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

May 21, 1997

RICHARD F. LAREAU, Complainant, v. USAIR, INC., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00048)))

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr., Complainant's Representative. Barbara Berish Brown, Esq.*, Kenneth M. Willner, Esq., Paul, Hastings, Janofsky & Walker L.L.P. and *Michelle V. Bryan, Esq.*, for Respondent.

I. *Introduction*

Yet another in a series of tax challenges seeking redress under 8 U.S.C. §1324b against actual and virtual employers who refuse to conspire with complainants in avoiding federal income tax withholding and social security contribution, this case poses two questions:

- Can a tax challenge, articulated in immigration-related verbiage, confer 8 U.S.C. §1324b jurisdiction on administrative law judges (ALJs) and overrule the Anti-Injunction Act, 26 U.S.C. §7421(a)?

- Does an employer's refusal to conspire with an employee[1] to avoid tax withholding and social security contribution violate 8 U.S.C. §1324b, which prohibits unfair immigration-related employment practices?

Common sense and judicial precedent compel an answer in the negative to both questions.

This Final Decision and Order, like numerous antecedent decisions by ALJs,[2] dismisses the case for lack of subject matter jurisdiction over tax matters and for failure to state a claim upon which re-

[1]Although the pleadings suggest that Lareau is currently an incumbent employee, his precise status is not all that clear. This is so because, while USAir's Response to the Order To Show Cause (Response) recites at page 1 that "Lareau is a Maintenance Inspector employed by USAir in Indianapolis," an assertion repeated at paragraph 11 of its Answer to the Complaint, his status is obscured when, on page 5 of its Response, USAir states that it "would not assist him, post-employment, with his efforts to evade taxes." But it makes no difference, as Lareau's Complaint explicitly excludes the allegation that he was not hired or discharged in violation of §1324b, or that USAir asked him for too many or wrong documents than required to establish eligibility for employment in the United States. If there were a valid claim, it is instructive that on addressing liability for discriminatory retaliation under Title VII of the Civil Rights Act of 1964, §704(a), 42 U.S.C. §2000e–3(a), a unanimous Supreme Court has recently held that the definition of employee controls as to former as well as current employees "consistent with the broader context of Title VII and the primary purpose of §704(a)." Robinson v. Shell Oil Co., 117 S. Ct. 843, 848 (1997).

[2] *See Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4–5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *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.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96–3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr. (Kotmair), as Director, National Worker's Rights Committee (Committee), represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents were always self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Lareau v. USAir, Inc.* takes place in this too-familiar context.

lief can be granted under 8 U.S.C. §1324b. It is certain that this forum of limited jurisdiction cannot override the Anti-Injunction Act, which prohibits all suits to restrain the collection of taxes. It is also clear that §1324b's prohibition of ***immigration-related*** unfair employment practices is not implicated by an employer's refusal to accept improvised, unofficial, gratuitously tendered documents purporting to exempt the employee from tax withholding and social security compliance obligations.

II. *Procedural History*

On July 24, 1985, USAir, Inc. (USAir or Respondent) hired Richard F. Lareau (Lareau or Complainant). According to Lareau, USAir hired him as an Aircraft Mechanic. According to USAir, Lareau was a Maintenance Inspector. Whether as a mechanic or maintenance man, he apparently served at least nine years without incident in USAir's employ. On May 26, 1994, this peaceful period came to an end when Lareau tendered USAir self-styled tax exemption documents—i.e., a "Statement of Citizenship"[3] and an "Affidavit of Constructive Notice,"[4] and asked USAir to transmit the documents to the IRS and to cease and desist from withholding taxes and social security contributions.

On February 13, 1995, Lareau filed a discrimination complaint against USAir with the Indiana Civil Rights Commission and the Indianapolis Equal Employment Opportunity Commission (EEOC) Office. Lareau alleged that beginning May 26, 1994, and continuing through January 12, 1995, USAir discriminated against him on the basis of national origin by "refusing to forward my statement of citizenship to the I.R.S. Service Center, and [by continuing] . . . to withhold taxes. . . . Further, Respondent has failed to acknowledge my rescission and revocation of my social security application." EEOC Charge.

