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

May 1, 1997

ROBERT S. MATHEWS, Complainant, v. GOODYEAR TIRE & RUBBER CO., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00044)))

FINAL DECISION AND ORDER GRANTING MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
David L. Drechsler, Esq., on behalf of Respondent.

I. *Introduction*

This tax challenge is one in a series of cases which address the lawfulness of employer compliance with statutory federal income tax withholding and social security obligations, brought before this forum by complainant's representative John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee (Committee). To date, the administrative law judge (ALJ) has dismissed each such case, rejecting the complainant's assertion that an employer violates 8 U.S.C. §1324b prohibitions against immigration-related unfair employment practices when he refuses to accept an employee's improvised, unofficial documents purporting to exempt the employee from tax withholding and social security contribution. *See Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919

(1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.), and *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O), *appeal filed*, No. 97–70124 (9th Cir. 1997). *See also Horne v. Hampstead (Horne I)*, 6 OCAHO 884 (1996), 1996 WL 658405 (O.C.A.H.O.)[1]

The present case is a unique variant of unusual durability, a long-running tax drama starring Robert S. Mathews (Complainant or Mathews). Mathews, the protagonist, pits himself against his employer, Goodyear Tire & Rubber Company (Respondent or Goodyear), and its agents, to prevent them from withholding taxes and deducting social security contributions from his wages. Looking to a completely irrelevant federal tax regulation, 26 C.F.R. §1.1441–5 (Withholding Tax on Nonresident Aliens and Foreign Corporations), Mathews, a United States citizen residing in Ohio, disingenuously characterizes as immigration-based employment discrimination Goodyear's refusal to give credence to his fanciful assertion that withholding of income taxes is voluntary, not compulsory, for United States citizens.

Goodyear, of course, is statutorily bound to comply with the Internal Revenue Code (IRC) regimen, 26 U.S.C. §3402, which stipulates that "every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures described by the Secretary;" and 26 U.S.C. §3403, which commands that "the employer shall be liable for the payment of the tax required to be deducted and withheld . . . and shall not be liable to any person" for complying with the IRC. The employer is subject also to 26 U.S.C. §6672, which imposes a 100% penalty "equal to the total amount of the tax evaded, or not collected" on "any person required to collect, truthfully account for, and pay over any tax . . . who fails to collect such tax."

[1] *See also Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996), which differs to the extent that neither Kotmair nor the Committee appear of record. For a helpful catalogue of federal court as well as OCAHO responses to challenges to withholding of federal taxes and participation in the social security system, *see Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) .

This drama has played:

- in the Ohio Court of Appeals, Ninth Judicial District, Mathews v. Dugan (C.A. No. 15309) (1991), an action against Goodyear and its officers "to prevent Respondents from withholding any of his wages," petition for writ of mandamus denied;[2]

- in the Ohio Supreme Court, Mathews v. Dugan, 63 Ohio St. 3d 1403 (1992), 585 N.E.2d 425 (Table) (Ohio 1992), dismissed;

- in the Common Pleas Court of Summit County, Ohio, Mathews v. Dugan, (Case No. 92 CV 02 0603) (1982), dismissed, for lack of jurisdiction under the Anti-Injunction Act, 26 U.S.C. §7421(a), and for failure to state a cause of action, and finding that Mathews "engaged in frivolous conduct in civil actions" in seeking to restrain Goodyear's compliance with federal tax law;[3]

- in the Ohio Court of Appeals, Ninth Judicial District, Mathews v. Dugan, 1993 WL 107843 (Ohio App. 1993) (unpublished opinion), aff'g the trial court's dismissal, and holding the constitutionality of IRC tax levy procedure to be "long settled" (quoting United States v. National Bank of Commerce, 472 U.S. 713, 721 (1985));

- in the Ohio Supreme Court, Mathews v. Dugan, 67 Ohio St.3d 1451 (1993), 619 N.E.2d 420 (Table) (Ohio 1993), dismissed sua sponte on September 23, 1993;

- in the Supreme Court of the United States, Mathews v. Dugan, 510 U.S. 1167 (1994), cert. denied.

While his state court claim against Goodyear was still on the boards, Mathews repeated his cause of action, this time, however, featuring as his antagonists, the IRS and its employees, *Robert S. Mathews v. Ronald Alltop; J. Huajt; Internal Revenue Service,*

- in the United States District Court, N.D. Ohio, Eastern Division, Mathews v. Alltop, 1994 WL 381823 (Case No. 5:93

[2]Motion To Dismiss, Attachment A.
[3]Motion To Dismiss, Attachment C.

CV 2699) (N.D. Ohio, 1994), an action to prevent the IRS and its employees "from taking his private property, that is, his wages, without his consent," dismissed (March 10, 1994), because barred by the Anti-Injunction Act;

- in the United States Court of Appeals, Sixth Circuit, Mathews v. Alltop, 38 F.3d 1216 (Table) (Case No. 94–3520) (6th Cir. 1994), 1994 WL 589578 (unpublished disposition; citation permitted under Sixth Circuit Rule 24(c) to establish res judicata, estoppel, or the law of the case), aff'g District Court decision (October 21, 1994).

Spurned by state and federal courts, Mathews, on May 2, 1995, filed a discrimination charge against Goodyear with the Equal Employment Opportunity Commission (EEOC), again based on Goodyear's insistence on withholding taxes from his wages.

