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

April 14, 1997

MICHAEL L. SMILEY, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00049
CITY OF PHILADELPHIA, DEPT. OF LICENSES AND INSPECTIONS, Respondent.	)

FINAL DECISION AND ORDER DISMISSING COMPLAINT

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, for Complainant
Howard Lebofsky, Esq., Deputy City Solicitor, City of Philadelphia, on Behalf of Respondent

I. *Introduction and Procedural History*

This case, one of a number of substantially similar actions brought before this forum by John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee (Committee), as Complainant's representative, treads a well-worn path which rejects employer liability under 8 U.S.C. §1324b when a job applicant or employee tenders improvised documents as a predicate for claiming exemption from tax withholding and social security contribution. *See 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*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL

131346 (O.C.A.H.O.), and *Lee v. Airtouch Communications*, 6 OCAHO 888 (1996), 1996 WL 675579, *appeal filed*, No. 97–70124 (9th Cir. 1997). *See also Horne v. Hampstead (Horne I)*, 6 OCAHO 884 (1996), 1996 WL 658405 (O.C.A.H.O.).[1]

The impediments to the causes of action in those cases also pervade the §1324b Complaint of Michael L. Smiley (Complainant or Smiley). In addition, at the threshold a question arises of immunity from suit under the Eleventh Amendment on the part of the City of Philadelphia (Respondent or Philadelphia) as a municipal employer in a tax avoidance suit. Philadelphia's meager reliance in its pleadings on state sovereign immunity, limiting its argument to an analog of 42 U.S.C. §1983, may well arise from doubt that immunity is available under Pennsylvania law, as more fully discussed below. Although discussed in an interlocutory order in *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915 (1997) (Order Finding Jurisdiction), a §1324b case arising in Texas, the issue of municipality immunity to suit under §1324b has not previously been addressed in a final decision and order.

Smiley alleges that Philadelphia violated 8 U.S.C. §1324b by discriminating against him as his employer on the bases of national origin and citizenship status and by committing §1324b(a)(6) document abuse, all for failure to accept certain improvised documents as the predicate for avoiding income tax withholding and social security trust fund contributions. I hold that: (1) 8 U.S.C. §1324b is unavailable to compel an employer to accept an applicant/employee's tender of self-styled, unofficial documents claiming tax and social security exemption; (2) an employer who refuses to acknowledge and act upon those documents does not discriminate against the applicant or employee within the meaning of §1324b(a)(1); and (3) an employer who refuses to recognize improvised documents does not by rejecting them commit document abuse in violation of §1324b(a)(6). I also hold that the defense of sovereign immunity is not available to Philadelphia on a §1324b claim.

The first act in this tax avoidance drama took place on June 22, 1992, in Philadelphia, the City of Brotherly Love, where City Housing and Fire Inspector Smiley made an abortive attempt to per-

[1] *See also Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 (1996) 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996), which differs to the extent that neither Kotmair nor the Committee appear of record.

suade Philadelphia that he was tax-exempt ***because*** he is a United States citizen. In Smiley's words:

> On June 22, 1992, I filed citizenship papers with my personnel unit at the Dept. of L&I and the City of Phila. has continuously refused to act upon my wishes to cease withholding income taxes and social security withholdings as I have requested that they do (as this is a voluntary system of withholding) that I have informed them that I have withdrawn from officially, in acting in the manner that they have my employer has denied me my right as a US Citizen under the Constitution.

OSC Charge No. 62–35, at ¶9. Presented with Smiley's self-styled documents—an "Affidavit of Constructive Notice" that Smiley, as a United States citizen, was exempt from taxation, and a "Statement of Citizenship"[2] to the same effect—Philadelphia ignored his home-grown attempts to exempt himself from the Internal Revenue Code (IRC) and Social Security Act (SSA).

On August 23, 1995, more than three years after Smiley first confronted Philadelphia with the improvised, unofficial "citizenship papers," Smiley filed discrimination Charge No. 170952067 with the Equal Employment Opportunity Commission (EEOC), Philadelphia Branch Office. OSC Charge No. 62–35, at ¶8.

Apparently receiving no satisfaction from EEOC, Smiley on January 2, 1996, filed a charge based on the same set of facts, alleging citizenship status and national origin discrimination and document abuse, with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Department of Justice. OSC Charge No. 62–35, at ¶8.

By an undated letter, OSC subsequently informed Kotmair, as "representative of . . . [nine] injured parties" including Smiley, that his charge was "not timely filed with this Office" and that "there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. §1324b . . . [or] document abuse under 8 U.S.C. §1324b(a)(6)." OSC advised that it had "decided not to file any complaint with an Administrative Law Judge [ALJ] with re-

[2]The "Statement of Citizenship," which Smiley offered to show that he was not subject to income tax withholding and social security deductions, is ***not*** to be confused with official INS Forms N–560 or N–561, which are INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v)(A)(2) (1997).

gard to the above referenced charges" and informed him of "the right to file a civil administrative complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO)" within 90 days of receipt of the OSC letter.

On May 14, 1996 Kotmair filed a complaint on Smiley's behalf, signing the Complaint "under the enclosed Power of Attorney." Smiley's Power of Attorney, notarized on December 6, 1995, gave Kotmair in his position of Director of the National Worker's Rights Committee "permission to inquire of, and procure from, City of Philadelphia Department of Licenses and Inspection . . . any and all authenticated copies of the records pertaining to any matter involving: the withholding of taxes (including but not limited to a Statement of Citizenship) that either City of Philadelphia . . . or the Internal Revenue Service (IRS) alleges I may owe [and] . . . any claim of levy." This document was on its face ineffective to confer upon Kotmair the power to represent Smiley before this forum. However, on August 26, 1996, Kotmair filed a notice of appearance pursuant to 28 C.F.R. §68.33(b)(5), accompanied by a new power of attorney dated July 31, 1996, which cured the defect and is effective to confer authority to represent Complainant.

The OCAHO Complaint alleges that Philadelphia discriminated against Smiley, a U.S. citizen, on the basis of national origin and citizenship, and committed document abuse, by refusing to accept a "Statement of Citizenship" and "Affidavit of Constructive Notice," "Documents which asserted his statutory rights not to be treated as an Alien for any reason or purpose under the legal practices of the City." Complaint at ¶¶8, 9, 10, 16. However, the Complaint denies that Smiley was "knowingly and intentionally not hired" or discharged, or that Smiley was "intimidated, threatened, coerced or retaliated against because . . . [he] filed or planned to file a complaint." Complaint at ¶¶13, 14, 15. Although an incumbent employee, Smiley requests back pay from June 22, 1992. Complaint at ¶¶20, 21.

