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

January 15, 1998

LARRY BUNN, Complainant, v. USX/US STEEL, Respondent.	)))) 8 U.S.C. 1324b Proceeding) OCAHO Case No. 97B00160)))

FINAL DECISION AND ORDER

Appearances: John B. Kotmair, Jr., National Worker's Rights Committee
Westminster, Maryland, for complainant;
Jared Meyer, Esquire, Pittsburgh, Pennsylvania, for respondent.

Before: Administrative Law Judge McGuire

I. *Background*

On April 15, 1997, John B. Kotmair, Jr., Director of the National Worker's Rights Committee, filed a charge on behalf of Larry Bunn (Bunn/complainant) with the Office of Special Counsel (OSC), United States Department of Justice, alleging that USX/U.S. Steel (USX/respondent), by having refused to discontinue withholding federal taxes from his wages, had committed unfair immigration-related employment practices namely, national origin and citizenship status discrimination, as well as document abuse, in violation of the pertinent provisions of the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324b(a)(1) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6).

Bunn was hired by USX on September 9, 1969, as a steelworker in that company's Fairfield Steel Works in Birmingham, Alabama, and he has been steadily employed since then at that location.

In January of 1994, Bunn allegedly tendered two (2) self-created documents entitled "Statement of Citizenship" and "Affidavit of Constructive Notice" to USX and advised the latter that those documents provided the bases for his being exempt from the requirement that he pay federal income tax, as well as social security tax, on his wages. For that reason, he demanded that USX discontinue withholding federal income and social security taxes from his wages. USX declined to comply with Bunn's request and continued to withhold federal taxes from his wages pursuant to the requirements of the Internal Revenue Code.

Resultingly, Bunn filed a charge of national origin discrimination with the Equal Employment Opportunity Commission (EEOC). He has not provided the date upon which he filed that charge, nor has he supplied the date upon which EEOC dismissed that charge for lack of jurisdiction.

On April 15, 1997, Bunn, through his designated representative, John B. Kotmair, Jr., filed discrimination charges with OSC. The nature of those charges are contained in an eight (8)-page letter submitted to OSC:

> In January of 1994, Mr. Bunn submitted a Statement of Citizenship . . . which states that he is a U.S. Citizen, and the IRS publication 515, which states that after receipt of the statement, the withholding agent is relieved from the duty of withholding the income tax.
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> . . .
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> It was additionally communicated to Mr. Petz, at USX/US Steel, by service of an Affidavit of Constructive Notice, that Mr. Bunn does not have nor does he recognize a social security number in relationship to himself.

After completing its investigation, OSC forwarded a determination letter, dated July 15, 1997, to Bunn, advising him that his allegations "have not raised an issue within our jurisdiction . . . [and] we are taking no further action with respect to your correspondence."

OSC further informed Bunn that if he disagreed with its decision, he was entitled to file a private action directly with this Office if he did so within 90 days of his receipt of that correspondence.

It should be noted that Bunn alleges that he filed his OSC charge on April 15, 1997, Complaint ¶18. OSC, however, has indicated in its determination letter that it received his charge on July 11, 1997, some four days before issuing its determination letter. For purposes of this ruling, the earlier of the two (2) dates will be utilized.

On September 11, 1997, complainant timely commenced this private action by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of IRCA. In his OCAHO Complaint, Bunn seeks back pay from January, 1994.

It can be readily seen that Bunn's September 11, 1997 Complaint did not reallege the charge of national origin discrimination that was contained in his initial OSC charge. OCAHO has jurisdiction over claims of national origin discrimination only where the employer has more than three (3) but less than 15 employees. *See* 8 U.S.C. §1324b(a)(2)(B); *Wilson v. Harrisburg School District*, 6 OCAHO 919, at 14 (1997).

The burden of demonstrating that OCAHO has jurisdiction is placed on the complainant at all times, and cannot be waived by either party. It is quite clear that complainant cannot meet this burden since it is found, as a matter of official notice, that USX employs well over 14 employees. *See* 28 C.F.R. §68.41. Accordingly, our inquiry is limited to the two (2) allegations contained in the Complaint, citizenship status discrimination and document abuse.