Those cases and this case arise from the same factual predicate—Goodyear's insistence that taxes be withheld from Mathews' wages either routinely or as part of a wage levy. This case is an effort to mount the same attack, couched this time in terms of immigration-related employment discrimination, on the bases of Mathews' U.S. citizenship and Goodyear's refusal to give credence to his claim that U.S. citizens are tax-exempt, and rejection of his documentation to support that claim. Judicial economy demands that this case, in which a tax avoidance claim long settled comes masked in immigration-related unfair employment practice guise, be decided out of hand, the essential claim, but for its immigration-related patina, having already been litigated before every conceivable forum but Tax Court.

As the United States District Court for the Northern District of Ohio instructs, "attempts to avoid the application" of the Anti-Injunction Act, 26 U.S.C. §7421, "by characterizing the complained of action not as assessing or collecting taxes," but as a collateral matter, cannot defeat the Act; "[a]ny such attempt is prohibited under §7421(a)" and must fail. *Mathews v. Alltrop*, 1994 WL 381828 (N.D. Ohio 1994), *aff'd*, 38 F.3d 1216 (6th Cir. 1994) (Table), 1994 WL 589578 (unpublished disposition; citation permitted to establish law of the case).

Accordingly, as explained below, this Final Decision and Order dismisses the Complaint for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b, and for lack of subject matter jurisdiction.[4]

No stranger to the Anti-Injunction Act, Mathews obtained explicit instruction in the relevant law by Ohio courts, the Sixth Circuit[5] and the United States District Court.[6] I too find this action barred by the Anti-Injunction Act, 26 U.S.C. §7421(a).

II. *Factual and Procedural History*

On or about August 14, 1989, Goodyear, an Akron, Ohio, employer of more than fourteen employees, hired Robert Sidney Mathews, a U.S. citizen, as a Turbine Engineer. OSC Charge, ¶3; Complaint, ¶¶11, 12, 13. Mathews remained in Goodyear's employ for at least seven years.[7]

On a date uncertain, Mathews filed Charge No. 48–186 with the Office of Special Counsel for Immigration Related Unfair Employment Practices, U.S. Department of Justice (OSC). Mathews alleged that Goodyear had committed national origin discrimination, but crossed out the line stating that the "Injured Party Has Suffered an Unfair Immigration-Related Employment Practice," implicitly

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[4]For an earlier disposition of a similar tax avoidance action, but lacking the §1324b cause of action, where the District Court dismissed both for failure to state a claim upon which relief can be granted *and* for lack of subject matter jurisdiction, *see Craig v. Lowe*, 1996 WL 116822, at *1, 3, 6 (N.D. Cal. 1996) (Schwarzer, J.), *aff'd*, 108 F.3d 1384 (9th Cir. 1997) (Table), 1997 WL 117094 (unpublished disposition).

[5]*Mathews v. Alltop et al.*, 38 F.3d 1216, 1994 WL 589578, an unpublished disposition, cited for law of the case, as permitted by SIXTH CIRCUIT RULE 24(c), is attached as required.

[6]*Mathews v. Alltop*, 38 F.3d 1216, 1994 WL 589578 ("**Clearly, plaintiff's action is barred under the Anti-Injunction Act**" [emphasis added]), *aff'g Mathews v. Alltop*, 1994 WL 381828, at *1, which observed that

> **Mathews attempts to avoid the application of this statute [the Anti-Injunction Act] by characterizing the complained of action not as assessing or collecting taxes, but as a wrongful taking of property without due process. However, no matter what Mathews calls this action, it is simply an attempt to prohibit the IRS from collecting a tax from him. Any such attempt is prohibited under §7421(a). Mathews' remedy is a suit for refund** [emphasis added]**.**

[7]On September 11, 1996, Kotmair charged that Goodyear was making Mathews' situation intolerable by continuing to withhold taxes and social security contributions from his paycheck. Complainant's Motion to Respondent's Motion To Dismiss the Complaint, at p. 12.

negating his discrimination claim. OSC Charge. Mathews acknowledged that on May 2, 1995, he had filed a "charge based on this set of facts . . . with the Equal Employment Opportunity Commission," Cleveland District Office, File No. 220951172. OSC Charge, ¶8. Before OSC, Mathews alleged that in February 1992 and in February 1995 Goodyear trampled his rights as a U.S. citizen by refusing to accept an improvised "statement of citizenship" purporting to exempt him from tax withholding. OSC Charge, ¶9. By so doing Goodyear treated Mathews "as if [he] . . . were a non-resident alien," who, according to Mathews, is the only individual obligated to pay U.S. taxes! *Id*.

By letter dated March 18, 1996, OSC informed Mathews that it declined to file a complaint on Mathews' behalf because "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. §1324b(a)(6)," and that Mathews had the right to file a private action directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days of receipt.

On May 14, 1996, Mathews timely filed his OCAHO Complaint. Mathews identifies himself as a native-born U.S. citizen, hired by Goodyear in 1989, but discriminated against on the bases of national origin and citizenship status. While denying discrimination stemming from lack of hire, discharge, or retaliation, Mathews alleges that Goodyear committed document abuse in February 1992 and in February 1995, three and five years after hire, by refusing to accept certain unofficial documents. Complaint, ¶¶13, 14, 15, 16. The specific documents Goodyear refused to accept in 1992 and 1995 were a "Statement of Citizenship" and an "Affidavit of Constructive Notice:"

> asserting his rights as a U.S. citizen, secured by statute, which indicate that he is not to be treated as an Alien[8] for any reason, practice, or purpose.

