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

July 25, 1997

ELDON HUTCHINSON, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00084
GTE DATA SERVICES, Inc. Respondent.	)

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* Complainant's Representative
Leslie R. Stein, Esq., for Respondent

I. *Introduction*

This is another garden variety assault on the federal income tax and social security regimen[1] couched in terms of alleged immigra-

[1]*See D'Amico v. Erie Community College*, 7 OCAHO 948 (1997); *Hollingsworth v. Applied Research Assocs.,* 7 OCAHO 942 (1997); *Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel,* 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.,* 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications, Inc.,* 7 OCAHO 926, at 4–5 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346

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tion-related employment discrimination because an employer refused to accept an employee's representation that, as a citizen of the United States, he was exempt from federal income tax withholding and social security contribution obligations. The distinguishing characteristic of this case is the contention that **the employer for a time acceded to the employee's request, not countenanced by law,[2] that he avoid federal tax withholding.** Federal law and judicial precedent compel a ruling in favor of the employer.

II. *Factual and Procedural History*

In October 1987, Eldon Hutchinson (Hutchinson or Complainant) applied for employment as a Programmer Analyst with GTE Data Services, Inc. (GTE or Respondent). On his job application, Hutchinson provided his social security number. In November 1987, he was hired by GTE and submitted his Florida driver's license and an original social security card to prove identity and eligibility to work in the United States. GTE promoted Hutchinson to System Engineer in January 1991.

On or about August 14, 1995, Hutchinson gratuitously tendered GTE an improvised "Statement of Citizenship" purporting to exempt him from taxation. He contends that on its perceived strength GTE exempted him from FICA contributions and from withholding tax.[3]

Continued—

(O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.,* 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Associates*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (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: rejection by the employer of an employee's or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" (that the offeror is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

[2]All employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which employers must collect "at the source" — i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a), 3403. Employers are immunized from legal liability for doing so by 26 U.S.C. §3102 ("[e]very employer. . . shall be indemnified against the claims and demands of any person"), 26 U.S.C. §3403 (an "employer shall not be liable to any person"), and the Anti-Injunction Act, 26 U.S.C. §7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"), which has been interpreted to prohibit suits against employers who withhold taxes. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

[3]Employers are statutorily obliged under 26 U.S.C. §3102(a) and 26 U.S.C. §3402(a) to deduct FICA and withhold federal taxes; they may not opt in and out of these obligations.

Hutchinson's tax frolic came to an end not later than January 1996[4] when GTE appointed a new head of payroll, Dennis Anderson (Anderson). Anderson insisted on tax compliance. Seeking to regain his purportedly lost advantage, Hutchinson tendered a second *sui generis* document, an "Affidavit of Constructive Notice," setting forth that he had renounced his social security number and therefore was no longer an "employee" for tax purposes. Anderson ignored the spurious affidavit.

On July 3, 1996, Hutchinson filed a charge (which was subsequently dismissed) alleging national origin discrimination with the Miami Office of the Equal Employment Opportunity Commission (EEOC).

On September 6, 1996, Hutchinson resigned from GTE. In September 1996, through John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee, Hutchinson filed a charge pursuant to 8 U.S.C. §1324b with the United States Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)**.** Hutchinson alleged that GTE discriminated against him on the basis of his United States citizenship and national origin.

By determination letter dated January 30, 1997, OSC advised Hutchinson that the Charge was untimely and failed to state a cause of action under 8 U.S.C. §1324b, but that he could file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO).

On April 2, 1997, Hutchinson filed his OCAHO Complaint. Identifying himself as a natural-born United States citizen and "citizen of the state of Florida," Hutchinson charged that GTE discriminated against him on the basis of citizenship status. Conceding that GTE did not refuse to hire or fire him, or retaliate against him, or violate the over-documentation provisions of §1324b(a)(6) **(the only causes of action cognizable under 8 U.S.C. §1324b)**, Hutchinson claims that GTE somehow discriminated against him by not acting upon his gratuitously tendered, improvised tax-exemption documents.