On September 15, 1997, a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, were served on respondent by certified mail, return receipt requested.

On September 23, 1997, John B. Kotmair, Jr. filed a Notice of Appearance on behalf of the complainant.

On October 6, 1997, respondent filed its answer in which it denied having discriminated against Bunn based upon his citizenship status and also denied having committed acts of document abuse.

On November 13, 1997, USX filed a pleading captioned Respondents USX Corporation and its U.S. Steel Division's Motion to Dismiss, or In the Alternative, Motion for Summary Judgment.

On November 24, 1997, Bunn filed a response to USX's dispositive motion.

For the following reasons, respondent's motion to dismiss Bunn's claims is being granted for failure to state a cognizable section 1324b claim and because this Office lacks subject matter jurisdiction. Complainant's charge of document abuse is being dismissed on the additional ground of not having been timely filed.

II. *Standards of Decision*

OCAHO rules of practice and procedure[1] authorize the Administrative Law Judge to dispose of cases, as appropriate, upon motions to dismiss for failure to state a claim upon which relief can be granted, 28 C.F.R. §68.10. When matters outside the immediate pleadings are considered by the Administrative Law Judge, a motion to dismiss is treated as one for summary decision, 28 C.F.R. §68.38(c). Since the assessment of Bunn's claim is being limited to the immediate pleadings, the standards governing a motion to dismiss apply.

The pertinent procedural rule governing motions to dismiss, 28 C.F.R. §68.10, provides:

> The respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint.

A motion to dismiss for failure to state a claim upon which relief can be granted under section 68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)[2]. *Costigan v. NYNEX*,

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

[2]28 C.F.R. §68.1 provides that the Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by OCAHO rules.

6 OCAHO 918, at 2 (1997)[3]; *Bent v. Brotman Medical Ctr. Pulse Health Servs.*, 5 OCAHO 764, at 364 (1995); *Kasathsko v. IRS*, 6 OCAHO 840, at 3 (1996).

In considering such a motion, a federal court liberally construes the complaint and views it in the light most favorable to the complainant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The allegations contained in the complaint are taken as true. Therefore, a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *United States v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 901 (5th Cir. 1997); *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

III. *Bunn's Citizenship Status Discrimination Claim*

Complainant has alleged that respondent discriminated against him based on his citizenship status. IRCA provides that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . 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 . . . in the case of a protected individual, because of such individual's citizenship status." 8 U.S.C. §1324b(a)(1).

The burden of stating a prima facie case of discrimination under IRCA requires that complainant demonstrate that: 1) he is a member of a protected class; 2) the employer had an open position for which he applied or was discharged; 3) he was qualified for the position; and 4) he was rejected or discharged under circumstances giving rise to an inference of unlawful discrimination. *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11 (1996); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Comm. Affairs v.*

[3]Citations to OCAHO precedents reprinted in bound Volume 1 through Volume 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volume 1 through Volume 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.

Burdine, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–07 (1993).

Once a complainant provides a sufficient quantum of facts to demonstrate a prima facie case, the burden of production shifts to the employer to present a legitimate non-discriminatory reason for its employment action.

However, if the complainant fails to meet its initial burden of demonstrating a prima facie case, the inference of discrimination never arises and the employer has no burden of production, and the complaint should be dismissed unless the defect can be cured by an amendment.

It is undisputed that Bunn, who is a United States citizen and thus within the class of persons granted IRCA protection against unlawful citizenship status discrimination, was hired in 1969 by USX and continues to be employed by the respondent firm. 8 U.S.C. §1324b(a)(3).

In support of its motion to dismiss, USX quite correctly argues that "[s]ince absolutely no event made illegal by section 1324b has occurred or been suffered by Complainant Bunn, as a matter of law there is no factual predicate or legal foundation whatever [to] underpin a decision to overturn [OSC's] conclusion that no remedial action is warranted in this case."

