

United States District Court

MAY 28 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

Air-Exec. Inc., an  
Oklahoma Corporation

CIVIL ACTION FILE NO. 75-C-489

Plaintiff,

vs.

Two Jacks, Inc., a Tennessee corporation  
and Jack Adams, Sr., an individual

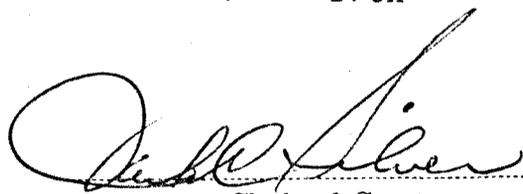
JUDGMENT

This action came on for trial before the Court and a jury, Honorable Allen E. Barrow  
, United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that having found in favor of the Plaintiff  
and against the Defendants, assesses damages in the sum of \$60,000.00,  
plus interest.

Dated at Tulsa, Oklahoma  
of May , 19 76

, this 27th day



Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY DARYL ATKINS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOHN GIBSON LANNING, KENNETH D. )  
 FOUTS, RANDALL CRAIG RUARK, and )  
 DONALD WALLACE STOCKTON, )  
 )  
 Defendants. )

No. 75-C-458-C ✓

FILED

MAY 28 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

O R D E R

The Court has before it for determination a Motion for Summary Judgment by the defendants herein.

Plaintiff's Complaint alleges that the defendant, John Gibson Lanning, District Attorney for Washington County, State of Oklahoma, during the period from June 26, 1975, through August 20, 1975, acting in concert jointly and severally with the defendants, Kenneth D. Fouts, an investigator for the Washington County District Attorney's Office, and Randall Craig Ruark, an undercover agent employed by the Washington County District Attorney's Office, did under color of law conspire to unlawfully charge the plaintiff with a felony crime and cause him to be arrested, confined and imprisoned for 33 days before charges were dismissed.

Plaintiff states in the Complaint that the action arises under the Fourteenth Amendment, 42 U.S.C. § 1983 and 42 U.S.C. § 1985. In the section of the Complaint entitled "Cause of Action" plaintiff makes specific allegations in regard to the conduct of each defendant and only specifies that such conduct is in violation of 42 U.S.C. § 1983. No reference is made to the Fourteenth Amendment or 42 U.S.C. § 1985.

In their Motion for Summary Judgment defendants contend

plaintiff has failed to state a cause of action pursuant to 42 U.S.C. § 1985. Section 1985 provides in pertinent part for safeguarding the equal protection of the laws or of equal privileges and immunities under the laws. As stated in Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 388 (1971):

"The language requiring intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

Title 42 U.S.C. § 1985(3) reaches conspiracy to deprive one of rights only when the object thereof is deprivation of equality and does not cover conspiracies to deny due process. Selegeski v. Ilg, 395 F.Supp. 1253 (D.C. Conn. 1975); Collins v. Bensinger, 374 F.Supp. 273 (D.C. Ill. 1974); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).

In Daly v. Pedersen, 278 F.Supp. 88 (D. Minn. 1967) the plaintiff alleged he was unlawfully and maliciously arrested based on parking violations. The court dismissed the complaint, stating that "a conspiracy claim based upon § 1985(3) requires clear showing of invidious, purposeful and intentional discrimination between classes or individuals." In dismissing the complaint of an individual who alleged a conspiracy to secure a conviction by the knowing use of perjured testimony, the court in Mitchell v. Greenough, 100 F.2d 184 (9th Cir. 1938) rehearing denied 100 F.2d 1006, cert. denied 306 U.S. 659, 59 S.Ct. 788, 83 L.Ed. 1056, observed:

"Appellant was subject to no greater hazard than any other individual in the State, namely, the hazard of being prosecuted for a crime and convicted by false testimony."

Plaintiff in the case at bar has failed to allege that there was some racial or other class-based invidiously discriminatory animus behind the actions of the defendants. It is therefore

the determination of the Court that defendants' Motion for Summary Judgment in regard to Title 42 U.S.C. § 1985 should be granted and hereby is sustained.

The defendants also contend that plaintiff has failed to state a cause of action in regard to Title 42 U.S.C. § 1983. The Court finds without merit defendants' contention that defendants' conduct was not under "color of law." Clearly the District Attorney and those on his staff were acting under "color of law" when, based upon their investigation, they caused an arrest warrant to be issued against the plaintiff. An officer or employee of a State or one of the political subdivisions thereof will be deemed to be acting under "color of law" as to those deprivations of rights committed in the fulfillment of the tasks and obligations assigned to him. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Furthermore, misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state, is action taken "under color of law." Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). The Supreme Court has said: "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

An examination of the factual allegations is warranted in the case at bar in order to determine whether a cause of action is stated and the applicable immunities, if any, as to each defendant.

Plaintiff alleges as factual basis for the action, that Ruark was hired by District Attorney Lanning as a paid operative on salary from the Office of the District Attorney, and Fouts was a special investigator on the District Attorney's staff. Plaintiff further states that Fouts and Ruark conducted a probe of Washington County contraband sales with Fouts directing the

operation and Lanning having overall supervision. It is alleged that on June 26, 1975, Ruark purchased marijuana from a person who gave his name as "Adkins" or "Atkins," and that based thereon, Ruark and Fouts, without probable cause and without further investigation determined to charge the plaintiff Timothy Daryl Atkins, with the crime of distributing marijuana. Fouts and Ruark discussed the investigation and supposed sale of marijuana by the plaintiff with District Attorney Lanning in his position as overall supervisory director of the investigation. District Attorney Lanning thereafter filed an information verified by Fouts and citing Ruark as the purchaser of the drugs, which resulted in a bench warrant being issued for the plaintiff. As a result thereof, plaintiff was arrested by Donald Stockton of the Bartlesville Police Force and incarcerated for 33 days.

In regard to defendant Stockton plaintiff states:

"Subsequent to the filing of the Complaint defendants have admitted in their pre-trial statement that the plaintiff Timothy Atkins, was the individual upon whom the arrest warrant was meant to be served. Therefore, it would appear, that Donald Stockton is immune from liability in this action and the plaintiff would move that he be stricken under said circumstances, from the list of defendants."

The Motion for Summary Judgment of Donald Stockton is, therefore, sustained.

In regard to defendant Lanning, the Supreme Court in Imbler v. Pachtman, 44 U.S.L.W. 4251 (March 2, 1976) recently addressed the question of whether a state prosecuting attorney acting within the scope of his duties in pursuing criminal prosecutions is absolutely immune from a civil suit for damages under § 1983. The Court stated:

"We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious and dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public

interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."

Plaintiff points out that in Imbler the Supreme Court noted that the Court of Appeals focused upon the functional nature of the activities rather than the prosecutor's status, leaving standing those cases in its circuit and some others which hold that a prosecutor engaged in certain investigatory activities enjoys not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. The Supreme Court stated:

"We hold only that initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."

Plaintiff relies heavily on Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) cert. denied, 415 U.S. 917, in which the court concluded that the prosecutor was not acting in a "quasi-judicial" role but rather in an investigative role in the planning and execution of a raid that led to the death of alleged Chicago Black Panther leader Fred Hampton. In Hampton, the alleged civil rights violation arose out of the prosecutor's conduct as an investigator. In the case at bar, however, the investigation itself did not violate plaintiff's constitutional rights, but rather the violation, if any, was the bringing of a criminal charge without probable cause. The filing of an information by a prosecutor certainly comes within his quasi-judicial role for which the Supreme Court has provided absolute immunity. If the prosecutor were faced with the prospect of civil liability whenever he authorizes prosecution, the prosecutor would bring few charges and justice would not be served. It is therefore the determination of the Court that the Motion for Summary Judgment of defendant John Lanning should be and hereby is sustained.

