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

December 10, 1997

EBBON JOHNSON, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding
	) OCAHO Case No. 97B00149
FLORIDA POWER CORPORATION, Respondent.	)

FINAL DECISION AND ORDER OF DISMISSAL

Procedural History

On August 14, 1997, John B. Kotmair, Jr., Director of the National Worker's Rights Committee, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of Ebbon Johnson of Sorrento, Florida. The complaint asserted that in May 1973 (sic) Johnson applied for work as a lineman for respondent Florida Power Corporation (Florida Power or FPC). Boxes on the complaint form were checked indicating both that the employer "refused to accept the documents I presented to show I can work in the United States" and that the complainant had been discriminated against because of his citizenship status. The documents respondent allegedly refused to accept were identified as a "Statement of Citizenship" and an "Affidavit of Constructive Notice." Attached to the complaint were copies of the charge Johnson filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) and the letter dated June 13, 1997 from OSC stating that Kotmair may[1] have the right to file a complaint on behalf of

[1]The term "may" is evidently used because OSC had previously dismissed the charge without issuing a notification letter; the instant letter was issued in response to an inquiry about the status of the charge. For purposes of this order I have assumed without deciding that OSC may issue such a letter *nunc pro tunc* without reopening the charge.

his client within 90 days from the receipt of this determination letter. He did so. The complaint seeks back pay from June 1994. A companion charge alleging national origin discrimination was evidently also filed with the EEOC.

Florida Power filed an answer on September 17, 1997 in accordance with applicable rules, [2] together with a Motion to Dismiss and numerous attachments.[3] The attachments demonstrate that Johnson was hired by Florida Power in February 1973 as a lineman and that he has evidently been continuously employed there since that time. Johnson claimed he "renounced" his social security number on February 11, 1994 and in June 1994 wrote Florida Power alleging that he was not subject to withholding for taxes because "Congress lacks the Constitutional authority to compel membership in social security" and because "the Internal Revenue Code under Title 26 has never been passed into positive law."

On October 15, 1997, Johnson moved to strike the answer on the ground that it was not accompanied by a notice of appearance as required by 28 C.F.R. §68.33(b)(5). On October 30, 1997 a response to this motion was filed, together with the notice of appearance of Rodney E. Gaddy, noting also that Kendall Crowder would serve as co-counsel for Florida Power. For reasons stated herein, the motion to strike the answer is denied and the motion to dismiss the complaint is granted.

The Applicable Statutory Provisions

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. §1324a, as well as a prohibition against certain unfair immigration-related employment practices based on the national

[2]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

[3]Exhibits filed with the motion include 1) a letter dated June 27, 1994 from Ebbon Johnson to whom it may concern, 2) a one-page document captioned "Statement of Citizenship," 3) a letter dated July 1, 1994 from Rodney Gaddy of Florida Power to Ebbon Johnson, 4) a letter dated February 14, 1995 from the Internal Revenue Service to Florida Power, 5) a letter dated July 6, 1994 from Ebbon Johnson to whom it may concern, and 6) a two-page document captioned "Affidavit of Constructive Notice."

origin or citizenship status of an applicant for employment. 8 U.S.C. §1324b. In 1986 Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer has since then been obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a covered worker's identity and employment eligibility under §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(1996), and to complete a form I–9 for each such new employee.

The specific provision at issue in this proceeding, 8 U.S.C. §1324b(a)(6), was added to the INA by the Immigration Act of 1990 (IMMACT) to address concerns that employers were rejecting valid work documents, and to ensure that the choice among the documents on the approved list would be the employee's choice, not the employer's. It provides that certain documentary practices, informally referred to as "document abuse," may be treated as discriminatory hiring practices.[4]

> For purposes of paragraph (1),[5] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[6] 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.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS

[4]The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208 §421, 110 Stat. 3009, 3670 (1996), made significant changes in this provision with respect to events occurring on or after September 30, 1996. Because the events in question here occurred in 1995, IIRIRA does not apply.

[5]Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[6]Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

[7]IIRIRA also made prospective reductions to the number of acceptable List A documents. P.L. 105–54, 111 Stat. 1175, signed by President Clinton on October 6, 1997, extended by six months the September 30, 1997 deadline to implement the reduction.

Forms N–560 or N–561, Certificate of United States Citizenship.[7] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, and various State Department or INS Forms. When a document from the lists set out in §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document for that purpose if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair immigration-related employment practice under this provision if: 1) a document from List A or one document each from both List B and List C are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

Regulations implementing the employment eligibility verification system make abundantly clear that the statute was meant to have prospective application only. Employers are required to examine documents and to complete Form I–9 only for individuals hired after November 6, 1986 who then continued to be employed after May 31, 1987. 8 C.F.R. §274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. §274a.7.

