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

June 5, 1997

HOBART D'AMICO, JR., Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 97B00027
ERIE COMMUNITY COLLEGE, Respondent.	)

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Background and Procedural History*

This case arises with Complainant Hobart D'Amico, Jr. filing a Complaint on November 18, 1996, alleging that Respondent Erie Community College (ECC) discriminated against him on the basis of his United States citizenship status (Comp. ¶9) and committed document abuse by refusing to accept his proffered "Statement of Citizenship" and "Affidavit of Constructive Notice" [1] (Comp. ¶16). A copy of Complainant's February 12, 1996, claim filed with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC) accompanies the Complaint. Also attached to the Complaint is an August 20, 1996, letter OSC sent Complainant informing him of its opinion that his claim comprised insufficient evidence to state a cause of action under §1324b. This letter informed him of his right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) (Comp. ¶19).

[1]These documents should not be confused with INS Forms N–560 or N–561, which are official certificates of U.S. citizenship, documents acceptable for complying with employment eligibility requirements under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2).

Respondent was served with the Complaint on December 13, 1996. I did not receive an Answer from Respondent within the appropriate time period, which under OCAHO Rules of Practice and Procedure is thirty days after service of the complaint. 28 C.F.R. §68.9(a) (1996). Thus, on January 22, 1997, I issued a Notice of Default to the Respondent.[2] Complainant then filed a Motion for Default Judgment on February 12, 1997, on the same basis. No answer having been received by Respondent, on February 19, 1997, I issued an Order requiring Respondent to show cause why Complainant's Motion for Default Judgment should not be granted.

Also, on February 19, 1997, I issued an Order directing Complainant to provide information regarding his employment status at the time the complaint was filed, the date he was hired, whether he had ever been an employee, and when he ceased employment with Respondent. The Order also directed Complainant to provide information regarding the circumstances under which the "Statement of Citizenship" and "Affidavit of Constructive Notice" were submitted to Respondent. Complainant filed a Motion to Reconsider or Alter Order on March 10, 1997, taking exception to my February 19, 1997 Order directing him to provide information and questioning my authority to issue the January 22, 1997, Notice of Default Judgment. On March 11, 1997, I issued an Order denying Complainant's Motion to Reconsider or Alter Order.

Respondent then filed an Answer and Response to Complainant's Motion for Default Judgment on March 13, 1997, explaining that pleadings and notices of administrative actions are usually served on the relevant Erie County agency and the Erie County Attorney's office, but in this case such dual service did not occur (Ans. ¶3). As a result, the Erie County Attorney 's office only became aware of the Complaint when Complainant filed a Motion for Default Judgment (Ans. ¶4). Respondent also asserted that proceeding with the case would not prejudice the non-movant's case and that the Complaint failed to state a valid cause of action. Therefore, Respondent respectfully requested that Complainant's Motion for Default Judgment not be granted.

[2]Rule 55(a) of the Federal Rules of Civil Procedure provides that an entry of default may be noted when a party fails to file an answer. The OCAHO Rules of Practice and Procedure state that the Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by the OCAHO Rules. 28 C.F.R. §68.1. Therefore, the entry of a notice of default was authorized under OCAHO Rules.

On March 13, 1997, I issued an Order Staying Proceedings and on March 17, 1997, Respondent filed an Affidavit in Opposition to Complainant's Motion to Reconsider or Alter Order. I then issued an Order denying Complainant's Motion for Default Judgment on April 22, 1997.

Respondent served a Motion to Dismiss, and brief in support thereof, on April 25, 1997, alleging that the Complaint should be dismissed, pursuant to 28 C.F.R. §68.11, on the grounds that the Complaint failed to state a cause of action for immigration-related employment discrimination and that this tribunal lacks subject-matter jurisdiction of this action. Complainant then filed a reply to Respondent's Motion to Dismiss on May 16, 1997, claiming that Respondent's refusal to honor the "Statement of Citizenship" and "Affidavit of Constructive Notice" constituted valid §1324b citizenship and document abuse claims.[3]

On May 22, 1997, I issued an Order requiring Respondent to submit information helpful in determining whether ECC is a local or state entity for purposes of Eleventh Amendment sovereign immunity. In compliance with this Order, Respondent sent a letter dated June 2, 1997, asserting that ECC considers itself a local entity.[4]

This Order dismisses the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted under 8 U.S.C. §1324b and is in accord with numerous antecedent decisions.[5]

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[3]The OCAHO Rules of Practice and Procedure (hereinafter OCAHO Rules), 28 C.F.R. §§68.8(c)(2) and 68.11(b) permit a party to file a response to a motion served by mail within 15 days of service. Consequently, Complainant's reply, filed on May 16, 1997, was late filed.

