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

MARIA M. PARHAM, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00122
UNITED STATES POSTAL SERVICE, Respondent.	)	Judge Robert L. Barton, Jr.

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.

[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

[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

[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:

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