[4]In his OCAHO Complaint, Hutchinson seeks back pay from January 1996, the date upon which it may be inferred that Anderson instituted tax code compliance, if GTE had not already, as it claims, complied.

OCAHO issued a Notice of Hearing on April 14, 1997.

On May 15, 1997, GTE filed its Answer, insisting that it withheld federal taxes "since the inception of Complainant's employment on November 2, 1987." Answer, at ¶7. GTE maintains that it responded to Hutchinson's August 15, 1995 tender of his "Statement of Citizenship" by seeking advice from the Internal Revenue Service (IRS), which advised that Hutchinson's document had no legal authority. GTE contends that Hutchinson's claim is barred by 8 U.S.C. §1324b(d)(3) as untimely, having occurred more than 180 days prior to the charge being filed with the Special Counsel. Finally, GTE argues that because Hutchinson filed a charge alleging the same factual predicate with EEOC, his claim is barred by the "no overlap" provisions of 8 U.S.C. §§1324b(a)(2)(B) and 1324b(b)(2).

In support, GTE appends Hutchinson's application for employment (which contains his social security number) and his Employment Eligibility Verification Form (INS Form I–9), with attached copies of the following documents presented at hire to establish identity and to prove eligibility to work in the United States: a Florida driver's license; a social security card; and IRS Publication 515, which advises employers that "[i]f you are required to withhold the tax, you become the taxpayer liable for its payment."

GTE also appends an IRS August 16, 1995 letter advising that IRS Regulation 1.1441–5 (on which Hutchinson and all other Kotmair complainants have unavailingly relied) "does not exempt employees [who are United States citizens] . . . from normal withholding required by Internal Revenue Code (IRC) Section 3402," and informing GTE that,

> **[w]ith respect to the materials sent to you by "The National Worker's Rights Committee," they appear to contain nothing that requires a response from you as an employer or from the Internal Revenue Service. The statements contained therein are commonly referred to as "constitutional protest" arguments. The Courts have consistently treated these statements as frivolous. This is especially true in connection with IRC Section 3402.**

Answer, at Appendix: Exhibit 4, at pp. 1–2. To evidence its tax and social security compliance for the period 1993 to 1996, GTE appends Hutchinson's IRS Form W–2s. GTE also appends Hutchinson's EEOC Charge, which claimed that GTE acceded to his request for exemption from income tax withholding, beginning in December

1993, for "almost two years," while collecting FICA. Answer, Appendix: Exhibit 6, at p. 4.

On May 15, 1997, GTE moved to dismiss the Complaint as untimely, failing to state a claim under §1324b, and subject to the prohibition against overlap with EEOC filings.

On June 13, 1997, Hutchinson filed both a Reply to the Motion To Dismiss, arguing that he was entitled to have his Complaint "equitably tolled,"[5] and a Reply to the Answer and Affirmative Defenses, contending that he "is not subject to any income tax withholdings."

On June 23, 1997, GTE moved to strike Complainant's Reply to its Motion To Dismiss as untimely under 28 C.F.R. §68.11(b).

III. *Discussion and Findings*

Because of the result reached here, absolutely predictable and inescapable under OCAHO precedent and controlling federal tax law,[6] it is unnecessary to resolve whether and when, if at all, GTE ceased avoiding withholding obligations. I do not reach the question of timeliness of the OSC Charge or other procedural *contretemps* because this case is hopelessly outside the jurisdiction of OCAHO, as was well known to Complainant's representative at the time he filed Hutchinson's Complaint.[7]

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[5]This case does not invite equitable tolling analysis, which depends for its applicability on events ***before*** the end of the period, not after. Equitable tolling principles were explained in *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 11, 1997 WL 131346, at *9, an earlier case brought by a Kotmair disciple.

[6]*See* 26 U.S.C. §§3101, 3102, 3402, 3403, 6331(a), 6332(d), 6334(a)(9), 6671, 6672, 7421, 7422.