[4]Although my May 22 Order provided that Complainant could respond to Respondent's submission, since ECC is not asserting sovereign immunity, no response is necessary.

[5]*See Cholerton v. Hadley*, 7 OCAHO 934 , at 1 (1997) (which described the complaint as "[yet another tax challenge . . . against a hapless employer who refuses to conspire with the complainant in avoiding federal income tax withholding and social security contribution . . .]") *see Lareau v. USAir*, 7 OCAHO 932 (1997); *Mathews v. Goodyear Tire & Rubber Co.,* 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.,* 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia,* 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.,* 6 OCAHO 923 (1997); *Wilson v. Harrisburg Sch. Dist.,* 6 OCAHO

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II. *Standards Governing Dismissal / Summary Decision*

A court will assume that the facts alleged in the complaint are true, for purposes of ruling on a motion to dismiss. *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d. Cir. 1996) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc,* 476 U.S. 409, 411 (1986), and *Bankers Trust Co. v Rhoades*, 859 F.2d 1096, 1098 (2d. Cir. 1988, *cert. denied*, 490 U.S. 1007 (1989)); *Murray v. Miner*, 74 F.3d 402, 403–04 (2d Cir. 1996); *Bent v. Brotman Medical Ctr. Pulse Health Serv.,* 5 OCAHO 764, at 3 (1995), *citing Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the non-moving party the benefit of all inferences that can be derived from the alleged facts. *Painewebber*, 81 F.3d at 1197–98 (citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984)). The motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Geller v. County Line Auto Sales, Inc*, 86 F.3d 18, 20 (2d Cir. 1996) (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Murray*, 74 F.3d at 404 (citing same); *Painewebber*, 81 F.3d at 1198. However, the motion to dismiss may be granted if, even assuming that the complainant's factual assertions are true, the complaint fails to state a cognizible claim. *See Geller*, 86 F.3d at 20.

"Among other things, Rule 12(b)(6) provides that if, on a motion to dismiss for failure to state a claim, matters outside the pleadings are presented to the court and not excluded, the motion 'shall be

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

treated as one for summary judgment.'" *Yosef v. Passamaquoddy Tribe*, 876 F.2d 283 (2d Cir. 1989); *see* Fed R. Civ. P. 12(c); *United States v. Italy Department Store,* 6 OCAHO 847, at 2–3 (1996). ECC relies on extraneous documents in support of the motion to dismiss, including a letter written by Timothy J. Trost to Hobart D'Amico, Jr., denying Complainant's request to stop all payroll deductions from his wages and an Affidavit of Revocation and Rescission sent to Respondent. Reliance on affidavits in support of motions to dismiss turns a motion to dismiss into a motion for summary judgment. *Samara v. United States*, 129 F.2d 594 (2d. Cir.), *cert. denied* 317 U.S. 686 (1942). Therefore, Respondent's motion to dismiss will be treated as a motion for a summary decision.[6]

The OCAHO Rules authorize the ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). After the moving party has met its burden, the burden of production then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." *United States v. Tri Component Product Corp.*, 5 OCAHO 82, at 4 (1995) (quoting Fed. R. Civ. P. 56(e)). Failure to meet this burden invites summary decision in the moving party's favor.

III. *Applicable Statutory Authority*

D'Amico's complaint alleges violations of 8 U.S.C. §1324b, specifically citizenship status discrimination and document abuse. The

[6]Although the OCAHO Rules use the term "summary decision" rather than "summary judgment," 28 C.F.R. §68.38, these are equivalent terms.

statutory provisions pertinent to these types of unfair immigration-related employment practices provide as follows:

> (a) Prohibition of discrimination based on . . . citizenship status
>
> (1) General rule
>
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of the title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
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> . . .
>
> (B) in the case of a protected individual (as defined in paragraph (3), because of such individual's citizenship status.
>
> . . . .
>
> (6) Treatment of certain documentary practices as employment practices
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. §1324b(a)(1), (6)(1994).