[3]Such self-styled, improvisational, unofficial "Statement(s) of Citizenship" are apparently staple, albeit ineffective, weapons in the war on taxation. *See Brokers v. Morton*, 1995 WL 653260, at *1 (D. Alaska 1995). Self-styled "Statement(s) of Citizenship" are not to be confused with INS Forms N–560 or N–561, which are official 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).

[4]An equally ineffective armament is the oft-used "Affidavit of Constructive Notice." *See Risner v. Commissioner of Internal Revenue*, 71 T.C.M. (CCH) 2210 (1996).

On July 14, 1995, the EEOC dismissed Lareau's Charge on its merits because:

> The facts you allege fail to state a claim under any of the statutes enforced by the Commission.
>
> * * *
>
> This is your NOTICE OF RIGHT TO SUE . . . *WITHIN 90 DAYS* [in U.S. District Court] . . . otherwise your right to sue is lost.

Apparently Lareau did not sue in District Court. Instead, on November 26, 1995, one month after his right to sue expired, he filed a charge based on the same factual predicate with the United States Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Lareau's OSC Charge characterized USAir's refusal to join in his tax avoidance scheme as a discriminatory, ***immigration-based***, unfair employment practice, based on Lareau's undisclosed national origin and his status as a United States citizen. Specifically, Lareau contended that, by withholding taxes and social security contributions from his paycheck, USAir treated him as a non-resident "alien," who, according to Lareau, are the only individuals statutorily obligated to pay income tax and contribute to social security.[5] By treating him as an "alien," alleged Lareau, USAir discriminated

[5]Contrary to Lareau's claims, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which their employers must collect "at the source"—i.e., in the workplace, through payroll deductions. 26 U.S.C. §§3101, 3102, 3402(a), 3403. Employers who do so are immunized from legal liability by 26 U.S.C. §3102 ("[e]very employer . . . shall be indemnified against the claims and demands of any person"), 26 U.S.C. §3403 (an "employer shall not be liable to any person"), and the Anti-Injunction Act, 26 U.S.C. §7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"), which has been interpreted to prohibit suits against employers who withhold taxes. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974); *United States v. Kim*, 1997 WL 194135, at *4—5 (7th Cir. 1997); *Bowlen v. United States*, 956 F.2d 723, 726 (7th Cir. 1992); *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984) ("All individuals, natural or unnatural, must pay federal income tax on their wages"); *United States v. First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984); *Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir. 1984); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984); *Rappaport v. United States*, 583 F.2d 298, 300 (7th Cir. 1978); *United States v. Dema*, 544 F.2d 1373, 1375 (7th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977). Social security withholding contributions from employees are compelled, even if an employee declines benefits. *United States v. Lee*, 455 U.S. 252, 261 n.12 (1982). The constitutionality of the Social Security Act has long been acknowledged. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

against him and thereby violated 8 U.S.C. §1324b. Lareau claimed that USAir violated 8 U.S.C. §1324b when it

> REFUSED TO FORWARD MY **STATEMENT OF CITIZENSHIP** TO THE IRS SERVICE CENTER IN PHILADELPHIA, PA 19255 PURSUANT TO 26 CODE OF FEDERAL REGULATIONS, SECTION 1.1441–5, FREEING THEM [sic] OF AUTHORITY TO WITHHOLD INCOME TAXES FROM ME. EMPLOYER ALSO REFUSED TO ACKNOWLEDGE MY **AFFIDAVIT OF CONSTRUCTIVE NOTICE** THAT I NO LONGER HAD APPLICATION FOR SOCIAL SECURITY BENEFITS AND CONTINUES TO WITHOLD [sic] FICA TAXES FROM MY REMUNERATION.

