite the letters, you know

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that — and I guess even based on this statement —

A: Well, I told you earlier today it's been their practice not to be be responsive. They just go forward without responding.

Q: I understand that.

A: Okay. Well, that's the answer.

Q: Based on this statement, you're telling the members that —

A: We tell the members that.

Q: — even though the letters are sent —

A: And even though the members cite the law.

Q: — that this is going to continue?

A: Well, it's a possibility. We don't know. I can't look into the future.

Q: I understand that.

A: Okay. Right. Now should I give it to George?

Q: Okay. Mr. Kotmair, can you look at what's marked as Plaintiff's Exhibit 19.

A: All right. Same answer.

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Q: Okay. And what you're responding to when you say "same answer" is just identifying this document.

A: Right.

Q: In the second paragraph, what this is referring to, if you'd take a minute to look at it while I'm asking the question, is just the preparation of court filings by the paralegals that work in the fellowship?

This is the second paragraph.

(Pause in the proceedings.)

A: Well, it says what it says. I didn't write this, as I told you, but it says what it says. And that the political pressure would be exposing the law as it reads.

Q: When you're referring to political pressure, that's referring to —

A: The political pressure would be —

Q: In the fourth paragraph it refers to political pressure?

A: Yeah. Political pressure would be exposing the law, which we try to do.

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Q: And that would be exposing it to either the IRS —

A: The public at large, including the IRS and the courts. Of course.

You know, one time I was in Judge Garbis' courtroom and there were some agents in the back of the courtroom, and he said to me, he says, You don't like them back there.

And I said to him, How can I dislike them? I don't know them, I said, All I want them to do is obey and apply the law as it's written.

Q: And then in the paragraph that you're referring to —

A: That's what that means.

Q: Okay. The fourth paragraph. Is that right?

(Pause in the proceedings.)

A: Well, that's been our experience, the first sentence.

Q: And the first sentence reads, "The

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current political climate of the courts is such that judges are (in a number of cases) actively protecting government employees who violate the law."

A: That was the experience, but like I said, I didn't write this. But that's been our experience, yes.

Q: Is that they're adopting —

A: There have been cases where that happened.

Q: Where they're adopting conclusions and holdings in court —

A: Let me give you a for-instance. I'll give you a for-instance.

We had a — we had a case in North Carolina and we filed — it was a levy action; right?

Q: Can I ask you, before you start going — is this in reference to an individual member or — it's not for yourself.

A: No. It's for a member.

Q: A member?

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A: Right.
And we wrote about it in the
newsletter. I can even send you the article.
So we filed an action — I think it's
Title 28 section 1361 I believe — in asking the
court to order the agent to obey the law as it's
written, which would be 6303(a). Right?
So the U.S. attorney came back and
answered that it would be a violation of the
Antilnjunction Act, and we come back and said
no, we're not asking him to enjoin the
collection of the action, we're asking the court
to order the agent to obey the law as it's
written. And the U.S. attorney came back and
said to the court, If you order him to obey the
law as written, you can't collect the tax. And
the judge dismissed our action.
That's a case in point and we have it
documented.
Q: That there was —
A: That the judge dismissed our action.
Q: And there's a number of holdings where

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the judges just aren't adopting the arguments
that you're presenting?
A: If we sit down here — they're not
arguments. If we sit down here like I read the
law to you and the law says this, it's not
vague. It reads as it reads.
Now, if the judge rules against it,
then that's what we're talking about here.
Q: And for the most part they have
consistently —
A: Just like that — just like that
for-instance there, you know. It's the same
thing, so if a judge does that, that's what
we're talking about here.
Q: And would it be accurate to say that
judges have uniformly and consistently done
that, they've ruled against these arguments?
A: I wouldn't say that. I don't know. I
can't say that every judge has. Certainly the
Supreme Court hasn't because that's who we're
citing, is the Supreme Court.
Q: I'm referring only to the actions that

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you have filed or that members have filed.
A: Well, I can't speak for that because
I'm —
Q: But in this particular case you're
aware —
A: In that particular case I told you
about, it was so gross that we put it in the
newsletter.
Q: And that would be in reference to the
political climate where you're —
A: Well, that is a political climate;
wouldn't you say so?
Q: The judges are actively protecting —
A: They certainly didn't go back to the
law and say the law doesn't say that, so it had
to be political. You know? If they can go to
the law and see what it says.
Q: Would you please turn to what's marked
as Exhibit 20. And this is Plaintiff's
Exhibit 20.
A: Right.
Q: And I'm going to ask you the same

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question again, whether or not you recognize the
document.
A: The same answer.
Q: Okay. In what's listed as
subheading V, it's action V: Petitioning
Bankruptcy Court to Stop Collections and
Challenge IRS Claim, we talked about this
yesterday.
A: Yeah. We don't do this.
Q: You don't do them anymore?
A: No. We haven't done that since back in
the early to mid-'90s.
Q: And the person that did it no longer
works at the fellowship?
A: No.
Q: That was the only question I wanted to
ask you about it.
A: All right.
Q: Mr. Kotmair, could you turn to
Plaintiff's Exhibit 21.
A: Yes.
Q: Can you identify it?

