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

August 15, 1997

JAY S. MANNING, Complainant,	)
v.	) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00126
CITY OF JACKSONVILLE, Respondent.	)

FINAL DECISION AND ORDER TO DISMISS

MARVIN H. MORSE, Administrative Law Judge

Appearances: *John B. Kotmair, Jr.,* Complainant's Representative
Joseph Clay Meux, Jr., Assistant General Counsel, City of Jacksonville, Florida, for Respondent

I. *Introduction*

Yet another frivolous[1] attack on the federal income tax and social security regimen couched as an immigration-related employment

[1]A complaint is frivolous if it lacks an arguable basis in law or fact. "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (*citing Nietzke v. Williams*, 490 U.S. 319, 327 (1989)). "A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton,* 1 F.3d 315, 317 (5th Cir. 1993) (*citing Nietzke,* 490 U.S. at 327). "[T]o take a position which indicates a desire to impede the administration of tax laws is a legally frivolous position." *McKee v. United States,* 781 F.2d 1043, 1047 (4th Cir. 1968), *cert. denied*, 477 U.S. 905 (1986). U.S. citizen claims to be exempt from the income tax have been found to be frivolous *per se*. *LaRue v. Collector of Internal Revenue*, 96 F.3d 1450 (7th Cir. 1996),1996 WL 508567, at *1 (7th Cir. 1996) ("LaRue's argument that he should be treated as a nonresident alien—one that is offered occasionally by tax protestors—is patently frivolous"). For Eleventh Circuit disposition of frivolous tax suits, *see Woods v. Internal Revenue Service,* 3 F.3d 403, 404 (11th Cir. 1993) ("we would not hesitate to order sanctions if appellant had been represented").

discrimination complaint! Jay S. Manning (Manning or Complainant) sues his employer, the City of Jacksonville, Florida (Jacksonville or Respondent) because Jacksonville refused to exempt him from federal income tax withholding and social security contribution obligations [2] on the basis of gratuitously tendered, unoffical, improvised, *sui generis* tax-exemption papers.

II. *Factual and Procedural History*

Following Equal Employment Opportunity Commission (EEOC) dismissal for lack of subject matter jurisdiction of a national origin discrimination charge based on the same factual predicate,[3] Manning, a Jacksonville employee, through his lay representative,[4] John B. Kotmair, Jr. (Kotmair), Director, National Worker's Rights Committee (Committee), filed by letter dated January 29, 1997, a charge with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Manning alleged that Jacksonville committed an ***immigration-related unfair employment practice*** proscribed by 8 U.S.C. §1324b. He specified that Jacksonville refused to recognize for tax-exemption purposes two documents Manning gratuitously presented on September 10, 1996, *i.e.*, an Affidavit of Constructive Notice (that Manning

[2]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 are immunized from legal liability for doing so by 26 U.S.C. §3102, 26 U.S.C. §3403, and the Anti-Injunction Act, 26 U.S.C. §7421(a), 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).

[3]In response to claims of this genre, 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. citizen . . . should be dismissed for failure to state a claim" under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000–e *et seq.* Memorandum, Ellen J. Vargyas, EEOC Legal Counsel, to All EEOC District, Area & Local Directors, July 13, 1995, "Clarification to April 13, 1995 Memorandum on Charges Alleging National Origin Discrimination Due to the Withholding of Federal Income or Social Security Taxes from Wages," at 1.

[4]In a matter unrelated to the case at hand, I note that on July 3, 1997, the Florida Supreme Court issued a proposed opinion, "The Florida Bar Re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration," which found that: "[N]on-lawyer representatives in securities arbitration who accept compensation for their services are engaged in the unlicensed and unauthorized practice of law, and that the public is actually being harmed and has the potential for being harmed in the future by this practice." 22 FLA. L. WEEKLY S388 (1997), 1997 WL 365462 (Fla. 1997).

"does [not] recognize a social security number in relationship to himself . . . [because] he has executed an Affidavit of Revocation and Rescission of his signature") and a Statement of (U.S.) Citizenship (Manning's contention being that only non-resident aliens are subject to withholding tax).

By determination letter dated April 2, 1997, OSC advised Manning that he had not "raised an issue within our jurisdiction" and that OSC would, therefore, take no action on hisbehalf. OSC also advised Manning of his right to file a private complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). On June 16, 1997, Manning filed an OCAHO Complaint charging citizenship status discrimination and overdocumentation. On June 23, 1997, OCAHO issued a Notice of Hearing. On June 30, 1997, Kotmair entered his appearance.

On July 28, 1997, Jacksonville filed its Answer. While incorrectly asserting that natural-born U.S. citizens are not within the protective reach of 8 U.S.C. §1324b, and failing to interpose the obvious affirmative defense of the Anti-Injunction Act, 26 U.S.C. §7421(a), Jacksonville denies it committed an unfair labor practice by its compliance with the tax code.

On August 15, 1992, Manning filed a Reply to Respondent's Answer and Affirmative Defenses, correctly asserting that U.S. citizens are protected by 8 U.S.C. §1324b.

