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

July 29, 1997

LONNIE W. HOGENMILLER, Complainant, v. LINCARE, INC., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00104)))

FINAL DECISION AND ORDER OF DISMISSAL

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* for Complainant
M.R. Schuetzler, Director, Employee Relations, for Respondent

I. *Introduction*

Title 8 U.S.C. §1324b was enacted as part of the Immigration Reform and Control Act of 1986 (IRCA) to render unlawful workplace immigration-related discrimination. As amended, IRCA prohibits national origin discrimination in hiring and firing where there are four to fourteen employees; citizenship status discrimination where there are four or more employees; employer requests for 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(b); and employer retaliation against employees asserting rights conferred by §1324b.

This claim against withholding of employee wages under the Internal Revenue Code (IRC) and the Social Security Act (SSA), disguised as a discrimination complaint, is but another iteration of recent challenges brought by John B. Kotmair, Jr. (Kotmair), Director,

National Worker's Rights Committee, on behalf of his disciples.[1] The Complaint compels the inquiry as to whether a corporate successor-in-interest employer discriminates in violation of §1324b by refusing to acknowledge a hold-over employee's unofficial, gratuitously tendered documents purporting to excuse tax withholding, and whether such employer retaliates in violation of §1324b when it cautions the employee that failure to provide a social security number and complete an Internal Revenue Service (IRS) Form W–4 will cause his discharge? As discussed below, the answer is "no."

II. *Factual and Procedural History*

On September 19, 1996, Lonnie W. Hogenmiller (Hogenmiller or Complainant) became an employee of Lincare, Inc. (Lincare or Respondent), of Clearwater, Florida, when Lincare acquired the assets of Hogenmiller's previous employer.

On October 15, 1996, Hogenmiller presented Lincare with an unofficial and improvised "Statement of Citizenship," which attempted to "relieve" Lincare of its statutory duty to withhold income tax from Hogenmiller's paycheck.[2] OSC Charge, at 3. Hogenmiller informed Lincare that he had repudiated his social security number, and was,

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[1]*See D'Amico v. Erie Community College,* 7 OCAHO 948 (1997)*; Hollingsworth v. Applied Research Assocs.,* 7 OCAHO 942 (1997)*; Hutchinson v. End Stage Renal Disease Network, Inc.,* 7 OCAHO 939 (1997)*; Kosatschkow v. Allen-Stevens Corp.*, 7 OCAHO 938 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co*., 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs*., 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc*., 6 OCAHO 923 (1997), 1997 WL 235918; *Wilson v. Harrisburg Sch. Dist*., 6 OCAHO 919 (1997), 1997 WL 242208; *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199; *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910; *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820; *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346; *Lee v. Airtouch Communications,* 6 OCAHO 901 (1996), 1996 WL 780148; *appeal filed*, No. 97–70124 (9th Cir. 1997). 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).

[2]*See* 26 U.S.C. §§3402 and 3403, which oblige all employers to withhold income tax "at the source," *i.e.*, from the paycheck, and confer immunity from liability on employers who do so. *See also* 26 U.S.C. §6672(a) (imposing a "penalty equal to the total amount of the tax . . . not collected" on "[a]ny person required to collect, truthfully account for, and pay over [such] tax").

therefore, no longer an "employee" for tax purposes,[3] so that Lincare need not withhold income tax or social security contributions from his paycheck. Lincare refused to credit his assertions.

By letter dated October 18, 1996, Lincare informed Hogenmiller:

> **[Y]ou have again advised us that you have 'revoked' your social security number as your preference. In order to pay our employees, Lincare Inc. must have a social security number for all employees and it is a condition of employment that all employees provide Lincare with a social security number. It is a hardship for Lincare to even try to accommodate someone without said number.**
>
> **Given these requirements, we need a response from you on providing this social security number by Monday, October 21, 1996, or we will have no alternative but to release you from employment.**

OCAHO Complaint, at Exhibit 1.

In response, Hogenmiller complied, then filed a charge alleging national origin discrimination with the Equal Employment Opportunity Commission (EEOC). Hogenmiller maintained that Lincare treated him as a "non-resident alien" by insisting on compliance with IRC and SSA mandates. The EEOC dismissed the charge.

By letter dated January 29, 1997, Hogenmiller filed a charge alleging citizenship and national origin discrimination with the United States Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). By determination letter dated April 2, 1997, OSC found that Hogenmiller had not raised an issue "within its jurisdiction," declined to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), and advised him he could file a private action within ninety days.

Through Kotmair, Hogenmiller filed an OCAHO complaint on May 12, 1997, which describes him as "a citizen of the United States of America and the State of New Mexico." Complaint, at ¶4. Complainant alleges citizenship discrimination, retaliation, and document abuse, because Lincare ignored his tax-exemption documents, and threatened to fire him if he refused to complete IRS Form W–4.

[3]Lincare is bound to collect such contributions. *See* 26 U.S.C. §3102(a) (requiring all employers to deduct FICA from employees' wages) and §3102(b) (imposing liability on employers who fail to withhold FICA taxes from employees' wages).

On May 28, 1997, Lincare filed its Answer to the Complaint, contending that:

> **Hogenmiller claimed to not have a social security number. Lincare was aware from [its corporate predecessor] that Hogenmiller did indeed have a social security number and was unwilling to provide it to Lincare for personal or political reasons. Lincare made it clear to Hogenmiller that it did not care about his political beliefs, but needed the social security number to get Hogenmiller into the payroll system so that he could be paid accordingly. While Hogenmiller supplied numerous documents, none provided Lincare with the social security number needed to place him into the payroll system as an active employee. After several conversations, Hogenmiller was informed by telephone and letter of the requirement that he provide a social security number as a condition of his continued employment with Lincare. Subsequently, Hogenmiller supplied the requested documentation.**

Answer, at 2–3.

III. *Discussion*

A. *An Employer Does Not Discriminate Within the Meaning of 8 U.S.C. §1324b(a)(6), Which Prohibits "Document Abuse," by Refusing To Accept Gratuitously Tendered, Unofficial Tax Exemption Documents*

An employer only commits document abuse by requiring an employee to provide more or different documents than are required by the Immigration and Naturalization Service (INS), or by insisting on production of a particular INS-prescribed document, for purposes of completing INS Form I–9, the employment eligibility verification regimen prescribed by §1324b(a)(6), in conjunction with employment eligibility verification.

An employer's refusal to honor documents other than those specified pursuant to 8 U.S.C. §1324a(b)(1)(C) or to accept documents presented for other purposes does not constitute document abuse or citizenship discrimination. *Boyd v. Sherling*, 6 OCAHO 916, at 18 (1997), 1997 WL 176910, at *15; *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11–12 (1996), 1996 WL 780148, at *9–10.

Hogenmiller fails to state a claim of document abuse because §1324b(a)(6) only makes it unlawful for employers to demand particular documents from among the INS Form I–9 catalogue of employment eligibility verification documents. *Austin v. Jitney Jungle*

Stores of Am., Inc., 6 OCAHO 923, at 19 (1997), 1997 WL 235918, at *14–15; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 16 (1997), 1997 WL 242208, at *14; *Boyd v. Sherling*, 6 OCAHO 916, at 22 (1997), 1997 WL 176910, at *18; *Winkler v. Timlin Corp.*, 6 OCAHO 912, at 10 (1997), 1997 WL 148820, at *9*; Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 16, 1996 WL 670179, at *13, *appeal filed*, No. 96–3688 (3d Cir. 1996). There can be no claim of document abuse where the employer requests, or the employee tenders, documents for other purposes. *Winkler v. Timlin Corp.*, 6 OCAHO 912, at 11, 1997 WL 148820, at *9.

Hogenmiller does not allege that Lincare discriminated against him with respect to ascertaining his eligibility to work in the United States. In fact, all that Lincare is alleged to have done wrong was to insist that he provide a social security **number** and complete IRS Form W–4, the tax withholding form which calls for a social security number. *See* 26 U.S.C. §3402(a)(1); *United States v. Drefke*, 707 F.2d 978 (8th Cir. 1983), *cert. denied, Jameson v. United States*, 464 U.S. 942 (1983); 26 C.F.R. §301.6109–1(a)(1)(ii).

Hogenmiller had no legal right to press his documents upon Lincare. No document abuse took place because the documents presented were not tendered for the purpose of satisfying or "required under" 8 U.S.C. §1324a(b). Because his documents were for a different purpose and were in derogation of the list prescribed by the Attorney General for §1324a(b) compliance, the Complaint fails to state a cause of action under §1324b(a)(6). *Boyd v. Sherling,* 6 OCAHO 916, at 26–27, 1997 WL 176910, at *22; *Winkler v. Timlin Corp.,* 6 OCAHO 912, at 11–12, 1997 WL 148820, at *10*; Lee v. Airtouch Communications,* 6 OCAHO 901, at 13, 1996 WL 780148, at *10*; Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11 (1992), 1992 WL 535635 at *6*; Horne v. Town of Hampstead*, 6 OCAHO 906, at 8–9, 1997 WL 131346, at *6.

B. *An Employer Which Insists That All Employees Provide Social Security Numbers and Complete IRS Form W–4 Does Not Discriminate on the Basis of Citizenship Under 8 U.S.C. §1324b*

Administrative Law Judge (ALJ) jurisdiction under §1324b applies only where the employee has been ***discriminatorily*** rejected or fired. *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 19, 1997 WL 235918, at *14; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 15, 1997 WL 242208, at *12; *Costigan v. NYNEX*, 6

OCAHO 918, at 3 (1997), 1997 WL 531898, at *8–9. A complaint of citizenship status discrimination which fails to allege discriminatory rejection or discharge is insufficient as a matter of law. Failure to allege a discriminatory injury compels a finding of lack of subject matter jurisdiction. ALJ authority is limited to discriminatory hiring or discharge and does not embrace the terms of employment. Title 8 U.S.C. §1324b does not reach employment conditions or controversies. *Horne v. Town of Hampstead*, 6 OCAHO 906, at 5–6, 1997 WL 131346, at *6; *Naginsky v. Dep't of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (citing *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11, 1992 WL 535635, at *7); *Ipina v. Michigan Dep't of Labor*, 2 OCAHO 386, at 11–12 (1991), 1991 WL 531898, at *8–9; *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991), 1991 WL 531875, at *9.

Hogenmiller acknowledges that this dispute stems from Lincare's request that he complete IRS Form W–4, and from Lincare's refusal to accept Hogenmiller's proffered improvised documents. Not having contended that Lincare exempted other employees "of different nationalities or citizenship" from the Form W–4 regimen of withholding tax and social security deductions, Complainant concedes that Lincare did not discriminate. The implied admission that Lincare applied its withholding regimen even-handedly to citizens and aliens leaves Hogenmiller with no cognizable §1324b claim.

As in *Boyd v. Sherling,* 6 OCAHO 916, at 22, 1997 WL 176910, at *18, *Winkler v. Timlin Corp.,* 6 OCAHO 912, at 11, 1997 WL 148820, at *10, and *Horne v. Town of Hampstead*, 6 OCAHO 906, at 4–5, 1997 WL 131346, at *4, the employee's refusal to accede to the employer's compliance with income tax and social security withholding obligations is insufficient to state a §1324b cause of action. Section 1324b does not prohibit an employer from requiring a social security number or completion of a W–4 as a condition of employment. *Austin v. Jitney Jungle Stores of Am., Inc.,* 6 OCAHO 923, at 11 n.9, 1997 WL 235918, at *18 n.9*; Wilson v. Harrisburg Sch. Dist.,* 6 OCAHO 919, at 10, 1997 WL 242208, at *7–8*; Winkler v. Timlin Corp.*, 6 OCAHO 912, at 12, 1997 WL 148820, at *7; *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 18–19, 1996 WL 670179, at *13–14.

Lincare is entitled to demand that employees provide social security numbers for payroll and tax purposes. *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 10 (1992), 1992 WL 535635, at *7. "OCAHO case law correctly holds that nothing in the logic, text or

legislative history of the Immigration Reform and Control Act [IRCA] limits an employer's ability to require a social security number as a precondition of employment." *Winkler v. Timlin Corp.*, 6 OCAHO 912, at 11, 1997 WL 148820, at *10; *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 17, 1996 WL 670179, at *15; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 4 (1991), 1991 WL 531895, at *4.

The case before me has everything to do with Hogenmiller's unwillingness to participate in federal income tax and social security withholding and nothing to do with Lincare's §1324b compliance. As appears from the Complaint, Hogenmiller concedes that he was neither denied employment nor ***discriminatorily*** discharged. Accordingly, the Complaint fails to state a claim of citizenship status discrimination upon which relief can be granted.

C. *Insistence that Employees Submit to Income Tax and Social Security Withholding Is Not "Retaliation"*

Respondent's threat of discharge is not "retaliation" within the meaning of 8 U.S.C. §1324b, because it turned on Hogenmiller's refusal to comply with employee tax obligations and not on the prospect, never stated, that he intended to seek redress under §1324b. The Complaint fails to state a claim of retaliation upon which relief can be granted.

