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

August 13, 1997

SUSAN K. HORST, Complainant, v. JUNEAU SCHOOL DISTRICT, CITY AND BOROUGH OF JUNEAU, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00123)))))

FINAL DECISION AND ORDER WITH SCHEDULE FOR BRIEFING ON ATTORNEY'S FEES

Procedural History

This is an action alleging unfair immigration-related employment practices in which Susan K. Horst is the complainant and Juneau School District, City and Borough of Juneau is the respondent. Horst alleged that Juneau School District engaged in conduct prohibited by the Immigration and Nationality Act, as amended, 8 U.S.C. §1324b (1994) (INA) when it refused to accept the documents that she presented to show she can work in the United States. The complaint is signed by John B. Kotmair, Jr., Director of the National Worker's Rights Committee.

Horst's complaint alleges that she is a United States citizen and a teacher, employed by the Respondent since August 1978. She seeks back pay from July 1995. The significance of that date is unelaborated. The complaint alleges that the school district refused to accept her Statement of Citizenship and Affidavit of Constructive Notice, but denies that the employer asked for too many or wrong documents to show she was authorized to work in the United States. The paragraph of the form complaint reading "The Business/Employer re-

fused to accept the documents that I presented to show I can work in the United States" is checked "yes" but the words "to show I can work in the United States" are crossed out.

Accompanying the complaint is a nine-page letter dated January 29, 1997 to the Office of the Special Counsel for Immigration-Related Unfair Employment Practices from John B. Kotmair, Jr., Director of the National Worker's Rights Committee with attachments.[1] The thrust of the letter is an explication of the views of the National Worker's Rights Committee that United States citizens are not obliged to have money deducted from their wages for taxes and are free to decline participation in the Social Security system.

On July 22, 1997, respondent filed an answer and a motion to dismiss. The answer admits that complainant is a United States citizen and has been employed by respondent as a teacher since 1978. It admits withholding from complainant's wages and refusing to honor the subject documents for the purpose of creating an exemption from withholding. It denies that complainant's right to work in the United States is in issue. It also requests reasonable costs and attorney's fees in defending against Horst's claims. The motion to dismiss asserts that no claim is stated because the complaint alleges no acts prohibited by §1324b and because the school district acted pursuant to the requirements of federal law in withholding for taxes.

The Applicable Statutory Provision

The Immigration Reform and Control Act of 1986 (IRCA), enacted as an amendment to the Immigration and Nationality Act, (INA), established a comprehensive system of employment eligibility verification, 8 U.S.C. §1324a, as well as prohibitions against certain unfair immigration-related employment practices. 8 U.S.C. §1324b. Congress for the first time made it unlawful for an employer to hire employees without verifying their eligibility to work in the United States. A prospective employer is obligated under the employment eligibility verification system to examine certain documents acceptable for demonstrating a worker's identity and employment eligibility under §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v)(1996), and to complete a Form I–9 for each new employee.

[1]Among the attachments is a letter from OSC dated April 2, 1997, stating that the Horst charge raised no issue within OSC's jurisdiction and authorizing the filing of a complaint within 90 days thereafter with the Office of the Chief Administrative Hearing Officer.

The specific provision at issue in this proceeding, 8 U.S.C. §1324b(a)(6), provides that certain documentary practices may be treated as discriminatory hiring practices.

> For purposes of paragraph (1),[2] a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b)[3] of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

The specific documents acceptable to show identity and employment eligibility are set out in 8 U.S.C. §§1324a(b)(1)(B), (C), and (D), 8 C.F.R. §§274a.2(b)(1)(v)(A), (B), and (C). List A documents are acceptable to show both identity and employment eligibility, and include a United States passport, certain unexpired foreign passports showing work authorization and various INS forms, including INS Forms N–550 or N–570, I–151 or I–551, I–688, I–688A, I–688B, I–327, I–571, and N–560 or N–561, a Certificate of United States Citizenship.[4] List B documents are acceptable to establish identity only, and include drivers' licenses and certain specific identification cards; List C documents, which establish work authorization only, include social security cards, certain birth certificates, Native American tribal documents, various State Department Forms including FS–545 and DS–1350, and INS Forms including I–197 and I–179, or unexpired employment authorization documents issued by INS. When a document from the lists set out in §1324a(b)(1), 8 C.F.R. §274a.2(b)(1)(v) is presented for purposes of satisfying the requirements of the employment eligibility verification system, an employer, recruiter, or referrer for a fee is obligated to accept the document if it appears on its face to be genuine.

Accordingly, the rejection of a prospective employee's proffered documents will be treated as an unfair hiring practice under this

[2]Paragraph (1) deals with the hiring, recruitment, referral for a fee, or discharge of employees.

[3]Section 1324a(b) sets forth the specifics of the employment eligibility verification system.