IV. *Findings and Conclusions*

A. *Eleventh Amendment Sovereign Immunity*

In its motion to dismiss, Respondent has not raised the issue of sovereign immunity. In fact, in a letter dated June 2, 1997, Respondent disavows any claim of sovereign immunity because ECC is a local entity established by the county, not the state. Nevertheless, since the Eleventh Amendment to the United States Constitution is a jurisdictional bar, it is appropriate and necessary that I consider this issue *sua sponte*. *Atlantic Healthcare Benefits Trust v. Googins, et al,* 2 F.3d 1, 4 (2d Cir. 1993) (Court of Appeals raised Eleventh Amendment *sua sponte*, holding that Connecticut Department of Insurance was state agency immune from suit in federal court); *Esparza v. Valdez,* 862 F.2d 788, 793–94 (10th Cir. 1988). In this respect, the Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced against any state by citizens of another state. U.S. Const. amend XI. The Supreme Court has interpreted the Eleventh Amendment's bar to apply to suits

against a state by citizens of the same state as well. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996); *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 304 (1990).

In order for the state to be subject to suit in federal court, Congress must designate by legislation that the entity is amenable to suit in federal court, or the state must consent to suit. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Title 8 U.S.C. §1324b is silent on the subject of sovereign immunity, but the United States Court of Appeals for the Tenth Circuit has held that §1324b does not reach state entities. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994), *reh'g denied* (Nov. 21, 1994). More recently, the Supreme Court in *Seminole Tribe of Florida v. Florida*, *supra*, held that Congress can only abrogate Eleventh Amendment immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." 116 S.Ct. 1114, 1123 (1996). No such intention is manifest from the text of section 1324b. *Smiley*, 7 OCAHO 925, at 7 (1997).

Since 1324b does not manifest an intention to make the state amenable to such a suit and the state has not consented to such a suit, a state may invoke Eleventh Amendment sovereign immunity with respect to a law suit brought pursuant to 8 U.S.C. §1324b. Furthermore, state agencies and entities may be understood to act as the state's alter-ego, in which case the entity may invoke state sovereign immunity.[7] However, the Supreme Court has held that political subdivisions, such as counties and cities, do not ordinarily obtain Eleventh Amendment immunity. *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915, at 5 (1996). In *Monell v. Dept. of Social Services of New York City*, the Court held that municipalities and local governing bodies may be sued under 42 U.S.C. §1983 where official municipal policy causes a constitutional tort. 98 S.Ct. 2018, 2035–36 (1978) (overruling *Monroe v. Pape*, 81 S.Ct. 473 (1961)).[8]

[7]*Smiley v. City of Philadelphia*, 7 OCAHO 925, at 9 (1997); James J. Dodd-o & Martin A. Toth, *The Emperor's New Clothes: A Survey of Significant Court Decisions Interpreting Pennsylvania's Sovereign Immunity Act and Its Waivers,* 32 Duq. L. Rev. 1 (1993)).

[8]In two recent cases the United States Supreme Court has provided further guidance on the questions of liability of local entities and their employees under 42 U.S.C. §1983. *Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382, 1394 (1997) (distinguishing *Monell* and concluding that "Congress did not intend municipalities to be held liable [under §1983] unless deliberate action attributable to the municipality directly caused a deprivation of federal rights"); *McMillan v. Monroe County, Alabama*, 1997 WL 284827, at *6 (June 2, 1997) (finding that Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama and not their counties).

The U.S. Court of Appeals for the Second Circuit has also held that the Eleventh Amendment does not apply to suits against counties, municipal corporations, and other political subdivisions. *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 292 (2d Cir. 1996).[9]

The Respondent in this case has not brought suit against the State of New York, but instead against Erie Community College. Since local political subdivisions may not invoke Eleventh Amendment sovereign immunity but state agencies and entities may invoke such immunity, it is imperative to determine whether Erie Community College is a local or state entity. The ability to invoke the Eleventh Amendment depends on whether ECC is more like 'an arm of the State' such as a state agency, than like a municipal corporation or other political subdivision. *See Mt. Healthy City Sch. Dist. Bd. of Educ v. Doyle*, 429 U.S. 274, 280 (1977); *Mancuso*, 86 F.3d at 292.