[8]Mathews elsewhere defines by contrast what it means to be treated "as an Alien." For example, the Reply to Respondent's Motion To Dismiss the Complaint (Reply), asserts that a U.S. citizen is entitled to a paycheck from which neither withholding tax nor social security contributions have been deducted. Complainant contends that such contributions are voluntary for U.S. citizens, because "the Social Security Act cannot be forced upon U.S. citizens," each of whom is "entitled to 100% of his earnings for his labor." Goodyear assertedly tramples Mathews' rights by "taking a portion of his pay as if he were an alien . . . thereby attempting to force him out of his position of employment." Reply, pp. 10–11. To have social security deducted and tax withheld from one's paycheck is Respondent's *ipso facto* definition of being treated "as an Alien."

Complaint, ¶16(a). Mathews claims that these documents were "presented to show I can work in the United States." Complaint, ¶16. Mathews requests back pay from February 28, 1992.

The Complaint is signed not by Mathews, but by Kotmair, under an enclosed April 4, 1996, Power of Attorney delegating to Kotmair, as Director of the Committee, the right to investigate: (1) "the withholding of taxes" by Goodyear, and (2) any "claim of levy authority submitted to Goodyear" by the IRS.

On June 12, 1996, OCAHO issued a Notice of Hearing (NOH).

On August 7, 1996, having been granted a continuance, Goodyear timely filed its Answer. Goodyear denied that it discriminated against Mathews, but admitted that he "applied for or worked at Goodyear on August 14, 1989, and that he had a job as a turbine engineer." Answer, ¶8.

Concurrently, Goodyear moved to dismiss for failure to state a claim upon which relief can be granted,[9] with a memorandum in support of its motion, arguing that:

> Mathews . . . is merely seeking to avoid paying his federal income taxes. He is trying to achieve that goal by having this Court rule that . . . Goodyear . . . is not obligated to withhold federal income taxes from Mathews' income. Although this may be the first action filed by Mathews in this particular case, it is by no means the first action filed with respect to similar issues raised in the Complaint.

Memorandum in Support of Motion To Dismiss, §I.

Goodyear recites a litany of legal tactics employed by Mathews to avoid an IRS Notice of Levy on his Goodyear wages, beginning with Mathews' *mandamus* complaint with the Ohio Court of Appeals (Ninth District), *supra, dismissed,* November 6, 1991; appeal to the Ohio Supreme Court, *supra, denied*; his declaratory judgment action in the Court of Common Pleas (Summit County, Ohio), *supra, dismissed,* June 5, 1992; his appeal to the Ninth District Court of Appeals, *supra, denied*; his Motion for Jurisdiction to the Ohio

[9] 28 C.F.R. §68.10 (1997) provides:

> If the Administrative Law Judge [ALJ] determines that the complainant has failed to state . . . a claim, the Administrative Law Judge may dismiss the complaint.

Supreme Court, *supra*, *denied*; and his petition for *certiorari* in the Supreme Court of the United States, *supra*, *cert. denied*.

Goodyear argues that "all employers . . . [are] required to withhold income taxes pursuant to 26 U.S.C. §3402(a)(1)" and that this duty is mandatory; and that under 26 U.S.C. §3403 Goodyear is liable for the payment of taxes required by statute to be deducted. Memorandum in Support of Motion To Dismiss, §II. Goodyear also argues that 26 U.S.C. §1441, the statute cited by Mathews as authority for his proposition that he need not be taxed because he is a U.S. citizen, is completely unrelated to the case at hand, applying as it does to non-resident aliens and to U.S. citizens abroad. Goodyear characterizes Mathews' legal arguments as "trying to mix apples and oranges," arguing that the Complaint must be dismissed because:

> This lawsuit is pre-empted by Title 26 [U.S.C] §7421(a) [The Anti-Injunction Act] which provides that "[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The purpose of §7421(a) is to withdraw the jurisdiction from state and federal courts for suits seeking injunctions that prevent assessment or collection of federal taxes. The intent is to allow the United States to assess and collect taxes without judicial intervention and to require that procedural issues be determined in a suit for refund. The rule against enjoining assessment or collection is based on the necessity of collecting revenue promptly with a minimum of pre-enforcement judicial interference.

Id.

On August 26, 1996, I granted Complainant's motion requesting an extension of time to respond to Goodyear's Motion To Dismiss.

On September 11, 1996, Complainant filed his Reply to Respondent's Motion To Dismiss. Mathews asserts that Goodyear's recitation of his prior tax liability litigation was "entirely irrelevant." Yet Mathews contends:

> ***The Complainant's position is that the Respondent recklessly disregarded his rights as a U.S. Citizen, who is not encumbered by voluntary federal statutes and regulations, when it ignored the Complainant's rights as a U.S. Citizen, who has lawfully made and voiced his decision to keep his right to receive the full amount of his pay for labor free from any encumbrances under the voluntary social benefits program of the Social Security Act. The Respondent did this by denying the Complainant's Statement of Citizenship which not only shows that he is not subject to the income tax which is imposed only on non-resident aliens, since he is a U.S. Citizen*** . . . ***U.S. Citizens are not subject to an income tax.*** . . .
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> * * * *

> ***[I]t is a fact that the Complainant, as a U.S. Citizen, is by statute, regulation, and Supreme Court decision, entitled to 100% of his earnings for his labor, and is having his rights as a U.S. Citizen ignored by the Respondent's taking a portion of his pay as if he were an alien, this is making the Complainant's relationship with the Respondent an untenable situation, as the Respondent is thereby attempting to force him out of his position of employment, thereby avoiding the act of firing him in violation of the law.***

Reply to Respondent's Motion To Dismiss (emphasis added).

On December 27, 1996, Mathews filed a response to the affirmative defenses,[10] reiterating his claim that U.S. citizenship immunizes him from social security and withholding tax deductions.

