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

June 18, 1997

ALEXANDER KOSATSCHKOW, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00025
ALLEN-STEVENS CORP., Respondent.	)

FINAL DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* for Complainant

Richard M. Miettienen, Esq., and *Daniel J. Dulworth, Esq.,* for Respondent

I. *Introduction*

This case posits five issues:

1) Is an untimely charge, initially filed with the Equal Employment Opportunity Commission (EEOC) thirty-two years after hire and 231 days after the alleged violation, cured when the Department of Justice Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) fails to identify untimeliness in advising why it will not file a complaint?

2) May an employee whose wages are garnished in compliance with an Internal Revenue Service (IRS) Wage Levy in satisfaction of unpaid taxes successfully circumvent that garnishment by suing his employer for discrimination in violation of Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, codified as 8 U.S.C. §1324b?[1]

[1]For recent resolution of this issue *see Austin v. Jitney-Jungle Stores of America, Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.).

3) Does an employer's refusal to honor gratuitously tendered, unofficial documents, that purport to exempt an employee from tax withholding and social security deduction, constitute 8 U.S.C. §1324b discrimination?[2]

4) May an employee successfully maintain a citizenship status discrimination and document abuse action against an employer with whom there is an ongoing employment relationship?[3]

5) May an employer who withholds federal income tax and social security contributions from employees' wages and complies with an IRS Notice of Levy and because of such compliance is sued by an employee for §1324b discrimination successfully substitute the United States in its role of tax collector?[4]

As more fully explained below, I conclude that: (1) OSC's omission in a determination letter of timeliness as a ground for not espousing a Complainant's cause does not cure an untimely charge; (2) an employee cannot utilize 8 U.S.C. §1324b antidiscrimination provisions to avoid IRS tax and social security obligations, in-

[2]This issue is well-settled in OCAHO jurisprudence: an employer's refusal to honor improvised tax and social security exemption papers does not subject the employer to liability for discrimination under 8 U.S.C. §1324b. *See Werline v. Pub. 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*, 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*, 6 OCAHO 923, 1997 WL 235918; *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). Kosatschkow'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 self-styled, unofficial documents purportedly exempting the offeror from taxation. The self-styled documents are all "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]. The instant case fits this pattern.

[3]*See D'Amico v. Erie Community College*, 7 OCAHO 927 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 , 1997 WL 242199; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, 1997 WL 131346.

[4]*See Austin v. Jitney-Jungle*, 6 OCAHO 923, 1997 WL 235918.

cluding wage levies; (3) an employer's refusal to honor gratuitously tendered, improvised documents purporting to exempt an employee from tax withholding and social security deduction is not a violation of §1324b; (4) an employee cannot successfully maintain a citizenship status discrimination and document abuse action against an employer with whom there is an ongoing employment relationship; and (5) an employer sued for §1324b discrimination may not successfully substitute the United States as a party.

II. *Facts and Procedural History*

Alexander Kosatschow (Complainant or Kosatschkow) was born in Germany on March 26, 1946. He obtained permanent resident status in 1951 and became a naturalized citizen of the United States in 1967. A resident of Nuremberg, Pennsylvania, he now seeks 8 U.S.C. §1324b redress against his employer, Allen-Stevens Corp. (Respondent or Allen-Stevens) of West Hazelton, Pa., a manufacturer of zinc die castings. Kosatschkow has worked as a Trimmer/Melter for Allen-Stevens for more than thirty-two (32) years.[5]

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[5]An improvised charge format filed with the OSC by Kosatschkow's representative, Kotmair, alleges that Kosatschkow was retaliatorily discharged for filing a complaint with EEOC:

> After asserting his rights through EEOC, Mr. Kosatschkow has been fired for alleged absenteeism and tardiness, which he claims was not uniformly applied. It appears that Allen-Stevens has taken a retributive action against Mr. Kosatschkow for asserting his rights as a U.S. Citizen under law.

OSC Charge, at p. 5. However, Kosatschkow's Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO), the subject of this adjudication, while claiming that Allen-Stevens discriminated against the Complainant on the basis of U.S. citizenship by deducting federal taxes and withholding social security contributions from his wages, denies on its face that Allen-Stevens discharged Kosatschkow or retaliated against him. OCAHO Complaint, at ¶¶11, 14, 15. While Kosatschkow answers "yes" to statement 16 of the OCAHO Complaint format, "The Business/Employer refused to accept the documents that I presented to show I can work in the United States," he affirmatively declines to allege document abuse, prohibited by 8 U.S.C. §1324b(a)(6), by crossing out the important qualifier, "to show I can work in the United States." Title 8 U.S.C. §1324b(a)(6) only prohibits an employer from rejecting certain specified documents chosen by an employee ***to prove eligibility to work in the United States***. Documents presented for other purposes are not covered by the statute. *See Boyd v. Sherling*, 6 OCAHO 916, at 20, 1997 WL 176910, at *16; *Toussaint v. Tekwood*, 6 OCAHO 892, at 19, 1996 WL 670179, at *15 ("IRCA does not create a blanket prohibition on an employer's request for documents.").