Defendants Fouts and Ruark contend that they should also be afforded absolute immunity. It is clear from an examination of the cases dealing with absolute immunity, however, that it is narrowly applied. The courts have considered whether abso-

lute immunity should be afforded high officials of the Justice Department and rejected it. Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974). Likewise absolute immunity was not afforded the Governor of Ohio, the Adjutant General and various members of the Ohio National Guard. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). An extension of absolute immunity to a prosecutor's investigative staff would permit too great an area for abuse. Carrying this extension to an extreme, if absolute immunity were accorded to a district attorney's staff, in theory he could put the entire police force on salary and thereby create absolute immunity for the whole force.

The Court must, therefore, determine whether the alleged facts give rise to a § 1983 cause of action against defendants Ruark and Fouts. Plaintiff alleges that "defendants Lanning, Fouts and Ruark did conspire to charge him with the crime of delivery of marihuana without probable cause." It would appear from this allegation that plaintiff is, in effect, charging the defendants Lanning, Ruark, and Fouts with malicious prosecution in causing criminal charges to be brought against the plaintiff without probable cause. The courts have not frequently been faced with the allegation of a § 1983 cause of action based upon malicious prosecution. However, according to C.Antieau, Federal Civil Rights Acts § 56 (1971):

"A person has the right to be free from malicious prosecution by others acting under 'color of law,' and defendants violating this right are liable in actions under 42 U.S.C. § 1983."

In Muller v. Wachtel, 345 F.Supp. 160 (S.D.N.Y. 1972) the court overruled defendants' motion to dismiss a § 1983 action against New York State Police investigators stating:

"Plaintiff specifically alleges that defendants, under color of state law, intentionally conspired to, and did, deprive him of his constitutional rights to due process and to be free from unlawful arrest and malicious prosecution

by arresting him and instituting criminal proceedings against him for the crime of grand larceny maliciously and without probable cause. Consequently, defendants' motion to dismiss for lack of subject matter jurisdiction is denied."

The court in Nesmith v. Alford, 318 F.2d 110 (1963) touched upon the subject in an action for false imprisonment and malicious prosecution based upon the law of the State of Alabama and brought in the federal court pursuant to 28 U.S.C. § 1332 and also for conspiracy to deprive plaintiffs of their constitutional rights pursuant to 42 U.S.C. § 1983. The court stated:

"[T]he commencement and prosecution of unfounded criminal prosecution might under certain circumstances constitute, not only malicious prosecution under the state law but a violation of Civil Rights as well. Since the matter is not directly before us, we ought not to explore fully what those facts must be or what legal principles will be finally controlling. . . . [S]ince we are dealing here with rights protected either by federal statute or the Constitution, there is no purpose to make every state criminal prosecution which ends in an acquittal automatically a violation of Federal Civil Rights Statutes. There must be something more. And the added elements may well partake substantially of traditional general tort law to bring in elements akin to want of probable cause, or malice, or both. If that is so, then the federal claim may turn at times upon personal motivation and certainly the conduct of the particular officer-defendant as the actor. The trial court must therefore take pains that all of these issues are appropriately submitted."

While in certain circumstances, therefore, conduct amounting to malicious prosecution may give rise to a cause of action under § 1983, not all conduct which might amount to a state-defined tort of malicious prosecution would necessarily amount to a denial of due process under the Fourteenth Amendment actionable under § 1983. The Supreme Court in Paul v. Davis, 44 U.S.L.W. 4339 (U.S. Mar. 23 1976), in holding that plaintiff failed to state a cause of action against a police chief under § 1983 for what would amount to a charge of libel pursuant to state law, stated:

"Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under color of law establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

The Supreme Court cited the leading case of Screws v. United States, supra, in which the Court considered the proper application of the criminal counterpart of § 1983, likewise intended by Congress to enforce the guarantees of the Fourteenth Amendment. Quoting from Screws, the Court stated:

"Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected and secured by the Constitution or laws of the United States."

The Tenth Circuit in Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972) discussed the relationship of a common law cause of action arising under state substantive law as compared to a cause of action under § 1983. The Court stated:

"The cases recognize that evaluations of rights and duties under § 1983, supra, arising as they do under the Fourteenth Amendment to the Constitution of the United States, are often different from counterpart common law actions which arise under state substantive law. This is not to say that at times the same set of facts will not give rise to remedies under both § 1983 and the state law of torts. The differences are though in terms of not only the requisite elements under § 1983, but also in the gravity of the right which has been invaded."

The vindication of federal rights under 42 U.S.C. § 1983 is determinable by federal law. Diamond v. Marland, 395 F.Supp. 432 (D.C. Ga. 1975). This Court is not, therefore, limited to consideration of the elements of malicious prosecution as established by a particular state court. However, since the elements of a § 1983 cause of action based upon allegations of malicious

prosecution have not been federally established, the Court will consider state law. According to the law of the State of Oklahoma, the elements entering into and necessary to be shown in a suit for malicious prosecution are that a prosecution was commenced against the plaintiff, that the prosecution was malicious and was instituted or instigated by defendant, that the prosecution was without probable cause and that the prosecution was legally and finally terminated in plaintiff's favor. Park v. Security Bank & Trust Co., 512 P.2d 113 (Okla. 1973). See also Lewis v. Crystal Gas Co., 532 P.2d 431 (Okla. 1975).

In the case at bar, plaintiff does not allege that defendants maliciously caused charges to be brought without probable cause. The court recognizes that in certain states, such as Oklahoma, malice in instituting a criminal proceeding may be inferred or implied in actions for malicious prosecution where proof shows want of probable cause. Moore v. York, 371 P.2d 469 (Okla. 1962). While Oklahoma allows this inference, it is merely an inference and does not amount to an irrebuttable presumption. In the case at bar, malice is not alleged and any inference of malice due to lack of probable cause is rebutted by the facts alleged in the Complaint. The facts alleged indicate that defendant Ruark purchased marijuana from a man named "Adkins" or "Atkins" and based upon this information, the defendants carelessly, or possibly negligently, furnished information which resulted in charges being brought against the plaintiff, Timothy Daryl Atkins.

In attempting to determine the proper elements of a § 1983 action based upon malicious prosecution, the Court also notes the elements of malicious prosecution as set out in the Restatement of Tort § 653. The Restatement provides that the initiating of criminal proceedings against another who is not guilty of the offense charged is liable to him if the proceedings were initiated without probable cause and primarily because of a

purpose other than that of bringing an offender to justice.

In the case at bar, the factual allegations certainly do not indicate that the defendants initiated the prosecution against plaintiff primarily because of a purpose other than that of bringing an offender to justice. This element would seem to be a proper prerequisite to the bringing of a § 1983 action based upon an alleged malicious prosecution.

This Court recognizes that an individual may have a cause of action under § 1983 for a denial of due process which does not fall neatly into a category such as malicious prosecution, false arrest, assault, etc. Furthermore, negligence on the part of a state officer may provide the source of a violation of federal civil rights. Bailey v. Harris, 377 F.Supp. 401 (E.D. Tenn. 1974). In Monroe v. Pape, supra, it is stated that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." See also Green v. Cauthen, 379 F.Supp. 361 (D. S.C. 1974).

Every negligent act of a state official does not, however, give rise to a § 1983 action. In Scott v. Dollahite, 54 F.R.D. 430 (N.D. Miss. 1972) an action was brought pursuant to § 1983 against police officers who had secured a search warrant which they erroneously believed was based upon probable cause. In sustaining defendant's Motion to Dismiss the court stated:

"We need not consider whether the quoted information contained in [defendant's] affidavit constitutes probable cause in the eyes of the court, for even though the facts may be carelessly or partially stated, the defendant officers are not liable, under the foregoing authorities, in a § 1983 suit for their negligent mistakes and omissions in obtaining search warrants in the course of the good faith performance of their official duties."

Similarly in Madison v. Manther, 441 F.2d 537 (1st Cir. 1971) a § 1983 action was brought based upon an alleged illegal search and seizure and arrest. The court initially noted that the

complaint alleged that "defendants knew or should have known that they did not have . . . probable cause [for the issuance of a search warrant.]" The court recognized "there is a substantial difference between a claim that the defendants knew that probable cause was lacking, and that they should have known. The one supports a finding of malice; the other simply of negligence." The court stated:

"In sum, the complaint charges that defendants in good faith, but negligently, sought a search warrant upon an affidavit that they believed was sufficient . . . ; that as a result plaintiff was arrested and criminal proceedings were instituted against him . . . The question accordingly is whether negligent conduct, often sufficient to create tort liability, and hence to support sections 1983 actions, (cites omitted) should not have that effect, for reasons of policy, in the case of a police officer applying for a warrant."

The court thereafter stated:

"As a matter of general law, police officers charged with improper prosecution must also be shown to have been malicious."

In conclusion, the court recognized that a public officer, or as in this case a member of the District Attorney's staff, may be discouraged from seeking warrants or furnishing investigative information upon which charges might be based if the cost could be a suit for negligence. Therefore, the court declined to place upon policemen acting in good faith the risk of personal liability if that official makes a negligent mistake.

This Court recognizes that in certain circumstances conduct amounting to gross negligence is actionable under § 1983. Green v. Cauthen, supra; Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). However, the factual allegations in the case at bar do not support a finding of malice or gross negligence on the part of the defendants.

It is therefore the determination of the Court that plaintiff has failed to state a cause of action against defendants Ruark, Fouts and Lanning. The Motion to Dismiss filed on behalf of all the defendants is therefore hereby sustained.

It is so Ordered this 28<sup>th</sup> day of May, 1976.



H. DALE COOK  
United States District Judge

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MILDRED GRACE,

Plaintiff,

vs.

STATE FARM AND CASUALTY COMPANY,  
a foreign corporation,

Defendant.

CIVIL ACTION FILE No. 75-C-109 ✓

FILED JUDGMENT  
MAY 28 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

This action came on for trial before the Court and a jury, Honorable H. Dale Cook  
, United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff take nothing and that the  
defendant recover of the plaintiff its costs of action.

Dated at Tulsa, Oklahoma  
of May , 19 76 .

, this 28th day

*Jack C. Silver*  
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

FILED

PUBLIC SERVICE COMPANY OF OKLAHOMA )  
an Oklahoma Corporation; and )  
ROYAL INDEMNITY COMPANY )  
 )  
Plaintiffs )  
 )  
vs. )  
 )  
BLACK AND VEATCH )  
 )  
Defendants )

MAY 27 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NO. 74-C-461

JOURNAL ENTRY OF JUDGMENT

The above captioned cause comes on for non-jury trial before the undersigned Judge, plaintiffs appearing by and through their attorney, John Osmond, of the Firm of Whitten, McDaniel, Osmond, Goree & Davies, and defendant appearing by and through their attorney, Joseph A. Sharp, of the Firm of Best, Sharp, Thomas & Glass; the parties announced ready for trial, and the court proceeds to hear opening statements of counsel, the testimony of witnesses and argument of counsel.

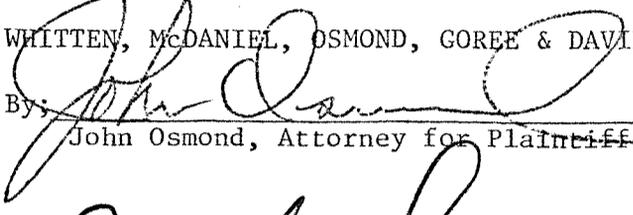
The court having considered the evidence introduced at the trial, the pleadings filed in said cause, and the arguments of counsel, finds that said action is predicated upon breach of a written contract between the plaintiff Public Service e Company of Oklahoma and defendant Black and Veatch, Consulting Engineers. The court finds that under the evidence introduced at the trial the defendant Black and Veatch fully complied with the terms and conditions of said contract and there was no breach thereof which caused or contributed to the damages suffered by the plaintiffs herein. That the defendant is therefore entitled to judgment in their favor and against the plaintiffs.

Judgment is therefore entered in favor of the defendant and against the plaintiffs on the plaintiffs' complaint, with the costs of said action being assessed against the plaintiffs.

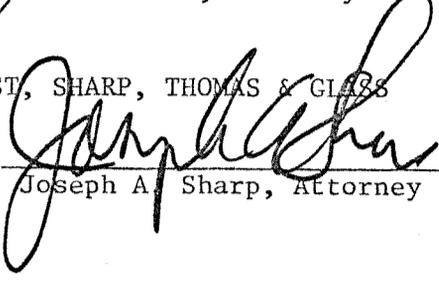
J. H. Dale Cook  
Judge

APPROVED AS TO FORM:

WHITTEN, McDANIEL, OSMOND, GOREE & DAVIES

By:   
~~John Osmond, Attorney for Plaintiffs~~

BEST, SHARP, THOMAS & GLASS

By:   
Joseph A. Sharp, Attorney for Defendant

JAS:ws

FILED

MAY 27 1976 *pl*

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 MARVIN O. G. ADKINS a/k/a )  
 MARVIN O. ADKINS a/k/a O. G. )  
 MARVIN ADKINS, DOROTHY MARIE )  
 ADKINS a/k/a DOROTHY M. ADKINS, )  
 WARREN L. McCONNICO, Attorney- )  
 at-Law, DORMAN STITES d/b/a )  
 DORMAN HOME SUPPLIES, OLLIE W. )  
 GRESHAM, SAND SPRINGS STATE )  
 BANK, a corporation, FIRST )  
 NATIONAL BANK AND TRUST COMPANY, )  
 a corporation, POSTAL FINANCE )  
 COMPANY, INC., COUNTY TREASURER, )  
 Tulsa County, BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 and SUZANNE M. ADKINS a/k/a )  
 SUZY ADKINS a/k/a SUZANNE ADKINS, )  
 )  
 Defendants. )

CIVIL ACTION NO. 76-C-180-C ✓

ORDER

Now on this *27<sup>th</sup>* day of *May*, 1976, there came on for consideration the Notice of Dismissal filed by the United States and the Stipulation of Dismissal entered into by and between the United States of America, First National Bank and Trust Company of Tulsa, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County. The Court finds that this action should be dismissed without prejudice on the ground and for the reason that the mortgage loan has been reinstated by the payment of the arrearage.

NOW IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this action be and the same is hereby dismissed without prejudice.

*W. Dalebrook*  
 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MAY 27 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 76-C-182-B
	)	
R. C. DRUMMOND and	)	
CHARLES R. DRUMMOND,	)	
	)	
Defendants.	)	

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law filed in this civil action on the 27<sup>th</sup> day of May, 1976,

It is therefore, ORDERED, ADJUDGED and DECREED that the Defendants R. C. Drummond, and Charles R. Drummond, their officers, agents, principal, servants, employees, attorneys and all persons in active concert or participation with them, are permanently enjoined from interfering in any way with the ingress and egress of the oil and gas lessee, R. Clark Taylor, his officers, agents, servants, employees and contractors for the purpose of drilling and production operations including laying and maintaining a pipeline and erection and maintenance of an electric line on electric poles on any of the real property described as follows, to-wit:

The SE 1/4 of Section 21, T. 26 N., R. 7 E.,  
in Osage County, State of Oklahoma,

and this injunction shall remain in full force and effect until such time as the oil and gas mining lease, described in the Findings of Fact filed herein, shall expire by operation of law.

It is further ORDERED that the Defendants, R. C. Drummond, and Charles R. Drummond, pay the costs of this proceeding to the Clerk, United States District Court, Northern District of Oklahoma.

