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

February 18, 1997

GAYLON D. SHEPHERD, Complainant, v. STURM, RUGER & CO., INC., Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO CASE NO. 97B00163)))

ORDER GRANTING RESPONDENT'S MOTION FOR ATTORNEY'S FEES

Procedural History

On December 24, 1997, I entered a final decision and order dismissing the complaint of Gaylon Shepherd (Shepherd or complainant) against his employer Sturm, Ruger, & Company, Inc. (Sturm, Ruger or respondent). Shepherd, by the National Worker's Rights Committee and its Director, had alleged that Sturm, Ruger's refusal to accept a "Statement of Citizenship" and "Affidavit of Constructive Notice" as a reason to cease withholding federal income and FICA taxes from Shepherd's pay was an unfair immigration-related employment practice in violation of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324b(a)(6). The order of dismissal held that the actions Shepherd complained of were not immigration-related employment practices within the meaning of the statute, and also set out a schedule for the parties to file their submissions respecting the issue of attorney's fees.

On January 15, 1997, Respondent Sturm, Ruger filed an affidavit in support of it's request for attorney's fees. The affidavit summarized the legal experience of Robert L. Danaher, respondent's Assistant General Counsel who represented Sturm, Ruger in this case, and de-

scribed the tasks performed during the 7.8 hours Danaher spent on this case. Sturm, Ruger proposed two alternative methods of calculating attorney's fees, and requested a total of either $1,404.00 or $418.00, depending on the method of calculation chosen.

Shepherd filed a timely reply in opposition to the request. Shepherd did not question the reasonableness either of the proposed hourly rates or of the time spent by Sturm, Ruger's counsel. Rather, Shepherd re-argued the merits of the dismissed action, contending that Sturm, Ruger failed to present evidence that his "Statement of Citizenship" and "Affidavit of Constructive Notice" are not lawful documents, or to show that its refusal to honor the documents was lawful. Further, he pointed out that fees should not be assessed against him because a *pro se* complainant should be held to a less stringent standard than a represented party, citing *Haines v. Kerner*, 404 U.S. 519 (1972), and because he was simply attempting in good faith to exhaust his administrative remedies.

Standards for Awarding Attorneys Fees

The applicable statutory provision governing the award of fees, 8 U.S.C. §1324b(h), directs that an administrative law judge, in a proceeding under that section,

> may allow a prevailing party, other than the United States, a reasonable attorney's fee if the losing party's argument is without reasonable foundation in law and fact.

Before an award of attorney's fees may be granted, it is thus necessary to consider two questions: first, is the requesting party the "prevailing party" under the Act, and second, did the losing party's argument lack a reasonable foundation in law and fact.

Discussion

It is clear that Sturm, Ruger is the party in whose favor the ruling on the motion to dismiss was rendered, and which received the dispositive relief sought by its motion to dismiss. *Cf. Huesca v. Rojas Bakery*, 4 OCAHO 654, at 560 (1994),[1] *United States v. G.L.C.*

[1]Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

Restaurant, Inc., 3 OCAHO 439, at 465–66 (1992). Complainant has not contended otherwise.

Shepherd's argument that Sturm, Ruger is obliged to present evidence of the lawfulness of its refusal to honor his documents misconstrues the allocation of burdens of proof and ignores overwhelming contrary precedent in this forum. As pointed out in the earlier decision, OCAHO case law has repeatedly addressed similar claims filed by the National Worker's Rights Committee and its associates protesting an employer's or prospective employer's refusal to honor a "Statement of Citizenship" and "Affidavit of Constructive Notice" as exempting the complainant from withholding for taxes, and/or protesting an employer's request for a social security number as a condition of employment. In each instance, those claims were dismissed as posing no issues cognizable under 8 U.S.C. §1324b. *Johnson v. Florida Power Corp.*, 7 OCAHO 981 (1997); *Hamilton v. The Recorder*, 7 OCAHO 968 (1997); *Cook v. Pro Source, Inc.*, 7 OCAHO 960 (1997); *Horst v. Juneau Sch. Dist. City and Borough of Juneau*, 7 OCAHO 957 (1997); *Manning v. Jacksonville*, 7 OCAHO 956 (1997); *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. Pub. Serv. Elec. & 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. 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); *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.*, 6 OCAHO 892 (1996), *aff'd sub nom. Toussaint v. OCAHO*, 127 F.3d 1097 (3d Cir. 1997).[2] Shepherd does not even acknowledge the existence of this body of law, much less explain how his case differs from those cited.

[2]Neither the National Worker's Rights Committee nor its Director appear of record in *Toussaint*.