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A: The same answer.
Q: Okay. The second paragraph below where it is written "Example of the Level of Service From SAPF"?
A: All right.
Q: This is somewhat repetitive, but the second paragraph begins with "Some people think we are writing letters to make the IRS go away."
A: All right.
Q: And just to make it clear, you're aware and that the fellowship knows that writing the letters is not going to make the IRS go away?
A: Well, of course.
Q: And you are making the members aware of that and that —
A: Well, of course. We don't lie to anybody and we don't give anybody advice. We're not enticing somebody to do anything. We tell them the way it is.
Q: Okay. Mr. Kotmair, could you turn to

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Plaintiff's Exhibit 22.
Do you recognize this document? You can take a minute.
A: Estes Communications. She asked me for my opinion. Yeah, I recall — I remember this.
Q: Okay. This letter is dated January 8, 1997.
A: 1997.
Q: And as you just said, this is a person that I would assume is a member?
A: I don't know if she's still a member. She was a member.
Q: And she wrote in —
A: She asked me for my opinion about the law with IRAs, and I gave her my opinion.
Q: And her question regarded the taxability of her IRA withdrawal; is that right?
A: I'm — yeah. I believe so. I don't remember. I told her what the law was.
Q: Okay.

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A: And that's exactly what's in this letter.
Q: And what you wrote in the first sentence says, "Received your e-mail this date about IRA withdrawals and reporting the penalty to IRS."
And this refers to the penalty under section 72.
A: Then I cite the laws.
Q: And what you wrote in the third paragraph down underneath the —
A: Section 72 —
Q: — indented paragraph —
A: — is found in subtitle B — or subchapter B, rather, chapter 1 subtitle A, and it deals with the — it identifies lists of items of gross income. The income from these items of gross income are taxable, but they must come from a source that is — that's what we went over before —
Q: Right.
A: — in subchapter N.

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Q: That it's listed in subchapter N chapter 1.
A: "All the sources found therein are foreign."
That's a fact.
Q: And the last sentence of that —
A: "Then, and in that case, if the source of the funds that are deposited in your IRA are foreign, the income therefrom is taxable."
Just a statement of fact.
"If the funds are domestic, then the income is not taxable."
Because it's all foreign sources.
Q: And this is responsive to a question —
A: She had a question about the law, and I told her what the law says and where to find it.
Q: For something like this you wouldn't charge; this is just a —
A: No. I just sent this back to her. There's no charge for that.

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Q: So I would assume that this would be something that would be available only to a full member?
A: No. No. To anybody.
Q: It could be anybody?
A: Anybody who's a member.
Q: Okay. Do you still answer questions like this?
A: Do I still answer questions like that? Do I give opinions?
Q: Yes.
A: I give opinions. I give lectures every Saturday night and I talk about all these things as you saw in the video. That's no different than this.
In other words, I'm just citing what the law says. The person that I cite that to should be responsible enough to go check me out, and then they act accordingly. From — because they're an adult.
Q: I understand.
A: Okay. That's the answer.

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Q: So you still receive inquiries like this from members and you may respond to them?
A: If somebody asks me a question about the law, then I'll answer the law, yeah, but I'm not giving them any advice. That's not advice.
Q: No. I understand that. I just wondered if you were still responding to questions like this just because this letter is so dated —
A: When we have these lectures and they ask questions, then if I can answer them then, if I have the availability of the code and everything, I'll show them right where it is —
Q: Okay.
A: — where it's cited. And they — then they can check it out for themselves.
We tell everybody to check out what we, you know, what we're saying. You know, you got to — if you're a responsible adult, that's your responsibility; right? Don't take our word for it. Check it out for yourself.

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Q: I just want to go back to a statement that you made earlier, Mr. Kotmair, in reference to some court cases that were petitioned, and not necessarily by your members, where you used the term "frivolous" as it was used in a court opinion.
A: I said that it's far beyond the definition of "frivolous" the way it's being used. That's because in order to be frivolous, according to my research of the word, the court would have to show in detail why the argument does not fit within the law, and they're not doing that. They're not addressing the law at all.
So when a court does that — I don't care where the court is — then I would say that's wrong.
Q: Are you aware of courts using that term in reference to members of the fellowship that have petitioned either district court or the tax court?
A: No. Not myself. But I know it's been

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used around the country with even people that are not even members.
Q: But you're not aware of it being used in reference to members —
A: No. I don't recall any. Not at all. If it has been, it's, you know, it's not my recollection or it slipped my recollection, but I don't recall that. Normally we don't usually get that far.
Q: As to going to court you mean?
A: Yeah.
Q: Okay.
A: So no. It's — it could have, but I don't recall.
But I've heard it thrown around and I've seen cases that lawyers and people send me that I read where that term is used, and according to the way it's supposed to be used, it's not being used that way. They're not showing where the argument put forth is frivolous in regards to the law itself, and that's what they're supposed to do, and I don't

