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

May 29, 1997

ERIC R. CHOLERTON, Complainant, v. ROBERT M. HADLEY CO., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 96B00046)))

FINAL DECISION AND ORDER

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.*, Complainant's Representative.
James A. Hadley, President, Robert M. Hadley Co, Inc., Respondent's Representative.

I. *Introduction*

Yet another tax challenge seeking redress under 8 U.S.C. §1324b against a hapless employer who refuses to conspire with the complainant in avoiding federal income tax withholding and social security contribution, this case poses two variants of the typical question in such cases:

> Can a foreign-born, naturalized citizen of the United States, discharged by his employer for refusing to provide a social security number, but reinstated three weeks thereafter, successfully claim discrimination on the bases of citizenship status and document abuse, as defined by 8 U.S.C. §1324b?
>
> Does an employer commit retaliation cognizable under 8 U.S.C. §1324b when a fellow employee characterizes an OCAHO complainant as a "scumbag?"

The answer to both questions is no.

This Final Decision and Order, like numerous antecedent decisions by ALJs,[1] dismisses the case for lack of subject matter jurisdiction over tax matters and for failure to state a claim upon which relief can be granted under 8 U.S.C. §1324b. This forum of limited jurisdiction cannot override the Anti-Injunction Act, 26 U.S.C. §§7421, 7422, which prohibits suit to restrain collection of taxes. The prohibition of §1324b against ***immigration-related*** unfair employment practices is not implicated by the employer's refusal to accept improvised, unofficial, gratuitously tendered documents purporting to exempt the employee from tax withholding and social security compliance obligations. The coworker's remark is not employer retaliation.

II. *Procedural and Factual History*

This oft-told tale of tax avoidance begins on January 6, 1992, when Eric R. Cholerton (Cholerton or Complainant) applied for the position of Sales Representative and Applications Engineer with Robert M. Hadley Co., Inc. (Hadley or Respondent), an employer doing business in Ventura, California. Hadley hired Cholerton early in February, 1992.[2] Upon hire, Hadley refused to sign IRS Form W–4, the Internal Revenue Service form upon which federal income tax

[1]*See Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *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), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *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 are all 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]. *Cholerton v. Hadley* is of this ilk.

[2]According to Cholerton, on February 7, 1992; according to Hadley, on February 4, 1992.

withholding and social security (FICA) payments are premised. Ignoring Cholerton's claim that he was not obligated to pay taxes or contribute to social security,[3] Hadley, as it is obliged to do by 26 U.S.C. §§3101, 3102, 3402, and 3403, withheld taxes and social security contributions from his wages.[4]

For more than two years Cholerton apparently suffered, although not in silence. However, on April 29, 1994, he renewed his tax and social security protest, this time presenting Hadley with self-styled, improvisational, unofficial documents which purported to exempt him from tax and social security because he was a United States citizen. These documents, familiar to forae which have heard tax protests, were a "Statement of Citizenship"[5] and an "Affidavit of

[3]Contrary to Cholerton's claims, all employees residing in the United States are subject to withholding taxes and social security (FICA) contributions, which 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); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984). 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).

[4] *See Mcfarland v. Bechtel Petroleum, Inc.*, 586 F. Supp. 907, 910 (N.D. Cal. 1984) (holding that 26 U.S.C. §3403 "clearly proscribes employer liability" to the employee where wages are withheld, as the employer is merely complying with its federal "legal obligations, with the result that [the employee's] claim is statutorily barred."). *See also Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 770 (9th Cir. 1986) (holding employer not liable to employee because 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[;]" under 26 U.S.C. §3403, "an employer is liable to the IRS for the payment of tax withheld, and 'shall not be liable to any person for the amount of any such payment.' Thus, suits by employees against employers for tax withheld are 'statutorily barred.'") (citations omitted); *Maxfield v. United States Postal Serv.*, 752 F.2d 433, 434 (9th Cir. 1984) ("[An] employer is immune from liability to the employee for the withholding [of taxes from an employee's pay], since the duty to withhold is mandatory, rather than discretionary, in nature.") (referencing *Chandler v. Perini Power Constructors, Inc.*, 520 F. Supp. 1152 (D.N.H. 1981).