III. *Discussion*

Title 8 U.S.C. §1324b prohibits as an unfair immigration-related employment practice discrimination based on national origin or citizenship status. 8 U.S.C §1324b (1997). Prohibited activities are limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." 8 U.S.C. §1324b(a)(1), (a)(5), (a)(6); *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 18; *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.

Mathews has been Goodyear's employee since August 14, 1989. Mathews seeks §1324b relief years after hire. Mathews seeks §1324b redress not because Goodyear refused to hire him or because Goodyear fired him, but because Goodyear withholds federal taxes and deducts social security contributions from his paycheck, refusing to accept improvised, unofficial documents purporting to exempt Mathews from taxation. He contests Goodyear's statutory duty to withhold taxes, and denies his own obligation to pay taxes. Although

[10]28 C.F.R. §68.9(d) permits a Complainant to file a reply responding to each affirmative defense.

he does not contend he was discharged by Goodyear, Mathews requests back pay from February 28, 1992, presumably the day on which he first presented Goodyear with his improvised tax-exemption documents. Mathews's request is without legal authority. Mathews' claim turns on a misguided contention that only non-citizens are subject to tax withholding.

Mathews sues because his longtime employer refused to treat him preferentially by excusing him from his tax and social security obligations. To refuse to prefer is not to discriminate. Where an employer treats all alike, he discriminates against no one. *Boyd v. Sherling*, 6 OCAHO 916, at 24, 1997 WL 176910, at *20. Nowhere in his pleading does Mathews describe discriminatory treatment. Mathews does not allege that other employees of different citizenship or nationality were treated differently, nor does he implicate the INS employment eligibility verification system (INS Form I–9). 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 IRC mandates. Goodyear's decision to subject Mathews to its tax and social security regimen is not discrimination under 8 U.S.C. §1324b.

The administrative enforcement and adjudication modalities authorized to execute and adjudicate the national immigration policy espoused by §1324b are not sufficiently broad to address Mathews' attacks 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 Mathews, consequently discriminatorily denied employment. *United States v. Mesa Airlines*, 1 OCAHO 74, at 466–467 (1989),[11] 1989 WL 433896, at *26, 30–31 (O.C.A.H.O.), *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991).

[11]Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

An incumbent employee's complaint regarding terms and conditions of employment fails to state a claim upon which §1324b relief can be granted. *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 6; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 4, 1997 WL 131346, at *5. This is so because ALJ power under §1324b(a)(1) is limited to discriminatory failure to hire and discharge, and does not include terms and conditions of employment. A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege either refusal to hire or wrongful discharge compels a finding of lack of §1324b(a)(1) subject matter jurisdiction.

To the same effect, an incumbent employee who alleges that his employer refused to accept gratuitously tendered, improvised documents purporting to prove that the employee is exempt from federal tax withholding and social security wage deductions fails also to state a legally cognizable cause of action under 8 U.S.C. §1324(b)(a)(6), which requires an employer to ascertain an employee's eligibility to work in the United States. "[N]othing in the employment eligibility verification system requires an employer uncritically to accept . . . [an] employee's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes." *Lee v. Airtouch Communications*, 6 OCAHO 888, at 5 (1996), 1996 WL 675579, at *4 (O.C.A.H.O.). There can be no 8 U.S.C. §1324b(a)(6) cause of action where the employee tenders improvised, unofficial documents that are not those statutorily prescribed for employment eligibility verification purposes. *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 26–27; *Boyd v. Sherling*, 6 OCAHO 916, at 18–21, 1997 WL 176910, at *15–17; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 148820, at *7–8; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 4, 1996 WL 131346, at *3; *Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892, at 16, 1996 WL 670179, at *13; *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 (O.C.A.H.O.).

A. *Summary Judgment Standard: "No Genuine Issue of Material Fact"*

Goodyear moves to dismiss for failure to state a claim upon which relief can be granted under the relevant statute, 8 U.S.C. §1324b,

which forbids an employer to engage in unfair immigration-related employment practices, including discriminatory hiring, firing, and retaliation.

Title 28 C.F.R. §68.10 provides that where "the Administrative Law Judge [ALJ] determines that the complainant has failed to state . . . a claim, the Administrative Law Judge may dismiss the complaint." *United States v. Italy Dep't Store, Inc.*, 6 OCAHO 847, at 2 (1996), 1996 WL 312113, at *2 (O.C.A.H.O.). Frequently, a motion to dismiss is treated as a motion for summary decision.[12]

An ALJ may "enter a summary decision for either party if the pleadings . . . or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). Summary judgment is appropriate "where there is no genuine issue of material fact." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party must show that no genuine issue of material fact exists. *Huizinga v. United States*, 68 F.3d 139, 143 (6th Cir. 1995). There is no genuine issue of material fact if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Any uncertainty as to a material fact must be considered in the light most favorable to the non-moving party. *Matsushita Electric Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Huizinga v. United States*, 68 F.3d at 143; *Jacobs v. E. I. DuPont de Nemours & Co.*, 67 F.3d 1219, 1233 (6th Cir. 1995); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that

[12] *See* FED. R. CIV. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56 . . . "). FED. R. CIV. P. 56(b) provides that "a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." The FEDERAL RULES OF CIVIL PROCEDURE are generally available as guidelines for OCAHO adjudication. 28 C.F.R. §68.1.

there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Elfelt v. Abbott*, 1995 WL 238335, at *2 (E.D. Mich. 1995). Where the non-moving party fails to establish the existence of an essential element of his case, the moving party is entitled to judgment as a matter of law.