The chain of events culminating in this proceeding began on September 12, 1994, when Kosatschkow gratuitously tendered his employer a self-styled "Statement of Citizenship,"[6] which purported to exempt him from federal tax withholding, and a "letter of transmittal," which Kosatschkow asked his employer to submit to the Internal Revenue Service (IRS).

On September 13, 1994, Allen-Stevens informed Kosatschkow that it had contacted the IRS regarding his request.

On October 18, 1994, Kosatschkow made a second gratuitous proffer, this time an improvised "Affidavit of Constructive Notice." By this *sui generis* document, Kosatschkow declared that he did not "recognize any connection between myself and a social security number"[7] and was, therefore, exempt from social security deductions from his wages. Complainant's Reply to Respondent's Affirmative Defenses, Kosatschow Affidavit, May 1, 1995.

On November 8, 1994, Allen-Stevens informed Kosatschkow that it would continue to withhold federal taxes and social security contributions.

On May 1, 1995, 231 days after he presented his "Statement of Citizenship" on September 12, 1994 (the rejection of which he claims as the discriminatory event), Complainant filed an untimely charge with the EEOC alleging that Allen-Stevens had discriminated against him on the basis of his national origin.[8] According to

[6]This improvised "Statement of Citizenship," offered to show Complainant was not subject to income tax withholding and social security deductions, is not to be confused with official INS Forms N–560 and 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).

[7]The social security number is the taxpayer identification number for individuals pursuant to 26 C.F.R. §§301.6109–1(a)(1)(ii)(D), (b)(2), (d).

[8]Title 8 U.S.C. §1324b(d)(3) establishes a 180-day time limit: "No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with Special Counsel." According to the Memorandum of Understanding between EEOC and OSC, a timely filing with EEOC on the same charge may satisfy this deadline. 54 FED. REG. 32499, 32500 (1989); *see Caspi v. Trigild Corp.*, 6 OCAHO 907 (1997), 1997 WL 131354 (O.C.A.H.O); *Toussaint v. Tekwood*, 6 OCAHO 892, 1996 WL 670179. However, Complainant's EEOC charge of discrimination on the basis of national origin (1) differs from his OSC charge of citizenship status discrimination, and (2) was brought after the 180-day deadline expired.

Kosatschkow, EEOC dismissed that charge for lack of subject matter jurisdiction. OSC Charge, at p. 8.

On or about October 11, 1995, the IRS sent Allen-Stevens a Wage Levy on Kosatschkow. On October 11, 1995, the IRS advised Allen-Stevens by letter:

> If Mr. Kosatschkow refuses to complete Part 4 of the Wage Levy in which he lists his dependents and declares his marital status or provides information which you know to be false then you are to consider him to be single with one exemption and withhold accordingly. According to the exemption table included with the Wage Levy a single person with one exemption paid weekly would receive a net pay of $120.19.

Answer, Attachment (Exhibit).

On January 9, 1996, 484 days after September 12, 1994, Kosatschkow filed an untimely charge[9] alleging national origin discrimination with the Pennsylvania Human Relations Commission (PHRC):

> I have lawfully withdrawn from the voluntary participation in the Social Security and Welfare System of the United States via a lawfully submitted AFFIDAVIT OF REVOCATION AND RECISSION [sic] to the Honorable Nicholas Brady, Secretary of the Treasury. Said Affidavit was submitted by me on August 19, 1991, and I have received no form of rebuttal whatsoever from the Secretary, or his delegates regarding this. Pursuant to this action, I am no longer required by any law, statute, code or regulation to make any further contribution to Social Security Taxes . . . [in withholding Social Security contributions from wages] Allen-Stevens has been treating me as if I were an [sic] nonresident alien, and has continued to do so as of this date. Allen-Stevens has therefore discriminated against me based on my national origin, treating me as though I do not have the rights of a citizen.

Complainant's Reply to Respondent's Affirmative Defense, Appendix, PHRC Charge, at Continuation, pp. 2–3. (Complainant's assertions contrast with 26 U.S.C. §§3101 and 3102, which oblige

[9]Title 29 C.F.R. §1601.13 (b)(1) establishes timeliness for discrimination filings with State and local agencies after first filing with the EEOC: "Such filing is timely if effected within 300 days from the date of the alleged violation." Here, Complainant's filing with EEOC was untimely, occurring 231 days after the alleged violation, long after the 180 days prescribed by statute. Kosatschkow's subsequent filing with the PHRC is even staler, taking place 484 days after the alleged violation, 184 days after the 300-day clock ran. *See Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).

the employee to make social security contributions through employer deductions.)

Apparently receiving no satisfaction from the PHRC, Kosatschkow filed a charge of citizenship discrimination with OSC by letter dated February 28, 1996, based on the same factual predicate as his EEOC filing. Kosatschkow charged that on September 12, 1994, he attempted to "relieve" Allen-Stevens "from the duty of withholding the income tax" and informed Allen-Stevens "that he was also not subject to the Social Security Act." OSC Charge, at p. 3.