Shepherd's citation to *Haines v. Kerner* is unavailing because he is not proceeding *pro se*, but with the assistance and representation of John B. Kotmair, Jr., Director of the National Worker's Rights Committee, who filed Shepherd's complaint. *Cf. Hamilton v. The Recorder*, 7 OCAHO 968, at 4 (1997). Kotmair and the National Worker's Rights Committee also represented 23 other individuals whose similar, if not identical, claims were also summarily rejected. In one such case an order issued on August 15, 1997 advised the National Worker's Rights Committee:

> The filing of this Complaint is patently frivolous, and, on the part of Kotmair . . . disingenuous and irresponsible. . . . 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. . . . By this Final Order and Decision, Kotmair is cautioned that I may dismiss any further tax protests out of hand.

Manning v. City of Jacksonville, 7 OCAHO 956, at 8 (1997).

The pursuit of the instant complaint in this forum in the face of such overwhelming controlling authority to the contrary is patently frivolous, unreasonable, and without foundation. Shepherd's arguments, like the same arguments in the cases cited, have no reasonable foundation in law or fact. The National Worker's Rights Committee and its Director represented the complainants in all but one of the earlier cases, and received copies of those decisions. There is no possibility that Shepherd's representative was unaware of the adverse precedent.

Shepherd's representative has thus been on notice for many months that this office is an inappropriate forum in which to air his disputes with the Internal Revenue Service. While he asserts that the filing of the complaint is a good faith effort to "exhaust all available administrative remedies before seeking any redress in State or Federal District Court," there is no such redress to be had in either of those fora.[3] Neither is there any reason to anticipate that any Circuit in the United States would find Shepherd's argument to be anything other than frivolous.

[3]Claims of unlawful immigration-related employment practices arising under 8 U.S.C. §1324b are appealed directly from this office to the federal circuit court for the circuit in which the violation is alleged to have occurred, §1324b(i)(2). Therefore neither state nor federal district courts have jurisdiction under 8 U.S.C. §1324b.

These and similar time-worn attacks on well-settled principles of tax law have been rejected by federal courts all over the United States, whether asserted against employers, *see, e.g.*, *Lepucki v. Van Wormer*, 765 F.2d 86 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985), *Stonecipher v. Bray*, 653 F.2d 398 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), *Bright v. Bechtel Petroleum Inc.*, 780 F.2d 766 (9th Cir. 1986), *Edgar v. Inland Steel Co.*, 744 F.2d 1276 (7th Cir. 1984), *Lonsdale v. Smelser*, 553 F. Supp. 259 (N.D. Tex. 1982), *Lonsdale v. Smelser*, 709 F.2d 910 (5th Cir. 1983), *McFarland v. Bechtel Petroleum, Inc.*, 586 F. Supp. 907 (N.D. Cal. 1984), *amended by* No. C–83–3963–JPV, 1985 WL 1630 (N.D. Cal. Apr. 30, 1985) (unreported), *Press v. McNeal*, 568 F. Supp. 256 (E.D. Pa. 1983), against federal agencies, *Billman v. Comm'r*, 847 F.2d 887 (D.C. Cir. 1988), *Schoffner v. Comm'r*, 812 F.2d 292 (6th Cir. 1987), *Pascoe v. IRS*, 580 F. Supp. 649 (E.D. Mich. 1984), *aff'd* 755 F.2d 932 (6th Cir. 1985), *Granzow v. Comm'r*, 739 F.2d 265 (7th Cir. 1984), or against federal employees, *Ryan v. Bilby*, 764 F.2d 1325 (9th Cir. 1985) (civil rights action against judge, magistrates, attorneys and IRS agents), *United States v. Ekblad*, 732 F.2d 562 (7th Cir. 1984) (lien against property of IRS official), *United States v. Hart*, 701 F.2d 749 (8th Cir. 1983) (IRS officials' action to enjoin taxpayer who recorded "common law liens" on property owned by them).

Similar theories have been advanced in a variety of contexts, *Gattuso v. Pecorella*, 733 F.2d 709 (9th Cir. 1984) (tax protestors sought "abatement of the finding" that they owed taxes, claiming wages were not income), *In re Becraft*, 885 F.2d 547 (9th Cir. 1989) (sanctions under Fed. R. App. P. 38 against criminal defense counsel who had claimed, *inter alia*, on appeal that it was error for district court to refuse to give jury instruction that a United States citizen residing in the United States is not subject to federal income tax laws under Sixteenth Amendment), *Neal v. Regan*, 587 F. Supp. 1558 (N.D. Ind. 1984) (action for writs of mandamus seeking return of IRS penalties), and multiple appeals from Tax Court deficiency determinations, *Sochia v. Comm'r*, 23 F.3d 941 (5th Cir. 1994), *cert. denied*, 513 U.S. 1153 (1995), *Urban v. Comm'r*, 964 F.2d 888 (9th Cir. 1992), *Smith v. Comm'r*, 800 F.2d 930 (9th Cir. 1986), *Rager v. Comm'r*, 775 F.2d 1081 (9th Cir. 1985), *Hudson v. United States*, 766 F.2d 1288 (9th Cir. 1985).

