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

April 29, 1997

CHRISTOPHER R. WINKLER, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00064
WEST CAPITAL FINANCIAL SERVICES, Respondent.	)

FINAL DECISION AND ORDER GRANTING MOTION TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, on behalf of Complainant.
Robert B. Clark, Esq., on behalf of Respondent.

I. *Introduction and Procedural History*

This is another in a series of cases initiated in this forum by individuals represented by John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee (Committee), challenging the lawfulness of employer compliance with federal income tax withholding and social security obligations. To date, each such case has resulted in dismissal by the administrative law judge (ALJ) of the claim that by rejecting tender of improvised documents as a predicate for claiming exemption from tax withholding and social security contribution, the employer violated 8 U.S.C. §1324b prohibitions against immigration-related unfair employment practices. *See Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997); *Wilson v.*

Harrisburg Sch. Dist., 6 OCAHO 919 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.), and *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O), *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]

Specifically, Christopher R. Winkler (Winkler or Complainant), claims that West Capital Financial Services (West Capital or Respondent) rejected his Statement of Citizenship (offered gratuitously to establish that as a citizen he is not vulnerable to tax withholding), and an Affidavit of Constructive Notice (advising that he has no social security number), discharging him on August 25, 1995 within two weeks of hire, following compliance with the employment eligibility verification regimen established pursuant to 8 U.S.C. §1324a(b). Complainant contends that by discharging him because he refused to comply with social security and tax withholding prerequisites, Respondent violated §1324b prohibitions against national origin and citizenship status discrimination and §1324b(a)(6) proscriptions against document abuse, giving rise to this cause of action.

On or about November 27, 1995, Winkler timely filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). OSC issued an undated determination letter addressed to Kotmair on behalf of Winkler and two other charging parties (against different employers), concluding that upon investigation it had no cause to believe the charges stated a §1324b cause of action. OSC advised Winkler of the right to file a complaint directly (before an ALJ) in the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. §1324b(d)(2).

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[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. For a helpful catalogue of federal court as well as OCAHO responses to challenges to withholding of federal taxes and participation in the social security system, *see Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) .

On June 21, 1996, Winkler filed his presumptively timely Complaint, which was transmitted by OCAHO to West Capital by Notice of Hearing issued June 28, 1996. The Complaint contends he was fired in violation of the prohibitions against national origin and citizenship status discrimination, and overdocumentation, "as a U.S. citizen who refused to waive my rights under Federal law. The company was given the proper documentation and refused to honor it." Complaint ¶14 b. The documents Respondent refused to accept comprised a self-styled "Statement of Citizenship (which proves that I am a citizen of the U.S. and I am not subject to the withholding of income taxes pursuant to 26 C.F.R. 1.1441–5)," and an "Affidavit of Constructive Notice (informing company that I do not have a social security #)." Complaint ¶16a.[2] Where the OCAHO complaint format calls for specification of what documents the employer unlawfully demanded, Complainant entered "Social Security Card/Number." Complaint ¶17a.

On August 8, 1996, accompanying its timely Answer to the Complaint, Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted, with exhibits, and a memorandum in support. On August 26, 1996, Kotmair filed a notice of appearance which forwarded Winkler's revised power of attorney, curing a previously insufficient power under which Kotmair filed Winkler's Complaint.[3] I granted Complainant's concurrent request for extension of time, until September 6, 1996, to respond to West Capital's motion to dismiss. On September 10, 1996, Winkler filed his Response and supporting memorandum in opposition to the mo-

[2] Winkler's improvised "Statement of Citizenship," proferred to support the claim that as a citizen he is immune from income tax withholding and social security contributions, is ***not*** to be confused with INS Forms N–560 or N–561, official certifications of United States 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).

