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

April 30, 1997

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| JAMES O. JARVIS,<br>Complainant,<br><br>v.<br><br>AK STEEL,<br>Respondent. | )<br>)<br>)<br>) 8 U.S.C. 1324b Proceeding<br>) OCAHO Case No. 97B00024<br>)<br>)<br>) |

## ORDER OF DISMISSAL AND SCHEDULE FOR BRIEFING ON ATTORNEYS' FEES REQUEST

I. *Background*

On November 18, 1996, James O. Jarvis[1] (complainant or Jarvis) commenced this private action by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging citizenship status discrimination and document abuse in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(1)(B) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6).

On December 5, 1996, a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, together with a copy of the Complaint, were served on respondent by

[1]Jarvis has filed a document titled Privacy Act Release Form and Power of Attorney authorizing John B. Kotmair, Jr., who is not an attorney, to represent him in this matter. In fact, the Complaint in this action was not signed by Jarvis, but by Kotmair. While the rules applicable to this proceeding are not entirely clear as to the question of lay representation, absent objection by the respondent, I will accept Kotmair's appearance on behalf of Jarvis in this matter. 28 C.F.R. §68.33; *Costigan v. NYNEX*, 6 OCAHO 918, at 12 fn. 13 (1997) (lay representation may not be permitted if there are reasonable concerns about competence or ethical standards).

certified mail, return receipt requested. Respondent acknowledged receipt of that notice on December 9, 1996.

The Complaint was filed following complainant's receipt of the United States Department of Justice Office of Special Counsel (OSC) determination letter dated August 20, 1996, informing him that it had determined that there was "insufficient evidence of reasonable cause to believe these charges state a cause of action under 8 U.S.C. §1324b." For that reason, OSC also informed complainant that it was declining to file an action on his behalf before an administrative law judge assigned to this Office and that he was entitled to file a private action directly with this Office.

More particularly, in 1958 Jarvis was hired by AK Steel as a machinist, repairing equipment and manufacturing parts, in that firm's facilities located in Ashland, Kentucky, where Jarvis resides. Jarvis voluntarily retired in 1996. Jarvis alleges that respondent committed document abuse by having refused to accept two (2) documents, a self-created "Statement of Citizenship" and "Affidavit of Constructive Notice," which purport to demonstrate that he is not subject to withholding of federal tax from his wages and that section 1324b(a)(6) requires an employer to honor those documents and discontinue withholding. Jarvis also alleges that he was discriminated against based upon his citizenship status, but has not provided a statement of facts in support of that charge.

Jarvis seeks an award of back pay from October 6, 1994.

This case is another in a series of tax protester cases that have recently been filed in this Office. *See, e.g., Lee v. Airtouch Communications*, 6 OCAHO 901 (1996); *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Winkler v. Timlin Corporation*, 6 OCAHO 912 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997). Most of these complaints, advancing the same theories as here, were filed and pursued by Kotmair and the National Worker's Rights Committee and were dismissed at an early stage on motions to dismiss for lack of jurisdiction or for failure to state a claim or both. In at least one case, *Lee v. Airtouch*, respondent was awarded its costs and attorneys' fees. 7 OCAHO 926 (1997).

On January 6, 1997, respondent's attorney timely filed an answer denying that the respondent had committed any violations of IRCA and averring, among other things, that the Complaint fails to state a claim upon which relief can be granted, that the claims are barred by the applicable statute of limitations, and that the allegations in the Complaint are moot.

On January 21, 1997, respondent filed a pleading captioned Motion to Dismiss and on January 27, 1997, complainant filed a reply in opposition to that motion.

II. *Standards of Decision*

Presently pending is the respondent's motion of January 21, 1997, to dismiss the Complaint in its entirety, pursuant to OCAHO Rules of Practice and Procedure, 28 C.F.R. §68.10, and for an award of those attorney's fees and costs incurred in defense of this matter. In support of its motion, the respondent describes with some precision the factual circumstances upon which this case is premised and argues, among other things, that complainant's allegations have nothing to do with the purpose and scope of section 1324b, and that the Complaint wholly fails to state a claim upon which any sort of relief might be granted.

The procedural regulations governing these proceedings provide for the dismissal of a complaint where the administrative law judge determines, upon motion by respondent, that complainant has failed to state a claim upon which relief can be granted. 28 C.F.R. §68.10.