What these cases have in common is that all rejected the theories put forward. Many of these cases awarded attorney's fees; some assessed sanctions as well. The fact that in some instances the cases

were pursued *pro se* did not provide protection from the award of attorney's fees. *Gattuso*, 733 F.2d at 710 (argument that wages are not "income" is frivolous), *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1989) (frivolous argument that *pro se* tax protestors are exempt from taxation because they were "natural individuals" who had not requested any privilege from the government), *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) (*pro se* attempt to prevent IRS levies), *Press*, 568 F. Supp. at 259–60 (challenge to employer's withholding for federal income tax found meritless, vexatious and abusive), *Wise v. Comm'r*, 624 F. Supp. 1124, 1129 (D. Mont. 1986) (*pro se* challenge to withholding for taxes where the slightest amount of research would have disclosed there was no foundation for claim; plaintiff's *pro se* status "does not excuse him from researching the law").

There can be no "good faith effort" to exhaust remedies where there is no reasonable basis for a belief either that these claims are warranted by existing law or that the Second Circuit is likely to be persuaded that United States citizens are not subject to the provisions of the Internal Revenue Code, or stands ready to abandon its holdings in such cases as *Sitka v. United States*, 845 F.2d 43 (2d Cir. 1987), *cert. denied*, 488 U.S. 827 (1988) and *Schiff v. United States*, 919 F.2d 830 (2d Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991), in which the court observed,

> We conclude that the instant appeal is yet another in a series of frivolous appeals brought by Schiff "to make public his radical views on tax reform." *Schiff v. Commissioner*, supra, 751 F.2d at 117. We cannot countenance Schiff's continued resort to this Court to "rehash . . . his basic theses: [that] he does not have to pay taxes." *United States v. Schiff*, supra, 876 F.2d at 275. "The payment of income taxes is not optional . . . and the average citizen knows that the payment of income taxes is legally required." *Id.* (citations omitted).

> The imposition of sanctions against litigants who continuously abuse the appellate process is justified. E.g., *In re Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982)(per curiam), *cert. denied*, 459 U.S. 1206 (1983); *In re Hartford Textile Corp.*, 659 F.2d 299, 303–06 (2d Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1018 (1982); *Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35, 40 n. 5 (2d Cir. 1979). We hold that " ' the situation here is one of those "highly unusual" instances which permit the imposition of sanctions under Rule 38 because of "a clear showing of bad faith".'"

Schiff, 919 F.2d at 834.[4] *See generally*, Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 Gonz. L. Rev. 291 (1996–97).

Reasonableness of the Requested Attorney's Fees

OCAHO procedural rules[5] require that the requesting attorney file an itemized statement of the actual time expended and the rate at which fees and other expenses were computed. 28 C.F.R. §68.52(c)(2)(v). Danaher submitted an affidavit describing the 7.8 hours he worked on this case, and showing the specific tasks performed. These were:

Hours	*Activity*
0.5	Review Complaint and Notice of Hearing;
1.3	Obtain and review *Federal Procedure* for ACAHO [sic] procedures;
0.4	Prepare and file Notice of Appearance;
1.5	File review in preparation for Answer, TC to Personnel Manager for information, prepare and file answer;
1.8	Research and prepare Motion to Dismiss;
1.5	Research and Prepare Motion for Attorney's Fees;
0.8	Prepare Affidavit in Support of Claim for Attorney's Fees.

The affidavit also indicated that substantial time was expended in correspondence and telephone calls prior to the filing of the complaint, compensation for which is not included in the request.

Danaher also stated that since January 1, 1996 he has been Assistant General Counsel for Sturm, Ruger and that prior to that

[4]The court also stated at 831:

> Schiff is no stranger to this court. This is another in a series of cases involving Schiff's refusal to pay income taxes. E.g., *United States v. Schiff*, 876 F.2d 272 (2d Cir. 1989); *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); *Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210 (2d Cir. 1985); *Schiff v. Simon & Schuster, Inc.*, 766 F.2d 61 (2d Cir. 1985) (per curiam); *Schiff v. Commissioner*, 751 F.2d 116 (2d Cir. 1984) (per curiam); *United States v. Schiff*, 647 F.2d 163 (2d Cir.), *cert denied*, 454 U.S. 835 (1981); *United States v. Schiff*, 612 F.2d 73 (2d Cir. 1979).