Bunn alleges that USX's refusal to accept his Statement of Citizenship and acknowledge that he is not subject to the Social Security Act, as well as USX's refusal to discontinue federal tax withholding, constitute discriminatory conduct that violates section 1324b. The tax-related legal theories and relief urged by Bunn's representative John B. Kotmair, Jr. have been fully tested and unanimously rejected in several other OCAHO rulings involving parallel factual scenarios. *Boyd v. Sherling*, 6 OCAHO 916 (1997); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996); *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Winkler v. Timlin Corporation*, 6 OCAHO 912 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *D'Amico v. Erie Comm. College*, 7 OCAHO 948 (1997); *Hogenmiller v.*

Lincare, Inc., 7 OCAHO 953 (1997); *Hamilton v. The Recorder*, 7 OCAHO 968 (1997); *Cook v. Pro Source, Inc.*, 7 OCAHO 960 (1997); *Hollingsworth v. Applied Research Assocs.*, 7 OCAHO 942 (1997); *Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatchkow v. Allen-Stevens Corp.*, 7 OCAHO 938 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Werline v. Pub. Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997).

Each of the cited cases involved the dismissal of similar claims by employees or prospective employees who sought to avoid having federal tax sums withheld from their wages, or who sought to avoid furnishing their social security numbers to employers. Bunn's response to complainant's dispositive motion provides no substantive explanation to distinguish his claims from those previously-enumerated tax protester cases.

Accordingly, in the absence of a prima facie showing of discriminatory treatment, respondent's motion to dismiss is granted as it pertains to complainant's citizenship status discrimination claim, and that claim is hereby ordered to be and is dismissed with prejudice to refiling.

IV. *Bunn's Document Abuse Claim*

Bunn's remaining allegation, that of document abuse, lacks any substantive merit as well.

The document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6), provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system.

The employment verification system requires every U.S. employer to verify at the time of hire that its employees are eligible to work in the United States by inspecting identity and work eligibility documents provided by the employee. The documents which an employee may tender for purposes of establishing identity and work authorization are those specified in IRCA's implementing regulations, 8 C.F.R. §274a.2(b)(1)(v).

In order to verify employment eligibility, employers utilize the Immigration and Naturalization Service Form I–9, officially known as the Employment Eligibility Verification Form. Every U.S. employer has been subject to the employment verification requirement since November 7, 1986. Nothing in IRCA nor its implementing regulations indicate that the employment verification system is to apply to employees hired before November 7, 1986. 8 C.F.R. 274a.2(a); *Johnson v. Florida Power Corp.*, 7 OCAHO 981, at 4 (1997).

At the risk of engaging in proscribed discriminatory document abuse, the employer may not request a particular document or demand more or different documents than are necessary to verify identity and employment eligibility, nor may an employer refuse to accept facially valid documents.

Bunn must show at a minimum that USX requested documents for purposes of satisfying IRCA's employment verification system. Elemental allegations of that nature are wholly absent from his pleadings. Bunn has alleged that in January, 1994, he voluntarily furnished two (2) documents, a Statement of Citizenship and an Affidavit of Constructive Notice, to demonstrate his purported exemption from participation in the federal social security system and from having federal tax withholding sums deducted from his earnings.

Because Bunn has been steadily employed since 1969, USX has obviously not required him to establish his identity and employment eligibility by providing acceptable documentation for that purpose. Consequently, the documents which Bunn voluntarily furnished could not possibly have been tendered in order to demonstrate his employment eligibility for IRCA purposes.

If indeed Bunn had shown that USX requested documents for the purpose of verifying his identity and employment eligibility, the self-created Statement of Citizenship and the Affidavit of Constructive Notice are not among the documents described at 8 C.F.R. §274a.2(b)(1)(v), and thus could not have been utilized for that purpose.

IRCA simply does not render unlawful an employer's refusal to accept documents which are gratuitously presented for purposes which

are wholly unrelated to the employment eligibility verification procedures. *Costigan v. NYNEX*, 6 OCAHO 918, at 9–10 (1997).

Bunn's Complaint fails to offer specific facts showing that USX had engaged in document abuse activity. In view of the foregoing discussion, respondent's motion to dismiss is granted as it pertains to complainant's document abuse claim. Accordingly, that claim is also hereby ordered to be dismissed with prejudice to refiling.