In determining whether an entity is local or state for Eleventh Amendment purposes, the Second Circuit has used a six-factor test. "[E]ssentially the same broad principles identified by the Court as relevant in the multistage entity context apply also in determining whether, within a single state, a governmental entity is 'state' or 'local' for purposes of the Eleventh Amendment." *Mancuso*, 86 F.3d at 293; *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995). Accordingly, the test set out in *Mancuso* includes an inquiry into the following factors:

> (1) how the entity is referred to in the documents that created it;
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> (2) how the governing members of the entity are appointed;
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> (3) how the entity is funded;
>
> (4) whether the entity's function is traditionally one of local or state government
>
> (5) whether the state has a veto power over the entity's actions
>
> (6) whether the entity's obligations are binding upon the state.

Mancuso, 86 F.3d at 293; *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). If, after analyzing

[9]Since ECC is in New York, the decisions of the U.S. Court of Appeals for the Second Circuit are the controlling federal circuit case law.

these factors, they seem to point in different directions, the Court of Appeals for the Second Circuit will turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk? *Mancuso*, 86 F.3d at 293.

While all of the above factors are important and relevant, whether the judgment will be paid out of state funds seems to be the most important factor considered. *Hess v. Port Authority Trans- Hudson Corp.,* 513 U.S. 30 (1994). "Even if it had not been abandoned, the claim against the state would of course fall by virtue of the Eleventh Amendment since it involves the payment of public funds from the state treasury." *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986); *see Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

While I was not provided with enough information to analyze extensively the *Mancuso* factors in regard to ECC, I did have access to information pertinent in making a determination of whether ECC is a state or local entity. One of the *Mancuso* factors inquires as to how the entity is funded. *Mancuso*, 86 F.3d at 293. ECC is jointly funded by state and local funds. Under New York Education Law §6304(1)(a), state funds finance one-third of the amount of ECC's operating costs, while a local sponsor(s) finances two-thirds of those costs. N.Y. Education Law §6304(1)(a) (McKinney 1985). Also, the local sponsor(s) provides one-half of ECC's capital costs. N.Y. Education Law §6304(1)(c) (McKinney 1985).

The most important factor in making the determination of whether ECC is a local or state entity (whether the judgment is paid out of the state treasury) also turns in favor of ECC being a local entity. Any recovery against respondent ECC would be paid by its local sponsors. New York Education Law §6308(3)(a) provides that, "[t]he local sponsor shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court. . . ." N.Y. Education Law §6308(3)(a) (McKinney 1985).

In an employment discrimination case alleging violations of §1983, Title VII and New York Executive Law, the court found that the City University of New York was an arm of the state of New York and could invoke Eleventh Amendment immunity. *Moche v. City University of New York*, 781 F. Supp. 160 (E.D.N.Y. 1992). However,

the court also held that Queensborough Community College (QCC) was not an arm of the state. *Id*. "The substantial local supervision over and control of defendants QCC and Physics Department of QCC, taken in connection with the City's indemnification for all judgments, indicates that the Eleventh Amendment is inapplicable to them." *Id.* at 166.

Just as any judgment against QCC would be paid by its local sponsor (City of New York), any judgment against ECC will be paid by its local sponsor or sponsors. The college is funded jointly by state and local funds and Respondent asserts in his Answer that ECC is a "semi-autonomous, municipal organization." Furthermore, Respondent is being represented by a local representative, the Assistant Attorney for the County of Erie. Additionally, in a June 2, 1997, letter written in compliance with my May 22, 1997 Order requiring Respondent to submit information regarding whether ECC considered itself a local or state entity, the Respondent asserts that ECC considers itself a local entity. Thus, I find that ECC is a local entity for Eleventh Amendment sovereign immunity purposes and is therefore amenable to suit in a federal court.

Having decided that sovereign immunity does not apply in this case, I will turn to the issues raised by Respondent's motion to dismiss.