This procedural regulation is similar to and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure, which has accordingly been used as a guidepost by the Administrative Law Judges in this Office in issuing orders pursuant to motions to dismiss under section 68.10.

In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint. *Udala v. NYS Dept. of Education*, 4 OCAHO 633, at 4 (1994); *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991) (Rule 12(b)(6) does not give the court authority to consider matters outside the pleadings; it simply delineates the procedures which must be followed in testing the legal sufficiency of a complaint). The court may, however, consider documents

incorporated into the complaint by reference and materials subject to judicial notice. *Udala*, at 5.

The court must also accept the complainant's allegations of fact as true, along with such reasonable inferences as may be drawn in the complainant's favor. Therefore, a complaint should not be dismissed for failure to state a claim unless the complainant can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

## III. *Analysis*

Complainant has alleged that respondent committed two (2) unfair immigration-related employment practices namely, discrimination based upon his citizenship status and document abuse. For the reasons set forth more fully below, respondent's motion to dismiss those claims is being granted for failure to state a claim upon which relief can be granted and because this Office lacks subject matter jurisdiction.

### A. *Citizenship Status Discrimination*

With respect to complainant's initial claim of citizenship status discrimination, IRCA provides:

> §1324b. Unfair immigration-related employment practices
>
> (a) Prohibition of discrimination based on . . . citizenship status
>
> (1) General rule
>
> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—
>
> . . .
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

The respondent accurately notes in its brief that section 1324b prohibits discrimination against any protected individual based on the individual's citizenship status with respect to the hiring or discharge of that employee. In order to state a *prima facie* case of citizenship status discrimination, there must be some claim or allegation that the individual is being treated less favorably than others because of the individual's citizenship status. *See Lee v. Airtouch*

*Communications*, 6 OCAHO 901, at 10 (1996) ("disparate or differential treatment is the essence of a discrimination claim").

The burden of stating a *prima facie* case of disparate treatment under IRCA is quite simple. A complainant must allege 1) he is a member of a protected class; 2) the employer had an open position for which he applied or was discharged; 3) he was qualified for the position; and 4) he was rejected or discharged under circumstances giving rise to an inference of unlawful discrimination. *Id*. Excepting the first element, that Jarvis, as a United States citizen, is a protected individual, none of the remaining elements are satisfied here.

Having carefully reviewed the Complaint, and the letter signed by Jarvis's representative Kotmair submitted simultaneously setting forth legal theories on why he is not subject to federal tax withholding, I find no allegations of discriminatory refusal to hire or discriminatory discharge. That deficiency makes that portion of the Complaint alleging citizenship status discrimination insufficient as a matter of law. *See, e.g., Costigan v. NYNEX*, 6 OCAHO 918, at 9 (1997). Indeed, as the respondent has argued, since it is undisputed that Jarvis has been employed at AK Steel since 1958, and voluntarily retired in 1996, complainant cannot make those factual assertions.[2]

Ordinarily once a complainant states a *prima facie* case, the burden of production shifts to the employer to present a legitimate nondiscriminatory reason for its employment action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). However, if the complainant fails to plead a *prima facie* case, the inference of discrimination never arises and the employer has no burden of production, and the complaint is dismissed.

Complainant's reply to respondent's motion to dismiss is also unavailing. That submission contains conclusory allegations and misstatements of law. For example, complainant states:

> It is quite clear that Respondent's refusal to honor Complainant's Statement of Citizenship and Affidavit of Constructive Notice, which meet the statutory and regulatory specifications as "documents tendered that on their face reasonably appear to be genuine", is a prohibited *documentation abuse* which constitutes prohibited *discrimination* against the Complainant *due to his citizenship status* under 8 U.S.C. §1324b. (emphasis in original)

[2]The respondent has asserted that Jarvis voluntarily retired in 1996. Complainant has not disputed that assertion.

Complainant's Reply to Respondent's Letter to Dismiss filed February 12, 1997, at p. 3. I am unaware of any OCAHO case holding that document abuse, even if proven, also constitutes illegal citizenship status discrimination under IRCA. It would be impossible to reach that conclusion because each of those illegal employment practices is separate and distinct, and contain different elements of proof. Neither is that conclusory argument required to be accepted in the posture of a motion to dismiss where the inquiry is whether complainant has stated a viable claim allowing some type of relief. By having failed to make elemental factual allegations, either that he was rejected or discharged from employment, complainant's claim of citizenship status discrimination must be dismissed.