Title VII provides the model upon which 8 U.S.C. §1324b claims of discrimination are decided. Its principles regarding the order and allocation of proof apply to §1324b claims of disparate treatment because of national origin or citizenship. *Boyd v. Sherling,* 6 OCAHO 916, at 24, 1997 WL 176910, at *20. *See also Westendorf v. Brown & Root*, 3 OCAHO 477, at 11, 1992 WL 535635, at *8. Adapted from the framework the Supreme Court established in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973), later elaborated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and by the Sixth Circuit in *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994), a claim of discriminatory treatment may be proved through direct, indirect, or circumstantial evidence. Unsupported accusations and conclusory statements do not suffice to establish a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248–249; *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

A complainant seeking to prove disparate treatment through circumstantial evidence must first establish a *prima facie* case. A *prima facie* case of disparate treatment on the basis of citizenship is established where an employee demonstrates: (1) that he is a member of a protected class, and (2) that he was treated less favorably than others not in his class but similarly situated under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship. *Boyd v. Sherling*, 6 OCAHO 916, at 24, 1997 WL 176910, at *20. Where the complainant establishes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). If the employer does so, the burden shifts back to the employee to produce evidence that the employer's non-discriminatory reason is pretextual. *Manzer*, 29 F.3d at 1081–84.

Where, however, a complainant is unable to present a *prima facie* case of discrimination, "the inference never arises and the employer has no burden of production." *Boyd v. Sherling*, 6 OCAHO 916, at 25, 1997 WL 176910, at *20 (citing *Lee v. Airtouch*, 6 OCAHO 901, at 11). If a complainant cannot shoulder the light burden of first establishing a *prima facie* case, there is no need for burden-shifting, and a motion to dismiss may be granted.

Here, Mathews fails to establish the second of the two-pronged test for *prima facie* disparate treatment. Mathews can satisfy the first prong, but not the second. As a U. S. citizen he is within §1324b's protective ambit. As defined by §1324b(a)(1)(3), he is included in the class of "protected individuals" benefiting from the prohibitions of §1324b(a)(1)(B), which includes U.S. citizens. However, Mathews cannot satisfy the second prong, which requires him to provide evidence that he was treated differently from similarly situated, alien employees. *See Harrison v. Metropolitan Gov't of Nashville*, 80 F.3d 1107, 1115 (6th Cir. 1996), *cert. denied*., 117 S.Ct. 169 (1996); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). Mathews presents no evidence of discrimination. In fact, Mathews denies in his OCAHO Complaint that Goodyear refused to hire or fired him because of his status as a U.S. citizen, or that Goodyear retaliated against him for filing a complaint. Instead, Mathews alleges only that Goodyear contrives to "force him out of his position of employment" by withholding federal tax and social security contributions from his wages. Reply to Respondent's Motion To Dismiss. Nowhere does Mathews assert that Goodyear treated any other employee differently.

"To discriminate" is "to make a clear distinction," to "differentiate." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 385 (1984). Difference is the essence of discrimination. In order to state a *prima facie* case of disparate treatment, Mathews must provide some evidence that he was treated "less favorably" than other Goodyear employees who were not U.S. citizens, and that he was so treated because he was a U.S. citizen. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

Intent is irrelevant where an action is facially non-discriminatory. Reducing Mathews' characterization of Goodyear's motive in deduct-

ing taxes from his wages to absurdity, even if Goodyear intended to drive Mathews and every other worker in its employ out by withholding taxes and deducting social security contributions (a nonsensical proposition, because Goodyear, regardless of its desires, must, as it consistently notes, withhold federal taxes[13] and deduct social security contributions[14]), if Goodyear treated all workers the same way, this would not constitute discrimination, and Goodyear could have no workforce.

Mathews fails to establish that Goodyear treated him differently from any other worker, U.S. citizen or alien. There is no suggestion that Goodyear singled out Mathews from among its many employees for tax and social security deductions because he was a U.S. citizen. He has not been adversely affected by any employment practice giving rise to an inference of discrimination because of his citizenship. Nowhere in his many pleadings does Mathews contend that anyone else, citizen or alien, was treated any differently than was he. Nowhere, for example, does Mathews contend that Goodyear accepted the representation that any one else was tax-exempt—alien or citizen. Mathews' convoluted inference, based on his unsupported claim that U.S. citizen compliance with income tax withholding is voluntary, does not establish disparate treatment, the second prong of a *prima facie* case.

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[13]Title 26 U.S.C. §3402 obliges "every employer making payment of wages [to] deduct and withhold upon such wages" taxes. Title 26 U.S.C. §3403 makes the employer liable for the tax to be withheld and immunizes the employer who withholds taxes from liability for so doing. Title 26 U.S.C. §6672(a) penalizes an employer who fails to collect taxes by imposing a monetary penalty "equal to the total amount of the tax [which should have been] withheld."

[14]The Supreme Court has held the Social Security 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.
>
> * * *
>
> We note here that the statute compels contributions to the system by way of taxes; it does not compel anyone to accept its benefits.

United States v. Lee, 455 U.S. 252, 261, n.12 (1982). The constitutionality of the Social Security Act has long been acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

The only immigration-related unfair employment practices cognizable under §1324b are discriminatory hiring, discharge, and retaliation.

Title 8 U.S.C. §1324b simply does not reach terms and conditions of employment, such as Goodyear's insistence that its employees submit to tax withholding and social security deduction. *Boyd v. Sherling*, 6 OCAHO 916, at 15, 1997 WL 176910, at *17; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, 1997 WL 131346, at *5; *Naginsky v. Department of Defense, et al.*, 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 Dep't of Labor*, 2 OCAHO 386, at 11–12 (1991); *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991)). Controversies over employment conditions, therefore, do not confer §1324b jurisdiction.

