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

July 1, 1997

JAMES L. HOLLINGSWORTH, Complainant, v. APPLIED RESEARCH ASSOCIATES, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00085)))

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* for Complainant.
William J. Sullivan, Esq., for Respondent.

This is another of a number of virtually identical complaints filed on behalf of individuals by the same representative, John B. Kotmair, Jr., Director, National Worker's Rights Committee (Kotmair). Kotmair filed this case in total disregard of the dismissal of every such case by each administrative law judge (ALJ) who has issued a decision. This case is groundless, lacking any standing under 8 U.S.C. §1324b and, therefore, not within the jurisdiction of the ALJ.

Title 8 U.S.C. §1324b, which prohibits certain discrimination in the workplace, was enacted as part of the Immigration Reform and Control Act of 1986 (IRCA). IRCA prohibits national origin discrimination in hiring and firing where there are four to fourteen employees, prohibits citizenship status discrimination where there are four or more employees, and, as amended, prohibits employers from requesting more or different documents than are tendered by a new

employee in compliance with the employment eligibility verification regimen of 8 U.S.C. §1324a. As amended, IRCA also prohibits retaliation, intimidation, threat or coercion occasioned by resort to §1324b relief.

By his Complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on April 2, 1997, James L. Hollingsworth (Hollingsworth or Complainant) claims that Applied Research Associates, Albuquerque, New Mexico (Associates or Respondent), violated §1324b by refusing to accept his improvised "statement of citizenship" and "affidavit of constructive notice" presented to avoid tax withholding.[1] Hollingsworth is a United States citizen, employed by Associates since July, 1984. Hollingsworth's Complaint affirmatively rejects any claims of national origin discrimination or retaliation. Hollingsworth asserts that Associates "refused to accept" his "statement of citizenship" and "affidavit of constructive notice." However, he deleted by pen that portion of the OCAHO pre-printed complaint format that provides the opportunity to allege violation of §1324b(a)(6), *i.e.*, that the rejected documents were presented "to show I can work in the United States." Complaint, at ¶16. Associates denies liability in its Answer to the Complaint, contending that the Complaint fails to state a cause of action upon which relief can be granted.

Hollingsworth's Complaint is yet another variant of a number of substantially identical cases asserting administrative law judge (ALJ) jurisdiction under §1324b, each of which was dismissed for failure to state a claim on which §1324b relief could be granted and/or for lack of subject matter jurisdiction.[2] However character-

[1]Complainant's rationale for his claim to be free from withholding is explained more fully in his charge against Associates filed with the United States Department of Justice, Special Counsel for Immigration Related Unfair Employment Practices (OSC), the agency which receives §1324b filings in the first instance. 8 U.S.C. §1324b(b)(1). The charge is essentially a boiler-plate reiteration, characteristic of those in a significant number of the cases collected at footnote 2.

[2]*See Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel,* 7 OCAHO 930 (1997*); Mathews v. Goodyear Tire & Rubber Co.,* 7 OCAHO 929 (1997*); Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 927 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*,

Continued on next page

ized by the complainants, these cases turn exclusively on the refusal by employers to participate in schemes to circumvent provisions of the Internal Revenue Code requiring employers to withhold federal income taxes and social security contributions (FICA) from employee wages.[3] No less than the others, Hollingsworth's suit against Associates is premised on the specious and discredited rationale that only aliens are subject to withholding.

In the face of unanimous precedent against him, however much credence Kotmair may once have given to this oft-repeated theory, he surely can no longer seriously assert its viability. Hollingsworth's allegations of citizenship status discrimination and document abuse only implicate the employer's failure to honor the "statement of citizenship" and "affidavit of constructive notice." Even without the overwhelming body of ALJ caselaw against him, these allegations must fail. This is so because 8 U.S.C. §1324b(a) limits citizenship status claims to refusal to hire and to wrongful discharge, both of which the Hollingsworth Complaint explicitly disclaims, and because 8 U.S.C. §1324b(a)(6) limits document abuse to demands arising out of the employment eligibility verification regimen of §1324a(b), which the Complaint literally, by pen, exonerates.

Continued—

6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications,* 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr., as Director, National Worker's Rights Committee, represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Hollingsworth v. Applied Research Associates* is another example.

[3]*See* 26 U.S.C. §§3102(a) (requiring employer to deduct FICA from employees' wages), 3102(b) (imposing liability on employer who fails to withhold FICA taxes from employees' wages), 3402(a) (requiring employer to withhold income taxes from employees' wages), and 3403 (codifying employer liability for failure to withhold income taxes from employees' wages). *See* "The Anti-Injunction Act," 26 U.S.C. §7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .").

The Complaint affirmatively denies that Associates rejected documents tendered "for purposes of satisfying the requirements of section 1324a(b)." Depending exclusively on documents tendered in compliance with §1324a(b), subsection 1324b(a)(6) by definition excludes homegrown documents, including those presented to Associates. The specious nature of Hollingsworth's claim is particularly evident here, where the employment has subsisted since 1984, because employments which antedate November 6, 1986 are generally not subject to §1324a(b).

Hollingsworth's citizenship status claim depends entirely on the discredited proposition that only non-citizens are subject to withholding. Complainant's sole claim is that his documents were given no effect by the employer. That claim lacks §1324b standing as demonstrated by the cases cited at footnote 2. Accordingly, I find and conclude that the Complaint fails to state a cause of action on which relief can be granted, and that the Anti-Injunction Act, 26 U.S.C. §7421(a), as well as the limited jurisdiction conferred by §1324b defeat ALJ jurisdiction.