[5]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).

Constructive Notice."[6] Cholerton insisted that Hadley place the documents on its company letterhead and forward them to the IRS. This Hadley refused to do. Instead, Hadley discharged Cholerton.

Relenting, Hadley reinstated Cholerton on May 25, 1994! The next week, on May 31, 1994, Cholerton filed a discrimination charge[7] against Hadley with the Los Angeles office of the Equal Employment Opportunity Commission (EEOC), amended on September 3, 1995. The EEOC dismissed Cholerton's charge.[8]

On November 13, 1995, Cholerton filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), based on the same set of facts. Cholerton's OSC Charge claimed that by complying with federal income tax withholding and social security deduction regimens Hadley violated his status as a "state citizen" and discriminated against him on the bases of religion,[9] national origin, and citizenship status. Cholerton requested as compensation one month's back pay, representing his April 30—May 24, 1994 discharge, "without deductions of withholding," and "immediate cessation of unauthorized withholding." Repeating hoary, oft-discredited tax avoidance arguments, Cholerton contended that "this Citizen is not an 'employee'," that Hadley is "not this Citizen's 'employer'," and that "earnings . . . are not 'wages' . . . [or] 'income'" for the purpose of taxation. OSC Charge at ¶9. Cholerton threatened dire consequences for those who would ignore his claim:

> We the People will take our cases *pro se* to the federal courts and disrupt a few careers on the bench if we have to. Treason is treason, and most courts at the

[6]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).

[7]File No. 340941766.

[8]The EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII. Memorandum, Ellen J. Vargyas, EEOC Legal Counsel, to All EEOC District, Area & Local Directors, July 15, 1995. Dismissal for failure to state a claim is a merits disposition, precluding adjudication of the same claim by an ALJ because of statutory overlap prohibitions. 8 U.S.C. §1324b(b)(2). *See, Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 18 (1997), 1997 WL 235918, at *13.

[9]Cholerton cannot take advantage of the statutory social security exemption, 26 U.S.C. §3127, applicable only when both employer and employee belong to an established religious sect (such as the Amish) which eschews social security benefits and has received IRS exception.

> federal level know that most citizens do not know the facts of the United States' bankruptcy.

OSC Charge at p. 6 (Addendum: "Political Considerations").

By an undated letter, OSC informed Cholerton and eight (8) other individuals represented by Kotmair, that "there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [discrimination] under 8 U.S.C. §1324b" or "document abuse under 8 U.S.C. §1324b(a)(6)." OSC advised Cholerton of his right to file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days of receipt of OSC's determination letter.

On May 14, 1996, Cholerton filed his OCAHO Complaint. Cholerton identifies himself as a native of "England or [the] United Kingdom," now a U.S. citizen who obtained permanent resident status on August 28, 1962; applied for naturalization on August 16, 1965; and was naturalized on September 5, 1968. Cholerton alleges discrimination on the basis of citizenship status because he was "knowingly and intentionally fired and rehired, after filing an EEOC Complaint."[10] This assertion, however, is belied by Cholerton's own OSC Charge, which states that Hadley fired him on April 29, 1994, and rehired him on May 24, 1994. Only ***after*** Cholerton rehired him, on May 31, 1994, did he file a discrimination charge with the EEOC. OSC Charge at ¶¶8 and 9. In order to have fired him on April 29, 1994, ***because*** he filed a May 31, 1994, EEOC charge, Hadley would have to have had a month's foreknowledge. This cannot be.

Cholerton also claims that he was "intimidated, threatened, coerced, or retaliated against" because he filed a complaint. Complaint at ¶15. Specifically, he contends that he was:

> Twice called a "SCUMBAG" by the Accounting Manager when it was discovered that a complaint was filed with the DOJ.