[7]Of the cases filed by Kotmair and collected at n.1, *supra,* seven were decided and issued against claims substantially identical to Hutchinson's prior to filing of this case. Moreover, Kotmair was on notice that such claims totally lack merit as early as August 1996. *See Horne v. Town of Hampstead (Horne I)*, 6 OCAHO 884, at 5 (1996), 1996 WL 658405, at *3 (O.C.A.H.O.) (Order Confirming Withdrawal of Complaint). And *see Boyd v. Sherling*, 6 OCAHO 916, at 27, 1997 WL 176910, at *23, a case decided on February 25, 1997 (rejecting a proferred agreed disposition of such a claim), which advised:

> **In light of unanimous OCAHO precedent, compelling the conclusion that the obvious infirmities are fatal to the pending claims, it would exceed ALJ jurisdiction to place a judicial imprimatur on an award. Absent subject matter jurisdiction over a complaint which fails to state a cause of action on which this forum can grant relief, judicial power is unavailable to approve a settlement which implicitly assumes the employer's liability. A §1324b claim as insubstantial and lacking in merit as the present one cannot obtain a judicial blessing, whether by concurring in a disposition or otherwise.**

To similar effect, *see Winkler v. Timlin*, 6 OCAHO 912, at 14, 1997 WL 148820, at *12, decided January 30, 1997.

A. *The Complaint Is Dismissed Because This Forum Lacks Subject Matter Jurisdiction*

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

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

S*ee Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884). "Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and, therefore, imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1350 (2d ed. Supp. 1995). Federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)). A claim is "plainly unsubstantial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans*, 415 U.S. at 537 (internal quotations omitted) (*citing Ex parte Poresky*, 290 U.S. 30, 31–32 (1933)). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

1. *Title 8 U.S.C. §1324b Does Not Confer Subject Matter Jurisdiction Over Terms and Conditions of Employment*

a. *IRCA Governs Only Immigration-Related Causes of Action*

Title 8 U.S.C. §§1324b(a)(1) and 1324b(a)(6) prohibit unfair immigration-related employment discrimination based on citizenship status and prohibit overdocumentation with respect to employer compliance with §1324a(b), which obliges employers to verify the work eligibility of all employees hired after November 6, 1986. In order to complete Immigration and Naturalization Service (INS) Form I–9, the work eligibility verification document, at the time of hire, an employee must establish his identity and work authorization by tendering official documents from a prescribed list. Hutchinson's *sui generis* papers, of course, have no relationship to the §1324b(a)(6)

compliance obligation, and his claim is patently *de hors* §1324b(a)(6). Enacted to discourage illegal immigration by penalizing employers who hire illegals, §§1324b(a)(1) and 1324b(a)(6) do not provide a safe harbor for tax avoidance.

b. *Title 8 U.S.C. §1324b Proscribes Only Discriminatory Hiring, Firing, Retaliation, and Document Abuse*

Title 8 U.S.C. §1324b relief is limited to discriminatory "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." *Austin v. Jitney-Jungle,* 6 OCAHO 923, at 8, 1997 WL 235918, at *6.[8] By specifically denying that GTE failed to hire him, discharged him, or retaliated against him, and by affirmatively declining to allege that GTE made improper document requests when verifying his eligibility to work in the United States, Hutchinson deprives himself of §1324b standing.

Hutchinson does not allege that other employees of different citizenship were treated differently, nor does he implicate the INS Form I–9 employment eligibility verification system. Instead, he sues because GTE refused to treat him preferentially by failing to excuse him from tax and social security obligations. To refuse to prefer is not to discriminate. An employer who treats all alike discriminates against none. Nowhere does Hutchinson describe discriminatory treatment on any basis whatsoever.

Moreover, it is a truism that §1324b does not reach terms and conditions of employment.[9] Nothing in 8 U.S.C. §1324b relieves an employer of statutory obligations to withhold taxes from employees' wages.[10] Nothing in the text or legislative history of 8 U.S.C. §1324b prohibits an employer from complying with the tax code or from ask-

[8]*See also Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 8, 1997 WL 242208, at *5–6*; Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 7, 1997 WL 131346, at *5; *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (O.C.A.H.O.).