OSC Charge at ¶8 (emphasis added).[6]

Lareau sought relief under 8 U.S.C. §1324b(a)(1), which prohibits discrimination based on national origin or citizenship status,[7] and under §1324b(a)(6), which prohibits "document abuse," the practice of requesting more or different documents than those required to prove that one can work in the United States.[8] Lareau's November 26, 1995, OSC Charge specified May 26, 1994, a date eighteen months earlier, as that of the alleged discrimination.[9] On that date,

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[6]Lareau refers to 26 C.F.R. §1.1441–5 (1997) ("Withholding of Tax on Nonresident Aliens and Foreign Corporations and Tax-Free Covenant Bonds"), a regulation applicable to U.S. citizens residing abroad, which states that "an individual's written statement that he or she is a citizen or resident of the United States may be relied upon by the payer of the income as proof that such individual is a citizen or resident of the United States." Lareau's reliance on this regulation is misplaced, for Lareau does not reside in a foreign land. At the time of the alleged offense, he resided in Indiana, and now lives in Pennsylvania.

[7]Specifically, 8 U.S.C. §1324b(a)(1) states that:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment —
>
> (A)because of such individual's national origin, or
>
> (B)in the case of a protected individual . . . because of such individual's citizenship status.

[8]Title 8 U.S.C. §1324b(a)(6) as of the date of the Complaint prohibited a request "for more or different documents than are required [to establish eligibility to work in the United States] . . . or refusing to honor documents tendered that on their face reasonably appear to be genuine." The OSC charge form explains that document abuse occurs where the "individual, business, or organization refused to accept a valid document or demand . . . more or different documents than are required for completing the INS Form I–9."

Title 8 U.S.C. §1324b(a)(6) was amended effective 9/30/96. Section 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (September 30, 1996). As before, the prohibition against over documentation pertains only to tender of documents "for the purpose of satisfying the requirements of §1324a(b), as discussed *infra* at III.D.(2).

according to Lareau, his "employer refused to forward my statement of citizenship to the IRS Service Center in Philadelphia." OSC Charge at ¶8. Lareau identified his employer as having fifteen (15) or more employees, a fact fatal to ALJ adjudication of his national origin discrimination claim,[10] and admitted that he filed a charge[11] based on the same set of facts with the Indianapolis EEOC office on February 13, 1995, another barrier to this forum's adjudication of his national origin discrimination claim.[12] OSC Charge at ¶¶3, 8.

OSC dismissed Lareau's Charge and eight others filed by his lay representative, Kotmair, in an undated determination letter. Lacking "reasonable cause to believe" that the charges stated §1324b causes of action, OSC advised them that it declined to file complaints on their behalf, but apprised them of the right to file private actions within 90 days of receipt of the determination letter.

On May 14, 1996, Kotmair filed a complaint on Lareau's behalf in the Office of the Chief Administrative Hearing Officer (OCAHO). On June 12, 1996, OCAHO issued its Notice of Hearing (NOH) transmitting the Complaint to USAir, cautioning that an answer was due thirty (30) days after receipt. The United States Postal Service receipt returned to OCAHO confirms that USAir received the NOH on June 14, 1996. On August 14, 1996, no answer having been timely filed, I issued an Order inviting USAir "to explain its failure to timely answer" and to show cause not later than September 6, 1996 "why judgment should not be issued against it."

By a filing on September 5, 1996, USAir explained that the NOH never reached a responsible management official among the 800 employees at its Arlington, Virginia, headquarters. Its Response opposed entry of default judgment and included an Answer to the Complaint. On September 12, 1996, Lareau filed a Motion for Default Judgment and Specific Relief Sought, with Brief and Legal Authorities in Support. Lareau's default motion ignored USAir's response to the Show Cause order. Including the names of USAir retained counsel on Lareau's service list, however, suggests that

[9]Time limits for filing OSC charges are specified in 28 C.F.R. §68.4, which states, "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."