III. *Discussion and Findings*

FED. R. CIV. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

S*ee Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction.

The result reached here—dismissal of Manning's frivolous tax protest—is absolutely predictable and inescapable, given unanimous

OCAHO precedent[5] and controlling federal tax law.[6] First, the Administrative Law Judge (ALJ) lacks subject matter jurisdiction over terms and conditions of employment, including tax compliance regimens, and Manning therefore fails to state a claim cognizable under 8 U.S.C. §1324b. Second, the ALJ is statutorily prohibited from adjudicating tax matters, no matter how disingenously disguised, by the Anti-Injunction Act, 26 U.S.C. §7421(a).

A. *The Complaint Is Dismissed Because This Forum Lacks Subject Matter Jurisdiction Over Terms and Conditions of Employment*

It is a jurisprudential truism that 8 U.S.C. §1324b, which forbids an employer to discriminate on the basis of citizenship status when hiring or firing, does not reach terms and conditions of employment.[7] Therefore, an employer who requires its employees to submit to law-

[5]*See Eldon Hutchinson v. GTE Data Systems, Inc.,* 7 OCAHO 954 (1997); *Hogenmiller v. Lincare, Inc.*, 7 OCAHO 953 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 948 (1997); *Hollingsworth v. Applied Research Assocs.,* 7 OCAHO 942 (1997); *Hutchinson v. End Stage Renal Disease Network, Inc.*, 7 OCAHO 939 (1997); *Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Werline v. Public Serv. Elec. & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *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*, *Inc.,* 7 OCAHO 926, at 4–5 (1997); *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 Corp.*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Town of Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications, Inc.,* 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Associates*, 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: rejection by the employer of an employee's 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 is tax-exempt) and "Statement(s) of Citizenship" (exempting the offeror from social security contributions). In every case, the complaint was dismissed.

[6]*See* 26 U.S.C. §§3101, 3102, 3402, 3403, 6671, 6672, 7421, 7422.

[7]*See 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)).

ful and non-discriminatory terms and conditions of employment commits no legal wrong. Among the terms and conditions of employment an employer may legitimately and nondiscriminatorily impose is the requirement that its labor force submit to tax code[8] and social security[9] mandates. An employer may lawfully insist that employees comply with tax withholding and social security contribution regimens as a condition of employment.

Nothing in the text or legislative history of 8 U.S.C. §1324b prohibits an employer from complying with the tax code or from asking for a social security number (the individual tax identification number).[10] Furthermore, 8 U.S.C. §1324b cannot be construed so as to re-

[8]Contrary to Manning's assertion, 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.

[9]Manning argues that he may opt out of social security. The Supreme Court has held otherwise. The Supreme Court has long acknowledged the constitutionality of the SSA. *Helvering v. Davis*, 301 U.S. 619, 644 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system":

> "[W]idespread individual voluntary coverage under social security. . . would undermine the soundness of the social security program." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. CODE CONG. & ADMIN. NEWS (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

United States v. Lee, 455 U.S. 252, 258 (1982). Manning's recitation of *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935), is unavailing. *Alton* is inapposite, dealing with the Railroad Retirement Act and predating the Court's consideration of the SSA. Although an employee may decline benefits, he must submit to deductions. *Lee*, 455 U.S. at 258, 261 n.12.

Title 26 U.S.C. §3101 imposes social security contributions "on the income of every individual" equal to certain percentages of wages "received by him with respect to employment." Title 26 U.S.C. §3102 (Federal Insurance Contributions Act: Tax on Employees) explicitly commands that social security contributions "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." Section 3102(b) in terms certain indemnifies the employer who performs this statutory duty:

> Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

[10]*See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 9, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 148820, at *7; *Horne v. Town of Hampstead (Horne II)*, 6 OCAHO 906, at 8, 1997 WL 131346, at *6; *Toussaint v. Tekwood Assocs.*, 6 OCAHO 892, at 16–17, 1996 WL 670179, at *14; *Lewis v. McDonald's Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3–4 (O.C.A.H.O.).

lieve an employer of statutory obligations to withhold social security contributions from ***all*** employees' wages.[11] Title 8 U.S.C. §1324b simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. Jacksonville's decision to subject Manning to its tax and social security regimen is not discrimination.

B. *Title 26 U.S.C. §7421(a) ("The Anti-Injunction Act") Precludes ALJ Jurisdiction over Federal Income Tax Withholding*

Manning attempts to restrain Jacksonville from collecting withholding tax and social security contributions. "[E]xcept in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes." *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990). Courts are barred from so doing by 26 U.S.C. §7421(a), "The Anti-Injunction Act," which prohibits all suits restraining tax assessment, collection, and determination. *Woods v. Internal Revenue Service*, 3 F.3d 403, 404 (11th Cir. 1993).