> Mr. Kosatschkow 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 of Rescission [sic] of his signature on the SS–5 Application for a Social Security Account Number Card.

Id. Kosatschkow argued that because he renounced his social security number, the terms "employee," "employer," and "wages" were meaningless as applied to him. OSC Charge, at p. 5.

By determination letter dated August 20, 1996, without commenting on the timeliness of the charge, OSC informed Kosatschkow and eight other individuals represented by 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. 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.

OSC advised of the right to file a private action before the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days of receiving the determination letter.

On November 18, 1996, Kosatschkow through Kotmair filed an OCAHO complaint alleging that Allen-Stevens discriminated on the basis of citizenship status by refusing to accept the improvisational "Statement of Citizenship" and "Affidavit of Constructive Notice" and by subjecting Kosatschkow to "withholdings on . . . [his] pay as an Alien." OCAHO Complaint, at ¶16(a). The Complaint, however, denies that Allen-Stevens discharged Kosatschkow, retaliated against him because he filed a complaint, or asked for too many or

wrong documents than required to show that he is authorized to work in the United States. ***The Complaint affirmatively declines to allege discharge or retaliation*** by answering "no" to statements at ¶¶14 and 15, ***and negates statutory document abuse*** by crossing out the words "to show I can work in the United States" from the statement at ¶16 of the OCAHO Complaint format. OCAHO Complaint at ¶¶14, 15, 16. The Complaint requests back pay from September 12, 1994, the date on which Complainant first presented an unofficial document. OCAHO Complaint, at ¶21.

OCAHO issued a Notice of Hearing on December 10, 1996.

On January 13, 1997, Allen-Stevens filed its Answer, admitting it employed Kosatschkow, but denying discrimination. Allen-Stevens argued that it

> withholds taxes from *all* of its employees pursuant to law and therefore does not discriminate among any of its employees.

Answer, at ¶5. Allen-Stevens also contended: (1) the Complaint was time-barred, and (2) named the wrong party, the proper party in tax suits being the United States of America; (3) employers are statutorily obligated by 26 U.S.C. §§3101, 3401, and 3402 to deduct social security contributions and to withhold federal taxes from employees' wages; (4) it relied on IRS advice in withholding contributions and taxes from Kosatschkow's wages; and (5) Kosatschkow is estopped from suit because he failed to follow statutory procedures for tax challenges by not paying the tax, claiming a refund, and suing the United States if denied.

Although Allen-Stevens did not file a separate motion, its Answer moved for dismissal with prejudice and summary judgment, and requested attorney's fees. Answer, at p. 7.

In support, Allen-Stevens attached an IRS letter advising Allen-Stevens on compliance methodology with the IRS levy on Complainant's wages. The IRS letter illuminates a murky confusion between the parties. While Kosatschkow characterizes as the discriminatory event Allen-Stevens' September 12, 1994 refusal to honor his tax-exemption document, Allen-Stevens assumes Kosatschkow is suing because Allen-Stevens withholds federal taxes and social security contributions from his wages, ***and*** because Allen-Stevens complies with an IRS wage levy. The tenor of the pleadings confirms Allen-Stevens' interpretation of events.

On January 27, 1997, Kosatschkow filed a Reply to Respondent's Affirmative Defenses, including as exhibits two highly revealing documents: (1) Kosatschkow's belated January 9, 1996 filing with the PHRC, and (2) an affidavit dated May 1, 1995, in which Kosatschkow provided a chronology of his tax protest. These documents clarify the nature of Kosatschkow's Complaint, the gravamen of which is a challenge to the Internal Revenue Code and Social Security Act.

III. *Discussion and Findings*

A. *The Complaint Is Untimely and Must Therefore Be Dismissed; the Concept of Equitable Tolling Complainant Invokes Is Inapplicable*

Kosatschkow states that Allen-Stevens hired him more than 32 years ago. Despite this long and ongoing relationship, Kosatschkow maintains that Allen-Stevens discriminates against him by not exempting him from federal taxation and social security contribution. Although Allen-Stevens has no authority to flout federal law which it is powerless to resist, Kosatschkow has initiated four actions against it.

Title 8 U.S.C. §1324b(d)(3) delineates the time frame within which a complaint must be brought:

> No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel.

8 U.S.C. §1324b(d)(3). Assuming the date of the alleged "injury" to be September 12, 1994 (when Allen-Stevens first rejected Kosatschkow's improvised tax-exemption document), Kosatschkow had ***only 180 days*** after September 12, 1994 ***to file*** his charge with OSC.

On May 1, 1995, ***231*** days after September 12, 1994, Kosatschkow filed an EEOC charge of ***national origin discrimination***, a charge subsequently dismissed. On January 9, 1996, ***484*** days after the allegedly discriminatory event, Kosatschkow filed a ***national origin discrimination*** charge with the PHRC. On February 28, 1996, Kosatschkow filed an even staler charge of ***citizenship discrimination*** with OSC based on the same factual predicate. While declin-

ing to file a complaint on his behalf, OSC's determination letter did not mention that Kosatschkow's charge was time-barred.