D. *The Anti-Injunction Act Precludes ALJ Jurisdiction Over Tax Collection Challenges, Requiring Dismissal of the Complaint*

It is well settled that "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *International Lotto Fund v. Virginia State Lottery Dep't*, 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. §7421(a), "The Anti-Injunction Act," which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. §7421(a). *See Woods v. Internal Revenue Service*, 3 F.3d 403 (11th Cir. 1993).

A taxpayer must follow the statutory procedure, *i.e.*, pay the tax, request a refund from the IRS, and, if the refund is denied, litigate the invalidity of the tax in federal district court. *Cheek v. United States*, 498 U.S. 192, 206 (1991) (enumerating Congressionally mandated procedures for challenging validity of tax code).[4] *See also*

United States v. MacElvain, 858 F. Supp. 1096, 1100 (M.D. Ala. 1994), *aff'd*, 68 F.3d 486 (11th Cir. 1995); 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3580 (2d ed. 1984) (administrative claim for refund is jurisdictional prerequisite to bringing suit).

Fed. R. Civ. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction, providing that "[w]henever 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." *Sua sponte* dismissal is appropriate where a court lacks subject matter jurisdiction, *Jefferson Fourteenth Associates v. Wometco de Puerto Rico,* 695 F.2d 524, 525 (11th Cir. 1983), and where the claim is based on "an indisputably meritless legal theory" **or** "whose factual contentions are clearly baseless." *Nietzke v. Williams*, 490 U.S. 319, 327 (1989), *quoted in Sultenfuss v. Snow*, 894 F.2d 1277, 1278 (11th Cir. 1990).

OCAHO precedents unambiguously confirm that Hogenmiller's claim is based upon an undisputably meritless legal theory and is a claim whose factual contentions are clearly baseless. Moreover, in *Sultenfuss*, 894 F.2d at 1278, the Eleventh Circuit instructs that a claim is based on an "undisputably meritless theory" where the respondent is "immune from suit." The ALJ lacks subject matter jurisdiction in tax matters.[5] Hogenmiller chose the wrong forum and sued the wrong party. The employer is immune from liability in the performance of its statutory duty to withhold taxes.[6]

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[4]*See* 26 U.S.C. §7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."); 26 U.S.C. §7422(b) ("Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress"); *Cohen v. United States*, 297 F.2d 760, 772 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962) (Congress may require taxpayer to pay first and then litigate); *Alaska Computer Brokers v. Morton*, 1995 WL 653260, at *2 (D. Alaska 1995) (courts consistently reject taxpayer attempts to circumvent the "pay first, litigate later" rule by framing tax contests as collateral attacks).

[5]*See* 28 U.S.C. §1346(a) ("district courts shall have original jurisdiction . . . of (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed . . . ").

[6]For disposition of frivolous tax protests on appeal, *see Woods v. Internal Revenue Service*, 3 F.3d 403 (11th Cir. 1993) (stating that the court would not hesitate to order sanctions were protestor represented).

IV. *Ultimate Findings, Conclusion, and Order*

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

Title 8 U.S.C. §1324b does not confer jurisdiction over tax withholding disputes. *See Boyd v. Sherling*, 6 OCAHO 916, at 21, 1997 WL 176910, at *17. As frequently noted in disposing of claims of this genre, this Complaint is not susceptible to reasonable amendment. *See Kosatschkow v. Allen-Stevens Corp.*, 7 OCAHO 928, at 22.

A corporate successor-in-interest employer, no less than the employer *ab initio*, does not discriminate or commit retaliation in violation of 8 U.S.C. §1324b by failing to honor an employee's self-styled tax-exemption documents or by insisting that an employee provide a social security number and complete IRS Form W–4 at risk of discharge.

Lacking any viable basis in fact or law, the Complaint is dismissed because: (1) it fails to state a claim upon which relief can be granted under 8 U.S.C. §1324b; (2) the ALJ lacks subject matter jurisdiction over it; and (3) this forum is deprived of jurisdiction over tax collection challenges by the Anti-Injunction Act.

Filing of this Complaint in light of unanimous OCAHO precedent known to Complainant's representative at the time, is frivolous.[7] The claim lacks legal foundation and is contrary to law which immunizes Lincare from liability.

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

SO ORDERED.

Dated and entered this 29th day of July, 1997.

MARVIN H. MORSE
Administrative Law Judge

[7]For disposition of frivolous tax protests on appeal, *see Woods v. Internal Revenue Service*, 3 F.3d 403 (11th Cir. 1993) (stating that the court would not hesitate to order sanctions were protestor represented).