[3] The new power of attorney dated August 11, 1996, but not the original one dated June 11, 1996, authorizes Kotmair to represent Winkler before the Equal Employment Opportunity Commission (EEOC), OSC, OCAHO and the ALJ. *See Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 5 (deficient uncured power of attorney no bar to dismissal of case where complainant filed no pleadings subsequent to the complaint); *Horne v. Hampstead (Horne I)* 6 OCAHO 884, at 4 (Order Confirming Withdrawal of Complaint) (powers of attorney similar to the first one in the present case are insufficient), 1996 WL 658405, at *3. *Compare, Winkler v. Timlin*, 6 OCAHO 912, at 5, 1997 WL 148820, at *2 (O.C.A.H.O.)*; Boyd v. Sherling*, 6 OCAHO 916, at 5 (1997) (deficient power cured by later version), 1997 WL 176910, at *3.

tion. On September 19, 1996, Respondent filed a Request for Leave to File Reply Memorandum, with memorandum enclosed.[4]

II. *Discussion and Findings*

A. *Consideration of the Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted*

OCAHO rules of practice and procedure authorize an ALJ to dispose of cases upon motions to dismiss for failure to state a claim upon which relief can be granted. 28 C.F.R. §68.10. Frequently, such a motion to dismiss is treated as tantamount to a motion for summary decision. *See* FED. R. CIV. P. 12(C) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[5]

An ALJ may "enter a summary decision for either party if the pleadings, affidavits, material obtained for discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Any

[4]Mysteriously, while the file contains an October 31, 1996 filing by Respondent in opposition to a supposed Complainant's motion for sanctions, and a Winkler reply filed December 16, 1996 countering Respondent's opposition, there is no motion for sanctions. By referring to an Answer "of July 29th 1996," Complainant's reply fails to implicate this case, where the Answer is dated August 7, 1996, filed August 8. In contrast, it may be speculated that Complainant inadvertently mailed to West Capital his "Motion to Strike Respondent's Answer and Violation of Rule 11," dated October 8, 1996, filed October 10, 1996 in *Winkler v. Timlin*, 6 OCAHO 912, 1997 WL 148820, and erroneously responded to by West Capital. Although in both cases, the identical complainant, Winkler, is represented by the same agent, Kotmair, and although the claims are substantially similar, there is no apparent nexus between the two respondents. In any event, FED. R. CIV. P. 11 sanctions would no more lie in this case than in *Winkler v. Timlin*.

The granting of Respondent's motion for summary decision overtakes Winkler's attack on it. Notable in that respect, the bellicose, strident terminology of Winkler's opposition to the motion, *e.g.*, describing the motion as "frivolously, spuriously and maliciously" mischaracterizing his statements, has no place in OCAHO litigation. Any repetition in future cases before me of similar gross unprofessionalism will hazard further representation. *See generally, Lee v. AT&T*, 7 OCAHO 924 (1997) (Order Excluding Complainant's Representative).

[5]The FEDERAL RULES OF CIVIL PROCEDURE are generally available as a guideline for the adjudication of OCAHO cases. 28 C.F.R. §68.1.

uncertainty as to a material fact must be considered in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Once the movant has carried its burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). *See United States v. Italy Dep't Store, Inc.*, 6 OCAHO 847 (Decision and Order Denying Respondent's Motion to Dismiss), 1996 WL 312113 (O.C.A.H.O.).

"'Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action.'" *United States v. Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984)), 1995 WL 367106, at *2 (O.C.A.H.O.); *United States v. Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at 3 (1994), 1994 WL 765377, at *2 (O.C.A.H.O.).

The purpose of summary decision is "to avoid an unnecessary hearing when there is no genuine issue of material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters." *United States v. Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (citing *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3 (1991)), 1995 WL 367106, at *2; *Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at *3, 1994 WL 765377, at *3. "A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enter., Inc.*, 4 OCAHO 615, at 2 (1994)), 1995 WL 367106, at *3; *Anchor Seafood Distrib., Inc.*, 4 OCAHO 718, at 3, 1994 WL 765377, at *2. In determining whether there is a genuine issue of material fact, all facts and inferences drawn from them are to be construed in favor of the non-moving party. *Id.* (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. at 586–587; *Primera Enter., Inc.*, 4 OCAHO 615, at 2). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue. . . ." *Matsushita*, 475 U.S. at 586. "Summary judgment may be based on matters deemed admitted." *Anchor Seafood Distrib., Inc.*, 5 OCAHO 742, at 5 (citing *Primera Enter., Inc.*, 4 OCAHO 615 at 3; *United States v.*

Goldenfield Corp., 2 OCAHO 321, at 3–4 (1991)), 1995 WL 367106, at *4; *Anchor Seafood Distrib., Inc.* 4 OCAHO 718, at 5, 1994 WL 765377, at *4. *See also Papike v. Tambrands, Inc.*, 107 F.3d 737, 739 (9th Cir. 1997); *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1249 (1977). In *Trevino*, quoting *Celotex Corp. v. Catlett*, 477 U.S. at 323, the Ninth Circuit, in whose domain this case falls, held that once the party moving for summary judgment satisfies its "'initial responsibility'" to inform the court "'of the basis for its motion,'" the burden

> shifts to the nonmoving party to provide evidence sufficient to establish that there is a genuine issue of material fact as to *each* element essential to that party's case on which that party will bear the burden of proof at trial.