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

26 U.S.C. §7421(a) (emphasis supplied). The purpose of the Anti-Injunction Act is "to preserve the Government's ability to assess and collect taxes expeditiously with 'a minimum of preenforcement judicial interference' and 'to require that the legal right to the disputed sums be determined in a suit for refund.'" *Church of Scientology v. United States*, 920 F.2d 1481, 1484–85 (9th Cir. 1990) (*quoting Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)), *cited in Enochs v. Williams Pkg. & Nav. Co.*, 370 U.S. 1 (1962). ***The Anti-Injunction Act enjoins suit to restrain* all *activities culminating in tax collection.*** *Linn v. Chivatero*, 714 F.2d 1278, 1282, 1286–87 (5th Cir. 1983). ***Such activities include employer withholding of taxes.*** *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 10 (1974).

[11] *See Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 269376, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 9, 1997 WL 242208, at *6; *Boyd v. Sherling*, 6 OCAHO 916, at 18, 1997 WL 148820, at *13; *Winkler v. Timlin*, 6 OCAHO 912, at 11–12, 1997 WL 176910, at *10.

The gravamen of Manning's Complaint is a frivolous, oft-discredited tax protest altogether outside the scope of ALJ jurisdiction. Manning's claim, although expressed in immigration-related employment jargon, is essentially a collateral attempt to avoid or restrain federal income tax collection. Manning seeks redress in this forum of limited jurisdiction in lieu of appropriate forae.[12] This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action.[13] 28 C.F.R. §44.300(a) (1996) (emphasis added).

IV. *Conclusion*

Taking all Manning's factual allegations as true, and construing them in a light most favorable to him, I determine that Manning is entitled to no relief under any reasonable reading of his pleadings. Even if, as Manning claims, he gratuitously tendered documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Jacksonville ignored these documents and insisted on making payroll tax and social security deductions, Jacksonville's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. §1324b. The factual background Manning describes simply does not support the ***immigration-related*** cause of action he pleads. Manning's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside the scope of §1324b.

Although leave to amend is favored in discrimination cases where subject matter jurisdiction is ineffectively pleaded, there is no conceivable way that Manning can transform this tax protest into an unfair ***immigration-related*** employment complaint. A complaint, even by a *pro se* Complainant (which Manning arguably is not), may be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *see Bankers Sec. Life Ins. Soc. v. Kane*, 885 F.2d 820, 822 (11th Cir. 1989).

Manning's claim is incapable of viable amendment: there is no material factual dispute between parties, only a bald tax challenge

[12]U.S. District Court or Tax Court.

[13]*See, e.g., Austin v. Jitney-Jungle*, 6 OCAHO 923, at 10, 1997 WL 235918, at *7; *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 917, at 11, 1997 WL 242208, at *8; *Boyd v. Sherling*, 6 OCAHO 916, at 8, 1997 WL 176910, at *9.

beyond this forum's jurisdictional reach. The Complaint cannot be amended to an ***immigration-related*** cause of action. Jacksonville 's insistence that all employees comply with tax code and social security requirements was entirely lawful. I am precluded from hearing this suit by the limited reach of §1324b, by the Anti-Injunction Act, and by the tax code, which immunizes employers from liability when they withhold tax and social security contributions from wages.

V. *Ultimate Findings, Conclusions, and Order*

(a) *Disposition*

Manning's action lacks "an arguable basis either in law or in fact.'" *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Manning's Complaint, having no arguable basis in fact or law, is frivolous. *See* n.1, *supra.* Where a claim is based upon a party's discharge of statutory duties, it derives from an indisputably meritless legal theory.[14] As an employer who complies with statutory obligations, Jacksonville is immune from liability under the very statutes conferring duties upon it.[15] Accordingly, I dismiss Manning's Complaint without leave to amend because his tax challenge cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice. The Complaint is dismissed because it fails to state a claim of immigration-related unfair employment practices in violation of 8 U.S.C. §1324b and because this forum lacks subject matter jurisdiction over employment conditions and tax challenges.

The filing of this Complaint is patently frivolous, and, on the part of Kotmair, Manning's representative, disingenuous and irresponsible. He files this, the latest in a litany of tax protests, as recently as June 16, 1997, in the face of unanimous OCAHO precedents rejecting such collateral attacks on the tax code.[16] By reiterating identical, stereotypical charges without discussing or otherwise acknowledging those precedents, he abuses the process of this forum. Were Kotmair an attorney, his actions would be sanctionable. *Woods v.*

[14]"A claim is based upon an indisputably meritless legal theory if the defendants are immune from suit." *Graves v. Hampton,* 1 F.3d at 317 (*citing Nietzke,* 490 U.S. at 327).

[15]*See* 26 U.S.C. §3102 (immunizing employers who collect social security contributions from "the claims and demands of any person") and 26 U.S.C. §3403 (providing that employers who withhold taxes "shall not be liable to any person").

[16]*See* n.5, *supra.*

Internal Revenue Service, 3 F.3d at 404. By this Final Order and Decision, Kotmair is cautioned that I may dismiss any further tax protests out of hand.

I have considered the pleadings of the parties. All requests not previously disposed of are denied.

(b) *Appellate Jurisdiction*

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. §1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *FluorConstructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 15th day of August, 1997.

MARVIN H. MORSE
Administrative Law Judge