B. *Lack of Subject Matter Jurisdiction*

Respondent has moved to dismiss for lack of subject matter jurisdiction. The present Complaint does not allege that Respondent either refused to hire Complainant (Comp. ¶13) or discharge him (Comp. ¶14). Conversely, Complainant explicitly avers that he either applied for or worked for ECC in November 1986.[10] Although

[10]Complainant's employment status is unclear. On February 19, 1997, I issued an Order directing Complainant to provide information regarding his employment status at the time the Complaint was filed, the date he was hired, whether he had even been an employee and when he ceased employment with Respondent. Complainant has refused to comply with this Order. Since Complainant has failed to comply with an order, pursuant to the OCAHO Rules of Practice, I could conclude that Complainant has abandoned its complaint and dismiss the complaint on that basis. 28 C.F.R. §68.37(b)(1). Alternatively, pursuant to 28 C.F.R. §68.23(c)(1)–(5), I may do the following:

> (1) Infer and conclude that the admission, testimony, documents, or evidence would have been adverse to the non-complying party;

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Complainant denies that he was not "knowingly or intentionally not hired" or discharged from ECC, he requests backpay from November 21, 1995. It is unclear whether Complainant is requesting backpay because he was discharged or whether he is simply requesting the social security taxes that he believes were wrongfully withheld from his wages. In any event, pursuant to 28 C.F.R. §68.23(c)(1)–(5), I conclude that he was not discharged and has been an employee of ECC continuously since November 1986.

Thus, the issue of whether a party can maintain an action against an employer with whom there is a continuing employment relationship based on a claim of citizenship status discrimination, pursuant to 8 U.S.C. §1324b(a)(1), and a claim of document abuse, pursuant to 8 U.S.C. §1324b(a)(6), is presented. This issue has been addressed in *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997)(J. Morse) and in *Costigan v. Nynex*, 6 OCAHO 918 (1997 (J. Barton).[11]

"It is established OCAHO jurisprudence that administrative law judges have §1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment." *Costiga*n, 6 OCAHO 918, at 5 (1997)*; Horne*, 6 OCAHO 906, at 5 (1997).

"A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge

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(2) Rule that for purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;

(3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) Rule that the non-complying party may not be heard to object to introduction and use secondary evidence to show that the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both; . . .

28 C.F.R. §68.23(c)(1–5).

[11]Because the issues are similar, and because the findings and conclusions here are the same as those in *Costigan* and *Horne*, I have borrowed liberally from the language of those decisions on the issue of jurisdiction.

is insufficient as a matter of law." *Horne*, 6 OCAHO 906, at 4 (1997). In fact, the power of the administrative law judge to grant relief in such matters does not include conditions of employment. *Costigan*, 6 OCAHO 918, at 4 (1997); *Horne*, 6 OCAHO 906, at 4 (1997) (citing *Naginski v. Department of Defense*, 6 OCAHO 891, at 29 (1996) (citing *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *7), *appeal* filed, No. 96–2138 (1st Cir. 1996), *Ipina v. Michigan Dep't of Labor*, 2 OCAHO 364, at 13 (1991), 1991 WL 531875, at *9)). "It is well-established that this forum has no authority over terms and conditions of employment, such as an employer's insistence on complying with IRS tax regimens." *Lareau v. USAir, Inc.,* 7 OCAHO 932, at 11 (1997); *accord, Wilson v. Harrisburg Sch. Dist.,* 7 OCAHO 925, at 9 (1997); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at 5 (O.C.A.H.O.) (citing *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11 (1992); *Ipina v. Michigan Dept. of Labor*, 2 OCAHO 386 (1991); *Huang v. Queens Motel,* 2 OCAHO 364, at 13 (1991)). Controversies over conditions of employment do not implicate the jurisdictional requirements of §1324b. *Costigan,* 6 OCAHO 918, at 5 (1997); *Horne*, 6 OCAHO 906, at 6 (1997).