99 F.3d at 920. (Emphasis supplied).

Here, Respondent satisfies its "initial responsibility" when it recites that Winkler refused to disclose a social security number, "insisted that West Capital withhold nothing from his paychecks and report none of his income to the Internal Revenue Service . . . West Capital was unwilling to risk a serious violation of the federal tax laws to accommodate" Winkler's "unusual request." Memorandum in Support of Motion to Dismiss at 2 (Memo). As recalled by Respondent and confirmed by Complainant,

> Nonetheless, West Capital gave the complainant the opportunity to obtain from the [IRS] a waiver of West Capital's withholding and reporting obligations.
>
> The complainant never provided West Capital with such a waiver. Instead, the complainant informed West Capital that no such waiver would be obtainable, because he was not subject to the jurisdiction of the Internal Revenue Service.

Id. at 4. *Accord*, Complainant's Response in Opposition to Respondent's Motion to Dismiss, at 11. Accompanying Respondent's motion, the Declaration of Michael A. Joplin, its President, asserts that Winkler satisfied the employment eligibility verification regimen, the INS Form I–9 procedure, by presenting his United States passport and (although unnecessary) his driver's license as proof of identity and employment eligibility. Joplin Declaration ¶¶4,5. Significantly, Winkler fails to take issue with that assertion.

In opposition, Complainant persists in arguing the merits of his claim that as a citizen of the United States he is not subject to any legal requirement to retain a social security number or to pay federal income tax withholding. Winkler's Complaint specifies that West Capital demanded a social security card and contends he was

fired because the employer refused to accede to his documentation. The only dispute of fact which survives the exchange of pleadings is whether the employer terminated the employee by mutual consent, or unilaterally in the face of his sustained refusal to confirm his social security number and to become subject to income tax withholding. Because not one of Winkler's three putative causes of action withstands scrutiny, that disagreement cannot rise to a substantial dispute of material fact.[6] Accordingly, I grant Respondent's motion to dismiss for failure to state a claim upon which §1324b relief can be granted. Moreover, Winkler's claim is driven, notwithstanding his protestations that he is not a tax protestor, either by an abiding unwillingness to share in the costs of his government or by a pervasive delusion that the incidence of withholding is only on non-citizens, and not on citizens. In either event, the ALJ is not empowered to assist him. I dismiss also for lack of subject matter jurisdiction.

1. *The Forum Lacks Subject Matter Jurisdiction over Winkler's National Origin Claim*

ALJ adjudication of Winkler's national origin discrimination claim is barred because §1324b effectively limits jurisdiction to employers of more than three and fewer than fifteen employees. 8 U.S.C. §1324b(a)(2). On the OSC charge form, Winkler candidly acknowledged his inability to estimate the number of West Capital employees, and does not challenge Respondent's assertion that it has 200 employees. Joplin Declaration ¶2. Jurisdiction over Winkler's Complaint is therefore precluded. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 14 (1997); *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). I lack jurisdiction over Winkler's claim of national origin discrimination because West Capital employs more than fourteen employees.

[6]In view of the conclusions reached as a matter of law, it is immaterial to the outcome whether the employee was terminated by mutual understanding or otherwise. It matters only, as explained below, that his claim is totally lacking as an 8 U.S.C. §1324b cause of action.

2. *Complainant Fails to State A Claim of National Origin Discrimination on Which Relief Can Be Granted*

Winkler does not identify his national origin. Even assuming jurisdiction, therefore, the Complaint fails substantively to state a claim upon which relief can be granted because at least in the face of a motion to dismiss for failure to state a claim, *inter alia*, of national origin discrimination, a claim which fails to specify Complainant's national origin is insufficient in that respect as a matter of law. *See Boyd v. Sherling*, 6 OCAHO 916, at 23, 1997 WL 176910, at *19; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15, 19 WL 670179, at *11. This is so because there is no glimmer of national origin discrimination in Complainant's pleadings, aside from his having checked off national origin discrimination as a cause of discharge both on the OSC charge form and the OCAHO complaint format.