Discussion

A. *Complainant's Motion to Strike*

Complainant's Motion to Strike is lacking in justification. While it is true that 28 C.F.R. §68.33(b)(5) requires each attorney to file a notice of appearance, nothing in that rule or any other suggests either that counsel's notice of appearance must be filed contemporaneously

with the answer or that an answer without a contemporaneous notice accompanying it is subject to striking. Where, as here, no significant development has occurred in the case, little time has passed, and no prejudice is asserted or shown, Johnson's request can only be seen as an attempt to exalt form over substance. Consequently it must be rejected.

B. *Respondent's Motion to Dismiss*

Construing the allegations most favorably to Johnson, as I must, and taking the factual allegations as true, the complaint nevertheless fails to raise any issues cognizable under 8 U.S.C. §1324b because the acts complained of are not immigration-related employment practices at all. Thus, it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

First, it is evident that Florida Power had no occasion to verify Johnson's eligibility to work in the United States pursuant to the INA because Johnson was hired at Florida Power prior to November 6, 1986 and continued to be employed there until the present. It is also evident, moreover, that the gravamen of Johnson's complaint is a challenge to Florida Power's lawful withholding of sums from his wages for federal income and social security taxes, and that no issues whatever are raised respecting the employment eligibility verification process. Notwithstanding Johnson's allegation that FPC refused to accept the documents he presented to show he could work in the United States, the documents he refers to are not documents which evidence anything of the sort. As the text of Johnson's charge also makes clear, the subject documents were tendered for the purpose of persuading Florida Power to cease withholding sums from Johnson's wages for federal income and FICA taxes. His "Statement of Citizenship," attached as Exhibit 2 to respondent's Motion to Dismiss states:

> I am a citizen of the United States of America by birth.
>
> I was born in: Ithaca, New York, on February 26, 1939

This statement is provided in duplicate to conform to the provisions of internal revenue regulations which will relieve a withholding agent of any duty to withhold money from payments to a United States citizen and/or resident. The withholding agent is also relieved of any liability, pursuant to the regulations, because money is not withheld.

"Section 1.1441–5 Claiming to be not subject to withholding.

"(a) Individuals. For purposes of Chapter 3 of the code, an individual's written statement that he or she is a citizen or resident of the United States may be relied upon by the payor of the income as proof that such individual is a citizen or resident of the United States. This statement shall be furnished to the withholding agent in duplicate."

The duplicate copy of this statement of citizenship, along with a letter of transmittal, must be sent only to Internal Revenue Service Center, Philadelphia, PA 19255, by the withholding agent, pursuant to 26 Code of Federal Regulations section 1.1441–5.

His "Affidavit of Constructive Notice," attached to the motion as Exhibit 6, alleges:

I, Ebbon C. Johnson of 1061 St. Croix Avenue, Apopka, Florida 32703, do hereby declare for the purposes of clarifying my position on possession of a social security number, and placing all concerned on constructive notice, that I do not recognize any connection between myself and a social security number, and do not have a social security number to disclose for the following reasons:

1. The Treasury Secretary has been duly notified of the nullification of my social security file account on 2/11/94 and has not objected to the severing of my association with this account number;

2. I do not meet the qualifications of a person required by law to have a social security number under Title 42 section 405(B);

3. Knowingly using an incorrect social security number may substantiate execution of false or fraudulent Internal Revenue documents, under penalties of perjury, which might impose penalties and backup withholding under §3406(a)(1)(B); and;

4. Not having a social security number places me outside of the legal definition of "employee" and I do not earn "wages", per 20 CFR §§404.1005 and 404.1041 respectively, and I am therefore not a person who:

(A) is subject to Title 26, Subtitle C §§3121, 3401, and 3402 of the IRC which govern the subjects of the voluntary social security program, and;

(B) must voluntarily subject themselves, by voluntarily executing a Form W–4, pursuant to 26 CFR §31.3402(p)–1, authorizing withholding of employment taxes, to withhold employment taxes pursuant to Chapters 21, 23, and 24 of the IRC.

Affiant hereby declares that he is responsible for himself, pays all taxes that he is liable for, and requests that Florida Power Corporation enter "None" in the space provided for the Affiant's social security number, on the all returns, statements, and or other documents used by Florida Power Corporation to declare the amounts reimbursed to the Affiant, for materials and time, while working for Florida Power Corporation.

Affiant further declares that use of a false or fraudulent number is expressly prohibited by law and the fines and penalties for the unauthorized use *shall rest fully* upon the person(s) entering the number on any record or legal instrument of the IRS or any other agency per the Internal Revenue Code §6065 **"Verification of Returns"** and §7207 **"Fraudulent returns, statements, or other documents."** Any use thereof is false and fraudulent, and an infringement and breach of the Affiant's right to privacy.

The above is true, correct, and complete to the best of my knowledge.

Further Affiant saith not.