Kosatschkow contends that the Complaint, otherwise untimely because the charge was untimely, was revived by OSC's failure to specify staleness as a ground for its refusal to file a Complaint. Kosatschkow argues that this omission should be construed as an application of the doctrine of equitable tolling to the OSC charge. Kosatschkow's argument is without merit. OSC's omission does not invite equitable tolling analysis, which depends for its applicability on events ***before*** the end of the period, not after.

Since the OSC Charge was filed ***354 days after the 180-day deadline***, the Complaint is dismissed as untimely. 8 U.S.C. §1324b(d)(3).

B. *A Forum Must Dismiss a Case if It Lacks Subject Matter Jurisdiction*

The Supreme Court instructs that federal administrative law judges (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. *Winkler v. Timlin*, 6 OCAHO 912, at 4, 1997 WL 148820, at *3; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 5, 1997 WL 131346, at *3.

"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 (3d 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); *see Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 427 n.1, 428, 431 (3d Cir. 1983); *Doughan v. Tutor Time Child Care Sys., Inc.*, 1996 WL 502288, at *1 (E.D. Pa. 1996); *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 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 (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 unsubstantial" 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 537 (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. 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, Complainant cannot prevail, a forum may even do so *sua sponte*. *Riddle v. Department of Navy*, 1994 WL 547840, at *1 (E.D. Pa. 1994). *See Roman v. Jeffes*, 904 F.2d 192, 194, 196 (3d Cir. 1990) (*sua sponte* dismissal appropriate "if as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. . . .") (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)), *cited in Abul-Akbar v. Watson*, 901 F.2d 329, 334–35 (3d Cir. 1990)); *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980).

C. *Title 8 U.S.C. §1324b Does Not Confer Subject Matter Jurisdiction Over Terms and Conditions of Employment*

1. *IRCA Governs Only Immigration-Related Causes of Action*

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, codified as 8 U.S.C. §1324a, which 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.[10]

Title 8 U.S.C. §1324b prohibits unfair immigration-related employment practices based on national origin or citizenship status; §1324a(b) obliges an employer to verify an employee's eligibility to work in the United States at the time of hire.

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."[11]

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

[10]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 UNITED STATES CODE CONG. & ADMIN. NEWS 5840, 5842.

[11]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, at *28 n.11 (O.C.A.H.O.).

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 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).

Title 8 U.S.C. §§1324b(a)(1) and 1324b(a)(6) clearly relate to our national policy of permitting only those aliens authorized to work in the United States to do so. To implement this national policy, they place on the employer's shoulder the burden of ascertaining employees' work eligibility, and the obligation of treating work-authorized immigrants fairly. Nowhere, however, in his rambling pleadings, does Kosatschkow implicate this ***immigration-related*** statutory regimen. Enacted to discourage illegal immigration by penalizing

employers who hire illegals, §§1324b(a)(1) and 1324b(a)(6) cannot be utilized as a universal panacea for all worker complaints, or distorted to provide a safe harbor for tax evasion.

2. *Subsection 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." *Austin v. Jitney-Jungle,* 6 OCAHO 923, at 8; 1997 WL 235918, at *6*; Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 8, 1997 WL 242208*; Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 7, 1997 WL 131346, at *5; *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 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.

Complainant specifically denies that Allen-Stevens discharged him or retaliated against him at ¶¶14 and 15 of the OCAHO Complaint format. Furthermore, he affirmatively declines to allege document abuse by crossing out the phrase that defines document abuse in ¶16 of the Complaint. Although he denies that Allen-Stevens refused to hire him, discharged him, retaliated against him, or committed document abuse, he seeks redress because Allen-Stevens withholds federal taxes and deducts social security contributions from his paycheck, and refuses to accept improvised, unofficial documents purporting to exempt Kosatschkow from taxation. Kosatschkow contests Allen-Stevens's mandatory statutory duty to withhold taxes, and denies his own obligation to pay taxes. Although he is an incumbent, Kosatschkow requests that he be awarded back pay from September 12, 1994. Kosatschkow's request is without legal authority. His claim turns on a misguided contention that only non-citizens are subject to tax withholding.

In effect, Kosatschkow sues because his employer, by failing to excuse him from tax and social security obligations, refused to treat him preferentially. To refuse to prefer is not to discriminate. An em-

ployer who treats all alike, discriminates against none. Nowhere does the Complaint describe discriminatory treatment on any basis whatsoever. Kosatschkow 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. Allen-Stevens's decision to subject Complainant to its tax and social security regimen is not discrimination within the scope of ALJ jurisdiction under 8 U.S.C. §1324b.

The administrative enforcement and adjudication modalities established to execute and adjudicate the national immigration policy that 8 U.S.C. §1324b evinces are not sufficiently broad to address Kosatschkow's attack 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 Kosatschkow, consequently discriminatorily denied employment. *United States v. Mesa Airlines*, 1 OCAHO 74, at 466–67 (1989), 1989 WL 433896, at *26, 30–31 (O.C.A.H.O.).