*Allen E. Brown*  
UNITED STATES DISTRICT JUDGE

MAY 27 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 76-C-182-B
	)	
R. C. DRUMMOND and	)	
CHARLES R. DRUMMOND,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing, at 10:00 A.M. on Tuesday, May 25, 1976, on the Plaintiff's Motion for Preliminary Injunction. The Plaintiff, United States of America, appeared by Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma. The Defendants, R. C. Drummond and Charles R. Drummond, appeared by their attorney, Mr. Cecil Drummond.

Pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court accelerated the hearing on preliminary injunction with a hearing on the merits.

In view of the hearing, the Court has considered the following factors in determining whether a preliminary and permanent injunction should issue:

(1) Whether there is a strong showing that Plaintiff is likely to prevail on the merits of the case; (2) whether Plaintiff will suffer irreparable harm if the preliminary injunction and permanent injunction are denied; (3) whether the Defendants will suffer harm if the preliminary injunction and permanent injunction are issued; and (4) whether the public interest will be served in granting the preliminary injunction and permanent injunction. After reviewing the pleadings filed in this case and having considered the statements of counsel made at the hearing, the Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACTS

1. The Defendants, R. C. Drummond and Charles R. Drummond, were notified of the hearing set for May 25, 1976, by the Clerk of this Court.

2. The Defendants, R. C. Drummond and Charles R. Drummond, have not filed any answer in this case either in person or by attorney, but did appear at the hearing held on May 25, 1976, by their attorney, Cecil Drummond.

3. The Osage Tribe of Indians is the owner of the oil, gas, coal and other minerals under the following described property, to-wit:

The SE 1/4 of Section 21, T. 26 N., R. 7 E.,  
in Osage County, Oklahoma.

Hereinafter this described property will be referred to as the subject property.

4. On January 26, 1976, the Osage Tribe of Indians granted to R. Clark Taylor, an oil and gas mining lease for three years from the date of approval thereof, and as long thereafter as oil and/or natural gas is produced in paying quantities, which lease covered the subject property. This lease was approved by the Bureau of Indian Affairs, Osage Agency, on March 1, 1976.

5. The Defendant, R. C. Drummond, owns the surface only of the subject property and the Defendant, Charles R. Drummond, is his agent regarding possession of said property.

6. On or about March 7, 1976 Mr. C. B. Witcraft, acting as a representative of the aforesaid lessee, met with Mr. Charles R. Drummond at the subject property. The location for the drilling of a proposed oil and gas well was pointed out to Mr. Drummond, the route of ingress and egress to such location was agreed upon, and Mr. Drummond was advised that Mr. Witcraft was the local representative of the lessee in regard to any claim for damages which the surface owner might sustain from mineral development or operations on the subject property.

At this meeting Mr. Witcraft tendered, on behalf of the aforesaid lessee, three hundred dollars (\$300.00) to Charles R. Drummond, the agent for the owner of the surface of the subject property, as the commencement fee for drilling the first well on subject property. Mr. Drummond refused to accept this tender and on or about March 12, 1976 the sum of \$300.00 was deposited, to the credit of R. C. Drummond, at the Osage Indian Agency, at Pawhuska, Oklahoma.

7. On or about March 12, 1976 the aforesaid lessee applied to the Osage Indian Agency for a permit to drill a well, designated as Well No. 1, at the location on subject property which Mr. Witcraft had pointed out to Mr. Charles R. Drummond on March 7, 1976.

8. On March 12, 1976, the aforesaid application of the said lessee was approved by the Osage Indian Agency and a drilling permit was issued by the Agency to the lessee.

9. On March 12, 1976, and at all times subsequent thereto, the Defendants, R. C. Drummond and Charles R. Drummond, have refused to allow the aforesaid lessee ingress to the subject property for the purpose of drilling the said Well No. 1.

10. There is a current shortage of petroleum products which has stimulated drilling and production activity nationwide in aid of our energy crisis. The Court is aware that such activity has and is creating a shortage of drilling rigs and drilling crews so that time is of the essence in cases such as this.

#### CONCLUSIONS OF LAW

1. The United States of America is a proper party Plaintiff to this action in that it acts as trustee or guardian for the Osage Tribe of Indians, the owner of the oil, gas, coal and other minerals under the subject property.

2. Service of both the summons in this case and the notice of the hearing set for May 25, 1976, was valid, and the Court has jurisdiction over the persons of the Defendants and the subject matter of this action.

3. The surface owner of the subject property and his agent hold such property subject to a statutory reservation of minerals thereunder in the Osage Tribe of Indians (34 Stat. 539, as amended) and the regulations for the mining and production of such minerals promulgated by the Secretary of Interior reported in 25 CFR Section 183.1 et seq., as revised July 22, 1974.

4. The oil and gas mining lease granted by the Osage Tribe of Indians to R. Clark Taylor (as particularly described in Finding of Fact No. 4) was a valid and subsisting lease on March 12, 1976, and has remained so at all times subsequent thereto, up to and including the present date.

5. The regulations promulgated by the Secretary of the Interior, contained in 25 Code of Federal Regulations, Sections 183.19 and 183.20, as revised July 22, 1974, are valid regulations promulgated by the Secretary pursuant to Federal statutes authorizing such action by him, and are controlling law in the factual situation found in this case.

6. The above-cited regulations provide that before commencing a drilling operation a lessee shall tender to the surface owner in Osage County, Oklahoma, commencement money in the amount of \$300.00 for each well, after which such lessee shall be entitled to immediate possession of the drilling site.

7. The oil and gas lessee of the subject property and the Osage Tribe of Indians have complied with the above-cited regulations of the Secretary of the Interior, and said lessee is entitled to possession of the subject property for its drilling operations.

8. The denial by the Defendants, R. C. Drummond and Charles R. Drummond, of ingress to and egress from its proposed drill site on the subject property by the aforesaid lessee is a violation of the rights of the said lessee and the Osage Tribe of Indians as set forth in the above-cited regulations of the Secretary of the Interior.

9. If the requested injunction does not issue, the Osage Tribe of Indians will suffer irreparable harm in that they will be deprived of the benefits of their mineral interests reserved to them by Congress.

10. The above-cited regulations of the Secretary of the Interior do not preclude recovery of damages by the surface owner, but instead protect his rights by providing the procedure for ascertainment of his damages, if any, caused by the lessee's operations. The commencement fee required by the regulations does not fix the amount of damages, but rather is used as a credit toward payment of the total damages, if any, since such damages cannot be ascertained until after completion of a well as a serviceable well or dry hole or completion of the drilling operation. In any event, the Defendant has an adequate remedy at law and will suffer no harm if the injunction be issued.

11. The public interest will be served by granting the injunction in that the public has a vital interest in the production and conservation of energy.

12. A permanent injunction should be issued against the Defendants in this case.

Entered this 27<sup>th</sup> day of May, 1976.

Allen E. Barrow

---

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 26 1976

CAROLYN W. ROBERTS,	)
Plaintiff,	)
	)
vs	)
	)
SOUTHWESTERN BELL TELEPHONE COMPANY,	)
Defendant.	)

Jack C. Silver, Clerk  
U. S. DISTRICT COURT  
No. 75-C-378-B ✓

STIPULATION FOR DISMISSAL

It is hereby stipulated by Carolyn W. Roberts, Plaintiff, and Jones, Jones and Rineer, Attorneys for Plaintiff and Southwestern Bell Telephone Company, defendant, by Nancy Coats, its attorney that the above-entitled action be dismissed with prejudice.

Dated this 26th day of May, 1976.

Carolyn W. Roberts  
Carolyn W. Roberts

By: Hugh Rineer  
Jones, Jones & Rineer  
Her Attorneys

FILED

MAY 28 1976 K

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Southwestern Bell Telephone  
Company

By: Nancy Coats  
Nancy Coats  
Its Attorney

ORDER

On the above stipulation filed herein on the 23th day of May, 1976, it is so ordered and the cause of action & complaint are dismissed with prejudice  
Dated this 28 day of May, 1976.

Allen E. Boren  
CHIEF UNITED STATES DISTRICT JUDGE

JONES, JONES & RINEER  
ATTORNEYS & COUNSELORS  
1440 NO. LANSING  
TULSA, OKLAHOMA 74106



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 25 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT *pc*

BONNIE J. ERNST and EDWARD ERNST, )  
individually and as father and )  
next friend of JULIE ERNST, )  
BRIAN ERNST and EDWARD ERNST )  
III, )

Plaintiffs, )

vs. )

No. 75-C-401(B) ✓

LUTHER W. SHELTON, )

Defendant. )

ORDER OF DISMISSAL

ON this 25<sup>th</sup> day of May, 1976, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said settlement is reasonable and proper and to the best interests of the Minor and said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

Allen E. Barrow

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

SELLERS & SELLERS,

By: [Signature]

Attorney for the Plaintiffs,

ALFRED B. KNIGHT,  
[Signature]

Attorney for the Defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ALAN GEORGE, FAITH GEORGE, )  
individually and FAITH GEORGE )  
as mother and next friend of )  
JOHN WINNIE, a minor, DR. W. J. )  
WARN and GLADA W. WARN, )

Plaintiffs, )

vs. )

No. 75-C-185 C ✓

MID-STATES BUILDERS, INC., a )  
Missouri corporation, MORTON )  
BUILDINGS, INC., an Illinois )  
corporation, RID-A-BIRD, INC., )  
an Iowa corporation, and )  
VELSICOL CHEMICAL COMPANY, )  
an Illinois corporation, )

Defendants. )

FILED  
MAY 24 1976  
Jack C. Silver, Clerk  
U S DISTRICT COURT

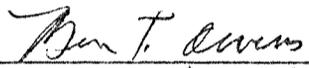
ORDER APPROVING SETTLEMENT OF MINORS  
CLAIM AND ORDER OF DISMISSAL

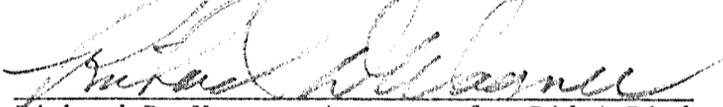
ON this 23<sup>rd</sup> day of May, 1976, upon the written application of the parties plaintiff for Court approval of settlement of any claim which may be made on behalf of Rachael Elizabeth George and John Winnie George, and for dismissal without prejudice of the Complaint herein as to Mid-States Builders, Inc., Morton Buildings, Inc., and Rid-A-Bird, Inc., and the Court having examined said Application, and finds that said Faith George is the natural mother of John Winnie and that said Alan George and Faith George are the natural parents of Rachael Elizabeth George, finds that said plaintiffs are the proper parties to act for said minors and that they are effecting a settlement with the three named defendants upon a covenant not to sue and reserving the minors rights against other parties including Velsicol Corporation, is in the best interest of said minors, and should be and hereby is approved by the Court. The Court further finds that the parties plaintiff have each individually and in their representative capacity have entered into a compromise settlement with said three named defendants and have requested the Court to dismiss said three named defendants from this action and the Court finds that said allowance paid on behalf of said minors is equitable and proper under the circumstances herein and finds that said complaint should be dismissed as to said three named defendants pursuant to said application.

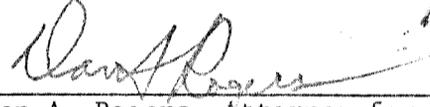
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Complaint and all causes of action of the plaintiffs filed herein individually and in their representative capacity is hereby dismissed as to Mid-States Builders, Inc., Morton Buildings, Inc., and Rid-A-Bird, Inc., as requested in said application, and the settlement on behalf of said minor children is found to be in their best interest and is approved by this Court upon the terms and conditions of said covenant executed on their behalf.

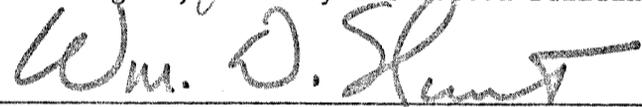
  
H. DALE COOK, JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVALS:

  
Ben Owens, Attorney for Plaintiffs

  
Richard D. Wagner, Attorney for Rid-A-Bird, Inc.

  
Dan A. Rogers, Attorney for Morton Buildings

  
~~Mr. Truman B. Rucker~~, Attorney for Mid-States Builders  
Wm. D. Hunt

COVENANT NOT TO SUE

For and in consideration of the total sum of TWENTY THOUSAND AND 00/100 DOLLARS (\$20,000.00) the receipt and sufficiency whereof is hereby acknowledged, the undersigned does hereby covenant and forever refrain from instituting, prosecuting, or in any way aiding, any suit or claim against Mid-States Builders, Inc., Morton Builders, Inc., or Rid-A-Bird, Inc., their agents and assigns, either directly or indirectly, for injuries or damages, to person or property, resulting or to result from a certain incident complained of within the suit filed by these parties in the United States District Court for the Northern District of Oklahoma, bearing case number 75-C-185, which may generally be described as the sale, purchase and use of a particular barn including Rid-A-Bird perches and liquid which is a poisonous substance.

WHEREBY, it is further agreed and understood that the undersigned does not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than are herein specifically named above; and expressly reserves their rights against Velsicol Corporation, or persons other than those specifically named herein; and

IT IS EXPRESSLY UNDERSTOOD that by this covenant not to sue the undersigned are individually and on behalf of their children John Winnie and Rachael Elizabeth George, are in the best interest of said minor children covenanting on behalf of said minor children and that the act herein both under advice of counsel and with knowledge and permission of the Court, and specifically find that said covenant is in the best interest of said minor children, and they are further on behalf of said minor children reserving any and all rights, causes of action or relief of any kind that the said children or these parties have now or may have in the future against Velsicol Corporation as a result of the above stated occurrence;

IT IS UNDERSTOOD AND AGREED THAT the undersigned are individually and on behalf of said minor children releasing known and unknown right an/or damages whether such are anticipated or known to exist at this time, or whether they may develop in the future,

and the parties hereto expressly waives and relinquishes any and all rights under any law or statute, and agree to hold harmless said Mid-States Builders, Inc., Morton Buildings, Inc., and Rid-A-Bird, Inc., their agents, servants or representatives, from any loss and expense resulting from said incidents; and

IT IS FURTHER AGREED that the money paid herein is fair and equitable under all of the circumstances, only releasing and discharging Mid-States Builders, Inc., Morton Buildings, Inc., and Rid-A-Bird, Inc., and further understood and agreed that this payment in said amount does not in any manner admit liability on the part of said Mid-States Builders, Inc., Morton Buildings, Inc., or Rid-A-Bird, Inc.,; and

This covenant not to sue contains the entire agreement of the parties released and their agents, servants and representatives; when considered with the application and order of the United States District Court of the Northern District of Oklahoma which is made a part hereof by reference, and it is agreed that the terms of this covenant not to sue are contractual and not a recital.

In witness whereof, I here unto set my hand this 23<sup>rd</sup> day of March, 1976.

Alan George  
Alan George, individually and as parent of Rachael Elizabeth George and John Winnie George, minors.

Faith George  
Faith George, individually and as parent of Rachael Elizabeth George and John Winnie George, minors.

Dr. W. J. Warn  
Dr. W. J. Warn

Glada Warn  
Glada Warn

Way Dean Mason  
Wallace & Owens, Attorneys for the Plaintiffs

Subscribed and sworn to before me this 13<sup>th</sup> day of May, 1976.

Caro H. Wheeler  
Notary Public

My commission expires: 9-19-79

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FIRST NATIONAL BANK, Tahlequah, )  
Oklahoma, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KANSAS CITY FIRE & MARINE )  
INSURANCE COMPANY, )  
 )  
Defendant. )

No. 76-C-202-C

**FILED**

MAY 24 1976 *per*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

On May 17, 1976 the plaintiff herein, First National Bank, defendant herein, ~~Kansas City Fire & Marine Insurance Company~~, filed a Motion to Remand Suit to Defendant, Kansas City Fire & Marine Insurance Company State Court. Plaintiff, ~~First National Bank~~, by way of response, states in a letter dated May 24, 1976 that it appears this lawsuit was inadvertently removed to the Northern District. The action was originally filed in Cherokee County, Oklahoma, which is included within the Eastern District of Oklahoma. 28 U.S.C. § 116.

It is therefore the Order of the Court that this action be remanded to the District Court of Cherokee County.

It is so Ordered this 24<sup>th</sup> day of May, 1976.

*H. Dale Cook*  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

VERNARD W. HULSEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ATCHISON, TOPEKA and SANTA )  
 FE RAILWAY COMPANY, a Kansas )  
 Corporation; ST. LOUIS-SAN )  
 FRANCISCO RAILWAY COMPANY, )  
 a Missouri Corporation and )  
 COLORADO FUEL AND IRON, a )  
 wholly owned subsidiary of )  
 CRANE COMPANY, an Illinois )  
 corporation, )  
 Defendants. )

No. 75-C-19-C ✓

FILED

MAY 25 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration a Motion to Quash Service filed herein by the defendant Elgin, Joliet and Eastern Railway Company (hereinafter "EJ&E"). Defendant contends that this Court lacks jurisdiction over the defendant "because the minimum contacts necessary to avoid offending traditional notions of due process are totally lacking."

The Amended Complaint alleges that the EJ&E was the owner of a certain steel freight car that was furnished to defendant, Inland Steel Company, and that the floor of said car had a large hole in it which made the railroad car dangerous, defective and unsafe. Plaintiff alleges he was injured when he stepped into the hole, falling through to his hips.

By way of affidavit, the EJ&E states it is incorporated and exists under the laws of both the State of Illinois and the State of Indiana and has its principal place of business in Joliet, Illinois. Further, the EJ&E is not now and has never been registered to do business in the State of Oklahoma and owns no property, nor maintains tracks or facilities in Oklahoma.

Affiant further states the EJ&E maintains no solicitation office in Oklahoma and does not retain an agent for the purpose of transacting business in Oklahoma. Defendant states that its only contact with the State of Oklahoma arises by virtue of the fact that railroad cars which it owns and leases to other entities for their own purposes, which are thereafter transported by and on different carrier lines, enter and pass through Oklahoma. According to the affidavit, "When the EJ&E interchanges an EJ&E car with another carrier in the States of Illinois or Indiana, the EJ&E exerts no control over said car when said car is in possession of a carrier operating in the State of Oklahoma." Affiant further states that revenue from the utilization of the EJ&E railroad cars which are transported through Oklahoma by other carriers is based upon a per diem rate paid to the EJ&E by the connecting carriers and the delivering carrier for each day the car is on the lines of said connecting or delivering carriers. In addition, according to the affidavit, the revenue received by the EJ&E while its railroad cars are in Oklahoma is substantially less than one percent of the gross revenue of the EJ&E.

A federal district court must look to the law of the state wherein it sits to determine whether it has in personam jurisdiction over the defendant. Doyn Aircraft, Inc. v. Wylie, 443 F.2d 579 (10th Cir. 1971). The parties agree that the Oklahoma statute applicable to the case at bar providing for personal jurisdiction over out-of-state residents is 12 O.S. § 1701.03(a)(4) which reads:

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:

. . . .

"(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent

course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

. . . . "

The Court is in agreement that § 1701.03(a)(4) is the applicable section in the case at bar. Neither § (1) or § (3) is applicable since § (1) requires the transacting of business within the state and § (3) relates to "causing tortious injury in this state by an act or omission in this state." If the EJ&E is guilty of any negligent act or omission said act or omission did not occur in Oklahoma. No other provisions of 12 O.S. § 1701.03 are applicable. Pursuant to Oklahoma law, therefore, in order for the Court to exercise personal jurisdiction over the defendant EJ&E, it must have done or solicited business in the State of Oklahoma, or have engaged in a persistent course of conduct in the State of Oklahoma, or derived substantial revenue from goods used or services rendered in this State. In Pullen v. Hughes, 481 F.2d 602 (10th Cir. 1973) the court considered the proper application of a Wyoming statute having the identical wording to that of § 1701.03(a)(4). The court noted that the Wyoming legislature had not chosen to draw its long-arm statute as broadly as it appeared it might have, but instead placed definite, specific restrictions on the circumstances under which out-of-state persons might be reached. Based upon the language as used in § 1701.03(a)(4), the court stated:

"It is readily apparent that appellants' position can be sustained only in the event that they have satisfactorily established [the defendant] falls within one of the three alternative prerequisites of section [1701.03(a)(4)]."

Although various courts with statutes providing for jurisdiction based solely upon a tort having been committed in the state have held that a negligent act committed outside the state which results in injuries within the state is to be considered a tort within the state, Oklahoma has clearly differentiated between torts which result from acts within the state and those which result from the acts occurring outside the state. Pursuant to

1701.03(a)(3) the only prerequisite to jurisdiction is causing tortious injury by an act in the state. Section 1701.03(a)(4), however, concerning tortious injuries caused by an act outside the state has additional alternative prerequisites, one of which must be met in order to sustain jurisdiction. These provisions of the statute cannot be ignored. The Oklahoma courts have stated on numerous occasions, however, that the Oklahoma long-arm statutes were intended to extend the jurisdiction of Oklahoma courts over non-residents to the outer limits permitted by the due process requirements of the Fourteenth Amendment of the United States Constitution. Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okla. Ct. App. 1974); Carmack v. Chemical Bank New York Trust Co., 536 P.2d 897 (Okla. 1975); Yankee Metal Products Co. v. District Court of Oklahoma, 528 P.2d 311 (Okla. 1974); Vemco Plating Inc. v. Denver Fire Clay Co., 496 P.2d 117 (Okla. 1972); Crescent Corp. v. Martin, 443 P.2d 111 (Okla. 1968). In attempting to reconcile the wording of the statute with the court-interpreted intent of the legislature this Court will consider the three alternative prerequisites of § 1701.03(a)(4) as broadly as permissible within the constitutional requirements of due process.

In regard to whether defendant was "doing business" in the state, defendant cites Vereen v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 209 F.Supp. 919 (E.D. Pa. 1962), in which the plaintiff brought an action to recover damage for personal injuries sustained when a door of a railroad car fell from the car and struck the plaintiff. The defendant had no tracks, operated no trains or locomotives, and transported no passengers or freight within the forum. All railroad cars owned by defendant were at all times exclusively within the operation, supervision and control of other connecting railroad lines. Although defendant maintained an office in the forum state for the purpose of solicitation of passenger and freight traffic, the court held that in light of all the facts, the defendant

was not "doing business" in the forum and sustained defendant's motion to quash service. See also Greenawalt v. Reading Company, 209 F.Supp. 954 (E.D. Pa. 1962). Since the defendant in the case at bar is not incorporated in the State of Oklahoma, owns no property in Oklahoma, has no agent in Oklahoma, did not contract with anyone in Oklahoma, did not direct that the railroad cars enter Oklahoma, and did not supply the cars to the carrier in Oklahoma, it cannot be said that defendant does or solicits business in the State of Oklahoma.

As stated, § 1701.03(a)(4) provides for personal jurisdiction not only as to persons doing or soliciting business in the state but also persons who "engage in any other persistent course of conduct or derive substantial revenue from goods used or consumed or services rendered in this state." In interpreting the statute, the Court will give effect to each provision thereof and therefore it appears that although a defendant may not be "doing business" in the state he still may be amenable to process if he engages in any other persistent course of conduct in the state or derives substantial revenue from goods used or services rendered in the state. The state courts of Oklahoma have not had occasion to circumscribe the type and extent of conduct which would amount to engaging in a persistent course of conduct in this state. In Cinocca v. Baxter Laboratories, Inc. v. Sherman Company, 386 F.Supp. 646 (E.D. Okla. 1974), a federal court applying 12 O.S. § 1701.03(a)(4), determined that the defendant, by selling and shipping twenty-five heart valves into Oklahoma over a persistent thirty-month period, by being the sole supplier of such valves in Oklahoma, and by deriving revenue of \$5,471 from said sales "engaged in a persistent course of conduct with reference to the State of Oklahoma." In Paddock v. Bensen Aircraft Corporation, 293 F.Supp. 745 (W.D. Okla. 1968) the court determined that defendant engaged in a persistent course of conduct in Oklahoma by shipping parts regularly to Oklahoma. In the case at bar, not only has the defendant never

sold or shipped its product into Oklahoma but has never caused its product to enter Oklahoma by directing any intermediary to transport its railroad cars into Oklahoma.

Finally, the Court must determine the correct interpretation of the provision regarding the deriving of substantial revenue in the state. In Paddock v. Bensen Aircraft Corporation, supra, the court held the defendant derived substantial revenue from goods used in Oklahoma since its sales in Oklahoma amounted to approximately one percent of its gross nationwide and overseas sales. In the case at bar, defendant states by way of affidavit "the revenue received by the EJ&E while its railroad cars are in Oklahoma is substantially less than 1 % of the gross revenue of the EJ&E." The Court notes that the statute does not read in terms of the percentage of a defendant's sales in Oklahoma in relation to its total sales. The statute merely states that whether the defendant "derives substantial revenue" in the state is a determining factor. As noted by plaintiff, the record does not indicate the dollar amount of revenue generated from the EJ&E's railroad cars passing through Oklahoma. In light of defendant's limited contact with Oklahoma, however, it would appear that the amount of revenue derived in Oklahoma could not be sufficiently substantial, standing alone, to create a basis for personal jurisdiction in the case at bar.

As stated by the court in Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3rd Cir. 1953):

"It is now too clear to require discussion and citation authority that a foreign corporation which carries on activities within a state of the United States is subject to suit there under certain circumstances. There are two questions involved in the assertion of this jurisdiction over a foreign corporation. One is the question whether the State seeks to assert jurisdiction under a given set of facts. The second question is whether the assertion of jurisdiction by the states is permitted under the circumstances, by the Constitution of the United States."

While the Court is unable to say with certainty whether or not

the Oklahoma "long-arm" statute could be construed broadly enough to provide personal jurisdiction, an examination of whether the extension of jurisdiction in the case at bar is in keeping with the Constitution of the United States is determinative of the issue.

In International Shoe Company v. Washington, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), the Supreme Court broke with the past and laid down the now familiar rule that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The Court also held the minimum contact "criteria . . . cannot be simply mechanical or quantitative . . . [but] must depend rather upon the quality and nature of the activity . . . ." In Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) the Court stated, however, that:

"[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitation on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him."

In Hanson v. Denckla, supra, the Court further stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum state, thus invoking the benefits and protections of its laws." In Crescent Corporation v. Martin, 443 P.2d 111 (Okla. 1968) the Oklahoma court adopted this prerequisite and quoting from Trinity Steel Company v. Modern Gas Sales & Service Company, 392 S.W.2d 861 (Tex.Civ.App. 1965) stated:

"[W]e think it can be said that it is now the law that it is essential in each case that there be some act by which the defendant purposefully avails (himself) of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. . . ."

In Anderson v. Shiflett, 435 F.2d 1036 (10th Cir. 1971) the federal appellate court noted that "to become subject to Oklahoma jurisdiction, the defendant must purposefully avail himself of the privilege of doing business in that state and thereby invoke the benefits and protection of its laws." In the case at bar, the EJ&E merely leased railroad cars to a carrier outside the State of Oklahoma. Thereafter, the EJ&E exercised no control over where the cars traveled, and was, in fact, precluded from directing the carrier not to route its trains through a specific state. The Court has great difficulty finding that defendant purposely availed itself of the privilege of doing business in Oklahoma. Furthermore, revenue of the EJ&E from the railroad car in question was based upon a per diem rate and whether the railroad car entered Oklahoma or not in no way affected the amount paid by the lessee or received by the EJ&E.

As stated by the court in Crescent Corporation v. Martin, supra:

"The qualitative rule (rather than the mechanical rule) which the court in International Shoe said will control, should include a consideration of all the circumstances affecting the central question of whether the constitutional guarantees of due process are not violated."

Based upon all the circumstances in the case at bar, to-wit: the fact that defendant was not engaging in or soliciting business in the state, did not have control over the destination of its railroad cars, and derived substantially less than one percent of its revenue from its railroad cars passing through Oklahoma, which revenue was not dependent upon location of the cars in Oklahoma, it is the determination of the Court, applying the qualitative rule, that the EJ&E did not have the requisite

minimum contacts with the State of Oklahoma to permit this Court to exercise in personam jurisdiction. The Motion to Quash of the EJ&E is therefore sustained and the EJ&E is hereby dismissed.

It is so Ordered this 24<sup>th</sup> day of May, 1976.



H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

OTIS ELMER BRIMER, )  
 )  
 Petitioner, )  
 )  
 vs. ) No. 76-C-170-C  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

FILED

MAY 24 1976

Jack C. Silver, Clerk  
DISTRICT COURT

ORDER OVERRULING MOTION PURSUANT TO 28 U.S.C. 2255

The Court has before it for consideration the pro se Motion of petitioner, Otis Elmer Brimer, Pursuant to 28 U.S.C. 2255 (1971). Petitioner contends that he was improperly sentenced to a term of five years imprisonment for the reason that he was found guilty of a crime which he did not commit.

On June 17, 1975, petitioner was indicted in the Northern District of Oklahoma and charged with entering a federal credit union with intent to commit larceny of property in violation of 18 U.S.C. § 2113(a) (1970). On September 2, 1975, the petitioner waived trial by jury and entered a plea of guilty to the indictment. After examining the petitioner thoroughly as to the voluntariness of the plea and after considering the petitioner's narration concerning his involvement in the crime charged in the indictment, the Court found the petitioner guilty of having on or about February 20, 1975, at Tulsa, Oklahoma, in the Northern District of Oklahoma, entered Safeway Tulsa Employees Federal Credit Union, 4580 East 50th Street, Tulsa, Oklahoma, the deposits of which were then insured by the Federal Credit Union Act, with intent to commit in such Credit Union a felony affecting such Credit Union, that is, the larceny of property belonging to and in the care, custody, control, management and possession of Safeway Tulsa Employees Federal Credit Union, in violation

of Title 18, U.S.C. § 2113(a).

On September 2, 1975 the Court sentenced the petitioner to five (5) years imprisonment with said sentence to run concurrently with the sentence imposed in Case No. 75-CR-83. On two separate occasions the Court overruled petitioner's Motion for Reduction of Sentence. Petitioner brings this action as a Motion for Writ of Habeas Corpus on the grounds that he did not rob a bank by force, violence or intimidation. Petitioner contends that he was "indicted under the wrong sub-section of the statute, but is further being persecuted as a bank robber when he is in fact not guilty of bank robbery, therefore his records on file in Washington, D. C. and in the institution where he is confined clearly state that petitioner was convicted and sentenced for bank robbery."