V. *Subject Matter Jurisdiction*

OSC declined to take further action with respect to Bunn's charges since it quite properly found that his allegations had not raised an issue addressable under IRCA's provisions.

Administrative Law Judges assigned to this Office are under an obligation to examine the complaint and determine whether there is subject matter jurisdiction regardless of whether the defense is raised by the respondent. *Jarvis v. AK Steel*, 7 OCAHO 930, at 8 (1997); *Boyd v. Sherling*, 6 OCAHO 916, at 7 (1997); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990).

As noted earlier, this case represents one of a significant number of cases which have been filed with this Office involving individuals who purport to be exempt from the payment of federal income and/or social security taxes. Most of those complainants have been represented by Mr. Kotmair and their collective allegations are identical to those alleged herein, or nearly so.

Prior OCAHO rulings in this area have clearly stated that this Office provides access only to those complainants seeking to resolve, among other things, disputes involving unfair immigration-related employment practices. There is nothing in the provisions of IRCA, nor in the pertinent implementing regulations, which even remotely suggest that this forum has subject matter jurisdiction over disputes which involve the withholding of federal income and/or social security taxes from wages. *Lee v. Airtouch Communications*, 7 OCAHO 926, at 8 (1997) (order granting request for attorney's fees); *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 21 (1997).

A thorough review of Bunn's allegations demonstrate that the dispute at issue centers solely upon whether USX must comply with federal tax law and withhold federal taxes from Bunn's wages. The

reasoning in *Wilson v. Harrisburg School District*, *supra*, in which similar tax-related claims were pressed, applies with equal force to Bunn's allegations:

> Nothing in IRCA confers upon an employer the right to resist the [Internal Revenue Code] by accepting gratuitously tendered improvised documents purporting to relieve an employee from taxation. IRCA simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment does not violate IRCA. The gravamen of [the Complaint], a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

Accordingly, Bunn's Complaint is also being dismissed with prejudice for lack of subject matter jurisdiction.

VI. *Timeliness Issue*

IRCA provides that a charge of unfair immigration-related employment discrimination must be filed with OSC, or an agency with which OSC has a Memorandum of Understanding, within 180 days after the alleged discriminatory event. 8 U.S.C. §1324b(d)(3).

Under the terms of a 1989 Memorandum of Understanding (MOU) between the EEOC and OSC, a charge of discrimination filed with EEOC within the 180 day statutory period is deemed to have been timely filed with OSC, whether or not citizenship status discrimination is charged before the EEOC. 54 Fed. Reg. 32,499 (1989); *Walker v. United Air Lines, Inc.*, 4 OCAHO 686, at 821 (1994).

Construing the Complaint most favorably to Bunn, it is assumed that the alleged discriminatory acts occurred on January 31, 1994, and that his OSC charge was filed on April 15, 1997.

It can readily be determined, therefore, that Bunn filed his charge with OSC some 1,170 days or more than three (3) years, after the alleged discriminatory event, or well beyond the 180-day statutory filing period. The current record reveals no information regarding either the date upon which Bunn filed his EEOC charge, how long the proceeding was pending or when it was finally decided. Without those critical facts, it cannot be determined whether Bunn's claim of citizenship status discrimination was timely filed, in accordance with the wording of the MOU.

However, the inability to reach a conclusion regarding the timeliness issue is immaterial because it has already been decided that Bunn's citizenship status claim fails on two other independent grounds, those being his failure to state a claim upon which relief can be granted and the lack of the required subject matter jurisdiction.

Moreover, because the 1989 MOU predates the 1990 enactment of the document abuse cause of action and only refers to national origin and citizenship status discrimination, "the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline." *Toussaint v. Tekwood Assocs., Inc.*, 6 OCAHO 892, at 11 (1996); *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 879, at 11 (1996). Consequently, Bunn's claim of document abuse is being dismissed as having been untimely filed, also.

In view of the foregoing, complainant's September 11, 1997, Complaint alleging citizenship status discrimination and document abuse in violation of section 1324b(a)(1) and (6) of IRCA is hereby ordered to be and is dismissed with prejudice to refiling.

JOSEPH E. MCGUIRE
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 a timely review of this 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 this Order.