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see that in the ones that I've read.
Q: And I sent you requests for admissions.
A: All right.
Q: And it listed court cases in there. And I know that —
A: Which court cases?
Q: They were all tax court cases.
A: Oh, yeah. But I don't fool with that.
Q: Right. We already talked about that.
A: Right.
Q: So you're not aware of those cases?
A: No. I'm not aware of the details of those cases, no.
Q: You didn't read the opinions?
A: No.
Q: And we already talked about this, but —
A: I don't think it — I think you have a different view of what actually goes on.
Q: No. I just want to know if after those cases were filed the caseworkers or

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anyone would be aware of what's written in the opinion.
A: Not to my knowledge, no.
Q: Okay.
A: You know, I don't — I don't — I'm not sitting there for every phone call that they have.
To my knowledge, no. Because we don't — we don't bother with tax court cases for the reasons that I told you earlier.
Q: No. I understand that.
A: Right.
Q: But the caseworkers may be aware of it if the —
A: It would only be in passing. In other words, somebody gives small talk or something, and I doubt if they would even make record of it or — because we don't fool with tax court. We don't get involved in tax court.
Q: Does anyone in the membership ever represent an individual that attends a

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collection due process hearing?
A: Not lately.
Q: Ever?
A: Well, I did.
Q: You did, and that's it.
A: Yeah.
Q: Have you ever received correspondence stating that the positions taken in the hearing are frivolous from an appeals officer?
A: Well, it's been so many years ago, I don't —
Q: No?
A: I wouldn't recall. The ones, like I told you, the ones that I did for the assessments, the deficiencies, they — we never heard anything from them again. Just about — I can't think of any of them that we heard anything from them. It just — everything ceased. It ended. That's my recollection of them.
Like I said, that was back in the early '90s. I don't ever recall a response

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from any of them because what I would normally do is show them the law and, to be quite frank with you, they would be flabbergasted and I could see that. And not to take advantage of somebody like that, I would always suggest that I would do a brief to them explaining the whole thing —
Q: To the appeals officer?
A: To the appeals officer — and then it would give them a chance to examine it — obviously he was ignorant of the whole thing — and then get back to me.
And I would do those briefs and send it to them, and then we would never hear from them again, and the assessment never seemed to go forward to collection. And that's my recollection of it.
Q: All right. Mr. Kotmair, I'm going to ask you questions about Plaintiff's Exhibits 11, 12 and 13, but I don't think that you need to refer to them, but generally these are just the letters that you sent to the IRS, all three that

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we already talked about today.
A: Which one is this one here (indicating)?
Q: This one specifically was the one that was sent to the substitute for return unit.
A: Okay. All right.
Q: But we talked about three letters. One related to notices of deficiency and the other one related to notices of liens.
A: Levy.
Q: Levy?
A: Levy, right.
Q: This —
A: Right.
Q: My question only relates to the sending of these letters, that the staff or you would be aware that these are being sent relating to the person's income tax, proposed liabilities or levies by the IRS because you're sending them directly to the IRS?
A: Yeah. They gave us power of attorney to represent them as to the documents they

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receive from the IRS.
Q: And they are still continuing to send these letters?
A: I don't see any reason why not to. I don't think it's against the law.
Q: But I'm just asking that —
A: Right.
Q: — they are still continuing to send them.
A: We have never been told to stop sending them because it's against the law.
Q: My question was just if they are still continuing to send them.
A: Of course.
Q: It hasn't abated for any reason.
A: There has been no reason to abate it.
Q: Okay.
A: I mean, do you — did you know of any person that told us to stop?
Q: My question was just —
A: I understand that, but my question to you is — I don't think the question is germane

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because it — how can it be germane to the action at hand?
Q: You're referring to this case?
A: Yeah. I don't — nobody has told us this is illegal. All it is is citing the law. That's all it's doing, is citing the law. If we can't cite the law to the Internal Revenue Service, then we're in poor shape in this country.
Q: I don't have any —
A: I think we better question ourselves.
MR. NEWMAN: I don't have any more questions. Do you have any, George?
MR. HARP: I don't think I've got — I've got maybe — let me see this now.

EXAMINATION
BY MR. HARP:

Q: Mr. Kotmair, do you recall the approximate date or time that you last actually represented somebody at one of the assessment hearings that we talked about earlier?

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A: Well, that was back in the early to mid-'90s. I don't remember the year.
MR. HARP: Okay. I really don't have anything else.
MR. NEWMAN: I'm finished.
(Time noted: 1:28 p.m.)
(Reading and signature not waived.)

STATE OF MARYLAND, to wit:

I, Josett F. Whalen, before whom the foregoing deposition was taken, do hereby certify that the within-named witness personally appeared before me at the time and place herein set out, and after having been duly sworn by me, according to law, was examined by counsel.

I further certify that the examination was recorded stenographically by me and this transcript is a true record of the proceedings.

I further certify that I am not of counsel to any party, nor an employee of counsel, nor related to any party, nor in any way interested in the outcome of this action.

As witness my hand and notarial seal this day of , 2006.

JOSETT F. WHALEN

Notary Public

MY COMMISSION EXPIRES: 10/1/08

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

JOHN BAPTIST KOTMAIR, JR.

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this day of , 2006, and executed the above certificate in my presence.

NOTARY PUBLIC IN AND FOR

MY COMMISSION EXPIRES: