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

March 31, 1997

JOYCE C. AUSTIN,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 96B00066
JITNEY-JUNGLE STORES	)	
OF AMERICA,INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS AND
DENYING RESPONDENT'S MOTION
TO IMPLEAD THE UNITED STATES

MARVIN H. MORSE, Administrative Law Judge

Appearances: *Charles L. Brocato, Esq. and Jeffrey A. Walker, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, on Behalf of Respondent*

I. *Procedural History*

This case posits three issues: (1) one, of first impression in Office of the Chief Administrative Hearing Officer (OCAHO) jurisprudence—whether an employee whose wages are garnished in compliance with an Internal Revenue Service (IRS) Notice of Levy in satisfaction of unpaid taxes may successfully circumvent that garnishment by suing her employer for discrimination in violation of Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), codified as 8 U.S.C. §1324b; (2) a second novel issue—whether an employer who complies with an IRS Notice of Levy and is sued by an employee for §1324b discrimination may implead the

United States in its role of tax collector, and (3) an issue on which OCAHO jurisprudence is well-established—whether an employer's refusal to honor gratuitously tendered, unofficial documents purporting to exempt an employee from tax withholding and social security deduction constitutes §1324b discrimination. As more fully explained below, I conclude that: (1) an employee cannot utilize 8 U.S.C. §1324b anti-discrimination provisions to avoid IRS tax obligations, including levies; (2) an employer sued for §1324b discrimination may not implead the United States, and (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.

The chain of events culminating in administrative adjudication of this claim began on May 26, 1995 when Joyce C. Austin (Complainant or Austin), an incumbent[1] employee of Jitney-Jungle Stores of America, Inc. (Jitney-Jungle or Respondent), gratuitously tendered her employer a self-styled "Statement of Citizenship."[2] Austin attempted to utilize this document to exempt herself from federal withholding tax and social security deductions on the basis that as a citizen of the United States she is not obliged to pay income tax or contribute to social security. Austin also served Jitney-Jungle with an "Affidavit of Constructive Notice" which purported to repudiate her social security number.[3] Austin also proffered an "Affidavit of Constructive Notice," as additional support for her claim that she was not subject to Internal Revenue Code (IRC) and Social Security Act (SSA) withholding.

[1] Although Austin's pleadings do not specifically acknowledge her current employment, it is inferred from the National Worker's Rights Committee June 7, 1995 letter to Jitney-Jungle on Austin's behalf, from the IRS March 27, 1996 Notice of Levy to Jitney-Jungle, garnishing Austin's wages, from ¶¶13 and 14 of her June 21, 1996 OCAHO Complaint, in which Austin denies that Jitney-Jungle fired or refused to hire her, and from Respondent's recitation at ¶2 of its Motion to Fix Location for Any Hearing filed July 29, 1996, which states "The Complainant is employed by Respondent."

[2] This improvised "Statement of Citizenship," which Austin offered to show that she was not subject to income tax withholding and social security deductions, is ***not*** to be confused with official INS Forms N-560 or 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).

[3] 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) (1997).

Unconvinced that Austin was exempt from taxation, Jitney-Jungle continued to withhold taxes and social security deductions. As a result, Austin on a date unspecified lodged a complaint of national origin discrimination with the Equal Employment Opportunity Commission (EEOC).

> My complaint to the EEOC was that Jitney-Jungle Stores of America, Inc. was discriminating against me based upon "national origin." Jitney-Jungle Stores of America, Inc. refused to reasonably accommodate my rights under the law by recklessly disregarding my rights as a Citizen of the United States of America . . . . [by insisting] that I allow myself to be treated as a non-resident alien and give up my rights to the full fruit of my labor.

OSC Charge at p. 8. Austin argued that only aliens are subject to U.S. tax and social security regimens. The EEOC dismissed her complaint for failure to state a claim.

As appears from Jitney-Jungle's response (by counsel) of June 16, 1995, the National Worker's Rights Committee (Committee) on June 7, 1995 wrote to Jitney-Jungle on Austin's behalf, apparently threatening litigation if Jitney-Jungle continued to withhold taxes from her wages. Jitney-Jungle replied that Internal Revenue Code (IRC) §§3101, 3111, and 3301 compel social security contributions, and that IRC §§3402-(a)(1) and 3403 compel an employer to withhold taxes. Jitney-Jungle also informed the Committee that:

> If Ms. Austin proceeds with the course of action outlined in your letter and eventually pursues litigation on the propositions set forth in your letter, we will . . . seek frivolous lawsuit sanctions against her, including costs and attorney's fees.

Answer, Exhibit A.

Undaunted, by letter dated October 17, 1995, Austin filed a charge substantially identical to her EEOC complaint with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

By letter to Austin dated March 18, 1996, OSC advised that it had determined that "there is no reasonable cause to believe that this charge states a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. §1324b . . . [or] document abuse under 8 U.S.C. §1324 b(a)(6)." OSC informed Austin of her right to file a civil administrative complaint directly with OCAHO within 90 days.

On March 27, 1996, the IRS served Jitney-Jungle a Notice of Levy (Form 668-W(c)) garnishing Austin's wages because of $139,512 in back taxes and penalties owed by Donald M. and Joyce J. Austin.[4] The notice informed Jitney-Jungle that:

> there is a lien for the amount that is owed. Although notice and demand that are required by the Code have been made, the amount owed has not been paid. This levy requires you to turn over to us: (1) this taxpayer's wages and salary that have been earned but not paid yet, as well as wages and salary earned in the future until this levy is released, and (2) this taxpayer's other income that you have now or for which you are obligated.

Motion to Add Party-Respondent, Appendix A.

On June 21, 1996, Austin filed a Complaint with OCAHO. Austin identifies herself as a "citizen of the United States and Mississippi" seeking redress against her employer because of discrimination based on national origin and citizenship. Complaint at ¶¶4, 8, and 9. She describes her position at Jitney-Jungle as that of Assistant DSD Pricing Coordinator, but omits her date of hire. Complaint at ¶¶11,12. Austin denies that Jitney-Jungle "knowingly and intentionally not hired" or "fired" her. Complaint at ¶¶13, 14. Although she alleges no injury, Austin nevertheless characterizes as discriminatory Jitney-Jungle's refusal to accept the unofficial documents she tendered for tax avoidance purposes. Complaint at ¶16. Specifically, Austin alleges that Jitney-Jungle refused to accept her:

> Statement of Citizenship [and] Affidavit of Constructive Notice which assert the statutorily secured rights of U.S. citizens not to be treated as Aliens for any reason or purpose under any practice.

Complaint at ¶16(a). Austin admits that the documents she gratuitously tendered Jitney-Jungle were not demanded by Jitney-Jungle to ascertain Austin's work eligibility. Complaint at ¶17.

Although Austin remains employed by Respondent, she nonetheless requests back pay from May 26, 1995, the day on which Austin

[4] It may be inferred from the Notice of Levy that Austin received an IRS Notice of Deficiency *at least* 100 days earlier, and an IRS Notice and Demand *at least* ten days before the Notice of Levy. *See* 26 U.S.C. §6213 and 26 C.F.R. §301.6331-1(a). The pleadings shed no light on whether Austin's gratuitous tender to Jitney-Jungle of the exemption documents was a response to her underlying tax problems or was a contributing cause.

first attempted to gain exemption from tax withholding and social security deduction. Complaint at ¶20.

Austin's OCAHO Complaint, signed by John B. Kotmair, Jr. (Kotmair), is accompanied by a "Privacy Act Release Form and Power of Attorney" granting Kotmair as Director, National Worker's Rights Committee,

> permission to inquire of, and procure from, Jitney-Jungle Stores of America, Inc. . . . copies of the records pertaining to and matter involving: the withholding of taxes (including but not limited to a Statement of Citizenship) that either Jitney-Jungle . . . or the Internal Revenue Service (IRS) alleges I may owe; any claim of levy authority submitted to Jitney-Jungle . . . by the IRS extra legem for the purpose of persuading the release of monies due me by the IRS.

On July 29, 1996, counsel for Respondent filed several pleadings in addition to an Answer, including:

> (1) Motion to add the United States, specifically including IRS, as a respondent, because "the Complaint is attacking the procedures imposed on Respondent by the Internal Revenue Service under the Internal Revenue Code and appropriate regulations;" because the IRS or Tax Division of the Department of Justice "have the most complete records relative to such frivolous positions [as that] maintained by the Complainant;" and because the government has "a definite monetary and procedural interest in the outcome of these proceedings" due to Austin's large indebtedness, supported by the IRS Notice of Levy;
>
> (2) Motion To Dismiss for Failure To State a Claim, because "Complainant admits that she was not knowingly and intentionally not hired . . . not fired . . . intimidated, threatened, coerced, or retaliated against because she filed or planned to file a complaint or to keep her from assisting someone else to file a complaint; and that the employer did not ask her for too many or wrong documents than required to show that she was authorized to work in the United States;" and because the Complaint was not executed by an appropriately authorized individual;
>
> (3) Motion to Fix Location for Any Hearing.

By letter dated August 26, 1996, the Department of Justice, Tax Division, Civil Trial Section, Southern Region, filed an opposition to Respondent's motion to add the government as a respondent. The Tax Division's memorandum of law in support argues that the United States has not waived its sovereign immunity to suit under 8 U.S.C. §1324b, citing *Hensel v. OCAHO*, 38 F.3d 505, 509 (10th Cir. 1994) ("the United States is not subject to suit under the IRCA").

II. *Discussion and Findings*

As a preliminary matter, the power of attorney is obviously insufficient to authorize Kotmair to represent Austin before an OCAHO administrative law judge (ALJ). *Horne v. Hampstead (Horne I)*, 6 OCAHO 884, at 4 (1996), 1996 WL 658405 (O.C.A.H.O.); 28 C.F.R. §68.33(b)(6) (1966). *Compare, Boyd v. Sherling,* 6 OCAHO 916, at 5 (1997). Nevertheless, OCAHO having administratively issued its Notice of Hearing, Respondent having filed its Answer and moved to dismiss the Complaint, and no further pleadings having been filed by Complainant, this Final Decision and Order in any event terminates the proceeding. Because, however, the purported representation is deficient, a copy of this final administrative adjudication will be served directly on Complainant, with an information copy to Kotmair.

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

The Supreme Court has instructed that federal 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); *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 5 (1997).

"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. *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1176-1177 (5th Cir. 1984).

A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are 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); *see also United States v. Garner*, 749 F.2d 281, 284 (5th Cir. 1985). "Federal courts are courts of limited jurisdiction by origin and continuing congressional design. The rules of jurisdiction, which occasionally may appear technical and counterintuitive, are to be ungrudgingly obeyed." *Beers v. North Am. Van Lines, Inc.*, 836 F.2d 910, 913 (5th Cir. 1988).

A fortiori, an administrative tribunal is one of limited jurisdiction. *Winkler v. Timlin*, 6 OCAHO 912, at 4; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 5. A federal forum may *sua sponte* determine subject matter jurisdiction. *Johnston v. United States of America*, 85 F.3d 217, 218 n.2 (5th Cir. 1996); *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 189 (1994); *Garner*, 749 F.2d at 284; *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297, 298 (5th Cir. 1984). 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). Nor can "the parties . . . create federal subject matter jurisdiction either by agreement or consent." *Beers,* 836 F.2d at 912. 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 unsubstan tial" 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 535 (internal quotations omitted) (citing *Ex parte Poresky*, 290 U.S. 30, 31-31 (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 Complaint should be dismissed. *MCI Telecommunications Corp. v. Credits Builders of Am., Inc.*, 980 F.2d 1021, 1022 (5th Cir. 1993), *cert. granted and judgment vacated*, 508 U.S. 957 (1993), *judgment reinstated*, 2 F.3d 103 (5th Cir. 1993), *cert. denied*, 510 U.S. 978 (1993); *Cinel*, 15 F.3d at 1342.

B. *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*

The relevant statutes this forum must construe are 8 U.S.C. §1324b, which prohibits unfair immigration-related employment practices based on national origin or citizenship status, and §1324a(b) (Section 101 of IRCA), which obliges an employer to verify an employee's eligibility to work in the United States at the time of hire.

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, which, codified as 8 U.S.C. §1324a, 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.[5]

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."[6]

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

[5] 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.

[6] 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 (O.C.A.H.O.).

by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after 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).

2. *Section 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." *Wilson v.*

Harrisburg Sch. Dist., 6 OCAHO 919, at 8 (1997); *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 7; *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 the 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.

Austin seeks IRCA redress not because Jitney-Jungle refused to hire her or because Jitney-Jungle discharged her, but because Jitney-Jungle withholds federal taxes and deducts social security contributions from her paycheck, thereby refusing to accept improvised, unofficial documents purporting to exempt Austin from taxation. Austin contests Jitney-Jungle's mandatory statutory duty to withhold taxes, and denies her own obligation to pay taxes. Although she is an incumbent, Austin requests that Jitney-Jungle pay her back pay from May 26, 1995. Austin's request is without legal authority. Her claim turns on a misguided contention that only non-citizens are subject to tax withholding.

In effect, Austin sues because her employer refused to treat her preferentially by excusing her from tax and social security obligations. To refuse to prefer is not to discriminate. An employer that treats all alike, discriminates against none. Nowhere does Austin's Complaint describe discriminatory treatment on any basis whatsoever. Austin does not allege that other employees of different citizenship or nationality were treated differently, nor does she 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. Jitney-Jungle's decision to subject Wilson to its tax and social security regimen is not discrimination within the scope of ALJ jurisdiction under 8 U.S.C. §1324b, the only immigration-related workplace discrimination jurisdiction assignable to an ALJ.

The administrative enforcement and adjudication modalities authorized to execute and adjudicate the national immigration policy IRCA evinces are not sufficiently broad to address Austin'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 Austin, consequently discriminatorily denied employment. *United States v. Mesa Airlines,* 1 OCAHO 74, at 466-467 (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 IRCA relieves an employer of obligations conferred by the Internal Revenue Code (IRC) to withhold taxes and social security deductions from employees' wages. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8-16; *Winkler v. Timlin*, 6 OCAHO 912, at 8-12. Nothing in IRCA's text or legislative history prohibits an employer from complying with the IRC regimen or from asking for a social security number (the individual tax identification number). *Winkler v. Timlin*, 6 OCAHO 912, at 11-12; *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892, at 16-17, 1996 WL 670179, at *14, *appeal filed*, No. 96-3688 (3rd 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 IRCA confers upon an employer the right to resist the IRC by accepting gratuitously tendered improvised documents purporting to relieve an employee from taxation. IRCA 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 Austin'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*

Austin's claim, although masked by transparent immigration-related employment jargon, is essentially a collateral attempt to avoid

or restrain federal income tax collection, both in withholding and through levy. Austin seeks to avail herself of 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); *Boyd v. Sherling*, 6 OCAHO 916, at 8 (1997). Upon tracing the procedural history of her claim, Austin's thin veil of immigration verbiage is readily lifted, revealing a tax protest with no immigration-related implications.

The May 26, 1995 gratuitous tender of an improvised "Statement of Citizenship" purports to exempt Austin from federal withholding tax ***because*** she is a citizen. Her "Affidavit of Constructive Notice" claims exemption from the IRC and SSA because of repudiation of her social security number (her individual taxpayer identifier under 26 C.F.R. §301.6109(a)(1)(ii)(D), (b)(2), (d)). Both efforts attempt to restrain Jitney-Jungle from collecting federal withholding tax and social security contributions, obligations which Jitney-Jungle must perform as her employer.[7] Obviously, challenges to the IRC and SSA do not properly implicate ALJ jurisdiction under 8 U.S.C. §1324b.

Austin's EEOC Complaint, subsequently dismissed, attacked Jitney-Jungles' continued compliance with tax and Social Security law as discriminatory on the bases of national origin and citizenship on the claim that compliance deprived Austin as a U.S. citizen of "the full fruit of [her] 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

[7] 26 U.S.C. §3402 obliges "every employer making payment of wages [to] . . . deduct and withhold upon such wages a tax." 26 U.S.C. §3403 makes the employer liable for the tax to be withheld and immunizes the employer who withholds taxes from suit. 26 U.S.C. §6672(a) penalizes an employer who fails to collect such tax by imposing a monetary penalty "equal to the total amount of the tax evaded or not collected."

[8] 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.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000-e *et seq*.[8]

Austin's October 17, 1995 OSC Charge, substantially identical to her EEOC Charge, again had as its stated purpose tax avoidance.

On March 27, 1996 Jitney-Jungle received an IRS Notice of Levy garnishing Austin's wages for $139,512 in delinquent back taxes and penalties.

On June 21, 1996, approximately three months after the Notice of Levy, Austin made another attempt to avoid tax compliance, filing the present OCAHO Complaint, once again accusing Jitney-Jungle of treating her as an "Alien," characterizing employer compliance with statutory tax mandates as immigration-related workplace discrimination. Austin's apparent theory, exhaustively discredited by this forum,[9] 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, Austin's myriad legal actions constitute a campaign to restrain the collection of taxes. The Anti-Injunction Act

[9] *See Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (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 (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 (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 8 (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.

bars such suits, that must be dismissed for lack of ALJ subject matter jurisdiction.

"[T]he general rule is that . . . federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Except in extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *Intern. 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," 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 (1997) (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 an action for refund.'" *Church of Scientology of California v. United States*, 920 F.2d 1481, 1484-85 (9th Cir. 1990) (*quoting Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)), *cert. denied*, 500 U.S. 952 (1991).

The Anti-Injunction Act enjoins suit to restrain* all *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 obliges employers to withhold federal income and social security taxes from employees' wages. 26 U.S.C. §§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 implement ers 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; none subject to suit under 42U.S.C. §1983, even were 26 U.S.C. §6331 authorizing collection of overdue taxes by levy and seizure unconstitutional).

Title 26 U.S.C. §§6671 and 6672, extensively litigated,[10] is a separate penalty provision that imposes joint and several liability on "any person required to collect . . . and pay over" withholding taxes or tax liens who fails to do so. Section 6672 imposes a 100% penalty "equal to the total amount of the tax evaded, or not collected." In Austin's case, therefore, ***had Jitney-Jungle chosen not to enforce the IRS wage levy, the corporation and those within it responsible for wage levies might have incurred liabilities of $139,512 each!***

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* 25 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 Austin wish to recover taxes Jitney-Jungle withheld from her paycheck, she 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 Austin wish to challenge her assessment liability, she must do so in ***Tax Court within 90 days of notice of deficiency.*** 26 U.S.C.

[10] *See Slodov v. United States*, 436 U.S. 238 (1978); *Stallard v. United States*, 12 F.3d 489 (5th Cir. 1994), *reh'g denied*; *McCray v. United States*, 910 F.2d 1289 (5th Cir. 1990), *cert. denied*, *Scott v. United States*, 499 U.S. 921 (1990); *Gustin v. United States*, 876 F.2d 485 (5th Cir. 1989); *Wood v. United States*, 808 F.2d 411 (5th Cir. 1987); *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743, 749, 751-753 (5th Cir. 1982); *Brown v. United States*, 591 F.2d 1136 (5th Cir. 1979); *Hornsby v. I.R..S.*, 588 F.2d 952 (5th Cir. 1979); *Moore v. United States*, 465 F.2d 514 (5th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States v. Hill*, 368 F.2d 617 (5th Cir. 1966); *Cash v. Campbell*, 346 F.2d 670 (5th Cir. 1965); *United States v. Huckabee Auto Co.*, 46 B.R. 741 (M.D.Ga. 1985), *aff'd*, 783 F.2d 1546 (11th Cir. 1986).