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

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

ing for a social security number (the individual tax identification number).[11] Nor does §1324b confer upon an employer the right to resist the IRC by accepting gratuitously tendered, improvised documents which purport to relieve an employee from taxation. Title 8 U.S.C. §1324b simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. Therefore, an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment commits no legal wrong. Among the terms and conditions of employment that GTE may legitimately and nondiscriminatorily impose is the requirement that its labor force submit, as must GTE, to tax code mandates. GTE's decision to subject Hutchinson to its tax regimen is not discrimination.

2. *Title 26 U.S.C. §7421(a) ("The Anti-Injunction Act") Precludes ALJ Jurisdiction over Federal Income Tax Withholding*

Hutchinson's legal actions constitute a campaign to restrain the collection of taxes. "[E]xcept in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Courts are barred from so doing by 26 U.S.C. §7421(a), "The Anti-Injunction Act," which prohibits all suits restraining tax assessment, collection, and determination. *Woods v. Internal Revenue Service*, 3 F.3d 403, 404 (11th Cir. 1993).

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

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

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

The Anti-Injunction Act enjoins suit to restrain all activities culminating in tax collection. *Linn v. Chivatero*, 714 F.2d 1278, 1282, 1286–87 (5th Cir. 1983). ***Such activities include employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974). This is because the tax code compels employers to withhold federal income and social security taxes from employees' wages. 26 U.S.C. §§3101, 3102, 3402(a), (d). An employer who fails to do so is liable for the tax. 26 U.S.C. §3403.

Title 26 U.S.C. §§6671 and 6672, extensively litigated,[12] is a separate penalty provision that imposes joint and several liability on "any person required to collect . . . and pay over" taxes who fails to do so. 26 U.S.C. §6672(a). Section 6672 imposes a 100% penalty "equal to the total amount of the tax evaded, or not collected." *Id.*

Hutchinson's gratuitous tender of an improvised "Statement of Citizenship" purported to exempt him from federal withholding tax ***because*** he is a United States citizen. His unsolicited "Affidavit of Constructive Notice" claimed exemption from the IRC and Social Security Act (SSA) because he repudiated his social security number (his individual taxpayer identifier under 26 C.F.R. §§301.6109(a)(1)(ii)(D), (b)(2), (d)). Both proffers attempted to restrain GTE from performing its statutory duty[13] to collect federal withholding tax and social security contributions. Obviously, challenges to the IRC and SSA do not implicate jurisdiction under 8 U.S.C. §1324b.

Hutchinson's 1996 EEOC charge, later dismissed,[14] fatuously attacked GTE's withholding as discriminatory on the basis of national

[12]*See Cooper v. United States*, 60 F.3d 1529, 1530–32 (11th Cir. 1995); *Haas v. Internal Revenue Serv.*, 48 F.3d 1153, 1157 (11th Cir. 1995); and *Malloy v. United States*, 17 F.3d 329, 331 (11th Cir. 1994).

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

[14]In response to claims of this genre, EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000–e *et seq*. Memorandum, Ellen J. Vargyas (Vargyas), EEOC Legal Counsel to All EEOC District, Area & Local Directors, July 13, 1995, "Clarification to April 13, 1995 Memorandum on Charges Alleging National Origin Discrimination Due to the Withholding of Federal Income or Social Security Taxes from Wages," at 1. Kotmair is well aware of this policy, as demonstrated by his epistolary war with EEOC, alluded to in a January 22, 1997 letter to him from Vargyas, attached to Hutchinson's Reply to Respondent's Answer and Affirmative Defenses.

origin because it supposedly deprived Hutchinson of "the full fruit of [his] labor"—i.e., a paycheck *sans* income tax or social security deductions.

Hutchinson's OSC Charge specified tax avoidance as its stated purpose. His OCAHO Complaint accused GTE of treating him as an "Alien" and predictably characterized employer compliance with statutory tax mandates as immigration-related workplace discrimination. Hutchinson's theory, exhaustively discredited by this forum,[15] is that only aliens must pay withholding taxes and that taxation (including social security) of U.S. citizens is, therefore, discriminatory.