Id.

[10]Having conceded in his OSC Charge that Hadley employs more than fourteen indivduals, Cholerton's OCAHO Complaint explicitly omits any claim of national origin discrimination. *See* 8 U.S.C. §1324b(a)(2)(B).

Cholerton charges that Hadley committed document abuse (the practice of requesting too many or the wrong documents to verify employment eligibility ***at the time of hire***) by refusing to accept his self-styled, improved, tax-exemption papers, *i.e.*, his

> Statement of Citizenship [and] Affidavit of Constructive Notice Asserting his rights as a U.S. citizen not to be treated as an Alien for any purpose, practice, or reason under any federal law.

Id. at ¶16(a).

Cholerton alleges that Hadley also committed document abuse by requiring him to produce his "Social Security Number/Card." *Id*. at ¶17(a). Cholerton affixes to his Complaint a "Privacy Act Release Form and Power of Attorney" authorizing Kotmair to "investigate this matter for me."

On June 12, 1996, OCAHO issued a Notice of Hearing (NOH), served June 18, 1996, upon Hadley.

On July 16, 1996, by letter dated July 12, 1996, Hadley timely filed its Answer. Hadley contends that:

> Cholerton was terminated because he failed to comply with the Company's policy with regards to providing a Social Security Number. After initially submitting his Social Security Number when he was hired in February 1992, which he had claimed had been "revoked" but nevertheless provided; on March 31, 1994 we received notarized correspondence from Mr. Cholerton that he no longer had "a social security number to disclose." Furthermore, in the same correspondence, Mr. Cholerton contended he should not be considered and [sic] "employee" and that he did not earn "wages." Accordingly, he maintained that he was not subject to withholding of employment taxes. After much Management involvement with this matter and after he was given a reasonable time to come forward with a Social Security Number his employment with the Company was terminated. His citizenship and his immigration history have never been issues and were not grounds for his dismissal as he contends in the referenced Complaint. Since he was originally hired on February 4, 1992 and his United States Passport was given as evidence of United States' citizenship (in accordance with INS Form I–9 requirements) his citizenship has never been challenged.
>
> * * *
>
> Cholerton, we believe, thinks he is deserving of a special status insofar as taxes are concerned. Through various maneuvers since he was hired, he has attempted to "persuade" the Company to not forward to the Federal and California tax authorities what we have been instructed to forward by those authorities. His maneuvers have included:
>
> — claims that his civil rights were violated,

— filing a complaint with the EEOC (discrimination on religious grounds),[11]

— multiple threats of litigation himself or through his power of attorney,

— threats of quitting,

— the transferal [sic] of an extraordinary amount of written correspondence from various organizations such as National Worker's Rights Committee, Liberty Library, Save-A-Patriot Fellowship, the Spotlight newspaper, and the Free Enterprise Society, etc., to myself and others at the Company,

— threats of a RICO complaint,

— filing of a discrimination charge with the United States Department of Justice, Civil Rights Division,

— generation of written correspondence to me that my "American values . . . are in the cesspool," that the Company is a "miserable, rights-abusive, un-American organization."

Answer at pp. 1–2.

Perhaps paradoxically, Hadley then describes Cholerton as:

> a productive, and effective employee . . . [who] has had his salary upwardly adjusted a couple of times since [rehire].

Answer at p. 2.

On August 26, 1996, Cholerton's representative, Kotmair, filed a Notice of Appearance, accompanied by a revised Power of Attorney of sufficient breadth to authorize representation before the administrative law judge (ALJ).

On December 22, 1996, Cholerton filed a Motion To Strike Respondent's Answer and Violation of Rule 11, and a Brief in Support of Motion To Strike. Hadley did not respond.