A. *Notice of Hearing (NOH) was issued on June 12, 1996.*

On July 16, 1996, Respondent filed its Answer, denying discrimination. As affirmative defenses, Respondent contends, *inter alia*, that the action characterized as discriminatory "was required in order to comply with Federal, State and local regulations," that

"Complainant is subject to withholding taxes under 26 U.S.C. §3402," 72 P.S. §7316, and 19 Phil. Code §1504, that "Complainant is not entitled to back pay" because pay was not withheld, that its actions were "in accord with the laws of the United States," and that the Complaint fails to state a cause of action upon which relief can be granted. Respondent also asserts qualified immunity under 42 U.S.C. §1983.[3]

On December 27, 1996, Complainant filed a gratuitous Reply to Affirmative Defenses, reciting his interpretation of *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935), to the effect that Congress lacked constitutional authority to create the Social Security System, to which Smiley therefore need not contribute; correctly observing that Philadelphia failed to identify the "indispensable parties" whose lack of joinder it asserted flawed Respondent's Complaint; touting the authority of Smiley's improvised "Statement of Citizenship" and "Affidavit of Constructive Notice;" noting that Philadelphia misconstrued the exception in 8 U.S.C. §1324b(a)(2)(c); arguing that the "withholding of income taxes [is] only imposed upon non-resident aliens;" stating that the Complaint is based "on the Citizenship of the Complainant and the Respondent's admission . . . [of its] refusal to honor" the documents tendered, and assert-

[3] Philadelphia asserts qualified immunity under 42 U.S.C. §1983 (which permits a municipality to be sued "like every other §1983 'person'" for "constitutional deprivations visited pursuant to governmental 'custom,'" *Monell v. Dept. of Social Serv.*, 436 U.S. 658, 690–91 (1978)). However, municipalities ***lack*** qualified immunity for constitutional violations (*see Owen v. City of Independence*, 445 U.S. 622 (1980), discussed *infra*, at 9). Even more to the point, as construed by the Third Circuit, qualified immunity in the 42 U.S.C §1983 municipal employment discrimination context applies only to the individual liability of legislators acting in their official legislative capacities. *See Carver v. Foerster*, 102 F.3d 96, 99 (3d Cir. 1996); *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1290–91 (3d Cir. 1989); *Aitchison v. Raffiani*, 708 F.2d 96, 99 (3d Cir. 1983).

Significantly, the Supreme Court in 1993 rejected

a claim that municipalities should be afforded qualified immunity, much like that afforded individual officers, based on the good faith of their agents. . . . [***U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under §1983.***

Leatherman v. Tarrant County Narcotics and Intelligence Unit, 507 U.S. 163, 166 (1993) (emphasis added).

Although Philadelphia does not raise an "arm of the state" immunity defense, its reliance on supposed immunity from 42 U.S.C. §1983 occasions the need to resolve the question of Philadelphia's amenability to §1324b actions. For an earlier discussion of §1324b municipal liability *see Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915.

ing that Philadelphia tramples Smiley's rights by treating him "as a non resident alien."

On March 13, 1997, based on Philadelphia's silence regarding his gratuitous motion, Kotmair filed a Motion for Default Judgment under 28 C.F.R. §68.9(b), on the basis that Philadelphia failed to respond to Complainant's reply to its affirmative defenses.

On March 24, 1997, Philadelphia filed an opposition to the motion for default, arguing that Philadelphia was not served with Smiley's reply, and that (in any event) it was under no statutory obligation to respond:

> If the complainant was correct in his supposition regarding responsive pleading, then every pleading would require a reply, every reply would require a corresponding reply, every reply to a reply would require a corresponding reply, and so on.
>
> If the Office of the Chief Administrative Hearing Officer accepted the complainant's position, then Administrative Procedure would be nothing more than a hall of mirrors, lacking in substance, containing nothing more than hollow images, infinitely reflecting the images preceding them.

Patently, Complainant's motion in reply to the affirmative defenses is an unauthorized pleading in the absence of a request to the Judge for leave to make such filing. 28 C.F.R. §68.9(e).[4] No request was made. Fairness, efficiency, and sound administration of justice demand no less; Respondent's aphorism, referring to a hall of mirrors, is well-taken. Without further discussion, the motion for default is denied, and the reply to the affirmative defenses is stricken.

On April 8, 1997, Philadelphia filed a motion to dismiss dated April 4, with a memorandum of law in support. Because the motion raises no issues not otherwise addressed in this Final Decision and Order, the preparation of which was substantially complete by April 8, and because of extensive OCAHO precedent rejecting claims such as Smiley's,[5] neither justice nor efficiency warrant delaying this issuance in order to discuss the motion or await a response by Complainant.

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[4]Title 28 C.F.R. §69.9(e) (Amendment and Supplemental Pleadings) provides:

[T]he Administrative Law Judge may . . . allow appropriate amendments to complaints and other pleadings . . . [and] upon reasonable notice and such terms as are just, permit supplemental pleadings.

[5]See cases cited in the first paragraph of this Final Decision and Order, *supra* at 1.

II. *Discussion and Findings*

An incumbent employee's complaint regarding terms and conditions of employment fails to state a claim upon which relief can be granted under 8 U.S.C. §1324b. *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 4, 1997 WL 13146, at *5.[6] This is so because ALJ power under §1324b(a)(1) is limited to discriminatory failure to hire and discharge, and does not include terms and conditions of employment. A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege either refusal to hire or wrongful discharge compels a finding of lack of §1324b(a)(1) subject matter jurisdiction.

To the same effect, an incumbent employee who alleges that his employer refused to accept gratuitously tendered, improvised documents purporting to prove that the employee is exempt from federal tax withholding and social security wage deductions fails also to state a legally cognizable cause of action under IRCA. "[N]othing in the employment eligibility verification system requires an employer uncritically to accept . . . [an] employee's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes . . ." *Lee v. Airtouch Communications*, 6 OCAHO 888, at 5 (1996), 1996 WL 675579, at *4. There can be no 8 U.S.C. §1324b(a)(6) cause of action where the employer does not request documents as part of the employment eligibility verification process, and where the employee tenders documents that are not statutorily prescribed for employment eligibility verification purposes. *Boyd v. Sherling*, 6 OCAHO 916, at 18–21; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 148820, at *7; *Horne v. Hampstead (Horne II)*, 6 OCAHO 906, at 4, 1996 WL 131346, at *3; *Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *13; *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13, 1996 WL 780148, at *10; *Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *6 (O.C.A.H.O.).

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

A. The Eleventh Amendment Does Not Shield Philadelphia From §1324b Suit

Complainant alleges discrimination based on citizenship status. ALJs exercise jurisdiction over citizenship discrimination complaints of "protected" individuals, including citizens or nationals of the United States and aliens lawfully admitted for permanent residence. 8 U.S.C. §1324b(a)(1)(B), §1324b(a)(3). Smiley contends that he is a United States citizen, and Philadelphia does not dispute this. I find, therefore, that on the date he applied for the job and at all other times relevant, Complainant was within a class of individuals protected by §1324b.