[10]ALJ jurisdiction over claims of national origin attaches only where employers employ between four and fourteen employees. 8 U.S.C. §1324b(a)(2)(A), (B).

[11]EEOC File No. 240950943.

Lareau was aware of the USAir pleadings. On September 19, 1996, USAir filed a Response to Lareau's motion, incorporating by reference its previously filed response to the Show Cause. On October 1, 1996, I issued an Order advising the parties that:

> The law disfavors defaults, as noted in the Response, citing 10 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §2685 (1983). I disfavor defaults. Accordingly, the motion for default is denied.

On January 2, 1997, Lareau filed a Motion for Reconsideration of the Order Denying Motion for Default Judgment, with brief in support, challenging Respondent counsel's failure to enter a notice of appearance. Respondent's counsel entered appearances pursuant to 28 C.F.R. §68.33 by Notice filed January 15, 1997. On January 16, 1997, USAir filed a Memorandum in Opposition to Lareau's Motion for Reconsideration of the October 1, 1996 Order which refused to default USAir. On January 23, 1997, Lareau filed a Reply. Lareau assailed USAir's counsels' initial lack of formal entry of appearance, misreading 8 C.F.R. §68.33 (1997), which implicitly acknowledges the appearance of counsel by virtue of filing a pleading, absent challenge by the judge. (In contrast, Lareau's initial power of attorney was insufficient to authorize representation by Kotmair before an ALJ, a deficiency not cured until September 12, 1996, when he filed a substitute power.)

In similar vein, USAir challenged Kotmair's lay representation. Although eschewed by Article III courts, lay representation of individuals is neither clearly prohibited nor explicitly countenanced by OCAHO Rules of Practice and Procedure (the Rules). 28 C.F.R. §68.33. To date, ALJs have not put to rest the issue of lay representation, because each decided case was dismissed on other grounds, rendering the issue moot.[13] In view of the result reached here, *i.e.*, dismissal of Lareau's Complaint for lack of subject matter jurisdiction and failure to state a claim on which §1324b relief can be

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[12] *See* 8 U.S.C. §§1324b(a)(2)(B) ("Exceptions" [to jurisdiction]), and 1324b(b)(2) ("No Overlap with EEOC Complaints").

[13] In *Lee v. Airtouch Communications*, 6 OCAHO 901, at 11–12 (1996), where the respondent sought to exclude Kotmair as a lay representative on the basis, *inter alia*, that he was a convicted felon, the judge found it unnecessary to decide the representation issue because the case was dismissed on other grounds. To the same effect, in *Costigan v. NYNEX*, 7 OCAHO 918, at 12 (1997), where the respondent moved to disqualify Kotmair as the complainant's representative *solely* on the basis that he was not an attorney, the judge, granting a NYNEX motion to dismiss, declined to reach the lay representation issue. Most recently, in *Lee v. AT&T*, 7 OCAHO 924, at 6 (1997) (Order Excluding Complainant's Representative), the judge succinctly put the question:

(Continued)—

granted, I too decline to decide whether the Rules contemplate lay representation.

III. *Discussion*

As appears from his Complaint, confirmed and expanded by subsequent pleadings, Lareau depends on an irrelevant federal tax regulation, 26 C.F.R. §1.1441–5 ("Withholding Tax on Nonresident Aliens and Foreign Corporations"), to support his claim that USAir has committed ***unfair immigration-related employment discrimination***. Lareau, a United States citizen, disingenuously characterizes as discrimination USAir's refusal to give credence to his fanciful assertion that withholding of income taxes, and social security payments (FICA), is voluntary, not compulsory, for United States citizens. Through a miasma of immigration-related verbiage, Lareau clouds the clear vista of a tax-avoidance scheme. This forum of limited jurisdiction cannot confer its *imprimatur* on such obfuscation, having received clear instruction on the disposition of tax-avoidance nuisance suits from the Fourth and Seventh Circuit United States Courts of Appeal, reviewing courts for the purpose of this action.[14]

A. *The ALJ Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act and Is Forbidden To Hear Tax Collection Matters by the Anti-Injunction Act*

FED. R. CIV. P. 12 (h)(3)[15] 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.