Indeed, Winkler's pleadings are totally silent as to national origin. This silence dramatically impeaches the claim when considered in context of a nine-page supplement to the OSC charge, and a 20-page response to the motion to dismiss, both replete with references to U.S. citizenship status as immunizing against tax withholding, but with no reference to national origin. It follows that Winkler's national origin claim can be understood, if at all, to turn on West Capital's refusal to accept his improvised "Statement of Citizenship." Such an allegation, however, does not implicate national origin. 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.

3. *Of the Remaining Claims, the Complaint Fails to State A Claim on Which Relief Can Be Granted*

Winkler in effect alleges that as to him as a citizen of the United States, Respondent's insistence on completion of Form W–4 and provision of a social security number as conditions for continued employment constitute discriminatory conduct in violation of §1324b. However, in order for Respondent's conduct to have violated §1324b(a)(1)(B), it would need to have discriminated on the basis of citizenship status, and to have violated §1324b(a)(6). West Capital would need to have demanded Winkler's social security card **for the purpose of satisfying the employment verification requirements of §1324a(b)** under circumstances where the demand would

be for "more or different documents than are required." *Westendorf v. Brown & Root*, 3 OCAHO 477, at 8 (1992), 1992 WL 535635, at *6 (O.C.A.H.O.).

a. *Complainant Fails To Establish a Prima Facie Case of Discrimination Based on Citizenship Status*

The complainant has the burden of establishing citizenship status discrimination. *Winkler v. Timlin*, 6 OCAHO 912 at 8, 1997 WL 148820 at *7; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16, 1996 WL 670179, at *12; *United States v. Mesa Airlines*, 1 OCAHO 462, 500 (1989), 1989 WL 433898, at *32 (O.C.A.H.O.), *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991). In order to prevail on a claim of citizenship status discrimination a complainant must be able to prove less favorable treatment than others due to his or her citizenship. *Winkler v. Timlin*, 6 OCAHO 912, at 8, 1997 WL 148820, at *7; *Westendorf*, 3 OCAHO 477, at 12, 1992 WL 535635, at *8.

Here, Winkler checked "yes" on the OCAHO complaint format at the question whether "although [he] was fired, other workers in [his] situation of different nationalities or citizenship were not fired." Complaint ¶14e. In contrast, West Capital's rejection of his "unusual request" to participate in his tax avoidance scheme because it "was unwilling to risk a serious violation of the federal tax laws," Memo at 1, is irreconcilable with his claim that he was treated differently than others similarly situated, *i.e.*, that West Capital acceded to proposals by other employees to finesse tax withholding. Significantly, nowhere in his lengthy response to Respondent's pleadings does Complainant suggest he received less favorable treatment than others on the basis of citizenship, with exception of his claim that citizens are not subject to federal income tax withholding. I conclude that West Capital evidences a compliance disposition which negates any inference that Winkler can rationally be understood to claim that other U.S. citizens or aliens were treated differently than was he.

The dispute between the parties concerning whether Winkler is subject to withholding for income tax and social security deductions does not implicate the prohibition against citizenship status discrimination. *See Winkler v. Timlin*, 6 OCAHO 912, at 8, 1997 WL 148820, at *7. *See Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 4–5, 1997 WL 131346 at *4; *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11 n.8, 1996 WL 780148, at *11 n.8. Winkler fails to

allege one of the four essential elements of a *prima facie* case for citizenship status discrimination.

A *prima facie* case of citizenship status discrimination, adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973) and elaborated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:

> (1) he is a member of a protected class;
>
> (2) the employer had an open position for which he applied;
>
> (3) he was qualified for the position; and
>
> (4) he was rejected or discharged under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Lee v. Airtouch, 6 OCAHO 901, at 11, 1996 WL 780148, at *8.

Where a complainant establishes a *prima facie* case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Where, however, a complainant is unable to present a *prima facie* case, "the inference of discrimination never arises and the employer has no burden of production." *Lee v. Airtouch*, 6 OCAHO 901, at 11 (citing *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)), 1996 WL 780148, at *9.