Mathews' OCAHO Complaint on its face admits that Goodyear hired him in 1989, that it has not discharged him, and that it has not retaliated against him, in effect denying that Goodyear committed any cognizable discriminatory act. Mathews therefore fails to establish adverse action, the second element in a *prima facie* employment discrimination case. Between these parties, there is no substantial dispute of material fact cognizable under §1324b. Because Mathews has failed to establish one of two elements essential to a charge of discrimination, Goodyear is entitled to judgment as a matter of law. Goodyear's motion to dismiss for failure to state a claim is granted, and Mathews' Complaint is dismissed with prejudice.

B. *Subject Matter Jurisdiction Is Lacking*

Mathews' Complaint must also be dismissed because I lack subject matter jurisdiction over it.

The Supreme Court has instructed that federal administrative law judges 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 administrative law judge is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures. *Boyd v. Sherling*, 6 OCAHO 916, at 6, 1997 WL 176910, at *5; *Winkler v. Timlin*, 6 OCAHO 912, at 4, 1997 WL 148820, at *3; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 5, 1997 WL 131346.

Subject matter jurisdiction may be raised "at any time, by any party or even *sua sponte* by the court itself." *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 630 (6th Cir. 1992), *appeal after remand aff'd*, 14 F.3d 601 (6th Cir. 1994), 1994 WL 2114 (6th Cir. 1994). To determine subject matter jurisdiction is a court's first duty 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). In order to "determine whether or not they have jurisdiction to entertain . . . [a] cause [courts must] . . . construe and apply the statute under which . . . asked to act." *Chicot*, 308 U.S. at 376. When evaluating the reach of its jurisdiction, the forum cannot expand or constrict its statutory jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992).

(1) *Complainant's National Origin Claim Must Be Dismissed*

Complainant alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986 as amended (IRCA), specifically §274B of the Immigration and Naturalization Act, codified as 8 U.S.C. §1324b, was not intended to supersede EEOC jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. 8 U.S.C. §1324b(b)(2). Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three and fewer than fifteen individuals. §1324b(a)(2)(B); *Huang v. United States Postal Serv.*, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd, Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), *aff'd, United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990). Mathews acknowledges in his OSC Charge that Goodyear employs fifteen or more employees. Because ALJs are only empowered to hear cases of national origin discrimination where an employer employs four through fourteen individuals, Mathews properly filed his national origin charge with the EEOC, this forum lacking jurisdiction over it. ALJ jurisdiction is unavailable as a matter of law.

Once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act. *Winkler v. Timlin*, 6 OCAHO 912 at 5, 1997 WL 148820, at *5; *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 2 (1995), 1995 WL 509453, at *6 (O.C.A.H.O.). This is true even where the EEOC errs in assuming jurisdiction. *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at *3 (O.C.A.H.O.).

Size of the payroll aside, prior exercise of EEOC jurisdiction over Mathews' Complaint precludes present OCAHO jurisdiction. Section 1324b(b)(2) precludes ALJ jurisdiction over alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEO charge. *Wockenfuss*, 5 OCAHO 767, at 3, 1995 WL 509453, at *6; *Adame*, 5 OCAHO 722, at 3–5, 1995 WL 217517, at *3. Section 1324b provides in pertinent part:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000e *et seq*], unless the charge is dismissed as being outside the scope of such title.

8 U.S.C. §1324b(b)(2).

Mathews admits in his OSC Charge that on May 2, 1995 he filed an EEOC Charge, based on the same set of facts as the present subsequent OCAHO Complaint, with the EEOC's Cleveland District Office. Although Mathews does not describe the disposition of his charge, the EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII. Memorandum, Ellen J. Vargyas, EEOC Legal Counsel, to All EEOC District, Area & Local Directors, July 15, 1995. Because dismissal for failure to state a claim is a merits disposition, I conclude that Mathews' national origin claim is barred because of 8 U.S.C. §1324b(b)(2) overlap prohibitions. *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 18; *Winkler v. Timlin*, 6 OCAHO 912, at 5–6, 1997 WL 148820, at *5.

Furthermore, a complaint of national origin discrimination which fails to state the complainant's national origin is insufficient as a

matter of law, at least where there has been a full exchange of pleadings, and ample opportunity to provide this information. *Austin v. Jitney-Jungle*, 6 OCAHO 923, at 18; *Boyd v. Sherling*, 6 OCAHO 916, at 23, 1997 WL 176910, at *17; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15, 1996 WL 670179, at *11. Remarkably, Mathews never identifies his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against U.S. citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Because by its own terms the national origin claim is based entirely on Mathews' citizenship status, it must be dismissed on the additional ground of failure to state a claim on which relief can be granted.

I find that at all times relevant to this action: (1) Goodyear employed more than fourteen individuals; (2) that Mathews filed a charge with respect to national origin discrimination based on the same set of facts with the EEOC under Title VII of the Civil Rights Act of 1964; (3) that the EEOC policy is to dismiss such a charge on its merits; and (4) that I, therefore, lack subject matter jurisdiction over Complainant's national origin discrimination claim. I, therefore, dismiss that portion of the Complaint alleging national origin discrimination. 8 U.S.C. §1324b(a)(2)(B). Mathews' national origin claim is also dismissed for failure to state a claim upon which relief can be granted because Mathews failed to specify his national origin, or to allege any facts which would constitute discrimination based on national origin.