§§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).

Austin may also sue the IRS in ***district court*** if it neglected to serve her with a deficiency notice, and thereby deprived her 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); *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); *King v. C.I.R.*, 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, 1005 (8th Cir. 1955), *cert. denied*, 350 U.S. 904 (1955), *reh'g denied*, 350 U.S. 955 (1955); *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.C.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, 5 (1962). OCAHO is never the proper forum for a tax challenge.

The procedures described provide due process and constitute Austin's available legal options. If Austin failed to exercise them, 26 U.S.C. §6331(a), as interpreted at 26 C.F.R. §301.6331-1(a) ("Levy and Distraint") and (b) (1997), 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 any 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.[11]

The March 18, 1996 IRS Notice of Levy (Form 668-W(c)) garnishing Austin's wages lists an "Unpaid Balance of [Tax] Assessment" of $130,474 and "Statutory Additions" (penalties) of $9,038, and emphasizes that mandated procedures have been followed:

Although notice and demand that are required by the Code have been made, the amount owed has not been paid. This levy requires you [the employer] to turn over to us [the IRS]: (1) this taxpayer's wages and salary that have been earned but not paid yet, as well as wages and salary earned in the future until this levy is released, and (2) this taxpayer's other income that you have now or for which you are obligated.

Unless pleadings allege that the IRS failed to provide notice, the Anti-Injunction Act forbids forae from hearing complaints relating to levy and penalty. *Shaw v. United States*, 331 F.2d 493, 494 (9th Cir. 1964); *Botta v. Scanlan*, 314 F.2d 392, 393 (2d Cir. 1963). Where the IRS gives notice, even if defective, an employee cannot sue to stop a levy. *Birks- Halyard Corp. v. United States*, 537 F. Supp. 1213 (E.D.Wis. 1982).

"The United States is a sovereign entity and may not be sued without its consent"—without consent, a suit against the United States must be dismissed for lack of subject matter jurisdiction. *Elias v. Connett*, 908 F.2d 521, 523, 527 (9th Cir. 1990). 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

[11] 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; if paid semimonthly, and $216.67, if paid monthly; if paid monthly. Additional monetary exemptions for dependents are allowed where a taxpayer submits to "her 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.

under ***both*** 28 U.S.C. §2410 and the Anti-Injunction Act's lack of notice exception. *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); *Elias*, 908 F.2d at 523; *Miller*, 817 F. Supp. at 1498.

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 arising from such [compliance with the levy]."

Pawlowke 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., USA v. United States*, 779 F. Supp. 610, 612 (D.D.C. 1993).

Austin failed to pursue available remedies in appropriate forae. For example, apparently she has not paid her 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). She has neither challenged her assessment liability in Tax Court within 90 days of notice of deficiency seeking an injunction of her 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)), nor 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)). No other forae are free 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 Austin'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 and the statutory requisites for its implementation do not properly implicate 8 U.S.C. §1324b jurisdiction.

The constitutionality of the Social Security Act has long been judicially acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Supreme Court has held social security's withholding system uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax system 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 here that 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), United States Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national security program providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id.

Austin argues that she may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, she 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. *This Forum Lacks Subject Matter Jurisdiction Over Austin's National Origin Claim*

This forum's adjudication of Austin's national origin discrimination claim is barred because the claim has already been adjudicated by EEOC, the proper forum, and because it is legally insufficient.

Austin's pleadings confirm that she filed an EEOC claim which was dismissed, arising out of the same facts as in the present case. Although she provides no details, 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*. Memorandum, Ellen J. Vargyas, EEOC Legal Counsel to All EEOC District, Area & Local Directors, July 13, 1995, *supra*. Because dismissal for failure to state a claim is a merits disposition insofar as the parties are covered by Title VII, even though the underlying charge may fail to state a cognizable claim, Austin's national origin claim is vulnerable also to the prohibition against overlap between §1324b and Title VII. 8 U.S.C. §1324b(b)(2). See *Winkler v. Timlin*, 6 OCAHO 912, at 5–6.