3. *Section 1324b Does Not Reach Terms or Conditions of Employment*

Section 1324b does not reach terms and conditions of employment. *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 obligations imposed by the IRC to withhold taxes and social security deductions from employees' wages. *Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 269376, at *7; *Wilson v. Harrisburg*, 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. Nothing in the text or legislative history of 8 U.S.C. §1324b prohibits an employer from complying with the IRC regimen or from asking for a social security number (the individual tax identification number). *Austin v. Jitney-Jungle*, 6

OCAHO 923, at 9, 1997 WL 269376, at *7; *Wilson v. Harrisburg*, 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. Hampstead (Horne II)*, 6 OCAHO 906, at 8, 1997 WL 131346, at *6; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16–17, 1996 WL 670179, at *14, *appeal filed*, No. 96–3688 (3d Cir. 1996); *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 resist the IRC by accepting gratuitously tendered, improvised documents which purport to relieve an employee from taxation. 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. 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 Kosatschkow's Complaint, a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

C. *The Anti-Injunction Act Deprives This Forum of Subject Matter Jurisdiction Over Tax Collection Challenges*

Kosatschkow's claim, although expressed in immigration-related employment jargon, is essentially a collateral attempt to avoid or restrain federal income tax collection, both in withholding and through levy. Kosatschkow seeks redress in this forum of limited jurisdiction in lieu of appropriate forae described below. 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) (emphasis added); *Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 235918, at *7; *Wilson v. Harrisburg*, 6 OCAHO 917, at 11, 1997 WL 242208, at *8; *Boyd v. Sherling*, 6 OCAHO 916, at 8, 1997 WL 176910, at *9. The procedural history of this claim reveals a tax protest with no immigration-related implications.

The September 12, 1994 gratuitous tender of an improvised "Statement of Citizenship" purports to exempt Kosatschkow from federal withholding tax ***because*** he is a citizen. His unsolicited "Affidavit of Constructive Notice" claims exemption from the IRC and SSA because he repudiated his social security number (his individual taxpayer identifier under 26 C.F.R. §§301.6109(a)(1)(ii)(D), (b)(2), (d)). Both efforts attempt to restrain Allen-Stevens from col-

lecting federal withholding tax and social security contributions, statutory obligations which the employer must perform.[12] Obviously, challenges to the IRC and SSA do not implicate jurisdiction under 8 U.S.C. §1324b.

Kosatschkow's May 1, 1995 EEOC charge, later dismissed, attacked Allen-Stevens' continued compliance with tax and Social Security law as discriminatory on the basis of national origin because that compliance deprived Kosatschkow as a U.S. citizen of "the full fruit of [his] labor"—i.e., a paycheck *sans* tax or social security deductions. In response to claims of this genre, 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 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000–e *et seq*.[13]

On or about October 11, 1995, Allen-Stevens received an IRS Wage Levy garnishing Kosatschkow's salary.

On January 9, 1996, three months later, Kosatschkow filed his PHRC national origin discrimination charge.

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[12]Contrary to Kosatschkow'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. 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. §3402 (obliging "every employer making payment of wages [to] . . . deduct and withhold upon such wages a tax"), 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). Title 26 U.S.C. §6672(a) penalizes a responsible person who fails to collect such tax by imposing a monetary penalty "equal to the total amount of the tax evaded or not collected." 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).

[13]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.

On February 28, 1996, four months after the IRS wage levy, apparently without waiting for a determination by PHRC, Kosatschkow filed a charge of citizenship discrimination based on the same factual predicate with OSC. Like Kosatschkow's charges before EEOC and PHRC, his OSC charge specified tax avoidance as its stated purpose.

On November 18, 1996, Kosatschkow filed his OCAHO Complaint, again accusing Allen-Stevens of treating him as an "Alien," and predictably characterizing employer compliance with statutory tax mandates as immigration-related workplace discrimination. Kosatschkow's theory, exhaustively discredited by this forum,[14] is that only aliens must pay withholding taxes and that taxation of U.S. citizens, including social security contributions, is therefore discriminatory under IRCA.

Taken in whole or part, Kosatschkow's myriad legal actions constitute a campaign to restrain the collection of taxes. The Anti-Injunction Act bars such suits, which must be dismissed for lack of ALJ subject matter jurisdiction.

Except in extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to

[14] *See Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, 1997 WL 242208 (refusal to hire or discharge only citizenship discrimination claims cognizable under §1324b(a)(1); incumbent school bus driver, who charged employer school district with immigration-related unfair employment practice because school district refused to accept gratuitous "Affidavit of Constructive Notice," touting social security number renunciation, and improvised "Statement of Citizenship," offered to show that bus driver was not subject to tax witholding and social security contribution, failed to allege cognizable cause of action under §1324b); *Boyd v. Sherling*, 6 OCAHO 916, 1997 WL 176910 (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 1, 1997 WL 148820, at *1 (denying approval to agreed voluntary dismissal and dismissing complaint of applicant telemarketer who alleged discrimination because telemarketing firm representative refused to hire him when he disputed policy that "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"); *Horne v. Town of Hampstead* (*Horne II)*, 6 OCAHO 906, at 2, 1997 WL 131346, at * 1 (dismissing complaint of incumbent police officer who charged that employer town violated the overdocumentation prohibition at §1324b(a)(6) by refusing to accept a self-styled "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"), to cite but a few examples.