This finding, however, does not end the need for a threshold analysis. Title 8 U.S.C. §1324b is silent on the subject of state sovereign immunity. In a recent case, the United States Court of Appeals for the Tenth Circuit held that §1324b does not reach state employees. *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 507 (10th Cir. 1994), *reh'g denied*. *Hensel* holds that because §1324b does not waive Eleventh Amendment state immunity, such claims must be dismissed for want of jurisdiction. *Id*. at 508. More recently, in a case unrelated to §1324b jurisdiction, the Supreme Court emphasized that Congress can only abrogate Eleventh Amendment state immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1123 (1996) (quoting *Dellmuth v. Muth*, 109 S.Ct. 2397, 2399–2400 (1989)). No such intention is manifest from the text of §1324b.

Accordingly, it is necessary to determine: (1) whether Philadelphia, a municipality, is sheltered by Eleventh Amendment state immunity; and (2) whether, on finding that Philadelphia is so sheltered, a municipality is amenable to suit in federal court for federal civil rights violations. To make these determinations, I am guided by Supreme Court and Third Circuit[7] precedent, as well as by state law. If Philadelphia is not an arm of the state, I have jurisdiction over the Complaint. To similar effect, if municipal immunity is unavailable, I may exercise jurisdiction.

[7]8 U.S.C. §1324(b)(i)(1) provides that a party may seek review of a §1324b case "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." Philadelphia is located within the United States Court of Appeals for the Third Circuit.

As explained below, on the basis of Supreme Court and Third Circuit authority, I conclude that Philadelphia cannot successfully defend on the basis of the Eleventh Amendment.

1. *Supreme Court Precedent*

The Eleventh Amendment to the United States Constitution divests federal courts of jurisdiction in suits against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1871 (1990).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C. Const. Amend. XI. While the amendment literally only addresses suits by a citizen of a state other than that against which relief is sought, the Supreme Court has extended this prohibition to suits by all persons against a state in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Pennhurst State Sch. and Hosp. v. Halderman*, 104 S.Ct. 900, 907 (1984); *Employees v. Missouri Dept. of Public Health and Welfare*, 93 S.Ct. 1614, 1615 (1973).

There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Dellmuth v. Muth*, 109 S.Ct. at 2399–2400. Secondly, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Atascadero State Hosp. v. Scanlon*, 105 S.Ct. 3142, 3146 (1985); *Clark v. Barnard*, 2 S.Ct. 878, 882 (1883).

It is well-established that state agencies and entities may be understood to act as the state's alter-ego so as to benefit from state sovereign immunity.[8] In contrast, the Supreme Court has held, in an apparently unbroken chain of cases beginning in 1890, that political subdivisions such as counties and cities do not ordinarily obtain Eleventh Amendment immunity.[9]

For example, in *Lincoln v. Luning*, the Court held Nevada counties liable to suit because "the eleventh amendment limits the jurisdiction [of circuit courts] only as to suits against a state." 133 U.S. 529,

[8]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).

[9]See the analysis in *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915.

530 (1890). And in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, the Court rejected a municipal school board's assertion of Eleventh Amendment immunity, holding that "the bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations." 97 S.Ct. 568, 572 (1977). In *Monell v. Department of Social Serv. of New York City*, the Court held municipalities and local governing units liable to suit under 42 U.S.C. §1983 where official municipal policy causes a constitutional tort. 98 S.Ct. 2018, 2035–2036 (1978) (overruling *Monroe v. Pape*, 81 S.Ct. 473 (1961)).

Again, in *City of Lafayette, La. v. Louisiana Power & Light Co.*, declaring that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them," the Court held municipalities to be among those "persons" subject to federal antitrust laws. 98 S.Ct. 1123, 1135 (1978). The Court also observed in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency* that it had "consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" 99 S.Ct. 1171, 1177 (1979). "By its terms, the protection afforded by that Amendment is only available to 'one of the United States.'" *Id.* at 1176.

In *Owen v. City of Independence, Missouri*, 100 S.Ct. 1398, 1407, 1413–415 (1980),[10] the Court denied a municipality immunity from 42 U.S.C. §1983 liability for due process violations. Because §1983 failed to specify any privileges, immunities, or defenses, the Court found cities to be within the statute's reach. *Id.* at 1407. The Court also held that public policy dictates that municipalities be included among those "persons" liable for civil rights violations. "[T]he threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Id.* at 1415. And the Court found defenses to a federal right of action, including a city's claim of sovereign immunity, to be controlled by federal law. *Id.* at 1413–14.

The Supreme Court in *Owen* undertook a textual analysis. By the Court's methodology, broad statutory language—coupled with si-

[10]Limiting the reach of §1983, the Supreme Court in 1989 held that §1983 did not abrogate ***state*** immunity, but refused to extend such immunity to cities. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2305 (1989).

lence on the subject of privileges, immunities, and defenses—means that municipalities are liable in federal court for civil rights violations. *Owen*, 100 S.Ct. at 1407.

> Its [the statute's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act [§1983] imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities of the Constitution and laws." And *Monell* [*supra*] held that these words were intended to encompass municipal corporations as well as natural "persons."

Id.

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. . . . By including municipalities with the class of "persons" subject to violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

Id. at 1413–14 (footnote omitted).

Title 42 U.S.C. §1983 provides:

> Every ***person*** [emphasis added] who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 8 U.S.C. §1324b provides:

> It is an unfair immigration-related employment practice for a person *or other* ***entity*** [emphasis added] to discriminate against any individual . . . with respect to the hiring, or recruitment . . . of the individual for employment . . . because of such individual's citizenship status.

8 U.S.C. §1324b(a)(1)(B).

The language of 8 U.S.C. §1324b, like that of §1983, is both "absolute" and "unqualified." Like §1983, §1324b does not specify privileges or immunities, although it enumerates a limited number of defenses. Moreover, on its face, §1324b, but not §1983, includes "other entit[ies]" among those subject to its mandate. Therefore, §1324b may be understood to be even more sweeping in application than is §1983. It would be consistent with the Supreme Court's rejection in *Owen*, *supra*, and *Monell*, *supra*, of immunity for municipalities in

§1983 cases to conclude that silence on the subject of privileges and immunities, coupled with inclusion of the term "other entity," is sufficiently clear to confirm §1324b municipal liability.