—(Continued)

> When a party seeks to be represented by a lay individual, two questions are presented:
> 1. Whether the OCAHO Rules . . . authorize the Judge to allow such representation; and
> 2. Whether the OCAHO Rules . . . require the Judge to permit such representation.

The judge concluded that, because he was barring Kotmair's participation for reasons of competency and conduct, it was unnecessary to resolve the issue of lay representation of an individual party. *Id*. at 5–7.

[14]Review of the final decision and order of an ALJ in an unlawful immigration-related employment practice case arising under 8 U.S.C. §1324b may be in either (1) the circuit in which the violation is alleged to have occurred, or (2) the circuit in which the employer resides or transacts business. 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[15]Title 28 C.F.R. §68.1 authorizes ALJs to apply the Federal Rules of Civil Procedure for the District Courts as a general guideline.

A federal forum has no authority to entertain a suit if no statute confers jurisdiction upon it. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Abercrombie v. Office of the Comptroller of the Currency*, 833 F.2d 672, 674 (7th Cir. 1987). No statute confers jurisdiction on this forum to hear tax challenges.

Even when a forum has statutory jurisidiction, "[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), the statute popularly known as "The Anti-Injunction Act," which commands that:

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

Tax collection under the Anti-Injunction Act includes tax withholding by employers. *United States v. American Friends Serv. Comm.*, 419 U.S. at 10.

Any taxpayer who wishes to sue must satisfy a strict statutory condition precedent:

> **No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.**

26 U.S.C. §7422(a) ("pay now, sue later").

The Anti-Injunction Act obliges taxpayers to pursue their remedies under its provisions, and otherwise proscribes suit. *Cheek v. United States*, 498 U.S. 192, 206 (1991) (directing tax complainants to follow the statutory scheme provided by the Anti-Injunction Act: "pay the tax, request a refund from the Internal Revenue Service, and if the refund is denied, litigate the invalidity of the tax in federal district court"); *South Carolina v. Regan*, 465 U.S. 367, 378 (1983); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974); *Goulding v. United States*, 929 F.2d 329, 331 (7th Cir. 1991), *cert. denied*, 506 U.S. 865 (1992); 13B CHARLES B. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3580 (2d ed.

1984) (administrative claim for refund is jurisdictional prerequisite to bringing suit).

The very limited, judicially created, equitable *Enochs* exception, permits suit otherwise proscribed by the Anti-Injunction Act where a taxpayer satisfies four concurrent tests: (1) ***the suit is against the government***, (2) the taxpayer demonstrates ***irreparable harm***, (3) the taxpayer demonstrates ***certain success*** on the merits, and (4) the court in which the taxpayer seeks relief has ***equitable jurisdiction*** over the subject matter. *South Carolina v. Regan*, 465 U.S. at 374; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–7 (1962); *Educo, Inc. v. Alexander*, 557 F.2d 617, 619–21 (7th Cir. 1977).

Lareau is unable to claim the *Enochs* exception.

- First, Lareau's suit is ***not against the government,*** but against USAir, his employer.

> Employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability.

Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1986) (such lawsuits represent "yet another disturbing example of a patently frivolous appeal filed by abusers of the tax system merely to delay and harass the collection of public revenues").

> Money collected in error by a lawful agent, public or private, or the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.

Kaucky v. Southwest Airlines, 109 F.3d 349, 350, 353 (7th Cir. 1997). *See also Webb v. United States*, 66 F.3d 691, 697–98 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 1079 (1997).