In light of footnote 2 precedents, eight of which issued before the April 2, 1997 filing of Hollingsworth's Complaint, this filing is a frivolous and irresponsible action by Complainant's representative.[4] The decisions and orders which were served on Kotmair made clear to Complainant's representative that under no conceivably reasonable reading of the Complaint could the ALJ assert subject matter jurisdiction over his claims. Hollingsworth cannot establish a *prima facie* case of citizenship status discrimination. His Complaint is so attenuated and unsubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing.

Maximizing opportunities to amend discrimination complaints is generally encouraged. As this is the first §1324b tax withholding case to reach decision by an ALJ within the appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit, that court's

[4] *See Farris v. Lanier Bus. Prods., Inc.*, 626 F. Supp. 1227, 1228 (N.D. Ga. 1986) (relying on *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), where the court granted fees and costs to an employer as a result of the frivolous, unreasonable and litigious actions of its former employee, and stated, "Plaintiff's propensity for meritless litigation reflects poorly upon his good faith in filing the present lawsuit.") (citation omitted), *aff'd*, 806 F.2d 1069 (11th Cir. 1986) (unpublished table decision). Although the *Farris* court addressed the actions of the party, not the representative, the text is particularly apt in the instant case. *See also*, *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

affirmance of dismissals sua sponte by trial judges is instructive. The Tenth Circuit has not hesitated to approve dismissals upon determining that to allow even a pro se discrimination plaintiff the opportunity to amend a complaint would be futile. *See Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir. 1991) *cert. denied*, 504 U.S. 941, 112 S. Ct. 2276 (1992) (affirming dismissal where the "complaint lacks any legal or factual specificity which would allow [a court] reasonably to read the pleadings as stating a recognized claim") (*citing Hall v. Bellmon,* 935 F.2d 1106, 1119 (10th Cir. 1991)); *see also Whitney v. State of New Mexico,* 113 F.3d 1170 (10th Cir. 1997).

Because Hollingsworth relies exclusively on Associates' refusal to accept his documents as the gravamen of his discrimination claim, the consequential lack of any discernible meritorious §1324b claim forecasts that amendment would be futile. Although not captioned as a motion to dismiss, Respondent's Answer asserts that "the Complaint fails to state a cause of action," and that in effect the ALJ lacks jurisdiction. By his Reply to the Answer, filed as recently as May 9, 1997, in face of all the precedents but with no acknowledgment of their existence, Hollingsworth repeats over and over again the thoroughly discredited notion that only aliens are subject to tax withholding, and that he is, therefore, entitled to §1324b relief. That filing demonstrates the futility of holding the case open for still another reiteration. Hollingsworth's claim is, therefore, dismissed for failure to state a claim cognizable under §1324b.

However disguised, this is a tax protest case, and nothing more. The Tenth Circuit's deference to the Anti-Injunction Act, 26 U.S.C. §7421(a), is controlling. In *Lonsdale v. United States*, 919 F.2d 1440, 1442 (10th Cir. 1990), taxpayers were not permitted "to avoid the jurisdictional restrictions of the Anti-Injunction Act by characterizing their action as one to quiet title." So, too with IRCA.

The Tenth Circuit acknowledges that where the bar of the Anti-Injunction Act applies, even its jurisdiction as a reviewing court is precluded. Of particular significance to ALJ administrative adjudication under 8 U.S.C. §1324b is the circuit's recognition that the Administrative Procedure Act does not override the limitations of the Anti-Injunction Act and, as well, the limitations of the tax exception provision of the Declaratory Judgment Act, 28 U.S.C. §2201. *Fostvedt. v. United States*, 978 F.2d 1201,1203–04 (10th Cir. 1992), *cert. denied*, 507 U.S. 988, 113 S.Ct. 1589 (1993). The Tenth Circuit lacks patience with obfuscation. *See Wyoming Trucking Ass'n, Inc. v. Bentsen,*

Secretary of the Treasury, 82 F.3d 930, 933 (10th Cir. 1996) ("Ignoring the Anti-Injunction Act simply because a plaintiff characterizes his claim as a constitutional question would elevate semantics over substance, and such a tactic would quickly become a method of choice for avoidance of the Anti-Injunction Act"). Hollingsworth's claim is, therefore, dismissed for lack of §1324b subject matter jurisdiction.

An ordered system of justice requires that the tribunal recognize when it is being misused. The proliferation of claims of the genre here compels dismissal of Hollingsworth's Complaint. Jurisdictional parameters could not be clearer. Judicial economy and efficiency demand no less.

So obviously does Hollingsworth's case lack 8 U.S.C. §1324b viability that there is no need to delay the inevitable outcome, providing an early opportunity to seek appellate review, if he so elects.

II. *Ultimate Findings, Conclusions, and Order*

I have considered the pleadings of the parties. All requests not disposed of in this final decision and order are denied.

The Complaint, having no arguable basis in fact or law, is dismissed because the ALJ lacks subject matter jurisdiction, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. §1324b(g)(3).

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding that the merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 1st day of July, 1997.

MARVIN H. MORSE
Administrative Law Judge