Winkler can satisfy the first of the four prongs for a *prima facie* case of citizenship discrimination. As a United States citizen, Winkler is a member of a class protected by §1324b from citizenship status discrimination. *Toussaint*, 6 OCAHO 892, at 17 n.11, 1996 WL 670179, at *13, n.11. As defined by §1324b(a)(3), the class of "protected individuals" entitled to benefit from the prohibitions of §1324b(a)(1)(B) includes United States citizens.

Winkler also satisfies the second prong: West Capital had an open position for which Winkler applied.

And he satisfies the third: He was qualified for the position.

Winkler, however, is unable to satisfy the fourth prong. His explanation for discharge makes unmistakable that had he complied with tax withholding and provided a social security number he could have

remained a West Capital employee. Accepting characterization of events most favorable to Winkler, he chose not to comply with the employer's obligatory demand that its employees accommodate federal requisites for income tax and social security compliance. Winkler challenges the Social Security Act as inapplicable to individuals who renounce their social security numbers, and cites Internal Revenue Code withholding provisions as applicable only to non-citizens. These challenges, however, even if they were not incorrect, are outside ALJ jurisdiction. Nothing in his claim permits a rational inference that West Capital discriminated on citizenship bases in not retaining him on the payroll. For discussion of the characterization of this venue as one of limited jurisdiction, *see, e.g., Smiley v. City of Philadelphia*, 7 OCAHO 925, at 15–16;*Winkler v. Timlin*, 6 OCAHO 912, at 4, 1997 WL 148820, at *11.

I do not credit Complainant's theory that only non-citizens are subject to providing social security numbers and amenable to obligatory tax withholding.[7] Complainant relies on long overtaken precedent and incomplete reading of the law.[8] But even if he were correct in those respects, his gripe is not with immigration law. Nothing in the employment eligibility verification process touches on an employee's federal income tax withholding obligations. Moreover, it is undisputed that Winkler provided documentation in response to the Form I–9 process **after** hire. Entry of a social security number in tax withholding paperwork and in Section 1 of the Form I–9 which the employee is obliged to provide after hire, is demanded not by the employer but by the government.[9] Nothing in the pleadings before me implicates citizenship status discrimination on the part of the employer. To the contrary, the gravamen of Winkler's claim is his reliance on 26 C.F.R. 1.1441–5, which provides a mechanism for a U.S.

[7]See discussion *infra*, at 14–16.

[8]See discussion *infra*, at 13–14.

[9]For example, the Attorney General is authorized at 8 U.S.C. §1324a(b)(1)(A) to establish an employment eligibility verification form; that is the Form I–9. 8 C.F.R. §274a(2). The Instructions accompanying the Form I–9 direct that "all employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for insuring that Section 1 is timely and properly completed.**" U.S. Department of Justice, Immigration & Naturalization Service Form I–9 Instructions (Rev. 11–21–91) OMB No. 1115–0136 (detailing instructions for completing INS Form I–9). (Emphasis in original).

citizen **or resident** to avoid the impact of tax withholding otherwise sought from **nonresident** aliens, foreign corporations and tax-free covenant bonds abroad. By seizing on that provision he fails to reckon with the universality of the IRC provision for collection of income taxes on wages at their source through employer withholding. 26 U.S.C. §3402.

It follows that under any conceivably reasonable reading of his Complaint, Winkler cannot establish a *prima facie* case of citizenship status discrimination. His Complaint is so attenuated and unsubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing. Winkler's insistence that he be exempted from West Capital's lawful and nondiscriminatory tax and social security compliance is a lawful, nondiscriminatory reason for terminating the employment. The Ninth Circuit instructs that even where a complainant may be able to make out a *prima facie* case, pre-trial summary judgment is appropriate where there is no evidence to refute a respondent employer's legitimate explanation, "even though there has been no assessment of the credibility of [the employer] at this stage." *Wallis v. J. R. Simplot Co.*, 26 F.3d 885, 892 (9th Cir. 1994).