- Second, Lareau suffered ***no injury,*** let alone irreparable harm. USAir's refusal to forward Lareau's self-styled "Statement of Citizenship" to the IRS Service Center, and withholding of his payroll taxes and social security contributions cannot be characterized as harm, much less "irreparable injury." USAir is statutorily obliged as an employer to withhold taxes and social security

obligations "at the source," and is relieved from liability for so doing. 26 U.S.C. §§3101, 3102, 3402, 3403. Furthermore, USAir had no legal duty to assist him in his tax protest. Lareau himself could easily have sent his dubious document to the IRS, thus mitigating whatever illusory "harm" USAir caused by not sending his tax protest to the IRS.

- Third, Lareau cannot succeed on the merits. "The notion that federal income tax is . . . consensual in nature is not only utterly without foundation, but . . . has been repeatedly rejected by the courts." Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986). Lareau's twisted logic cannot transform this sow's ear of a tax protest into the silk purse of a legitimate refund action, much less an ***immigration-related*** unfair employment practice case. Under no conceivable circumstances can he prevail.

- Fourth, this forum of limited jurisdiction lacks equitable jurisdiction over tax actions. The proper places to bring tax actions are Tax Court and District Court.[16]

This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is without authority to hear tax causes of action, whether or not clothed in immigration guise. 8 U.S.C. §1324b(b)(1); 28 C.F.R. §44.300(a) (emphasis added). Lareau's Complaint is, therefore, dismissed for lack of subject matter jurisdiction.

B. *The ALJ Lacks Subject Matter Jurisdiction Over Terms and Conditions of Employment*

Lareau sues USAir, his longtime employer, because USAir refused to forward his self-styled tax exemption documents to the IRS, and because USAir insisted on continuing to withhold taxes and social security contributions from his wages, as it is bound to do under 26 U.S.C. §§3101, 3102, 3402, 3403, discussed, *supra*, at n.5. Nothing in 8 U.S.C. §1324b obliges an employer to submit to an employee's tax avoidance scheme, nor prohibits an employer from fulfilling 26

[16] Title 28 U.S.C. §1346(a)(i) provides that "district 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;" 26 U.S.C. §7422(f) also places post-administrative actions in district court.

U.S.C. §3102's command to collect social security contributions, or §3402's mandate to deduct withholding taxes "at the source."

It is well-established that this forum has no authority over terms and conditions of employment, such as an employer's insistence on complying with IRS tax regimens. *Wilson v. Harrisburg Sch. Dist.*, 7 OCAHO 925, at 9 (1997); *Naginsky v. Department of Defense*, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (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 8 U.S.C. §1324b relieves an employer of statutory obligations. *Boyd v. Sherling*, 6 OCAHO 916, at 2, 8–16 (1997), 1997 WL 176910, at *10–14; *Winkler v. Timlin*, 6 OCAHO 912, at 8–12 (1997), 1997 WL 148820, at *9–10. Nothing in §1324b's text or legislative history prohibits an employer from complying with the IRS regimen. *Winkler v. Timlin*, 6 OCAHO 912, at 11–12 (1997), 1997 WL 148820, at *10; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16–17 (1996), 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 §1324b confers upon an employer the right to assist an employee who wishes to resist the IRS by accepting gratuitously tendered, improvised documents purporting to relieve the employee from taxation, or obliges an employer to forward to the IRS these self-same documents. Section 1324b 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 §1324b. The gravamen of Lareau's Complaint, a challenge to the Internal Revenue Code and the Social Security Act, is a matter altogether outside the scope of ALJ jurisdiction. Lareau's Complaint is, therefore, dismissed for want of subject matter jurisdiction.