In *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S.Ct. 394 (1994), a suit under the Federal Employers' Liability Act (FELA) by injured workers, the Court held a bistate railway created pursuant to the Interstate Commerce Clause subject to suit in federal court. Commenting that historically municipalities are not exempt under the Eleventh Amendment from federal suit, the Court nevertheless endorsed the "treasury test" to determine whether an entity is an arm of the state. *Id.* at 403–404. Because the purpose of the Eleventh Amendment is "prevention of federal court judgments that must be paid out of a State's treasury," the factor to be analyzed in order to determine state agency liability or immunity is who will pay a judgment against the entity being sued. *Id.* at 403.

Most recently, in 1996 the Supreme Court addressed state sovereign immunity in *Seminole Tribe of Florida v. Florida*, *supra*, a suit against the State of Florida to compel negotiations under the Indian Gaming Regulatory Act. The Court dismissed for want of jurisdiction, holding that even where Congress made unmistakably clear its intent to abrogate state sovereign immunity, it lacked authority to do so under the Indian Commerce Clause, which is trumped by the Eleventh Amendment. 116 S.Ct. at 1131. No intention to abrogate sovereign immunity is manifest from the text of §1324b.

Seminole notwithstanding, these cases do not support the conclusion that a city is immune from suit under federal statutes. To the contrary, the Court has clearly established that municipalities can be amenable to civil rights suits in federal court. *Owen*, 100 S.Ct. at 1407; *Monell,* 98 S.Ct. at 2035–2036; *Mt. Healthy*, 97 S.Ct. at 572. *See also Howlett v. Rose*, 110 S.Ct. 2430, 2444 (1990) (holding that "Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations," but acknowledging that the state and its arms are immune from the reach of §1983).

2. *Third Circuit Precedent*

In accord, a very recent decision of the Third Circuit provides a persuasive analog. In *Carver v. Foerster*, a §1983 civil rights action in which former employees of Allegheny County alleged that they were

improperly fired because they supported a political candidate, the Third Circuit held that

> We . . . will not undercut core doctrines of Constitutional law by applying legislative immunity to municipalities under §1983.

Carver v. Foerster, 102 F.3d 96, 104 (3d Cir. 1996). The Third Circuit is emphatic in its recognition that *Monell* and its progeny instruct that "local governments will be held responsible . . . for their violations of constitutional and federal rights." *Carver*, 102 F.3d at 100, 103 (citing *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405 n.29 and *Owen*, 445 U.S. at 635, and holding that *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) "leaves little, if any room, for the argument that the Court meant to 'preserve' [even] municipal legislative immunity," the only immunity recognized by the Third Circuit). This is because

> Local governments, unlike individual legislators, should be held liable for the losses they cause . . . local governments [do not] face the same mix of perverse incentives as [do] individual legislators when sued or threatened with a lawsuit.

Carver, 102 F.3d at 103.

In reaching this conclusion, the Third Circuit, like the *Owen* Court, found that silence on the subject of exceptions confers liability:

> [I]n *Owen* . . . the Court held that municipalities lacked qualified immunity under §1324. Justice Brennan's reasoning in the majority opinion in *Owen* bears on our resolution of this case. First, Brennan noted that the language of §1324 makes no mention of immunities or any exceptions to the scope of liability.

Carver, 102 F.3d at 102.

Section 1324b, like §1983, while silent on the subject of privileges and immunities, confers substantial federal civil rights upon its beneficiaries, including both United States citizens and aliens. Analogizing to *Carver v. Foerster*, I conclude that Philadelphia cannot invoke the shield of immunity from §1324b suit because "local governments will be held responsible . . . for their violations of constitutional and federal rights." *Carver*, 102 F.3d at 100.

3. *Pennsylvania Sovereign Immunity Distinguished*

The Pennsylvania Human Relations Code guarantees a state resident

> [t]he opportunity . . . to obtain employment for which he is qualified . . . without discrimination because of race, color, familial status, religious creed, ancestry,

> handicap or disability, age, sex, national origin, the use of a guide or support animal because of the blindness, deafness, or physical handicap of the user or because the user is a handler or trainer of support or guide animals [and establishes] . . . a civil right which shall be enforceable.

43 PA. CONS. STAT. ANN. §953 (1997). By enumerating "familial status," "ancestry," and "the use of a guide or support animal," the Code creates civil rights causes of action in addition to those federal rights embodied in Title VII and in 8 U.S.C. §1324b.

Expansive state civil rights statutes, such as Pennsylvania's, have long been construed by the Supreme Court to build upon the floor constructed by federal laws. In *California Fed. Sav. and Loan Ass'n v. Guerra*, for example, the Court agreed with the Ninth Circuit that, in enacting federal civil rights legislation affecting pregnant workers, Congress intended "to construct a floor beneath which . . . benefits may not drop—not a ceiling above which they may not rise." 479 U.S. 272, 280 (1987). The Court also agreed that federal civil rights law "does not preempt a state law [which is] . . . neither inconsistent with, nor unlawful under" the federal law. *Id*. It is established jurisprudence, of course, that state law cannot preempt federal law.[11]

Pennsylvania statutory law confirming sovereign immunity from suit against the Commonwealth and its officials in actions sounding in tort except where waived by statute is not *apropos*. *See* 1 PA. CONS. STAT. ANN. §2310. For example, Commonwealth sovereign immunity is waived as to nine enumerated tort causes of action, among them vehicular liability; medical-professional liability; bailment of personal property; commonwealth real estate, highways, and sidewalks; ***potholes*** and dangerous conditions; care, custody, or control of animals; liquor store sales; National Guard activities; and toxoids and vaccines. 42 PA. CONS. STAT. ANN. §8522(b) (emphasis added).

The Pennsylvania Political Subdivision Tort Claims Act (the Act) renders local governments and officials immune from suit for tort absent statutory waiver. 42 PA. CONS. STAT. ANN. §§8541, 8542. Immunity of local governments is waived under three conditions: (1)

[11] *See Howlett v. Rose*, 496 U.S. 356, 378 (1990) (quoting *Wilson v. Garcia*, 471 U.S. 261, 269 (1985) to the effect that "To the extent that . . . [state] law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. 'Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action'").

where damages would be recoverable under common law or statute were there no immunity, and (2) the injury is the result of negligence, and (3) the injury relates to vehicular liability; care, custody, or control of personal property; trees, traffic controls, and street lighting; utility service facility; streets; ***sidewalks***; and care, custody, or control of animals. 42 PA. CONS. STAT. ANN. §8542 (emphasis added).