III. *Discussion*

As appears from the Complaint, confirmed and explained by subsequent pleadings, Cholerton 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 Hadley

[11]Title 26 U.S.C. §3127 provides an exemption from social security participation for ***employers*** and their employees when ***both*** are members of an established religious sect which is opposed to social security. That is not the case here. Cholerton describes the claim of religious discrimination as the denial of his "status as a state Citizen." OSC Charge ¶4.

has committed ***unfair immigration-related employment discrimination***. Cholerton, a naturalized United States citizen, disingenuously characterizes as discrimination Hadley's insistence that he supply a social security number as a condition of employment, and Hadley'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, Cholerton obscures 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 by the United States Court of Appeals for the Ninth Circuit.[12]

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)[13] 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.

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). No statute confers jurisdiction on the ALJ to hear tax challenges. Indeed, "[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 Anti-Injunction Act, which commands:

---

[12]Review of the final decision and order of an ALJ in an immigration-related unfair employment practice case 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)(1); 28 C.F.R. §68.53(b). *See Bright*, 780 F.2d at 769–70, 772 (employer who withholds federal taxes has no liability to employee for commensurate reduction in wages; award of attorney's fees is "an appropriate deterrent to future frivolous suits") (citation omitted); *Jolly v. United States*, 764 F.2d 642 (9th Cir. 1985); *Nunley v. Commissioner of Internal Revenue Serv.*, 758 F.2d 372 (9th Cir. 1985).

[13]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.

> **[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 includes tax withholding by employers. *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

In order to sue, the taxpayer 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 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); 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).

Cholerton is unable to claim the *Enochs* exception.

- First, his suit is ***not against the government,*** but against Hadley, his employer.

- Second, he has suffered ***no injury,*** let alone irreparable harm. Respondent's refusal to forward his self-styled "Statement of

Citizenship" to the IRS Service Center, and withholding of his payroll taxes and social security contributions cannot be characterized as injury, much less "irreparable harm." His employer is statutorily obliged 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, an employer has no legal duty to assist a tax protest. The Complainant himself could easily have sent his dubious documents to the IRS, thus mitigating whatever illusory "harm" his employer caused by not sending his tax protest to the IRS on company letterhead.

- Third, he cannot succeed on the merits. 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.[14]

This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," lacks 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); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929, at 18–19 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928, at 13–16 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923, at 10–18 (1997), 1997 WL 235918, at *8–14. Cholerton's Complaint is, therefore, dismissed for lack of subject matter jurisdiction.

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

Cholerton sued Hadley, his longtime employer, because Hadley discharged him for refusing to provide a social security number, be-

[14]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. Jurisdiction is conferred on the Tax Court by 26 U.S.C. §7442.

cause Hadley refused to transcribe his self-styled tax exemption documents on its company letterhead and forward them to the IRS, and because Hadley 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 nn.3–4. Nothing in 8 U.S.C. §1324b obliges an employer to participate in an employee's tax avoidance scheme, nor prohibits an employer from fulfilling the command of 26 U.S.C. §3102 to collect social security contributions, or the mandate of 26 U.S.C. §3402 to deduct withholding taxes "at the source." Even assuming Cholerton was discharged for the reasons he alleges, the employer's conduct does not implicate an immigration-related unfair employment practice.

It is well-established that the ALJ has no authority over terms and conditions of employment, such as an employer's insistence that an employee furnish a social security number, and comply with IRS tax regimens. *Wilson v. Harrisburg Sch. Dist.*, 7 OCAHO 925, at 9 (1997), 1997 WL 242208, at *7. *See also 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 (1992); *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 on its own letterhead! Section 1324b simply does not reach tax and social security issues or exempt employers or employees from compliance with duties dictated elsewhere by statute.

It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment mandated by the government does not violate §1324b. The gravamen of Cholerton's Complaint, a challenge to the Internal Revenue Code

and the Social Security Act, is a matter altogether outside the scope of ALJ jurisdiction. Cholerton's Complaint is, therefore, dismissed for want of subject matter jurisdiction.