Even had I jurisdiction over Austin's claim of national origin discrimination, however, the Complaint fails substantively to state a

claim upon which relief can be granted. A complaint of national origin discrimination which fails to specify Complainant's national origin is insufficient as a matter of law. *Boyd v. Sherling*, 6 OCAHO 916, at 23; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15, 19 WL 670179, at *11, *appeal filed*, No. 96-3688 (3rd Cir. 1996). Remarkably, Austin does not even identify her national origin. Instead, she repeatedly refers to her national origin as that of a U.S. citizen. Discrimination against United States citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Austin's argument that she was discriminated against on the basis of national origin is based on Jitney-Jungle's refusal to accept her improvised "Statement of Citizenship." This allegation, however, relates only to claims of document abuse and citizenship status discrimination. Because by its own terms the national origin discrimination claim is based solely on Complainant's citizenship status, it is dismissed on the additional ground of failure to state a claim upon which relief can be granted.

F. *Citizenship Cause of Action Fails to State a Claim Upon Which Relief Can Be Granted*

Refusal to hire or discharge are the only citizenship status discrimina tion claims cognizable under §1324b(a)(1). The entries, *seriatim*, on Austin's OCAHO Complaint format, as well as the tenor of pleadings, indicate an ongoing employment relationship, as confirmed by ¶2 of Respondent's Motion to Fix Location for Any Hearing, which states "The Complainant is employed by the Respondent." The pleadings consistently point to Austin as having been Jitney-Jungle's employee since 1995.

OCAHO jurisprudence makes clear that ALJs have §1324b citizenship status jurisdiction only where the employee has been discriminatorily rejected or not hired. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 8; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 7; *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14, 1994 WL 752347, at *11. Title 8 U.S.C. §1324b does not reach conditions of employment. Here, although Austin remains employed, claiming neither refusal to hire nor wrongful termination, she seeks §1324b recourse over this dispute concerning federal tax withholding and social security law compliance.

This proceeding stems from what can at best be characterized as misapprehension that ALJ jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations im-

posed by federal revenue law. Such philosophical and political dispute is beyond the scope of §1324b. Complainant is in the wrong forum for the relief she seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit §1324b jurisdiction that turns on an employer's tax withholding obligations. Austin's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

G. *Austin's Document Abuse Cause of Action Fails To State a Claim Upon Which Relief Can Be Granted*

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)," a comprehensive system whereby an employer verifies an employee's eligibility to work in the United States by means of prescribed documents. 8 U.S.C. §1324b-(a)(6). The pleadings in this case fail to disclose that Jitney-Jungle asked Austin to produce any documents whatsoever. Accordingly, there is no basis on which to posit §1324b document abuse.

Austin's Complaint has nothing to do with the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. For example, Austin explicitly denies that she tendered her "Statement of Citizenship" for the purpose of employment eligibility verification implicated by the §1324a(b) requirement. Complaint at ¶17. In fact, Austin disclaims that Jitney-Jungle asked for wrong or different documents than those required to show work authorization, denying in effect that she was the victim of document abuse in violation of §1324b(a)(6). Complaint at ¶17. Indeed, Austin first presented a document ***unrelated*** to employment eligibility verification on May 26, 1995, sometime after the period in which the employer was required to verify her eligibility for employment. The documents Austin insists should have been accepted by the employer for tax exemption purposes—the "Statement of Citizenship and Affidavit of Constructive Notice which assert the statutorily secured rights of U.S. Citizens not to be treated as Aliens for any reason or purpose under any practice" have no place in the §1324a(b) process.

The holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10, *appeal filed*, No. 97-70124 (9th Cir. 1997), is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 at 18-21 (1996) and cases cited therein.