Moreover, section 1324b(g)(C) bars an award of back pay "if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status." *Horne v. Hampstead*, 6 OCAHO 906, at 5 (1997). Therefore, since it is undisputed that Jarvis was not refused employment and continued employment after October 6, 1994, until he voluntarily retired in 1996, an award of back pay is precluded as a matter of law.

In view of the foregoing, respondent's motion is granted as it pertains to complainant's citizenship status discrimination claim, and that claim is hereby ordered to be and is dismissed, with prejudice to refiling.

B. *Document Abuse*

Having disposed of complainant's first cause of action, a consideration of respondent's motion to dismiss complainant's final cause of action, that of document abuse, is now in order.

The document abuse provisions of IRCA, 8 U.S.C. §1324b(a)(6)[3], provide that it is an unfair immigration-related employment practice for an employer to request more or different documents, or to refuse to honor documents tendered that on their face reasonably appear to be genuine, for purposes of satisfying the requirements of the employment verification system, 8 U.S.C. §1324a(b). The employ-

[3]This section was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208. Because that amendment applies only to unlawful immigration-related employment practices committed after September 30, 1996, it is inapplicable in this proceeding.

ment verification system, among other things, requires an employer to verify at the time of hire that its employees are eligible to work in the United States by inspecting identity and work eligibility documents specified by the INS and provided by the employee.

In order to state a *prima facie* case of document abuse, the complainant must allege at a minimum that the employer requested documents for purposes of satisfying the employment verification system.

In his Complaint, Jarvis contends at ¶16:

> The Business/Employer refused to accept the documents that I presented [to show I can work in the United States].
>
> a) The Business/Employer refused to accept the following documents: Statement of Citizenship and Affidavit of Constructive Notice which prove my citizenship, protection under the law, and right to full payment of all wages as U.S. citizens are not subject to Subtitle A or C of the IRC unless they volunteer to be subject.

Jarvis has crossed out the language in his Complaint "to show I can work in the United States," thus he is not alleging that AK Steel requested documents to satisfy the employment verification system.

His claim merely consists of an allegation that he tendered two (2) documents, a Statement of Citizenship and Affidavit of Constructive Notice, for the purpose of demonstrating that he is not subject to certain provisions of the Internal Revenue Code, and that AK Steel refused to accept those documents and acknowledge his alleged exemption from federal tax withholding.

The documents which may be utilized by an employer for the purpose of verifying identity and employment eligibility under 8 U.S.C. §1324a(b) are enumerated in the regulations implementing the employer sanctions provisions of IRCA, at 8 C.F.R. §274a.2(b). A Statement of Citizenship and Affidavit of Constructive Notice do not appear on that list. Therefore, even assuming that AK Steel had requested documents to verify his employment eligibility, those documents are not valid for that purpose, and thus a refusal to accept them would not constitute a document abuse violation.

In reply to respondent's motion, Jarvis states that "[r]espondent plainly refused to honor Complainant's documents . . . and it is Respondent's refusal to honor Complainant's documents that is ille-

gal under 8 U.S.C. §1324b(a)(6)." Complainant's Reply to Respondent's Letter to Dismiss filed February 12, 1997, at p. 2.

The substance of that argument, that an employer honor any document whatsoever presented for any purpose whatsoever, is without merit. *Lee v. Airtouch*, 6 OCAHO 901, at 12; *see also*, *Costigan v. NYNEX*, 6 OCAHO 918, at 9–10 (1997) ("IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures").

Because Jarvis has failed to allege that respondent requested documents in connection with verifying his employment eligibility, the Complaint fails to state a claim upon which relief can be granted as to the allegations of document abuse.

Accordingly, respondent's motion to dismiss complainant's second cause of action, that of document abuse, is granted, and that claim is ordered to be and is dismissed, with prejudice to refiling.