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), a statute popularly known as "The Anti-Injunction Act," which prohibits all suits restraining tax assessment, collection, and determination.

> ***[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 Anti-Injunction Act's purpose 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 refun'" *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 Packing & Navigation Co.*, 370 U.S. 1 (1962).

The Anti-Injunction Act enjoins suit to restrain <u>all</u> 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). This is because the IRC compels employers to withhold federal income and social security taxes from employees' wages. 26 U.S.C. §§3101, 3102, 3402(a), (d). An employer who fails to do so is himself liable for the tax. 26 U.S.C. §3403.

Tax levies on wages are also activities culminating in tax collection. 26 U.S.C. §§6331(a), 6334(a)(9). Enforcers and implementers of tax levies are immune from suit. *Kotmair v. Gray*, 505 F.2d 744, 745 (4th Cir. 1974) (summary judgment appropriate where IRS agents acted under color of federal law, and bank and its employees acted in compliance with federal law; agents and employees are not subject to suit under 42 U.S.C. §1983, even were 26 U.S.C. §6331, which authorizes collection of overdue taxes by levy and seizure, unconstitutional).

Title 26 U.S.C. §§6671 and 6672, extensively litigated,[15] is a separate penalty provision that imposes joint and several liability on

[15] *See Slodov v. United States*, 436 U.S. 238 (1978); *Lauckner v. United States*, 68 F.3d 69 (3d Cir. 1995); *Greenberg v. United States*, 46 F.3d 239 (3d Cir. 1994); *United States v. Carrigan*, 31 F.3d 130 (3d Cir. 1994); *Quattrone Accountants, Inc. v. IRS*, 895 F.2d 921 (3d Cir. 1990); *United States v. Vespe*, 868 F.2d 1328 (3d Cir. 1989); *Wall v. United States*, 592 F.2d 154 (3d Cir. 1979); *Datlof v. United States*, 370 F.2d 655 (3d Cir. 1966).

"any person required to collect . . . and pay over" withholding taxes or tax liens who fails to do so. 26 U.S.C. §6672(a). Section 6672 imposes a 100% penalty "equal to the total amount of the tax evaded, or not collected." *Id*. In Kosatschkow's case, therefore, ***had Allen-Stevens chosen not to collect withholding tax and social security contributions or to enforce the IRS wage levy, the corporation and corporate officials responsible for collecting the tax and contributions might have incurred liabilities equivalent to Complainant's deficiency and penalties had they not complied!***

The Supreme Court has informed taxpayers of two limited statutory procedures available to challenge tax assessments:

> [The taxpayer may] pay the tax that the law purported to require, file for a refund and, if denied, present his claims of invalidity, constitutional or otherwise, to the courts. *See* 26 U.S.C. §7422. Also, without paying the tax, [a taxpayer may challenge] claims of tax deficiencies in the Tax Court, §6213, with the right to appeal to a higher court if unsuccessful. §7482(a)(1).

Cheek v. United States, 498 U.S. 192, 206 (1991). Put simply, depending on the nature of the tax challenged, the Supreme Court advises the dissident taxpayer to pay now, sue later, or proceed directly to tax court.

Should Kosatschkow seek properly to recover taxes Allen-Stevens withheld from his paycheck, he must file for a refund, and, if denied, sue in ***district court***. 26 U.S.C. §7422(a) ("**NO SUIT PRIOR TO FILING CLAIM FOR REFUND**") (emphasis supplied); 28 U.S.C. §1346(a)(i) (***"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 assessed"***). Should Kosatschkow wish to challenge his ***assessment liability***, he must do so ***in Tax Court within 90 days of notice of deficiency***. 26 U.S.C. §§6213(a), 6214, 6215. During these 90 days, a Notice of Levy may be enjoined. 26 U.S.C. §6213(a), (b)(2)(B). Tax Court decisions are reviewable by U.S. Courts of Appeal. 26 U.S.C. §7482(a).

Kosatschkow may also sue the IRS in ***district court*** if it neglected to serve him with a deficiency notice, and thereby deprived him of the opportunity to challenge the levy in Tax Court. 26 U.S.C. §6213(a); *Laing v. United* States, 423 U.S. 161 (1965). *See Flynn v. United States*, 786 F.2d 586, 589 (3d Cir. 1986) ("A suit to enjoin the