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

3. *The ALJ Lacks Jurisdiction over Challenges to the Social Security Act and the Federal Insurance Contributions Act*

Social Security challenges do not implicate 8 U.S.C. §1324b jurisdiction. Contributions to social security are mandatory. The Supreme Court has long acknowledged the constitutionality of the SSA. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).[18] The Court has found

[15]*See* n.1, *supra*.

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

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

[18]The Court has held the social security withholding system to be uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

United States v. Lee, 455 U.S. 252, 261 (1982).

> We note that here the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits.

Lee, 455 U.S. at 261 n.12.

"mandatory participation . . . indispensable to the fiscal vitality of the social security system":

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

United States v. Lee, 455 U.S. 252, 258 (1982). Hutchinson's recitation of *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935), is unavailing. *Alton* is inapposite, dealing with the Railroad Retirement Act and predating the Court's consideration of the SSA.

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

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

Hutchinson argues that he may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, he must submit to deductions. *Lee*, 455 U.S. at 258, 261 n.12. In any event, social security challenges do not implicate ***immigration-related*** unfair employment practices and are therefore beyond this forum's limited reach.

IV. *Conclusion*

Taking all Hutchinson's factual allegations as true, and construing them in a light most favorable to him, I determine that Hutchinson is entitled to no relief under any reasonable reading of his pleadings. Even if, as Hutchinson claims, he gratuitously tendered documents

purporting to exempt him from federal income tax withholding and social security deductions, and even if GTE first honored and then refused to honor these documents and insisted on making payroll tax and social security deductions, GTE's conduct in subsequently insisting on tax compliance constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Hutchinson describes simply does not support the ***immigration-related*** cause of action he pleads. Hutchinson's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside the scope of §1324b.

Although leave to amend is favored in discrimination cases where subject matter jurisdiction is ineffectively pleaded, there is no conceivable way that Hutchinson can transform this tax protest into an unfair ***immigration-related*** employment complaint. A complaint, even by a *pro se* Complainant (which Hutchinson arguably is not), may be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *see Bankers Sec. Life Ins. Soc. v. Kane*, 885 F.2d 820, 822 (11th Cir. 1989).

Hutchinson's claim is incapable of viable amendment: there is no material factual dispute between parties, only a bald tax challenge beyond this forum's jurisdictional reach. The Complaint cannot be amended to an ***immigration-related*** cause of action. GTE did not prefer a citizen of another land nor did it subject Hutchinson to discriminatory paperwork requirements. It simply insisted, as it was bound to do, that he submit to IRS tax and social security requirements. GTE's actions were entirely lawful.

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

V. *Ultimate Findings, Conclusions, and Order*

(a) *Disposition*

Hutchinson's action lacks "an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Where a claim is based upon a party's discharge of statutory duties, it derives from an

indisputably meritless legal theory. As an employer which complied with statutory obligations, GTE is immune from liability under the very statutes conferring duties upon it.[19] Accordingly, I dismiss Hutchinson's Complaint without leave to amend because his tax challenge cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice. As an 8 U.S.C. §1324b claim, it is disingenuous and frivolous.

I have considered the pleadings of the parties. All requests not previously disposed of are denied. Hutchinson's Complaint, having no arguable basis in fact or law, is before the wrong forum.[20] GTE's Motion to Dismiss is granted. The Complaint fails to state a claim of immigration-related citizenship discrimination, and this forum lacks subject matter jurisdiction over tax challenges.[21]

(b) *Appellate Jurisdiction*

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

SO ORDERED.

Dated and entered this 25th day of July, 1997.

MARVIN H. MORSE
Administrative Law Judge

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

[20]For Eleventh Circuit disposition of frivolous tax suits, *see Woods,* 3 F.3d at 403 ("we would not hesitate to order sanctions if appellant had been represented").

[21]See FED. R. CIV. P. 12(h)(3) ("whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").