C. *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*

Cholerton alleges that Hadley discharged him because of his U.S. citizenship. It is the complainant's burden to prove citizenship discrimination. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820, at *7; *Toussaint v. Tekwood*, 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *12; *United States v. Mesa Airlines*, 1 OCAHO 462, 500. To state a *prima facie* case of citizenship discrimination, "a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8 (citing *L.R.L. Properties v. Portage Metro. Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995)). Although well-pleaded allegations of fact are taken as true, legal conclusions and unsupported inferences obtain no deference.

Disparate treatment is the heart of discrimination. For a claim to constitute discrimination "[t]he employer [must] . . . treat some people less favorably than others" because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). "Where citizenship status is the forbidden criterion, there must . . . be some claim . . . that the individual is being treated less favorably than others *because* of his citizenship status." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 10 (1996) , 1996 WL 780148, at *8 (emphasis added). Where an employer treats all employees in the same way, there can be no discrimination.

In order for Hadley's conduct to have violated 8 U.S.C. §1324b(a)(1)(B), Hadley would need to have treated Cholerton ***differently*** from other employers because he was a U.S. citizen. To prevail, Cholerton would need to prove that he was accorded ***less favorable treatment than others*** because of his citizenship. *Winkler v. Timlin*, 6 OCAHO 912, at 8 (1997), 1997 WL 148820 at *7; *Westendorf v. Brown & Root*, 3 OCAHO 477, at 6–7 (1992), 1992 WL 535635, at *8.

Cholerton claims that he was discriminated against on the basis of his U.S. citizenship when Hadley fired him because he refused to provide a social security number. Cholerton argues that because he repudiated his social security number, he was not obligated to pay tax or contribute to social security. Cholerton states that Hadley fired him when, in lieu of the requisite social security number requested as part of the IRS Form W–4 regimen, he submitted an unofficial, improvised "Statement of Citizenship" "asserting his rights as a U.S. Citizen not to be treated as an Alien for any reason or practice," and because Hadley refused to give credence to an unofficial, improvised "Affidavit of Constructive Notice" exempting Cholerton from providing a social security number and from tax withholding. Complaint at ¶¶14, 16, and 17. ***Cholerton, however, admits that no other workers of different citizenship were retained, thereby negating his claim of discrimination.*** Complaint at ¶14(e).

Cholerton's claim fails to allege one of two essential elements of a *prima facie* case for discriminatory discharge. Adapted from the framework the Supreme Court established in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973), and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), a *prima facie* case of discriminatory discharge on the basis of citizenship is established where an employee demonstrates that:

(1) he is a member of a protected class;

(2) he was fired under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Where the 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 of discrimination, "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)), *cited in Winkler v. Timlin*, 6 OCAHO 912, at 9, 1997 WL 148820, at *8.

Cholerton can satisfy the first, but not the second, of the test's two prongs. As a United States citizen, he is a member of the class of "protected individuals" defined at 8 U.S.C. §1324b(a)(3)(A) entitled to

benefit from the prohibition of discrimination at §1324b(a)(1)(B). Cholerton cannot, however, satisfy the second prong. His own claim denies discrimination. Nowhere does Cholerton allege that anyone else, citizen or alien, was treated differently from him.

Characterizing events in a light most favorable to him, Cholerton chose not to comply with Hadley's demand that he provide a social security number and instead submitted improvised written statements purporting to exempt him from the Internal Revenue Code and Social Security Act. Cholerton's tax and social security challenges do not invite an inference that Hadley discriminated in firing him. Cholerton's theory that only aliens are subject to producing social security numbers and to complying with compulsory tax withholding is inconsistent with the Internal Revenue Code. His convoluted inference, based on the erroneous theory that U.S. citizens alone can claim exemption from tax withholding and social security payments, does not support the supposition that an employer who fails to favor U.S. citizens similarly situated discriminates against them. Failure to favor a group is not discrimination against it.