(2) *Complainant's Citizenship Claim Must Be Dismissed*

A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege injury compels a finding of lack of subject matter jurisdiction. This is so because the ALJ's power is limited to discriminatory failure to hire and to discharge and does not include conditions of employment. (*See* **Discussion** at **III**, **A**, *supra*.) The entries, *seriatim*, on Mathews' OCAHO Complaint format, as well as the tenor of pleadings, evidence a long and ongoing employment relationship. Nothing in the Complaint or any pleading even remotely suggests that Mathews was refused employment or discharged by Goodyear. Refusal to hire and discharge are the only citizenship status discrimination claims cognizable under §1324b. Mathews' Complaint is dismissed for lack of subject matter jurisdiction.

(3) *Complainant's Document Abuse Claim Must Be Dismissed*

An incumbent employee who alleges that his employer refused to accept proffered documents to show work eligibility, but specifies documents, which from the face of the complaint are not documents lawfully cognizable by the employment eligibility verification system, fails also to state a cause of action under 8 U.S.C. §1324b.

Jurisdiction over document abuse can only be established by proving that, in relation to hire, the employer requested one or another specific official document from a prescribed list "for purposes of satisfying the [work eligibility] requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6). Nothing in the case before me suggests that the tender of improvised documents identified by Mathews at ¶16a of his Complaint years after hire implicates §1324a(b) requirements. Patently, the Complaint negates any inference that Mathews was either denied employment or was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. The self-styled tax-exemption documents Mathews insists Goodyear should have accepted are not acknowledged as acceptable or embraced by that system. The recent holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13, 1996 WL 780148, at *10, 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 Goodyear's employer obligations under §1324a(b), I lack subject matter jurisdiction over Mathews' §1324b(a)(6) allegations.

C. *The Anti-Injunction Act Prohibits Forae From Hearing Suits Such As That Brought by Mathews*

Popularly known as the Anti-Injunction Act, 26 U.S.C. §§7421(a), 7422(a), and 7422(b), apply to ***all forae***:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in ***any court*** by ***any person*** . . . until a claim for refund or credit has been duly filed with the Secretary. . . .
>
> * * *
>
> PROTEST OR DURESS.—Such suit or proceeding may be maintained whether or not such tax . . . has been paid under protest or duress.

26 U.S.C. §§7421(a), 7422(a)(b) (emphasis added).

The Anti-Injunction Act, 26 U.S.C. §7421(a), in which Mathews is already well-tutored by the Ohio courts, United States District Court, and the Sixth Circuit, bars Mathews' present tax Complaint, however disguised. To echo the refrain of Judge Dowd in *Mathews v. Alltrop*, 1994 WL 381828, *aff'd*, 38 F.3d 1216 (Table), 1994 WL 589578:

> [N]o matter what Mathews calls this action, it is simply an attempt to prohibit the IRS from collecting a tax from him. Any such attempt is prohibited under §7421(a). Mathews' remedy is a suit in refund.

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); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 11; *Boyd v. Sherling*, 6 OCAHO 916, at 8, 1997 WL 176910, at *9.

So that there may be no further obfuscation, let me put to rest the ghost of Mathews' misapprehension that an action already adjudicated can be revived into infinity through recharacterization, by reviewing exactly what the Anti-Injunction Act prohibits. "[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). ***The Supreme Court construes "collection of taxes" to embrace employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). "[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,' " if the court in which relief is sought already exercises equitable jurisdiction over the claim. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).

Where a taxpayer has fulfilled statutory conditions precedent to a suit, *i.e.*—paid the tax, applied for a refund, and been denied,

"***[d]istrict 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 or illegally assessed." 28 U.S.C. §1346(a)(i) (emphasis added).

Except in these extraordinary circumstances, "[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).

The purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of judicial interference." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The Act embodies Congress's antipathy for premature interference with the determination, assessment, and collection of taxes. *Id.*, 416 U.S. at 732, n.7.

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). ***"Collection of tax" under the Anti-Injunction Act includes tax withholding by employers***. *United States v. American Friends Serv. Comm.*, 419 U.S. at 10.

The Anti-Injunction Act restrains actions relating to anticipatory withholding of taxes from all potential taxpayers, foreign and domestic, and is not limited to actions initiated after IRS assessments. *International Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d at 592. 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).

Where a taxpayer has not followed statutory conditions precedent to suit, courts are deprived of jurisdiction.

> Section 7421(a) of the Internal Revenue Code prohibits suits brought to restrain the assessment or collection of taxes. . . . The . . . contention that [a Complainant] . . . is entitled to a court determination of his tax liability prior to any collection action has been rejected by several courts. *See e.g. Kotmair, Jr. v. Gray*, 74–2 USTC P 9492 (Md. 1974), *aff'd per curiam* [74–2 USTC P 9843], 505 F.2d 744 (4th Cir. 1974). The plaintiff has an adequate remedy at law pursuant to the tax refund procedure set forth in Section 7422 of the Internal Revenue Code. . . . In order to contest the merits of a tax . . . a taxpayer may file an administrative claim for a refund after payment of the tax. Internal Revenue

> Code, §7422. The administrative claim must be filed and denied prior to filing . . . [an] action in the federal district court. *Black v. United States* [76 1 USTC P 9383], 534 F.2d 524 (2d Cir. 1976). [Where] the plaintiff failed to meet this jurisdictional prerequisite . . . the [c]ourt is without jurisdiction.

Melechinsky v. Secretary of Air Force 83–1 T.C. 9373 (D. Conn. 1983), 83–1 Stand. Fed. Tax Rep. (CCH) ¶9373 (D. Conn. 1983), 1983 WL 1609, at *2 (D. Conn. 1983).