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a 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 and 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 section 1324a, people who looked different or spoke differently might be subjected to workplace discrimination.[12]

The major purpose of enacting Section 274B, as stated by President Ronald Reagan in his formal signing statement, is to reduce the possibility that the employer sanctions provision of §1324

[12]*See* "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99–1000, 99th Cong., 2d Sess. 87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842.

will result in increased national origin and citizenship discrimination and to provide a remedy for such discrimination if it does occur. *Costigan*, 6 OCAHO 918, at 6 (1997); *Horne*, 6 OCAHO 906, at 6 (1997) (quoting 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), [13] 1990 WL 515872, at *4 ("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-Grifin v. Cahill Gordon & Reindel,* 3 OCAHO 568, at 14 n.11 (1993), 193 WL 557798, at *28 n.11. Thus, section 1324b only covers the practices of hiring, firing, recruitment or referral for a fee, retaliation, and document abuse, and it does not cover discrimination in wages, promotions, employee benefits or other terms and conditions or employment, such as an employer's insistence on complying with tax requirements. *Costigan*, 6 OCAHO 918, at 6 (1997); *Horne*, 6 OCAHO 906, at 6 (1997) (citing EEOC Notice No. 915.011, Responsibilities of the Department of Justice and the EEOC for Immigration Related Discrimination (Sept. 4, 1987)); *Lareau,* 7 OCAHO 932, at 11 (1997); *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11) (as amended in 1990 to add §1324(a)(6), §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse"), *petition for reh'g denied*, No. 94–3690 (3d Cir. 1994), *and review denied*, 66 F.3d 312 (3d Cir. 1995) (table)).

Complainant does not allege that he was "knowingly or intentionally not hired" or "knowingly and intentionally fired" (Comp. ¶¶13–14). Moreover, Complainant has refused to comply with my February 19, 1997, Order directing him to provide information about his employment status. Thus, I find that Complainant is a continuing employee of ECC. As established, the provisions of §1324b do not reach conditions of employment and I, therefore, do not have subject matter jurisdiction of Complainant's citizenship status discrimination claim.

[13]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 the 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.

I also lack subject matter jurisdiction over Complainant's allegation that Respondent committed document abuse by refusing to accept Complainant's "Statement of Citizenship" and "Affidavit of Constructive Notice" (Comp. ¶16). Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements, set out in 8 U.S.C. §1324a(b). As implemented 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 employment eligibility verification form (form I–9) within a specified period of the date of hire. 8 C.F.R. §§274a.2(a), (b)(1)(ii) (1996).

This employment verification system delineates a scheme that categorizes the documents acceptable to establish identity and work authorization. 8 U.S.C. §1324a(b)(1)(B)–(D); 8 C.F.R. §274a.2(b)(1)(v) (1996). After an employer hires an individual, the individual then signs an INS I–9 form which certifies his or her eligibility to work and also certifies that the documents he or she presents to demonstrate the individual's identity and eligibility to work are genuine. The employer also signs the I–9 form, indicating which documents were examined, that they appeared to be genuine, and that they appear to relate to the individual hired. The employer must examine and verify a List A document, *or* a List B and List C document, for purposes of this requirement. List A documents show identity and employment eligibility. A U.S. Passport is a good example of a List A document.[14] List B documents establish identity, and examples of List B documents are a driver's license or state issued I.D. card.[15] List C documents establish employment eligibility, and a social security card is an example of a proper List C documents.[16]

In completing the I–9 process, an employee may choose the documents he wishes to proffer in relation to this requirement. The employer must accept any documents presented by the employee that appear to be genuine on their face and appear to relate to the individual presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain docu-

[14]8 U.S.C. §1324a(b)(1)(B) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(A)(1996) designate acceptable List A documents.

[15]8 U.S.C. §1324a(b)(1)(D) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(B) (1996) designate acceptable List B documents.

[16]8 U.S.C. §1324a(b)(1)(C) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(C) (1996) designate acceptable List C documents.

ments or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provisions." *Costigan*, 6 OCAHO 918, at 7 (1997); *Horne*, 6 OCAHO 906, at 8 (1997) (citing Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6)).

Complainant asserts that ECC committed document abuse by refusing to honor his "Statement of Citizenship" and "Affidavit of Constructive Notice." However, the Complaint explicitly states that the Respondent's refusal to honor these documents does not pertain to the purposes of completing the I–9 form. In fact, in the Complaint, Complainant responds affirmatively to the inquiry that "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," but expressly crosses out the portion of the question that states that the purpose of these documents is "to show [he] can work in the United States" (Comp. ¶16). Complainant also does not assert that Respondent asked for wrong or different documents than those required to show work authorization (Comp. ¶17).