C. *The ALJ Lacks Subject Matter Jurisdiction Over Charges of National Origin Discrimination Where the Employer Employs More Than Fourteen Employees and/or Where the Matter Has Previously Been Adjudicated on Its Merits by the EEOC*

Lareau alleges discrimination based on national origin. Enactment of the Immigration Reform and Control Act of 1986 as amended (IRCA), specifically §274B of the Immigration and

Nationality Act, codified as 8 U.S.C. §1324b, was not intended to supersede EEOC jurisdiction over national origin claims where an employer's workforce exceeds fourteen employees. 8 U.S.C. §1324b(b)(2). Accordingly, it is well established that ALJs exercise jurisdiction over national origin claims only where the employer employs more than three and fewer than fifteen individuals. 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 sub nom.*, *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). Lareau acknowledges in his OSC Charge that USAir employs fifteen or more employees, and Respondent's filings confirm this. Because ALJs are only empowered to hear cases of national origin discrimination where an employer employs four through fourteen individuals, and Lareau properly invoked EEOC jurisdiction, ALJ jurisdiction is unavailable as a matter of law.

Size of the payroll aside, prior exercise of EEOC jurisdiction over Lareau's Complaint precludes present OCAHO jurisdiction. Once the EEOC exercises jurisdiction, the ALJ no longer is authorized to act. *Winkler v. Timlin*, 6 OCAHO 912 at 5 (1997), 1997 WL 148820, at *5; *Wockenfuss v. Bureau of Prisons*, 5 OCAHO 767, at 2 (1995), 1995 WL 509453, at *6 (O.C.A.H.O.). Section 1324b(b)(2) precludes ALJ jurisdiction over alleged unfair immigration-related employment discrimination based on national origin where the charging party has previously filed and obtained a merits determination on an EEOC charge. *Wockenfuss*, 5 OCAHO 767, at 3, 1995 WL 509453, at *6; *Adame*, 5 OCAHO 722, at 3–5, 1995 WL 217517, at *3. Section 1324b provides in pertinent part:

> No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) [national origin discrimination] . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sect. 2000e *et seq.*], unless the charge is dismissed as being outside the scope of such title.

8 U.S.C. §1324b(b)(2).

This is true even where the EEOC errs in assuming jurisdiction. *Adame v. Dunkin Donuts*, 5 OCAHO 722, at 3 (1995), 1995 WL 217517, at *3 (O.C.A.H.O.).

Lareau concedes in his OSC Charge that on February 13, 1995, he filed a charge alleging national origin discrimination, based on the same set of facts as the present Complaint, with the Indiana Civil Rights Commission and the local EEOC branch office. On July 14, 1995, the EEOC dismissed his charge for failure "to state a claim," a merits disposition. It is undisputed that USAir employs 800 employees at its Arlington, Virginia headquarters. Because dismissal for failure to state a claim is a merits disposition, I conclude that Lareau's national origin claim is barred because of 8 U.S.C. §1324b(b)(2) overlap prohibitions. *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 18 (1997); *Winkler v. Timlin*, 6 OCAHO 912, at 5–6 (1997), 1997 WL 148820, at *5.

I find that at all times relevant to this action: (1) USAir employed more than fourteen individuals; (2) Lareau filed a charge with respect to national origin discrimination based on the same set of facts with the EEOC under Title VII of the Civil Rights Act of 1964; (3) the EEOC dismissed his charge on its merits; and (4) I, therefore, lack subject matter jurisdiction over Lareau's national origin discrimination claim. I dismiss that portion of the Complaint alleging national origin discrimination. 8 U.S.C. §1324b(a)(2)(B).

Furthermore, a national origin discrimination complaint which fails to identify the complainant's national origin is insufficient as a matter of law, at least where there has been ample opportunity to make this identification and where there has been a full exchange of pleadings. *Austin v. Jitney-Jungle*, 6 OCAHO 923, at 18 (1997); *Boyd v. Sherling*, 6 OCAHO 916, at 23 (1997), 1997 WL 176910, at *17; *Toussaint v. Tekwood*, 6 OCAHO 892, at 15 (1996), 1996 WL 670179, at *11. Remarkably, Lareau never identifies his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against U.S. citizens is addressed separately. 8 U.S.C. §1324b(a)(1)(B). Because by its own terms the national origin claim is based entirely on Lareau's citizenship status, it must be dismissed on the additional ground of failure to state a claim on which relief can be granted.

