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

October 6, 1997

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

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

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

I. *Introduction*

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

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*LaRue v. Collector of Internal Revenue*, 96 F.3d 1450 (7th Cir. 1996) (Table), 1996 WL 508567, at *1 (7th Cir. 1996) (Unpublished Disposition) (Seventh Circuit Rule 53(b)(2) permits citation to support law of the case) ("LaRue's argument that he should be treated as a nonresident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

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

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

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

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

II. *Factual and Procedural History*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion, at ¶4.

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

III. *Discussion*

A. *Hamilton's Complaint Is Frivolous*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. *Ultimate Findings, Conclusions, and Order*

(a) *Disposition*

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

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

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

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

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

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

I have considered the pleadings of the parties. All requests not previously disposed of are denied.

(b) *Appellate Jurisdiction*

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

SO ORDERED.
Dated and entered this 6th day of October, 1997.

MARVIN H. MORSE
Administrative Law Judge