Maximizing opportunities to amend discrimination complaints is generally encouraged. *See Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1535 (9th Cir. 1995); *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083, 1085 (9th Cir. 1995). Because, however, Winkler relies exhaustively and exclusively on West Capital's's refusal to accept his documents as the gravamen of his discrimination allegation, the consequential lack of any discernible meritorious §1324b claim forecasts that amendment would be futile. Winkler's citizenship status discrimination claim is, therefore, dismissed for failure to state a claim cognizable under §1324b.

b. *Winkler's Complaint Is Not Document Abuse Within the Meaning of IRCA*

Title 8 U.S.C. §1324b(a)(6) makes it unlawful for employers to demand particular documents from among the Form I–9 catalogue of documents specified for satisfying employment eligibility verification obligations. *Winkler v. Timlin*, 6 OCAHO 912, at 10–12, 1997 WL 148820, at *9; *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 535635, at *5; *Lewis v. McDonald's Corp.*, 3 OCAHO 383, at 5 (1991),

1991 WL 531895, at *3 (O.C.A.H.O.); *United States v. Marcel Watch Corp.*, 1 OCAHO 143, at 1003 (1990), 1990 WL 512142, at *13 (O.C.A.H.O.), *amended*, 1 OCAHO 169, at 1158 (1990), 1990 WL 512157 (O.C.A.H.O.). For example, were a job applicant to produce one of the documents listed in "List A" of section 2 of Form I–9, or produce one of the documents listed in "List B" and one of the documents listed in "List C" of section 2 of Form I–9, but not an original social security card, and were an employer to demand that in addition or in lieu of the proferred documents the applicant produce a social security card as a precondition of employment, §1324b(a)(6) would be violated. *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 535635, at *5.

However, Winkler does not dispute West Capital's president that Winkler tendered documents in satisfaction of the employment eligibility verification process. Therefore, any request for the social security number, even if understood as claimed in the Complaint to include the card, is independent and unrelated to the Form I–9 process. In the circumstances as delineated in the pleadings by both parties, I do not understand Winkler to have alleged that West Capital requested a social security card for purposes of establishing employment eligibility. Nor does Winkler contend that he was asked, as part of the I–9 process, to produce a social security card in preference to, in lieu of, or in addition to the other employment verification documentation which was provided.

Instead, Winkler gratuitously engaged West Capital in an exercise designed to defeat the normal applicability of tax withholding and social security compliance to the workplace. Most significantly, the face of the Complaint demonstrates the threshold deficiency in Complainant's effort to manipulate the §1324b prohibition against document abuse by cloaking challenges to United States Tax Code and Social Security Act compliance regimes in an unrelated cause of action against a prospective employer. He was fired because the employer "refused to honor" his claim as "a U.S. citizen who refused to waive my rights under Federal law." Complaint ¶14b. In this case, Winkler's employment eligibility is unrelated to his claim of document abuse. The Form I–9 identifies the documents acceptable for employment eligibility verification purposes, not one of which can be reasonably understood to embrace the two documents relied on by Complainant. Simply stated, characterizing the Complaint in a light most favorable to Winkler by assuming the *facts* in a light most favorable to him, as §1324b(a)(6) commands *in haec verba*, there can

be no violation of the prohibition against document abuse where the documents tendered are *not* documents "required under" 8 U.S.C. §1324a(b).

Assuming that Respondent demanded only Winkler's social security number, "there is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment." *Westendorf*, 3 OCAHO 477, at 10, 1992 WL 535635, at *7. "OCAHO case law correctly holds that nothing in the logic, text or legislative history of the Immigration Reform and Control Act [IRCA] limits an employer's ability to require a Social Security number as a pre-condition of employment." *Toussaint*, 6 OCAHO 892, at 17 (citing *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 4), 1996 WL 670179, at *13. "[N]othing in IRCA limits an employer's ability to require a Social Security number as a precondition of employment . . . [unless an employer] applies this requirement in a discriminatory way." *Toussaint*, 6 OCAHO 892, at 18–19, 1996 WL 670179, at *14. "Because a request for a social security number is not a request for a document at all, this [request] . . . does not implicate any issues which come within the jurisdiction of OCAHO." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 7 (1996), 1996 WWL 780148, at *9. But Winkler checked off on the complaint format that the employer asked for a "social security card/number," not a number alone. Complaint ¶17a. He also checked off that he was asked to produce "too many or wrong documents than are required to show work authorization." Complaint ¶17. Patently, he is in error, as he had already provided Form I–9 documentation and he leaves no doubt that his entire claim turns **exclusively** on his insistence that the employer accept his "Statement of Citizenship" and "Affidavit of Constructive Notice." Considering his own assertion that he was fired because he "refused to waive [his] rights," *i.e.*, his posture vis a vis tax withholding and social security compliance, not §1324b compliance, I conclude it is irrelevant whether he was asked to show a Social Security card as well as provide the number.