C. *Subject Matter Jurisdiction*

Like federal district courts, this Office is a forum of limited subject matter jurisdiction. In general, federal courts cannot take jurisdiction in cases where the parties are not diverse or where a federal question is not involved. 28 U.S.C. §§1331 and 1332. Similarly, this Office provides access only to those complainants seeking to resolve, among other things, disputes involving unfair immigration-related employment practices.[4] There is nothing in the statute or implementing regulations to conclude that this forum has jurisdiction over disputes about withholding of federal taxes from wages. *Lee v. Airtouch*, 7 OCAHO 926, at 8 (1997). Quite simply, this forum is "reserved for those adversely affected directly by an unfair immigration-related employment practice and is powerless to hear tax causes of action." *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 21 (1997).

It is well-settled that administrative law judges assigned to this Office have §1324b subject matter jurisdiction only in those situations where the employee has alleged discriminatory rejection or discharge from employment where the basis of the discrimination involves

[4]Administrative law judges assigned to this Office also have jurisdiction to hear complaints filed by the INS against employers that have committed paperwork violations or illegal alien hire violations, and against individuals who have committed document fraud, 8 U.S.C. §1324a and §1324c.

an individual's national origin or citizenship status. Moreover, jurisdiction over a claim of document abuse can only be established if the complainant has alleged that the employer requested a particular document from a list of prescribed sources for the purposes of verifying work eligibility under §1324a(b). *See, e.g., Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Horne v. Town of Hampstead*, 6 OCAHO 906 (1997); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997); *Boyd v. Sherling*, 6 OCAHO 916 (1997); *Wilson v. Harrisburg School District*, 6 OCAHO 919 (1997); *Austin v. Jitney-Jungle Stores*, 6 OCAHO 923 (1997); *Costigan v. NYNEX*, 6 OCAHO 918 (1997). As noted previously, Jarvis has failed to make those elemental factual allegations.

This line of cases also instructs that an administrative law judge may always examine the complaint *sua sponte* for subject matter jurisdiction and should dismiss the complaint if none is found. *Boyd*, *supra*, at 7; *see also Rauch v. Day and Night Mfrg. Corp.*, 576 F.2d 697, 699 (6th Cir. 1977) ("[i]t is of course proper, and indeed mandatory for a court to inquire into its subject-matter jurisdiction"). The parties may not confer upon a court subject matter jurisdiction which in fact does not exist. *Id*.

By his own admissions, Jarvis was neither denied employment nor discharged. Nor was Jarvis asked to produce more or different documents than those prescribed by the INS in connection with IRCA's employment verification system, 8 U.S.C. §1324a(b). Complainant's allegations are based upon an "ideological dispute with the Internal Revenue Service over the method of withholding for taxes and over the constitutionality of the system of taxation in the United States" and do not implicate the immigration-related employment discrimination provisions of IRCA. *Lee v. Airtouch*, *supra*, at 4.

Because I find that complainant's claims are related solely to his dispute with Federal tax laws, and do not implicate §1324b, complainant's Complaint must also be dismissed for lack of subject matter jurisdiction.

IV. *Respondent's Request For Costs and Attorney's Fees*

As part of its motion to dismiss, respondent states that the Complaint is patently frivolous and should be dismissed with costs and fees to the respondent. IRCA, 8 U.S.C. §1324b(h), authorizes fee shifting:

> In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

Both parties shall be given the opportunity to brief the issues concerning whether an award of attorneys' fees is appropriate. Respondent may file its itemized request for an attorney's fee together with a supporting memorandum and documentation on or before June 16, 1997. Complainant may file his reply brief and supporting data on or before July 16, 1997.

*Order*

In view of the foregoing, respondent's Motion to Dismiss filed on January 21, 1997 is granted.

Further, complainant's November 18, 1996 Complaint alleging two (2) unfair immigration-related employment practices, that of citizenship status discrimination and document abuse, in violation of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §1324b(a)(1)(B) and the Immigration Act of 1990 (IMMACT), 8 U.S.C. §1324b(a)(6), is hereby ordered to be and is dismissed, with prejudice to refiling, for failure to state a claim and for lack of subject matter jurisdiction.

As the prevailing party in this proceeding, respondent's request for its costs and an attorney's fee shall be considered if that request is filed, together with a supporting memorandum of law and documentation, on or before June 16, 1997. A reply by complainant to respondent's request will be timely if filed not later than July 16, 1997.

JOSEPH E. MCGUIRE
Administrative Law Judge

*Appeal Information*

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.