Because nothing in the Complaint implicates §1324a(b) obligations of an employer, I lack subject matter jurisdiction over Austin's §1324b-(a)(6) allegations.

III. *Conclusion*

Respondent moves to dismiss. 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 on its own motion." *Things Remembered, Inc. v. Petrarca*, 116 S.Ct. 494, 499 n.1 (1995).

> [T]he rule is well settled that the party seeking to invoke . . . 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 at 1176 (quoting WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §3522, at 45). Austin has failed to demonstrate facts sufficient to justify this forum's exercise of jurisdiction. The motion to dismiss is granted.

Taking all Austin's factual allegations as true, and construing them in a light most favorable to her, I determine that Austin is entitled to no relief under any reasonable reading of her pleadings. Even if, as Austin claims, on May 26, 1995, she gratuitously ten-

dered documents purporting to exempt her from federal income tax withholding and social security deductions, and even if Jitney-Jungle refused to honor these documents and insisted on making payroll tax and social security deductions, Jitney-Jungle's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Austin describes simply does not support the immigration-related causes of action she pleads. Austin's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside of §1324b.

Although leave to amend is favored in discrimination cases where subject matter jurisdiction is ineffectively pleaded, *see Watkins v. Lujan*, 922 F.2d 261, 264 (5th Cir. 1991), there is no conceivable way that Austin can transform this tax protest into an unfair ***immigration-related*** employment complaint. A complaint, even by a *pro se* Complainant (which Austin 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, 520-521 (1972); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981).

Where a complaint "fails to state a claim because it lacks even an arguable basis in law, Rule 12(b)(6) . . . counsel[s] dismissal." *Moore v. Mabus*, 976 F.2d 268, 269 (5th Cir. 1992). "[C]laims which . . . clearly have no arguable basis in law, thereby negating a rectification by amendment . . . be dismissed with prejudice." *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). Austin's claim is incapable of 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. Jitney-Jungle, which continues to employ Austin, has not harmed her in any way. It has not preferred a citizen of another land to her, nor has it subjected her to discriminatory paperwork requirements. It has simply insisted, as it is bound to do, that she 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, and by the IRC, which im-

munizes employers from suit when they withhold tax and social security contributions from wages and when they comply with wage levies.

Austin's action is frivolous. "An action is frivolous if it 'lacks an arguable basis either in law or in fact.'" *Graves v. Hampton*, 1 F.3d at 317 (quoting *Neitzke v. Williams*, 490 U.S. 319, 325(1989)). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Id*. Jitney-Jungle, an employer who in compliance with statutory obligations, deducts withholding tax and social security contributions, and who complies with an IRS Notice of Levy, is statutorily immunized from suit. *See* 26 U.S.C. §§3402, 3403, 6331(a), 6332(d), 6334(a)(9), 6671, 6672, 7421, discussed *supra* at **II(C)**. Accordingly, I dismiss Austin's Complaint without leave to amend because her tax challenge, though clothed in immigration-related labor law verbiage, 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.

(a) *Disposition*

Austin's Complaint, having no arguable basis in fact or law, is before the wrong forum. The Complaint is dismissed 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).

Opposing Respondent's motion to add the United States as a party, the Department of Justice argues that §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, even where the United States does waive 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); *Miller v. United States*, 817 F. Supp. at 1498. In any event, in view of the result reached in this Final Decision and Order, it is unnecessary to address the question raised by Respondent's motion, and it is denied.

(b) *Post-decision Procedure*

Jitney-Jungle in ¶21 of its Answer requests "all costs incurred herein and reasonable attorney's fees." Fee shifting is authorized by

8 U.S.C. §1324b(j)(4). I am prepared to consider such a request. *Compare Williamson v. Autorama*, 1 OCAHO 174, at 1172–1175 (1990). Respondent 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 ***May 15, 1997***. A response by Complainant—limited to the subject at hand, the amount of attorney's fees requested—is timely if filed not later than ***June 16, 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).

SO ORDERED:

Dated and entered this 31st of March, 1997.

MARVIN H. MORSE
Administrative Law Judge

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