Even assuming, *arguendo*, that Johnson presented these documents to Florida Power to show that he could work in the United States, they are plainly not documents acceptable by an employer for that purpose because they are not among the documents set out in 8 U.S.C. §1324a(b)(1)(B), (C), and (D), 8 C.F.R. §274a.2(b)(1)(v)(A), (B), and (C). The origin of Johnson's purported "Statement of Citizenship" is unclear, but examination of the form demonstrates that it is not related in any way to INS form N–560 or N–561 Certificate of United States Citizenship. The forms issued by INS do not purport to address issues of federal taxation. Accordingly Florida Power's refusal to accept Johnson's documents to show he can work in the United States cannot be found to violate §1324b.

Similarly, Johnson's allegations of citizenship status discrimination state no claim under INA, first because there is no assertion

that any other similarly situated employee of differing citizenship was differently treated, and second because an employer's compliance with tax laws of uniform general applicability does not discriminate against any employee to whom such laws apply. Differential treatment is the essence of a discrimination claim. Absent any suggestion that any other employees were treated any differently, no claim of citizenship discrimination has been stated.

However disguised, this is in reality yet another challenge to an employer's compliance with federal income tax withholding laws and regulations. 26 U.S.C. §3402 et. seq., 28 C.F.R. §31.3402. The underlying charge is framed in language virtually identical to that in a plethora of similar cases filed in this office. OCAHO case law has already addressed these claims at great length and rather than do so yet again, I refer the interested reader to the decisions in those cases: *Hamilton v. The Recorder*, 7 OCAHO 968 (1997); *Cook v. Pro Source, Inc.*, 7 OCAHO 960 (1997); *Horst v. Juneau Sch. Dist. City and Borough of Juneau*, 7 OCAHO 957 (1997); *Manning v. Jacksonville*, 7 OCAHO 956 (1997); *Hutchinson v. GTE Data Servs., Inc.*, 7 OCAHO 954 (1997); *Hogenmiller v. Lincare, Inc.*, 7 OCAHO 953 (1997); *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. Pub. Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir, Inc.*, 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); *Smiley v. 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); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997); *Horne v. Hampstead*, 6 OCAHO 906 (1997); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Assocs., Inc.*,[8] 6

[8]While neither Kotmair nor the National Worker's Rights Committee appear of record in *Toussaint*, the allegations are substantially similar.

OCAHO 892 (1996), *aff'd sub nom. Toussaint v. OCAHO*, 127 F.3d 1097 (3d Cir. 1997). Each of these cases dismissed similar claims by employees or prospective employees who sought to avoid withholding from their wages for federal taxes or having to provide employers with their social security numbers. OCAHO case law makes clear that an employer's request for a social security number poses no issues under 8 U.S.C. §1324b(a)(6). *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477 at 811 (1992)[9] ("[T]here is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment"), *Lewis v. McDonald's Corp.*, 2 OCAHO 383 at 701 (1991) ("[N]othing in the logic, text, or legislative history of IRCA hints that an employer may not require a social security number as a precondition of employment").

OCAHO case law having unanimously rejected the theories which Johnson asserts, I am constrained to find that his allegations are frivolous, unreasonable, and without foundation in law or fact. Johnson cites no authority, and my research discloses none, which would provide a modicum of support for the proposition that the INA has any application to his disputes with his employer over issues of federal taxation.

The complaint must accordingly be dismissed.

Findings

1. Ebbon Johnson was hired by Florida Power Corporation in February 1973.

2. Ebbon Johnson has continued to work at Florida Power Corporation at all times relevant to the complaint, presently in the capacity of a lineman.

[9]Citations to OCAHO precedents reprinted in *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States* Volumes 1 through 5 reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

3. In June 1994 Ebbon Johnson presented to Florida Power Corporation two documents entitled respectively "Statement of Citizenship" and "Affidavit of Constructive Notice."

4. The precise origin of the documents remains undisclosed.

5. The documents were presented to Florida Power Corporation for the purpose of persuading the employer to cease withholding sums from Johnson's wages for federal taxes and social security contributions.

6. Florida Power Corporation declined to honor the documents or to cease withholding sums from Johnson's wages for federal taxes and social security contributions as Johnson requested.

7. The documents were not presented in the process of hiring, recruitment, or referral for a fee.

8. The documents are not documents acceptable for the purpose of showing an employee's identity or eligibility to work in the United States.

9. Florida Power Corporation had no obligation to ascertain Johnson's eligibility to work in the United States or to complete an I–9 form for him.

10. The documents were not presented for the purpose of showing Johnson's identity or eligibility to work in the United States.

11. Florida Power Corporation's rejection of Johnson's proffered documents does not violate 8 U.S.C. §1324b.

12. No claim is made that any other employees were treated more favorably than was Ebbon Johnson.

Conclusion

Johnson's complaint fails to state a claim upon which relief can be granted because it poses no issues cognizable under 8 U.S.C. §1324b. It is accordingly dismissed. Florida Power's request for attorney's fees will be timely if filed on or before January 31, 1998. Johnson shall have 30 days in which to respond to such request.

SO ORDERED.

Dated and entered this 10th day of December, 1997.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks timely review of that 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, and does so no later than 60 days after the entry of such Order.