The INS Form I–9 is the document to be executed by employers and employees at the time of hire in compliance with the employment eligibility verification regimen established to implement the statutory imperative of §1324a(b). Despite the reference to a "number/card," the pleadings do not suggest that West Capital requested that Winkler produce his social security card in connection with the preparation of the employer's section, §2 of the Form I–9, but rather that Winkler initiated a confrontation implicating instead his

"Statement of Citizenship" and "Affidavit of Constructive Notice." Because those documents are in derogation of the list stipulated on the Form I–9 which the Attorney General has prescribed for §1324a(b) compliance, the Complaint fails to state a cause of action for breach by Respondent of §1324b(a)(6). See *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 8–9, 1997 WL 131346, at *10.

I therefore dismiss the document abuse claim for failure to state a claim upon which relief can be granted.

5. *ALJs Lack Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act*

In *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, 1997 WL 131346, refusal to comply with the income tax and social security regimen by an individual employed by §1324b respondent was held insufficient to state an 8 U.S.C. §1324b cause of action against the employer. The present case holds that a §1324b claim against an employer that allegedly discharged an employee for failure to comply with income tax and social security imperatives:

(a) who refused to comply with federal income tax and social security accountability requirements fails to state a §1324b(a)(1)(B) citizenship status discrimination claim on which relief can be granted, and

(b) who insisted on acceptance of documents other than those identified by the Attorney General for compliance with 8 U.S.C. §1324a(b) fails to state a §1324b(a)(6) claim on which relief can be granted.

Considered as a whole, the pleadings do not support a claim that Winkler was treated differently than other employees. Winkler's contention—that judicial precedent supports the hypothesis that as a United States citizen he is less amenable to tax withholding or to social security practice and procedure than is a non-citizen—is immaterial here, where this tribunal of limited jurisdiction is powerless to respond to allegations that tax and social security compliance is offensive to any one or a number of individuals.

Complainant finds nourishment in *Equal Employment Opportunity Commission v. Information Systems Consulting*, Civil Action No. CA3–92–0169–T (D.C., E.D. TX) (1992) (a case arising

from Title VII employer obligations to reasonably accommodate religious beliefs in the workplace). Correctly noting that a government agency supported an employee's refusal to obtain a social security number, Complainant fails to mention that the court's consent decree approving settlement of a Title VII Civil Rights Act contained a significant caveat: "This decree is being issued with the consent of the parties and does not constitute an adjudication or finding by this Court on the merits of the allegations of the complaint." *Id.* at 3. Moreover, that case, initiated by the EEOC, involved a freedom of religion claim by the employee seeking not to participate in the social security system.[10] This §1324b claim is one of citizenship status discrimination, and not of free exercise of religion, over which in any event I lack jurisdiction.

Complainant relies extensively on *Railroad* Retirement *Bd. v. Alton R. Co.*, 295 U.S. 330 (1935), one of the last of a line of cases fatal to acts of Congress premised on the commerce clause, which held a compulsory retirement and pension plan beyond congressional power to regulate interstate commerce. Complainant's reliance on *Alton* is misplaced. More to the point, as early as 1937 the Supreme Court affirmed Congress' power to enact social security legislation. *See Helvering v. Davis*, 301 U.S. 619, 644 (1937), and *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

The constitutionality of the Social Security Act has long been judicially acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644; *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590. 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 un-

[10] *But compare Bowen v. Roy*, 476 U.S. 693, 702 (1986) (rejecting a challenge on religious grounds to providing a social security number as a condition precedent to receiving food stamps, the Court found no violation of the First Amendment's free exercise of religion clause, notwithstanding plaintiff's belief that use of a number would impair a Native American child's spirit, because "[t]he statutory requirement that applicants provide a social security number is wholly neutral in religious terms and uniformly applicable").

available 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.

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.

Winkler maintains he is entitled to opt out of social security. The Supreme Court has held otherwise. An employee may decline benefits, but must submit to deductions. *Lee*, 455 U.S. at 258, 261 n.12.