Cholerton's gripe is not with immigration law. Nothing in §1324b touches on an employee's federal tax withholding obligations. The call for a social security number in IRS Form W–4 is made by the government, not by the employer.

It follows that under any conceivably reasonable reading of his Complaint, Cholerton cannot establish a *prima facie* case of discriminatory discharge on the basis of citizenship. His Complaint is so insubstantial 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. Therefore, there is no call on Hadley to articulate a legitimate, non-discriminatory reason for firing Cholerton. It is certain, however, that Cholerton's insistence that he be exempted from Hadley's lawful and non-discriminatory regimen of tax withholding compliance would constitute such a reason.

Maximizing opportunities to amend discrimination complaints is generally favored. Because, however, Cholerton relies exclusively on Hadley's lawful request that he provide a social security number as the gravamen of his discrimination claim, the consequential lack of

any discernible meritorious §1324b claim forecasts that amendment would be futile. Cholerton's claim is, therefore, dismissed for failure to state a claim cognizable under IRCA.

(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.

At all times relevant to this case, jurisdiction over document abuse could 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).[15] Nothing in the case before me suggests that the tender of improvised documents identified by Cholerton at ¶16a of his Complaint ***years after hire*** implicates §1324a(b) requirements. Cholerton does not dispute Hadley's assertion that the I–9 requirement was satisfied at the time of hire in 1992 by tender of Cholerton's passport. Patently, the Complaint negates any inference that Cholerton 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 Cholerton documents are not acceptable to or embraced by the verification regimen established under §1324a(b).

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

[15]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)." *Id.*

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

Because nothing in the Complaint implicates Hadley's employer obligations under §1324a(b), I lack subject matter jurisdiction over Cholerton's §1324b(a)(6) allegations. Cholerton's Complaint is, therefore, dismissed for lack of subject matter jurisdiction and for failure to state a claim under §1324b.

(3) *Complainant's Retaliation Claim Must Be Dismissed*

An employer does not "retaliate" within the meaning of 8 U.S.C. §1324b(a)(5) by virtue of a fellow employee calling an OCAHO complainant a "scumbag." Assuming as true Cholerton's description of what occurred—i.e., that Hadley's Accounting Manager called him that, Cholerton alleges no facts that would attribute this remark to the employer. Cholerton was a Sales Representative, not a bookkeeper or accountant. The Accounting Manager occupied no supervisory relationship to Cholerton, and, therefore, was in no position to retaliate against Cholerton within the scope of 8 U.S.C. §1324b.

Prohibited employer retaliatory conduct generally consists of actions similar to discrimination under Title VII: "the refusal to hire or rehire, a delay in reinstatement, a disadvantageous transfer or assignment, the removal from a position as shop steward, a demotion, refusal to promote, refusal to transfer or to give a deserved pay raise, a suspension, discharge, or constructive discharge." LEX K. LARSON, EMPLOYMENT DISCRIMINATION, §34.04 (2d ed. 1997) ("What Employer Conduct Is Covered") (footnotes omitted). These retaliatory acts are not present in this case. Larson also catalogues retaliation in the form of harassment by fellow employees, such as "interrogation, reprimands, surveillance, unwarranted or unfavorable job evaluations, or the deprivation of some of the normal benefits or rights of the position, such as overtime, vacations, in-house dispute resolution procedures, office privileges, and access to clients." *Id*. The catalogue does not encompass the "scumbag" appellation. In any event, Cholerton has sustained no actionable injury. Despite Cholerton's persistent tax protests, his EEOC discrimination charge,

OSC Charge, and OCAHO Complaint, he remained, for better or worse, in Hadley's employ. This is not retaliation.

IV. *Decision and Order*

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. Cholerton's 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.

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 29th day of May 1997.

MARVIN H. MORSE
Administrative Law Judge