D. *Complainant Fails To State a Claim Upon Which Relief Can Be Granted Under 8 U.S.C. §1324b*

(1) *Complainant's Citizenship Claim Must Be Dismissed*

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. *Mathews v. Goodyear*, 7 OCAHO 929, at 17. Failure to allege injury compels a finding of lack of subject matter jurisdiction. This is so because the ALJ's power is limited to discriminatory failure to hire and to discharge and does not include conditions of employment. The entries, *seriatim*, on Lareau's OCAHO Complaint format, which deny that USAir refused to hire, discharged him, or retaliated against him, as well as the tenor of pleadings, evidence Lareau's and USAir's long and ongoing relationship. Nothing in the Complaint or any pleading even remotely suggests that Lareau was refused employment or discharged by USAir. Refusal to hire and discharge are the only citizenship status discrimination claims cognizable under §1324b. Lareau's Complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under §1324b.

(2) *Complainant's Document Abuse Claim Must Be Dismissed*

An incumbent employee who alleges that his employer refused to accept proffered documents to show work eligibility, but specifies documents not recognized by the employment eligibility verification system, fails also to state a cause of action under 8 U.S.C. §1324b.

Jurisdiction over document abuse can only be established by proving that, in relation to ***hire***, the employer requested one or another specific official document from a prescribed list "for purposes of satisfying the [work eligibility] requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6). Nothing in the case before me suggests that the tender of improvised documents identified by Lareau at ¶16a of his Complaint ***years after hire*** implicates §1324a(b) requirements. Patently, the Complaint negates any inference that Lareau was either denied employment, was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a, or was asked to provide specific documents. The self-styled tax-exemption documents Lareau insists USAir should have accepted are not acknowledged as acceptable or embraced by the verification system.

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

> The 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 USAir's employer obligations under §1324a(b), I lack subject matter jurisdiction over Lareau's §1324b(a)(6) allegations. Lareau's Complaint is, therefore, dismissed for lack of subject matter jurisdiction and for failure to state a claim under §1324b.

IV. *Decision and Order*

Other than conclusory allegations, Lareau nowhere specifies any act of national origin or citizenship status discrimination cognizable under 8 U.S.C. §1324b. In fact, Lareau denies that USAir refused to hire him, fired him, or retaliated against him for filing a complaint. Lareau charges that USAir "refused to accept the documents I presented to show that I can work in the United States." OCAHO Complaint at ¶¶16, 16(a). However, Lareau did not present his improvisational papers to prove that he was eligible to work in the United States, but to establish that he was exempt from taxation and social security contribution. Furthermore, Lareau presented his self-styled documents ***nine years*** after he was hired. In addition, his *sui generis* certificate and affidavit are not among those official documents prescribed to prove work eligibility under 8 U.S.C. §1324a(b), a mandatory condition precedent to a viable claim of document abuse in violation of 8 U.S.C. §1324b(a)(6).

I have considered the pleadings of the parties. To the extent not addressed in this Final Decision and Order, all arguments and requests are rejected. Lareau's national origin claim, citizenship status claim, and document abuse claim are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b.

VI. *Post-Decision Procedure: Attorneys' Fees*

USAir requests attorneys' fees. Fee shifting is authorized by 8 U.S.C. §1324b(h). In support of its request, USAir may file an appro-

priate statement which explains the rationale for fee-shifting together with a sufficient showing on which to premise an accurate and just calculation of attorney's fees. USAir's filing is due no later than ***June 30, 1997***. Complainant's response to USAir's filing—limited to the subject at hand, the amount of attorney's fees requested—will be timely if filed not later than ***July 21, 1997***.

V. *Appeal*

This Decision and Order is the final administrative order on the merits 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 21st day of May, 1997.

MARVIN H. MORSE
Administrative Law Judge