What doubt there might be that statutory waiver of such torts as implicate ***pothole*** or ***sidewalk*** deficiencies would be construed to forbid suit for federal civil rights actions has been resolved in favor of waiver. *See Coffman v. Wilson Police Dept.*, 739 F. Supp. 257, 266 (E.D. Pa. 1990) to the effect that the Act does not bar a 42 U.S.C. §1983 suit ("the immunity granted covers only torts and, at that, only claims sounding in negligence"). To the same effect, with respect to an immunity defense by the Commonwealth on behalf of state police officers, *see Heinly v. Commonwealth*, 153 Pa. Cmwlth. 599, 621 A.2d 1212, 1215, 1216 (1993) (relying on *Howlett v. Rose*, *supra*, for the proposition that the Supreme Court "held that the supremacy clause of the United States Constitution prevents a state from immunizing state actors from liability imposed under federal law," holding that "[b]ecause the Pennsylvania Sovereign Immunity Act does not immunize the [unnamed police defendants] from a . . . cause of action created under federal law, Heinly's §1983 action cannot be foreclosed merely because the conduct of the [defendants] does not fall within any of the exceptions to immunity"). I agree with the *Coffman* court's understanding of "the limited scope of the statute granting partial immunity to municipalities." *Coffman*, 739 F. Supp. at 266.

That municipalities are routinely held to be amenable to suit in Commonwealth courts for violations of Pennsylvania prohibitions against discrimination is confirmed by legions of cases which assume jurisdiction without reference to state sovereignty. *See, e.g., Civil Serv. Comm'n of City of Pittsburgh v. Pennsylvania Human Relations Comm'n*, 527 Pa. 315, 591 A.2d 281 (Sup. Ct. of Pa. 1991); *Pittsburgh Dept. of Public Works v. Foster*, 669 A.2d 492 (Pa. Cmwlth. 1995), *appeal denied* 677 A.2d 840, 544 Pa. 670 (1996). Consistent with *Coffman* and Pennsylvania authorities, I conclude, as at page 12, *supra*, that the sovereign immunity defense is not available to Philadelphia so as to override 8 U.S.C. §1324b.

Having rejected the implications that sovereign immunity controls the disposition of this proceeding, it is appropriate to address the merits of Smiley's Complaint.

B. *Smiley's Claim Is Untimely*

Filed at best well over three years[12] after the alleged discriminatory event, Smiley's Complaint is substantially out of time. IRCA requires that a charge be filed within 180 days of the allegedly discriminatory event. 8 U.S.C. §1324b(d)(3); 28 C.F.R. §68.4 ("An individual must file a charge with the Special Counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice"). The OSC Charge states that Smiley on June 22, 1992 tendered Philadelphia a "Statement of Citizenship" which was subsequently disregarded. The OCAHO Complaint requests back pay from June 22, 1992, the date on which Philadelphia presumably began to "discriminate" against Smiley. As OSC noted in its determination letter, "the charge was not timely filed" within 180 days of the alleged June 22, 1992 discrimination. Smiley is out of time. A complaint not timely filed must be dismissed. *Riddle v. Dept. of Navy*, 1994 WL 547840, at *1 (E.D.Pa. 1994).

C. *Where Subject Matter Jurisdiction Is Lacking, the Forum May Sua Sponte Dismiss the Complaint*

The Supreme Court instructs that federal ALJs are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction, subject to identical jurisdictional strictures. *Boyd v. Sherling*, 6 OCAHO 916, at 6; *Winkler v. Timlin*, 6 OCAHO 912, at 4, 1997 WL 148820, at *3; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 5, 1997 WL 131346, at *3.

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes

[12]The EEOC Complaint was filed August 23, 1995; the OSC Charge, January 2, 1996; and the OCAHO Complaint, May 9, 1996. By Final Agreement (Memorandum of Understanding) [MOU] Between EEOC and OSC, 54 FR 32,499 (1989), a timely filing in one agency is deemed timely in the other. However, even assuming that an EEOC filing would have effectively tolled Smiley's claim so as to overcome an untimely filing of a OSC charge, Smiley's EEOC filing was so hopelessly out of time as to render the MOU unavailing.

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).

"The person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation." *Packard v. Provident Nat'l* Bank, 994 F.2d 1039, 1045 (3rd Cir. 1993), *cert. denied sub nom Upp v. Mellon Bank*, 510 U.S. 964 (1993). The party invoking a forum's subject matter jurisdiction therefore bears the burden of proving it. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977).

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.

Fed. R. Civ. P. 12(h)(3); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884); *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426 (3rd Cir. 1983); *Doughan*, 1996 WL 502288, at *1; *Erie City Retirees Ass'n v. City of Erie*, 838 F. Supp. 1048, 1050–51 (W.D. Pa. 1993).

A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). In so doing, a forum is not free to expand or constrict jurisdiction conferred by statute. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). To determine subject matter jurisdiction, a forum must "construe and apply the statute under which . . . asked to act." *Chicot*, 308 U.S. at 376.[13]

Furthermore, 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

[13] *See Coffman v. Wilson Police Dept.*, 739 F. Supp. at 267 (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976) "federal courts . . . are courts of limited jurisdiction marked out by Congress").

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 535 (internal quotations omitted) (citing *Ex parte Poresky*, 290 U.S. 30, 31–31 (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. In such cases, the forum should dismiss the complaint. *Erie City Retirees Ass'n*, 838 F. Supp. at 1049. Where it is "patently obvious" that, on the facts alleged in the complaint, the complainant cannot prevail, a forum may do so *sua sponte*. *Riddle v. Dept. of Navy*, 1994 WL 547840, at *1.

D. *The Immigration Reform and Control Act of 1986 (IRCA) Does Not Confer Subject Matter Jurisdiction Over Terms and Conditions of Employment*

1. *RCA Governs Only Immigration-Related Causes of Action*

The relevant statutes this forum must construe are 8 U.S.C. §1324b, which prohibits unfair immigration-related employment practices based on national origin or citizenship status, and §1324a(b) (Section 101 of IRCA), which obliges an employer to verify an employee's eligibility to work in the United States at the time of hire.

Section 102 of IRCA enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding 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, 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 §1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[14]

[14] See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99–1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

President Ronald Reagan's formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result."[15]

Section 101 of IRCA, 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. §§1324a(b). As implemented by the Immigration and Naturalization Serv. (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS Form I–9 within a specified period of the date of hire. The employee must produce documentation establishing both identity and employment authorization.

The employment verification system established under §1324a provides a comprehensive scheme which stipulates categories of documents acceptable to establish identity and work authorization. 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b)(1)(v). When an employer hires an individual, the latter must sign an INS Form I–9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. List A documents can be used to establish both work authorization and identity. List B documents establish only identity and List C documents establish only employment eligibility. Employees who opt to use List B and List C documents to complete the I–9 process must submit one of each type of document. Only those documents listed may be used.

The employee completing the I–9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the per-

[15] 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), 1990 WL 515872 (O.C.A.H.O.) ("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-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798 (O.C.A.H.O.).

son presenting them. The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provisions. *See* Immigration Act of 1990, P.L. 101– 649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6).

2. Section 1324b Proscribes Only Discriminatory Hiring and Firing and Document Abuse

Title 8 U.S.C. §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (O.C.A.H.O.).