[4]The source of Horst's "Statement of Citizenship" is unclear. The form is not part of the record and there is no assertion that it is related in any way to INS form N–560 or N–561 Certificate of United States Citizenship. The forms issued by INS do not purport to address issues of federal taxation.

provision *if*: 1) a document from List A, or one document each from both List B and List C, are presented to an employer, recruiter, or referrer for a fee by a prospective employee for the purpose of hiring, recruitment, or referral, 2) the documents on their face appear to be genuine, and 3) the employer, recruiter, or referrer refuses to honor the documents as satisfying the requirements of the employment eligibility verification system.

Regulations implementing the employment eligibility verification system make clear that the statute was to have prospective application only. Employers are required to examine documents and to complete Form I–9 only for individuals hired after November 6, 1986 who continued to be employed after May 31, 1987. 8 C.F.R. §274a.2. The penalty provisions similarly have no application to employees hired prior to November 7, 1986 who continued in their employment. 8 C.F.R. §274a.7.

Standards for Motion to Dismiss

A motion to dismiss for failure to state a claim is a disfavored motion. The usual caution is that dismissal is proper only 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." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Nevertheless, a party can plead him or herself out of court by pleading facts showing the absence of a valid claim. *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085,(1994), *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992). While well pleaded factual allegations and inferences reasonably drawn from those facts will be taken as true in ruling on a motion to dismiss, there is no obligation to ignore facts in the complaint which undermine the pleader's claim. *R.J.R. Servs., Inc. v. Aetna Cas. and Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989). Neither is there any obligation to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

As is by now well established in OCAHO jurisprudence, the activities prohibited by 8 U.S.C. §1324b include discrimination in hiring, firing, recruitment, referral for a fee, retaliation for engaging in protected activity, and document abuse. 8 U.S.C. §§1324b(a)(1), (a)(5), and (a)(6). *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929,

at 9 (1997) (citing *Smiley v. City of Philadelphia*, 7 OCAHO 925, at 18 (1997)); *Tal v. M.L. Energia, Inc.*, 4 OCAHO 705, at 14 (1994). Other terms and conditions of employment such as wages, promotions, employee benefits, and the like are beyond the reach of the INA. *See*, *Lareau v. USAir, Inc.*, 7 OCAHO 932, at 11 (1997) (citing cases). Thus a long term incumbent employee's complaints about the terms and conditions of his or her employment fail to state a claim under §1324b. *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919, at 3–4, 9 (1997), *Horne v. Hampstead*, 6 OCAHO 906, at 5–6 (1997). Similarly beyond the reach of the INA is a complaint which does not set forth either direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory. *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995).

Discussion

Horst is a long term employee of the Juneau School District and alleges no facts involving hiring, recruitment, referral for a fee, or retaliation for engaging in protected activity. She does not allege that the subject documents were tendered "to show I can work in the United States". There seems to be no factual dispute between the parties. The school district indeed declined to honor her tendered documents requesting it to cease withholding sums from Horst's wages for federal taxes and social security contributions. Whether these facts state a claim justiciable in this forum is purely a question of law.

That complainant's assertions state no claim under 8 U.S.C. §1324b is well established in OCAHO jurisprudence. *Hutchinson v. GTE Data Servs., 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 Service Electric & Gas Co.*, 7 OCAHO 935 (1997); *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934 (1997); *Lareau v. USAir, Inc.*, 7 OCAHO 932 (1997); *Jarvis v. A.K. 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); *Smiley v. 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); *Winkler v. Timlin Corp.*, 6 OCAHO 912 (1997); *Horne v. Hampstead*, 6 OCAHO 906 (1997); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), *appeal filed*, No. 97–70124 (9th Cir. 1997); *Toussaint v. Tekwood Assocs., Inc.*,[5] 6 OCAHO 892 (1996), *appeal filed* No. 96–3688 (3d Cir. 1996).

The Ninth Circuit has likewise long and repeatedly held that an employer is not liable to an employee for complying with a legal duty to withhold for taxes, *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766 (9th Cir. 1986) and cases cited therein. To argue otherwise is patently frivolous.

The complaint must be dismissed. Ordinarily the dismissal of a claim for failure to meet minimal pleading requirements should be accompanied by a grant of leave to file an amended complaint to cure the defect. *Simmons v. Abruzzo*, 49 F.3d 83, 86–87 (2d. Cir. 1995), *Bransom v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (citing *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)). Where, as here, it appears to a certainty that amendment would be futile, there is no reason to permit such filing. *Cf. Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995).

The complaint is accordingly dismissed. Respondent shall have until September 7 1997 to file a detailed submission of its costs and attorney's fees, with supporting documentation. Complainant shall file her response, if any, on or before September 30, 1997.

SO ORDERED.

Dated and entered this 13th day of August, 1997.

ELLEN K. THOMAS
Administrative Law Judge

[5]While neither Kotmair nor the National Worker's Rights Committee appear of record in *Toussaint*, the allegations are substantially similar.

Appeal Information

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