assessment of a deficiency is permissible if the taxpayer has not been mailed a notice of deficiency and afforded the opportunity for review in the Tax Court.") (referenced citations omitted); *Delman v. Commissioner*, 384 F.2d 929, 934 (3d Cir. 1967) ("It is true that unless a notice of deficiency is mailed to the taxpayer the Tax Court may not acquire jurisdiction."), *cert. denied*, 390 U.S. 952 (1968). *See also King v. Commissioner*, 857 F.2d 676, 679 (9th Cir. 1988); *Jensen v. I.R.S.*, 835 F.2d 196, 198 (9th Cir. 1987); *Payne v. Koehler*, 225 F.2d 103, 105 (8th Cir. 1955), *cert. denied*, 350 U.S. 904 (1955); *Miller v. United States*, 817 F. Supp. 1493, 1498 (E.D.Wash. 1992) ("noncompliance with the notice requirements of §6212(a), (c), and §6213 is a recognized exception to §7421's general proscription against injunctive relief"), *aff'd*, 40 F.3d 1246 (9th Cir. 1994) (citations omitted); *Nassar v. United States*, 792 F. Supp. 1040, 1044 (E.D. Mich. 1992); *Rodriguez v. United States*, 629 F. Supp. 333 (N.D. Ill. 1986); *Antrum v. United States*, 127 F. Supp. 54 (D. Conn. 1953). When the United States waives immunity in "***quiet title actions affecting property encumbered by a tax lien***[,]" such as wages, the ***proper forae are federal district court, or the State court having jurisdiction over the property encumbered by the tax lien***. 28 U.S.C. §2410(a); *Miller*, 817 F. Supp. at 1498.

Even in these circumstances, 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," and if the court in which relief is sought already exercises equitable jurisdiction over the claim. *Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. 1, 7 (1962). ***OCAHO is not and as a matter of law cannot be the proper forum for a tax challenge***.

The procedures described provide due process and constitute Kosatschkow's available legal options. If Kosatschkow failed to exercise them, as interpreted at 26 C.F.R. §301.6331–1(a) ("Levy and Distraint") and (b), 26 U.S.C. §6331(a), 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.[16]

It is a "well-settled principle that the federal government is immune from suit 'save as it consents to be sued.'" *FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833, 839 (3d Cir. 1994) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "Furthermore, such consent 'cannot be implied but must be unequivocally expressed,' [*Testan*, 424 U.S. at 399,] and waivers of sovereign immunity must be construed narrowly in favor of the government." *FMC Corp.*, 29 F.3d at 839 (citing *United States v. Idaho*, 113 S. Ct. 1893, 1896 (1993)). In order to make the United States a party to a wage levy suit, a complaint must allege facts sufficient to invoke a waiver of sovereign immunity under ***both*** 28 U.S.C. §2410 and the lack of notice exception in the Anti-Injunction Act. *Miller*, 817 F. Supp. at 1498. The United States waives sovereign immunity in "quiet title actions affecting property [such as wages] encumbered by a tax lien" if the IRS fails to provide mandated notice precedent to levy. 28 U.S.C. §2410(a); *Miller*, 817 F. Supp. at 1498. Unless pleadings allege that the IRS failed to provide notice, the Anti-Injunction Act forbids forae from hearing complaints relating to levy and penalty. *Flynn*, 786 F.2d at 588 ("The object of [The Anti-Injunction Act] is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes. . . . The Act thus insulates the collection of taxes in most cases from judicial intervention, and requires that the legal right to disputed sums be determined in a suit for refund.") (quoting *Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. at 5); *Shaw v. United States*, 331 F.2d 493, 494 (9th Cir. 1964); *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963). However, where the IRS gives notice, even if defective, an

[16]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.

employee cannot sue to stop a levy. *Birks-Halyard Corp. v. United States*, 537 F. Supp. 1213 (E.D. Wis. 1982).

Employers who comply with IRS wage levies are immune from suit because their compliance is statutorily mandated:

> 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, 817 F. Supp. at 1497.

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.

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., U.S.A. v. United States*, 779 F. Supp. 610, 612 (D.D.C. 1993).

Kosatschkow failed to pursue available remedies in appropriate forae. For example, he has apparently not paid his taxes, applied for a refund, been denied, and sued in federal district court. 26 U.S.C. §7422(a); 28 U.S.C. §1346(a)(i). Nor has he challenged his assessment liability in Tax Court within 90 days of notice of deficiency by

seeking an injunction of his wage levy, (*see* 26 U.S.C. §§6213(a), 6213(b)(2)(B), 6215), sued IRS in district court for failure of notice, (*see* 26 U.S.C. §6213(a)), or sued the United States in a "quiet title action affecting property" in federal district court or in the state court having jurisdiction over the property encumbered by the tax lien (*see* 28 U.S.C. §2410(a)). Instead, he has sued in forae that have no statutory, equitable, or other authority to fashion tax remedies. Because the Anti-Injunction Act prohibits "suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person," I am without authority to hear Kosatschkow's Complaint. I dismiss this action for lack of subject matter jurisdiction.

D. *This Forum of Limited Jurisdiction Is Not Empowered To Hear Challenges to the Social Security Act*

Challenges to the Social Security Act (SSA) and the statutory requisites for its implementation do not properly implicate 8 U.S.C. §1324b jurisdiction. 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.

Complainant's reliance on *Railroad Retirement Bd. v. Alton Railroad Co.*, 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. 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 held the social security withholding system to be uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax 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 that here 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 social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id.