As understood by the EEOC (Notice No. 915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§1324b] only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

Although he declines to give his date of hire in his OCAHO Complaint, Smiley has been Philadelphia's employee at least since June 22, 1992. Smiley sues years after hire. Smiley seeks §1324b redress not because Philadelphia refused to hire him or because Philadelphia fired him, but because Philadelphia withholds federal taxes and deducts social security contributions from his paycheck, refusing to accept improvised, unofficial documents purporting to exempt Smiley from taxation. He contests Philadelphia's mandatory statutory duty to withhold taxes, and denies his own obligation to pay taxes. Although he continues to be in Philadelphia's employ, Smiley requests back pay from June 22, 1992. Smiley's request is without legal authority. Smiley's claim turns on a misguided contention that only non-citizens are subject to tax withholding.

Smiley sues because his longtime employer refused to treat him preferentially by excusing him from his tax and social security obligations. To refuse to prefer is not to discriminate. Where an employer treats all alike, he discriminates against no one. Nowhere in his

pleading does Smiley describe any discriminatory treatment on any basis whatsoever. Smiley does not allege that other employees of different citizenship or nationality were treated differently, nor does he implicate the INS Form I–9 employment eligibility verification system. Among the terms and conditions of employment that an employer may legitimately and nondiscriminatorily impose is the requirement that the employee submit, as must the employer, to Internal Revenue Code (IRC) mandates. Philadelphia's decision to subject Smiley to its tax and social security regimen is not discrimination under IRCA.

The administrative enforcement and adjudication modalities authorized to execute and adjudicate the national immigration policy IRCA evinces are not sufficiently broad to address Smiley's attacks on the tax and the social security systems. Where §1324b has been held to be available to address citizenship or national origin status discrimination without implicating the I–9 process, the aggrieved individual was found to have been treated differently from others, and, unlike Smiley, consequently discriminatorily denied employment. *United States v. Mesa Airlines*, 1 OCAHO 74, at 466–467 (1989), 1989 WL 433896, at *26, 30–31 (O.C.A.H.O.), *appeal dismissed, Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991).

3. *IRCA Does Not Reach Terms or Conditions of Employment*

Section 1324b does not reach terms and conditions of employment. *Naginsky v. Department of Defense, et al.*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.), *appeal dismissed*, No. 96–2138 (1st Cir. 1997) (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)). Nothing in IRCA relieves an employer of obligations conferred by the IRC to withhold taxes and social security deductions from employees' wages. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8–16; *Winkler v. Timlin*, 6 OCAHO 912, at 8–12, 1997 WL 148820, at *8–11. Nothing in IRCA's text or legislative history prohibits an employer from complying with the IRC regimen or from asking for a social security number (the individual tax identification number). *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 148820, at *11; *Toussaint v. Tekwood Assoc.*, 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.). Nothing in IRCA confers upon an employer the right to resist the IRC 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 Smiley's Complaint, a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

E. *The Internal Revenue Code (IRC) Compels Withholding Taxes and Deducting Social Security Contributions from an Employee's Wages*

An employee cannot avoid tax liability by renouncing and revoking his social security number. *See United States v. Updegrave*, 1995 WL 606608, at *2 (E.D.Pa. 1995).

The IRC ***compels*** an employer "at the source" to withhold taxes and to deduct social security taxes from an employee's paycheck through IRS Form W–4. 26 U.S.C. §3402(a)(1); 26 C.F.R. §§31.3401(a)–1, 31.3402(b)–1, 31.3402(f)(5)–1(a). An employer who fails to collect the withholding tax is "liable for the payment of the tax required to be deducted and withheld." 26 U.S.C. §3403; 26 C.F.R. §31.3403–1.

IRS Form W–4 obliges an employee to disclose his social security number, which serves as the individual taxpayer identification number. 26 C.F.R. §301.6109–1(a)(1)(ii). A wage-earner entitled to a "social security number [must use it] for all tax purposes . . . even though . . . a nonresident alien." 26 C.F.R. §301.6109–1(d)(4). An employee who provides a statement related to IRS Form W–4 for which there is no reasonable basis "which results in a lesser amount of income tax actually deducted and withheld than is properly allowable" is subject to a civil money penalty of $500. 26 C.F.R. §31.6682–1 (False Information with Respect to Withholding).

IRCA does not restrict an employer's freedom to insist on compliance with applicable tax law as a condition of employment. *Boyd v. Sherling*, 6 OCAHO 916, at 12–15; *Winkler v. Timlin*, 6 OCAHO 912, at 8–10, 1997 WL 148820, at *10. An employer may also insist that the employee provide his individual taxpayer identification number because "[n]othing in the logic, text, or legislative history of the Immigration Reform and Control Act limits an employer's ability to

require a social security number as a precondition of employment." *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 4, 1991 WL 531895, at *3–4. *See also Winkler v. Timlin*, 6 OCAHO 912, at 11–12; *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892, at 16–17, 1996 WL 670179, at *14.

To challenge the validity of a withholding tax, employees, whether citizens or resident aliens, must follow stringent statutory procedures precedent. Before suing for tax withheld, the employee must pay the tax, apply for a refund, and, if denied, sue in ***federal district court***. *Cheek v. United States*, 498 U.S. 192, 206 (1991). Such procedures precedent do not violate the employee's right to due process. *Cohn v. United States*, 399 F. Supp. 168, 169 (E.D.N.Y., 1975). "[T]he right of the United States to exact payment and to relegate the taxpayer to a suit for recovery is paramount." *Id*.

Title 26 U.S.C. §§7421(a), 7422(a), and 7422(b) apply to ***everyone***:

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

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

Non-resident aliens, like U.S. citizens and resident aliens, have long been subject to withholding tax. *Commissioner of Internal Revenue v. Wodehouse*, 337 U.S. 369, 380, 388 n.11, 391 n.13 (1949); *Korfund Co., Inc. v. C.I.R.*, 1 T.C. 1180 (1943). The IRC mandates that tax be withheld ***even*** from non-resident aliens and foreign corporate income to the extent income is derived from U.S. sources. 26 U.S.C. §1441(a); C.J.S. Internal Revenue §§1149, 1151. It is this IRC provision on which Smiley erroneously predicates his claim that aliens, but not citizens, are subject to tax withholding.

Smiley defines Philadelphia's refusal to accord him special tax-exempt status as discriminatory. Disparate treatment is the essence of discrimination. Nowhere in his Complaint does Smiley indicate that Philadelphia treated any other employee differently from Smiley. Philadelphia's insistence that Smiley be treated as are all citizen and resident taxpayers does not constitute discrimination. To define

discrimination as the refusal to prefer, as Smiley seeks, turns discrimination law on its head.