Citizens and alien wage-earners alike are obliged to obtain social security numbers (also known as individual "taxpayer identification numbers") and to provide them. 26 C.F.R. §301.6109–1(a)(1)(ii)(D), (b)(2), (d); 8 U.S.C. §§1304(f), 1324(a)(1)(C)(I).

Winkler submits in his response to the motion to dismiss that he renounced his social security number and that West Capital's refusal to acknowledge that renunciation, evidenced by its insistence that he complete IRS Form W–4, constitutes discriminatory conduct implicating 8 U.S.C. §1324b. The Supreme Court, however, has found "mandatory participation" "indispensable." *Lee*, 455 U.S. at 258. Furthermore, ***all*** U.S. wage earners must properly complete IRS Form W–4, a lynchpin in the revenue regimen. *Cheek v. United States*, 498 U.S. 192, 194 (1991). Because both citizens and resident aliens must comply, an employer's insistence that an employee complete IRS W–4 does not imply citizenship status discrimination.

Respondent's motion illustrates that state courts have rejected demands similar to those of Winkler's, clearly outside the reach of §1324b. *See, e.g., Birt v. Consolidated Sch. Dist. No.4*, 829 S.W.2d 538, 540 (Mo.App. 1992), *r'hg denied, transfer denied*. *See also Otworth v. Southern Pacific Trans. Co.*, 166 Cal. App.3d 452, 212 Cal. Rptr. 743

(1985), cited in *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 771 (9th Cir. 1986). Federal courts have rejected similar arguments, even when couched as free exercise of religion challenges. *Hover v. Florida Power & Light Co., Inc.*, 1994 WL 765369, at *5–6 (S.D.Fla. 1994) (granting summary judgment for employer who declined to create alternative taxpayer identification number for employee who refused to provide social security number, the "mark of the beast," because granting employee's request would violate federal regulations).

The Ninth Circuit has stated that "Under 26 U.S.C. §3402, an employer has a mandatory duty to withhold federal income tax from an employee's wages where required by applicable regulations." *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d at 769.

As more extensively discussed in numerous recent ALJ decisions, "[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). Except in extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." *Int'l 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," which prohibits all suits restraining tax assessment, collection, and determination. *Austin v. Jitney-Jungle Stores of Am. Inc.*, 6 OCAHO. 923, at 12–17. *See also, Alaska Computer Brokers v. Morton*, 1995 WL 653260, *3 (D. Alaska 1995) (Administrative Procedure Act waiver of sovereign immunity, 5 U.S.C. §706(2)(a)–(d), does not confer jurisdiction so as to "override the limitations of §7421 [the Anti-Injunction Act] [26 U.S.C. §7421(a)], and §2201 [prohibiting injunctive and declaratory relief against collection of federal taxes]" (footnote omitted) quoting *Hughes v. United States* [92–1 USTC ¶50,086], 953 F.2d 531, 537 (9th Cir. 1992).

Winkler's OCAHO filing is but a part of a campaign to restrain the collection of taxes. The Anti-Injunction Act bars such an action:

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

26 U.S.C. §7421 (1997) (emphasis supplied). The Anti-Injunction Act's purpose is "to preserve the Government's ability to assess and collect taxes expeditiously with 'a minimum of preenforcement judicial interference' and 'to require that the legal right to the disputed sums be determined in an action for refund.'" *Church of Scientology*

of Cal. v. United States, 920 F.2d 1481, 1484–85 (9th Cir. 1990) (*quoting Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)), *cert. denied*, 500 U.S. 952 (1991)).

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

In any event, challenges to the Social Security Act and the IRC and the statutory requisites for their implementation do not properly implicate ALJ jurisdiction under 8 U.S.C. §1324b.

III. *Conclusion and Order*

This case has nothing to do with an employer's obligations under 8 U.S.C. §1324b and everything to do with an employee's unwillingness to submit to federal income tax and social security withholding. The Complaint is, therefore, dismissed for failure to state a cause of action upon which relief can be granted, and for lack of subject matter jurisdiction. Respondent's motion to dismiss is granted. All other pleadings and requests are overruled.

Moreover, Complainant's claim 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 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 and social security compliance obligations. Winkler'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.

IV. *Appeal*

This Final Decision and Order is the final administrative adjudication 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 29th day of April, 1997.

MARVIN H. MORSE
Administrative Law Judge