Document abuse may only be established by proving that the employer refused to accept documents that were proffered "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. §1324(a)(6) (1994). In this case, there is no evidence or suggestion that Respondent requested the "Statement of Citizenship" and "Affidavit of Constructive Notice" for purposes of complying with section 1324a(b). In fact, Complainant gratuitously proffered such documents to Respondent so that Respondent would terminate the withholding of social security tax from Complainant's wages. Complainant's "Statement of Citizenship" and "Affidavit of Constructive Notice" are not even considered documents acceptable under 8 U.S.C. §1324a for purposes of showing employee's identity or employment eligibility. Thus, I do not have subject matter jurisdiction over Complainant's document abuse claim.

C. *Failure to State a Claim*

Respondent has also moved to dismiss on the basis that Complainant has not stated a claim upon which relief could be granted with respect to his citizenship claim and his document

abuse claim. Complainant bears the burden of proving citizenship basis discrimination. *Costigan*, 6 OCAHO 918, at 9 (1997); *Toussaint v. Tekwood Assocs. Inc.,* 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *10, *appeal filed,* No. 96–3688, at *32. To establish such discrimination, a Complainant must prove that he was treated less favorably than others because of his protected status, such as his citizenship status.

As a United States citizen, Complainant is a "protected individual" under 8 U.S.C. §1324b(a)(3) and, thus, has standing to bring a claim. However, to be successful in bringing a valid citizenship discrimination claim, Complainant must also successfully allege facts that show discriminatory treatment. Complainant falls short in alleging such facts. He has not alleged that, because of his United States citizenship, he was treated less favorably than other workers of different citizenship. More specifically, Complainant has not alleged that he either was rejected for employment or that he was fired from his job because of his citizenship.

It is the Complainant's burden to prove citizenship discrimination. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820, at 7*. Complainant's citizenship discrimination argument rests solely on the theory that only aliens should be required to have social security tax withheld from his or her wages and that United States citizens should have the right to all of his or her earnings. This theory, while somewhat interesting, does not establish grounds for a citizenship status discrimination claim. Disparate treatment is the heart of discrimination. For a claim to constitute discrimination, the employer must treat some people less favorably than others because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). Where citizenship status is the characteristic, there must be a claim that the individual was treated less favorably than others because of his citizenship status. *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8. When an employer treats all employees in the same way, there is no discrimination. Respondent has failed to allege different or less favorable treatment than other employees and consequently has not stated a viable claim of citizenship discrimination. *Cholerton* , 7 OCAHO 934, at 12; *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997).

Complainant also fails to state a claim upon which relief may be granted with respect to document abuse. 8 U.S.C. §1324 (a)(6) provides that refusing to accept documents that, on their face, reason-

ably appear to be genuine shall be treated as an unfair immigration-related employment practice. However, contrary to Respondent's belief, IRCA does not create a blanket rule with respect to an employee's proffer of documents. *Costigan*, 6 OCAHO 918, at 9 (1997). IRCA does not render unlawful an employer's refusal to accept documents unrelated to employment eligibility verification procedures. Here, Complainant does not proffer his "Statement of Citizenship" and "Affidavit of Constructive Notice" for employment verification procedures, but for purposes of avoiding withholding of taxes. Therefore, Complainant has failed to state a claim upon which relief can be granted with respect to his allegation of document abuse.[17]

V. *Conclusion*

ECC's Motion to Dismiss the Complaint is hereby granted because the Complaint fails to state a claim upon which relief may be granted and this tribunal lacks subject matter jurisdiction of this action. Any motions and arguments not expressly addressed are hereby denied.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Concerning Appeal

As provided by statute, not later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. *See* 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[17]While a complainant normally should be granted the opportunity to amend the complaint to cure any pleading defects, when, as here, such amendment would be futile, there is no reason to permit such filing. *See Acito v. IMCERA Group, Inc.* 47 F.3d 47, 55 (2d Cir. 1995)