F. *IRCA Does Not Confer Subject Matter Jurisdiction over Challenges to the Internal Revenue Code (IRC) and Social Security Act*

1. *This Forum Is Enjoined from Hearing Challenges to the IRC by Its Own Legislative Mandate and by the Anti-Injunction Act*

Smiley seeks to avail himself of this forum of limited jurisdiction in lieu of federal district court, the appropriate forum. This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action, whether or not clothed in immigration guise. 28 C.F.R. §44.300(a); *Boyd v. Sherling*, 6 OCAHO 916, at 8 (emphasis added).

"[T]he general rule is that . . . federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). ***The Supreme Court construes "collection of taxes" to embrace employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974); *see also Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 769 (9th Cir. 1986); *Weatherly v. Mallinckrodt Med., Inc.*, 1995 WL 695107, at *3 (E.D.Pa. 1995); *Barnes v. United States*, 1990 WL 42385, at *4 (W.D.Pa. 1990). "[A] suit to enjoin the . . . collection of taxes can only proceed when 'it is apparent that, under the most liberal view of the law and facts, the United States cannot establish its claim,'" if the court in which relief is sought already exercises equitable jurisdiction over the claim. *Bordo v. United States*, 1996 WL 472413, at *1 (E.D.Pa. 1996) (quoting *Enochs v. Williams Pkg. & Navigation Co.*, 370 U.S. 1, 5 (1962)); *Sutherland v. Egger*, 605 F. Supp. 28, 30 (W.D.Pa. 1984).

Where a taxpayer has fulfilled statutory conditions precedent to a suit, i.e.—paid the tax, applied for a refund, and been denied, "***[d]istrict court shall have original jurisdiction*** . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed." 28 U.S.C. §1346(a)(i) (emphasis added).

Except in these extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *International Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. §7421(a), a statute popularly known as "The Anti-Injunction Act." ***The Anti-Injunction Act provides that "no 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 added).

The purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of judicial interference." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The Anti-Injunction Act embodies "Congress' long-standing policy against premature interference with the determination, assessment, and collection of taxes." *Jericho Painting & Special Coating, Inc. v. Richardson*, 838 F. Supp. 626, 629 (D.D.C. 1993).

The Anti-Injunction Act enjoins suit to restrain activities culminating in tax collection. *Linn v. Chivatero*, 714 F.2d 1278, 1282, 1286–87 (5th Cir. 1983); *Hill v. Mosby*, 896 F. Supp. 1004, 1005 (D.Idaho 1995). ***"Collection of tax" under the Anti-Injunction Act includes tax withholding by employers***. *United States v. American Friends Serv. Comm.*, 419 U.S. at 10.

The Anti-Injunction Act mandates anticipatory withholding of taxes from all potential taxpayers, foreign and domestic, and is not limited to actions initiated after IRS assessments. *International Lotto Fund v. Virginia State Lottery Dept.*, 20 F.3d at 592. Even where the taxpayer is a foreign entity, possibly protected by an international treaty, and the collection of the tax may be legally dubious, the Anti-Injunction Act protects the collecting agent from suit. *Yamaha Motor Corp., USA v. United States*, 779 F. Supp. 610, 612 (D.D.C. 1993).

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

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

> to the tax refund procedure set forth in Section 7422 of the Internal Revenue Code. . . . In order to contest the merits of a tax . . . a taxpayer may file an administrative claim for a refund after payment of the tax. Internal Revenue Code, §7422. The administrative claim must be filed and denied prior to filing . . . [an] action in the federal district court. *Black v. United States* [76 1 USTC P 9383], 534 F.2d 524 (2d Cir. 1976). [Where] the plaintiff failed to meet this jurisdictional prerequisite . . . the [c]ourt is without jurisdiction.

Melechinsky v. Secretary of Air Force, 1983 WL 1609, at *2 (D. Conn. 1983). *See also Tien v. Goldberg*, 1996 WL 751371, at *2 (2d Cir. 1996); *Humphreys v. United States*, 62 F.3d 667, 672 (5th Cir. 1995).

2. *This Forum of Limited Jurisdiction Is Not Empowered to Hear Challenges to the Social Security Act*

Challenges to the Social Security Act and the statutory requisites for its implementation do not properly implicate ALJ jurisdiction under 8 U.S.C. §1324b.[16]

The constitutionality of the Social Security Act has long been judicially acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Supreme Court has held social security's withholding system uniformly applicable, even where an individual chooses not to receive its benefits:

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

United States v. Lee, 455 U.S. 252, 261 (1982) (statutory exemption for self-employed members of religious groups who oppose social security tax available only to the self-employed individual and unavailable to employers or employees, even where religious beliefs are implicated).

> We note here that 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.

[16]Title 42 U.S.C. §418(d)(3), (6)(C), "Voluntary Agreements for Coverage of State and Local Employees" (1997), provides a Social Security opt-out provision for public employees in states, including Pennsylvania, which elect to adopt a two-tier retirement system subject to certain conditions. Smiley does not assert that Pennsylvania has adopted such a system, nor does he seek claim relief under this Title. Even if he did, however, this forum is not empowered to grant relief for violation of that statute.

The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system." *Lee*, 455 U.S. at 258.

> "[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 security program providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id.

Smiley argues that one may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, an employee 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.

G. *This Forum Lacks Subject Matter Jurisdiction over Smiley's National Origin Claim*

This forum's adjudication of Smiley's national origin discrimination claim is barred because the forum has no jurisdiction over employers of more than fourteen employees, such as Philadelphia; because the claim has already been adjudicated by EEOC, the proper forum; and because it is legally insufficient.

I take official judicial notice of the fact that Philadelphia is an employer of well over fifteen employees. This forum's adjudication of Smiley's Complaint is therefore precluded, because it is well-established that ALJs exercise jurisdiction over national origin discrimination claims only where employers employ more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. §1324b(a)(2)(B); *Huang v. United States Postal Serv.*, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), *aff'd*, *Huang v. Executive Office for Immigration Review*, 962 F.2d 1 (2d Cir. 1992) (unpublished); *Akinwande v. Erol's*, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); *Bethishou v. Ohmite Mfg.*, 1 OCAHO 77, at 537 (1989), 1989 WL 433828, at *3 (O.C.A.H.O.); *Romo v. Todd Corp.*, 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), *aff'd*, *United States v. Todd Corp.*, 900 F.2d 164 (9th Cir. 1990). This forum has no jurisdiction over Smiley's claim of national origin discrimination because Philadelphia employs more than fourteen employees.