[5]Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1997).

date he was a litigation partner with Marsh, Day & Calhoun of Southport, Connecticut, where he handled civil litigation for nearly 13 years. He has been admitted to practice in Connecticut since 1983 and in the Second Circuit since 1986. Danaher requested attorney's fees in the amount of $1,404.00, the 7.8 hours he spent on the case multiplied by $180.00, his usual hourly rate when he was a litigation partner at Marsh, Day & Calhoun. Alternatively, he requested fees totaling $418.00, based upon the actual cost of Danaher's employment to Sturm, Ruger.

Shepherd has not challenged the specifics of the request. The hourly rate is well within the ranges awarded in similar OCAHO cases. *See, e.g.*, *Hamilton v. The Recorder*, 7 OCAHO 978, at 9 (1997) ($225.00 per hour for an associate in the Boston, Massachusetts area), *Austin v. Jitney Jungle Stores of America, Inc.*, 7 OCAHO 969, at 6–7 (1997) ($175.00 per hour for a partner in the Jackson, Mississippi area), *Kosatchkow v. Allan-Stevens Corp.*, 7 OCAHO 966, at 10 (1997) ($180.00 per hour for a partner in the Detroit, Michigan area), *Lareau v. U.S. Airways, Inc.*, 7 OCAHO 963, at 10 (1997) (discounted rate of $284.75 per hour for a senior partner and $207.00 per hour for "of counsel" in the Washington, D.C. market), *Jarvis v. AK Steel*, 7 OCAHO 952, at 5 (1997) ($240 per hour for attorney in the Pittsburgh, Pennsylvania area). Absent objection, I find both the number of hours expended and the requested hourly rate of $180 to be reasonable for a litigation partner with 13 years of experience doing the type of work performed. *See generally Lee v. AirTouch Communications*, 7 OCAHO 926, at 10, n.8 (1997).

In *Evans v. Connecticut*, 967 F. Supp. 673, 691 (D. Conn. 1997), the court noted that ordinarily the prevailing rates in the relevant community should be assessed in accordance with the rates in the judicial district in which the court sits. In this case, there is no evidence in the record from which I can ascertain the hourly rate in the Southport, Connecticut area. In *Evans*, however, the court additionally stated:

> The attorney in this case failed to submit any additional evidence, beyond his own affidavits, establishing the prevailing rates for similar services rendered in the relevant community. Therefore, this court looks to attorney's fees granted in the District of Connecticut [footnote omitted] and uses its own knowledge of similar cases to determine what is a reasonable rate. *Miele v. New York State Teamsters Conference Pension and Retirement Fund*, 831 F.2d 407, 409 (2d Cir. 1987) (trial judge may rely on his or her knowledge of prevailing community rates). Cases in the District of Connecticut reveal what has been considered reasonable rates for attorneys, paralegals, and law students in this community.

> *See G.R., et al. v. Regional School District #15*, 1996 WL 762324 (D. Conn. 1996) ($225.00 per hour is reasonable rate for attorney) . . .

Evans, 967 F. Supp. at 691.

Both the Supreme Court and the Second Circuit have explicitly approved the lodestar method of fee calculation. See *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), *Cruz v. Local Union No. 3 IBEW*, 34 F.3d 1148, 1159 (2d Cir. 1994). The lodestar fee is determined by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Id.* The Supreme Court has been cautious in departing from the lodestar calculation and has specifically warned that many of the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1994) are usually already subsumed within the lodestar calculation. *Blum v. Stenson*, 465 U.S. 886, 898–900 (1984) (novelty and complexity of issues, quality of representation, special skill and experience of counsel and results obtained are reflected in lodestar calculation and cannot serve as independent bases for adjusting fee award). *Blanchard* makes clear that the lodestar approach is the "centerpiece" on an attorney's fee award, noting that:

> The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation. In *Blum* we are rejected, as contrary to congressional intent, the notion that fees are to be calculated on a cost-based standard.

Blanchard, 489 U.S. at 94.

I am satisfied that compensation based on the lodestar calculation is reasonable, and find no reason to make any adjustment.

Conclusion

Complainant is directed to pay to respondent the sum of $1,404.00 for attorney's fees, based on 7.8 hours multiplied by a reasonably hourly rate of $180.00.

SO ORDERED.

Dated and entered this 18th day of February, 1998.

ELLEN K. THOMAS
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks 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.