IV. *Conclusion*

(a) *Disposition*

In light of the history of Mathews' tax challenges and arguments, which have been rejected by Ohio courts, the Sixth Circuit, and the Supreme Court, Mathews' present claim can most charitably be characterized as the result of the stubborn conviction that ALJ authority is available to overrule the Anti-Injunction Act. Mathews is in the wrong forum for the relief he 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. I am unaware of any theory on which to posit §1324b jurisdiction that turns on an employer's obligation to comply with tax withholding and social security deduction obligations. Mathews' gripe is with internal revenue and social security prerequisites to employment in the United States, not with immigration law. This forum of limited jurisdiction is powerless to grant Mathews the relief he seeks. Mathews' Complaint must be dismissed.

I find and conclude that:

> • 1. Goodyear hired Mathews in 1989 and continued to employ him at least through September 11, 1996;
>
> • 2. Goodyear committed no legal wrong cognizable under 8 U.S.C. §1324b by deducting withholding tax and social security contributions from Mathews' wages, as it is bound to do under 26 U.S.C. §3402 ("Income Tax Collected at the Source");
>
> • 3. Goodyear's compliance with 26 U.S.C. §3402 does not constitute an immigration-related unfair employment practice under 8 U.S.C. §1324b;
>
> • 4. collateral tax protests, even if disguised as immigration-related unfair employment actions, are enjoined by the Anti-Injunction Act, 26 U.S.C. §7421(a);
>
> • 5. Mathews has been judicially instructed that such collateral attacks are prohibited by the Anti-Injunction Act, by the Ohio courts, which advised him that the Anti-Injunction Act dictated dismissal; by the federal district court, which advised him that his only remedy regarding taxes withheld is an action

for refund; and by the Sixth Circuit, which instructed Mathews that his "action is barred by the Anti-Injunction Act," *Mathews v. Alltop*, 38 F.3d 1216 (Table), 1994 WL 589578 (Unpublished Disposition), *aff'g, Mathews v. Alltop*, 1994 WL 381828; and

• 6. Mathews having been so instructed, and this forum lacking §1324b jurisdiction over his claim, Goodyear's motion to dismiss is granted.

Mathews' Complaint is dismissed because: (1) this forum lacks subject matter jurisdiction over tax challenges, even if disguised by immigration-related unfair employment practice verbiage; (2) the Complaint fails to state a claim upon which relief can be granted under §1324b; and (3) the Anti-Injunction Act prohibits courts from hearing such complaints. All requests not disposed of in this Decision and Order are denied. Accordingly, the Complaint is dismissed with prejudice. 8 U.S.C. §1324b(g)(3).

(b) *Judicial Review*

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

SO ORDERED.

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

MARVIN H. MORSE
Administrative Law Judge

Attachment:

Attachment*: Mathews v. Alltop*, 38 F.3d 1216 (6th Cir. 1994) (Table), 1994 WL 589578.

74 A.F.T.R.2d 94–6829

Unpublished Disposition

(Cite as: 38 F.3d 1216, 1994 WL 589578 (6th Cir. (Ohio)))

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is reference in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Robert S. MATHEWS, Relator, Plaintiff-

Appellant,

v.

Ronald ALLTOP; J. Hurajt; Internal Revenue

Service, Defendants-Appellees.

No. 94–3520.

United States Court of Appeals, Sixth Circuit.

Oct. 21, 1994.

On appeal from the United States District Court for the Northern District of Ohio, No. 93–02699; David D. Dowd, Jr., District Judge.

N.D.Ohio, 1994 WL 381828.

AFFIRMED.

Before: JONES and BATCHELDER, Circuit Judges, and BECKWITH, District Judge. [FN*]

ORDER

****1** Robert S. Mathews appeals a judgment of the district court which granted defendants' motion to dismiss his petition for a writ

of prohibition for lack of jurisdiction. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Mathews filed his petition in the district court seeking only a writ of prohibition to prevent the Internal Revenue Service and its employees from levying on his wages to satisfy a tax debt. The government moved to dismiss the action for lack of jurisdiction, and Mathews responded in opposition. The district court granted the government's motion and dismissed the petition. A timely Fed.R.Civ.P. 59(e) motion for relief from judgment was denied. This timely appeal followed.

Generally, the dismissal of a complaint for lack of jurisdiction is reviewed by this court de novo. Duncan v. Rolm Mil-Spec Computers, 917 F.2d 261, 263 (6th Cir. 1990); Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). Moreover, plaintiff has the burden of establishing jurisdiction after defendants challenged jurisdiction by filing their motion to dismiss. See Moir, 895 F.2d at 269; Rogers v. Stratton Indus., Inc., 798 F.2d 913, 915 (6th Cir. 1986) (per curiam).

Upon consideration, we affirm the district court's judgment for the reasons stated in its memorandum opinion filed March 10, 1994. Clearly, plaintiff's action is barred under the Anti-Injunction Act. See 26 U.S.C. §7421(a); Bob Jones Univ. v. Simon, 416 U.S. 725, 738 (1974); Dickens v. United States, 671 F.2d 969, 971 (6th Cir. 1982). Plaintiff's claims on appeal that he does not owe the tax, and that the district court should have permitted further discovery or taken judicial notice of facts are without merit. Further, the claim that ex parte communication took place is unsupported in the record.

Accordingly, the judgment of the district court is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

FN* The Honorable Sandra S. Beckwith, U.S. District Judge for the Southern District of Ohio, sitting by designation.

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