Smiley's pleadings confirm that on August 23, 1995, he filed an EEOC claim which was dismissed, arising out of the same facts as in the present case. Although he provides no details, 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, 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. Because dismissal for failure to state a claim is a merits disposition insofar as the parties are covered by Title VII, even though the underlying charge may fail to state a cognizable claim, Smiley's national origin claim is vulnerable also to the prohibition against overlap between §1324b and Title VII. 8 U.S.C. §1324b(b)(2). See *Winkler v. Timlin*, 6 OCAHO 912, at 11, 1997 WL 148820, at *5.

Even had I jurisdiction over Smiley's claim of national origin discrimination, however, the Complaint fails substantively to state a claim upon which relief can be granted. A complaint of national origin discrimination which fails to specify Complainant's national origin is insufficient as a matter of law. *Boyd v. Sherling*, 6 OCAHO 916, at 23; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15, 19 WL 670179, at *11. Remarkably, Smiley does not even identify his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against United States citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Smiley's argument that he was discriminated against on the basis of national origin is based on Philadelphia's refusal to accept his improvised "Statement of Citizenship." This allegation, however, relates only to claims of document abuse and citizenship status discrimination. Because by its own terms the national origin discrimination claim is based solely on Complainant's citizenship status, it is dismissed on the additional ground of failure to state a claim upon which relief can be granted.

H. *Smiley's Citizenship Cause of Action Fails to State a Claim Upon Which Relief Can Be Granted*

Refusal to hire or discharge are the only citizenship status discrimination claims cognizable under §1324b. The entries, *seriatim*,

on Smiley's OCAHO complaint format, as well as the tenor of pleadings, indicate an ongoing employment relationship, as confirmed by the motion for default which requests back pay from June 22, 1992. The pleadings consistently point to Smiley as having been an employee of Philadelphia since 1992.

OCAHO jurisprudence makes clear that ALJs have §1324b citizenship status jurisdiction only where the employee has been discriminatorily rejected or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment. Here, although Smiley remains employed, claiming neither refusal to hire nor wrongful termination, he seeks recourse over his dispute concerning federal tax withholding and social security law compliance. See discussion at II.D.2 and 3, *supra*.

This proceeding stems from what can at best be characterized as misapprehension that ALJ jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations imposed by federal revenue law. Such philosophical and political dispute is beyond the scope of §1324b. Complainant is in the wrong forum for the relief he seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit §1324b jurisdiction that turns on an employer's tax withholding obligations. Smiley's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

I. *Smiley's Document Abuse Cause of Action Fails To State a Claim Upon Which Relief Can Be Granted*

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)," a comprehensive system whereby an employer verifies an employee's eligibility to work in the United States by means of prescribed documents. 8 U.S.C. §1324b(a)(6). The pleadings in this case fail to disclose that Philadelphia asked Smiley to produce any documents whatsoever. Accordingly, there is no basis on which to posit §1324b document abuse.

Smiley's Complaint has nothing to do with the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. For example, Smiley explicitly denies that he tendered his "Statement of Citizenship" for the purpose of employment eligibility verification implicated by the §1324a(b) requirement. Complaint at ¶17. In fact, Smiley disclaims that Philadelphia asked for wrong or different documents than those required to show work authorization, denying in effect that he was the victim of document abuse in violation of §1324b(a)(6). Complaint at ¶17. Instead, Smiley asserts that Philadelphia refused to accede to his representation that he was a tax-exempt individual by refusing to accept tendered improvisational documents unrelated to the employment eligibility verification system. The unofficial documents Smiley insists should have been accepted by Philadelphia for tax exemption purposes have no place in the §1324a(b) process.

The holding in *Lee v. Airtouch Communications*, 6 OCAHO 901, at 13, 1996 WL 780148, at *10 is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Assoc., Inc.*, 6 OCAHO 892 at 18–21 (1996) and cases cited therein.

Because nothing in the Complaint implicates obligations of an employer under §1324a(b), I lack subject matter jurisdiction over Smiley's §1324b(a)(6) allegations.

III. *Conclusion*

Where no set of facts can be adduced to support a complainant's claim for relief, and where the complaint affords a sufficient basis for the forum's action, the forum may dismiss the complaint *sua sponte*. *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3rd Cir. 1990).

The decision to grant or deny leave to amend is within the forum's sound discretion. *Coventry v. United States Steel Corp.*, 856 F.2d 514, 518 (3rd Cir. 1988) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The amendment of complaints is generally favored. *See Roman v. Jeffes*, 904 F.2d 192, 196 n.8 (3rd. Cir. 1990); *Weaver v. Wilcox*, 650

F.2d 22, 27–28 (3rd. Cir. 1981); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 923 (3rd. Cir. 1976); *Kauffman v. Moss*, 420 F.2d 1270, 1275–76 (3rd. Cir. 1970), *cert. denied*, 400 U.S. 846 (1970). As the Third Circuit instructs, the forum's reasons for denying leave to amend should be enumerated. *Coventry v. United States Steel Corp.*, 856 F.2d at 518. I dismiss Smiley's complaint without leave to amend because his tax challenge, though clothed in transparent immigration-related labor law verbiage, cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice; whatever currency it may have in other circles, as to this forum it is disingenuous and frivolous. Tax challenges, however disguised, are beyond this forum's jurisdictional reach. By its very nature, the Complaint cannot credibly be amended to an immigration-related cause of action.

Taking all Smiley's factual allegations as true, and construing them in a light most favorable to Smiley, I determine that Smiley is entitled to no relief under any reasonable reading of his pleadings. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3rd. Cir. 1988), *cert. denied*, *Upper Darby Township v. Colburn*, 489 U.S. 1065 (1989); *Rumfola v. Murovich*, 812 F. Supp. 569, 572 (W.D.Pa. 1992). Even if, as Smiley claims, in 1992 he gratuitously tendered to Philadelphia documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Philadelphia refused to honor these documents and insisted on making payroll tax and social security deductions, Philadelphia's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Smiley describes simply does not support the ***immigration-related*** causes of action he pleads. Smiley's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside of IRCA.

Furthermore, the ALJ is precluded from hearing this suit not only by the limits of §1324b powers, but by the IRC, which immunizes employers from suit when they withhold tax and social security contributions from wages, and by the Anti-Injunction Act, which prohibits courts from hearing such a claim where the taxpayer has not followed statutory conditions precedent.

(a) *Disposition*

Smiley's Complaint, having no arguable basis in fact or law, is not justiciable in this forum. The Complaint is dismissed because it is

untimely, because this forum lacks subject matter jurisdiction over it, because it fails to state a claim upon which §1324b relief can be granted, and because the Anti-Injunction Act precludes ALJ jurisdiction in any event. 8 U.S.C. §1324b(g)(3).

All motions and other requests not specifically addressed in this Final Decision and Order are dismissed as moot.

(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).

SO ORDERED.

Dated and entered this 14th day of April, 1997.

MARVIN H. MORSE
Administrative Law Judge