Kosatschkow argues that he may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, he 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.

E. *The United States Is Not the Proper Party in a 8 U.S.C. §1324b Action Because It Is Immune From Suit*

Contrary to Respondent's assertion that the United States is the proper party, §1324b does not waive the federal government's sovereign immunity. *Hensel v. OCAHO*, 38 F.3d 505, 509 (10th Cir. 1994). Moreover, in the IRS context, to the extent that the United States waives immunity to suit in quiet title actions affecting property encumbered by a tax lien, the proper forae for such suits are federal district court or the State court with jurisdiction over the encumbered property. 28 U.S.C. §2410(a).

IV. *Conclusion*

Respondent requests that the Complaint be dismissed with prejudice. 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). "[E]very federal court . . . is obliged to notice want of subject matter jurisdiction on its own motion." *Things Remembered, Inc. v. Petrarca*, 116 S.Ct. 494, 499 n.1 (1995) (Ginsberg & Stevens, JJ., concurring).

> [T]he rule is well settled that the party seeking to invoke the jurisdiction . . . must demonstrate that the case is within the competence of that court. The presumption is that a federal court lacks jurisdiction . . . until it has been demonstrated that jurisdiction over the subject matter exists. Thus the facts showing the existence of jurisdiction must be affirmatively alleged in the complaint.

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1176 (5th Cir. 1984) (quoting WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3522, at 45). Kosatschkow fails to demonstrate facts sufficient to justify this forum's exercise of jurisdiction. The motion to dismiss is granted.

Taking all Kosatschkow's factual allegations as true, and construing them in a light most favorable to him, I determine that Kosatschkow is entitled to no relief under any reasonable reading of his pleadings. Even if, as Kosatschkow claims, he gratuitously tendered documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Allen-Stevens refused to honor these documents and insisted on making payroll tax and social security deductions, Allen-Stevens'conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Kosatschkow describes simply does not support the ***immigration-related*** cause of action he pleads. Kosatschkow's legal theory, applied to an employer's lawful and nondiscriminatory 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 con-

ceivable way that Kosatschkow can transform this tax protest into an unfair ***immigration-related*** employment complaint. A complaint, even by a *pro se* Complainant (which Kosatschkow 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).

Kosatschkow's claim is incapable of viable amendment: there is no factual dispute between parties, only a bald challenge to the IRC. Tax challenges, however disguised, are beyond this forum's jurisdictional reach. By its very nature, the Complaint cannot be amended to an immigration-related cause of action. Allen-Stevens, which continues to employ Kosatschkow, has not harmed him in any way. It has not preferred a citizen of another land to him, nor has it subjected him to discriminatory paperwork requirements. It has simply insisted, as it is bound to do, that he submit to IRS tax and social security requirements. Its actions are entirely lawful.

Furthermore, I am precluded from hearing this suit not only by the limits of §1324b powers, but by the Anti-Injunction Act, which prohibits courts from hearing such a claim when the taxpayer fails to follow statutory conditions precedent to suit, and by the IRC, which immunizes employers from suit when they withhold tax and social security contributions from wages and when they comply with wage levies.

Kosatschkow's action is frivolous, lacking "an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Where a Respondent is statutorily immune from suit, a claim is based upon an indisputably meritless legal theory. Allen-Stevens, an employer who complies with statutory obligations by withholding tax and social security contributions, and who complies with an IRS Wage Levy, is statutorily immunized from suit. *See* 26 U.S.C. §§3101, 3102, 3402, 3403, 6331(a), 6332(d), 6334(a)(9), 6671, 6672, 7421. Accordingly, I dismiss Kosatschkow's Complaint without leave to amend because his tax challenge, though swaddled in immigration-related employment practice cloth, 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.

V. *Ultimate Findings, Conclusions, and Order*

(a) *Disposition*

I have considered the pleadings of the parties. All requests not previously disposed of are denied. Kosatschkow's Complaint, having no arguable basis in fact or law, is before the wrong forum.[17] 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) *Post-decision Procedure*

Allen-Stevens requests attorney's fees. Fee shifting is authorized by 8 U.S.C. §1324b(h). I find and conclude, within the meaning of §1324b(h), that Complainant's "argument is without reasonable foundation in law and fact." *Compare Williamson v. Autorama*, 1 OCAHO 174, at 1172–75 (1990), 1990 WL 515872, at *4–6 (O.C.A.H.O.). Allen-Stevens may file an appropriate motion explaining the rationale for such an award together with a sufficient showing on which to premise an accurate and just calculation of attorney's fees. Respondent's filing, if any, is due no later than ***August 1, 1997***. A response by Kosatschkow—limited to the subject at hand, the amount of attorney's fees requested—is timely if filed not later than ***September 1, 1997***.

(c) *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 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).

[17]For Third Circuit disposition of frivolous tax suits, *see Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985).

SO ORDERED.

Dated and entered this 18th of June, 1997.

MARVIN H. MORSE
Administrative Law Judge