Title 18 U.S.C. § 2113(a) provides in part:

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

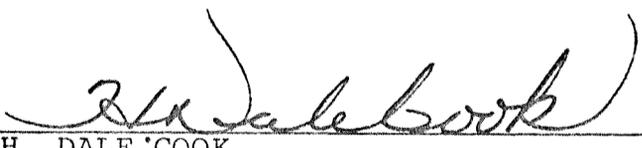
The essential elements required to sustain a conviction under the indictment and § 2113(a) are 1) the entering of the building on or about the date as alleged in the indictment 2) with intent to commit a larceny of property as alleged in the indictment. United States v. Mason, 440 F.2d 1293 (10th Cir. 1971), cert. denied, Edwards v. United States, 404 U.S. 883, 92 S.Ct. 219, 30 L.Ed.2d 165 (1971). See Cook v. United States, 443 F.2d 370 (5th Cir. 1971). No violence, force or intimidation is required for a conviction under this paragraph of § 2113(a).

The petitioner, Otis Elmer Brimer, both at the time of his plea and in his Motion Pursuant to 28 U.S.C. § 2255 has admitted

that he entered the Safeway Tulsa Employees Federal Credit Union on the date as alleged in the indictment. Petitioner at the time he entered a plea of guilty stated and admitted that such entry was made with the intent to commit a larceny of property as alleged in the indictment. The petitioner was, therefore, properly convicted of a violation of Title 18 U.S.C. § 2113(a) which subjects the petitioner to a maximum possible sentence of twenty (20) years imprisonment and/or \$5,000 fine or both. A sentence of five (5) years imprisonment is not improper or illegal under § 2113(a).

Petitioner contends that his records incorrectly show his crime under § 2113(a) to be bank robbery. This contention does not give rise to a constitutional claim and will be given no further consideration under a Motion Pursuant to 28 U.S.C. § 2255.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the Motion of the petitioner, Otis Elmer Brimer, Pursuant to 28 U.S.C. § 2255 is dismissed with prejudice this 24<sup>th</sup> day of May, 1976.

  
H. DALE COOK  
United States District Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

W.J. USERY, JR., Secretary of Labor,) )  
United States Department of Labor) )  
 ) )  
Plaintiff ) )  
 ) ) CIVIL ACTION  
v. ) )  
 ) ) NO. 75-C-526  
FOREST L. RICHARDSON d/b/a ) )  
Richardson Air Conditioning ) )  
 ) )  
Defendant ) )

FILED

MAY 24 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

JUDGMENT

Plaintiff has filed his complaint against Forest L. Richardson doing business as Richardson Air Conditioning. Thereafter, plaintiff and defendant announced that they have reached an agreement in this matter, and it appearing to the Court that plaintiff and defendant are in agreement that this judgment should be entered, it is therefore,

ORDERED, ADJUDGED and DECREED that defendant's his agents, servants, employees and those persons in active concert or participation with him are permanently enjoined and restrained from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (29U.S.C. 2091, et seq.), hereinafter referred to as the Act, in any of the following manners:

I

Defendant shall not, contrary to the provisions of section 7 of the Act, employ any employee engaged in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than 40 hours unless defendant compensates such employee for employment in excess of 40 hours in a workweek at a rate not less than one and one-half times the regular rate at which such employee is employed.

II

It is further ORDERED, that defendant is enjoined and restrained from withholding payment of overtime compensation in the total amount of \$967.08, which the Court finds to be due under the Act to defendant's employees, named in the attachment A hereto, which by reference is made a part hereof.

III

Defendant has paid overtime compensation in the total amount of \$967.08 which the parties agree, and the Court so finds, is due under the Act to defendant's employees named in Exhibit A attached hereto in the amounts indicated.

IV

It is further ORDERED, that plaintiff, shall promptly proceed to make distribution, less income tax and social security withholdings, to defendant's employees named herein in the amounts indicated, or to the legal representative of any deceased person so named. If, after making reasonable and diligent efforts to distribute such amounts

to the person entitled thereto, plaintiff is unable to do so because of inability to locate a proper person, or because of a refusal to accept payment by any such person, plaintiff, pursuant to 28 USC section 2041, shall deposit such funds with the Clerk of the Court. Any such funds may be withdrawn for payment to a person entitled thereto upon order of this Court.

It is further ORDERED, that defendants will pay the costs of this action.

DATED this 24<sup>th</sup> day of May  
1976.

*W. Dale Cook*

UNITED STATES DISTRICT JUDGE

Entry of this order is consented and agreed to:

*William J. Kilberg*  
WILLIAM J. KILBERG  
Solicitor of Labor

*Ronald M. Gaswirth*  
RONALD M. GASWIRTH  
Regional Solicitor

*William E. Everheart II*  
WILLIAM E. EVERHEART II  
Acting Counsel for ESA

*Allen L. Prince*  
ALLEN L. PRINCE  
Attorney

Attorneys for Plaintiff

*William W. Hood, Jr.*  
WILLIAM W. HOOD, JR.,  
Attorney for Defendant

E X H I B I T    A

David Blagg	\$151.60
Gary Cooper	196.00
Lloyd Lines	34.20
Jack Price	41.30
Bob Stroud	19.57
Stan Scott	29.71
Ron Sharp	494.70
	<hr/>
	\$967.08

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
vs. )  
 )  
DANDRAGE HOLMES, SR. a/k/a )  
DANDRAGE HOLMES, MARY ELIZABETH )  
HOLMES a/k/a MARY E. HOLMES, )  
SPRINGER CLINIC, a partnership, )  
STEWARTS, INC., OTASCO #66, a )  
Division of McCrory Corporation, )  
an Oklahoma Corporation, COUNTY )  
TREASURER, Tulsa County, Oklahoma, )  
and BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
 ) Defendants. )

CIVIL ACTION NO. 76-C-119-C ✓

FILED  
MAY 24 1976  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup>  
day of May, 1976, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the Defendants, County  
Treasurer, Tulsa County, Oklahoma, and Board of County  
Commissioners, Tulsa County, Oklahoma, appearing by its attorney,  
Gary J. Summerfield, Assistant District Attorney; the Defendant,  
Otasco #66, a Division of McCrory Corporation, an Oklahoma  
Corporation, appearing by its attorney, Jerry L. Goodman; and  
the Defendants, Dandrage Holmes, Sr. a/k/a Dandrage Holmes,  
Mary Elizabeth Holmes a/k/a Mary E. Holmes, Springer Clinic,  
and Stewarts, Inc., appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Dandrage Holmes, Sr.  
a/k/a Dandrage Holmes, Mary Elizabeth Holmes a/k/a Mary E. Holmes,  
Springer Clinic, County Treasurer, Tulsa County, Oklahoma, and  
Board of County Commissioners, Tulsa County, Oklahoma, were  
served with Summons and Complaint on March 19, 1976; that  
Defendant, Otasco #66, a Division of McCrory Corporation, an  
Oklahoma Corporation, was served with Summons and Complaint on

March 22, 1976; and that Defendant, Stewarts, Inc., was served with Summons and Complaint on March 25, 1976, all as appears from the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed its answers herein on April 7, 1976; that Defendant, Otasco #66, a Division of McCrory Corporation, an Oklahoma Corporation, has duly filed its disclaimer on April 12, 1976; and that Defendants, Dandrage Holmes, Sr. a/k/a Dandrage Holmes, Mary Elizabeth Holmes a/k/a Mary E. Holmes, Springer Clinic, and Stewarts, Inc., have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty (20), Block Five (5), SUBURBAN ACRES SECOND ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Dandrage Holmes, Sr. and Mary Elizabeth Holmes, did, on the 23rd day of July, 1971, execute and deliver to the Administrator of Veterans Affairs their mortgage and mortgage note in the sum of \$10,500.00 with 7 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Dandrage Holmes, Sr. and Mary Elizabeth Holmes, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$10,323.34 as unpaid principal with interest thereon at the rate of 7 1/2



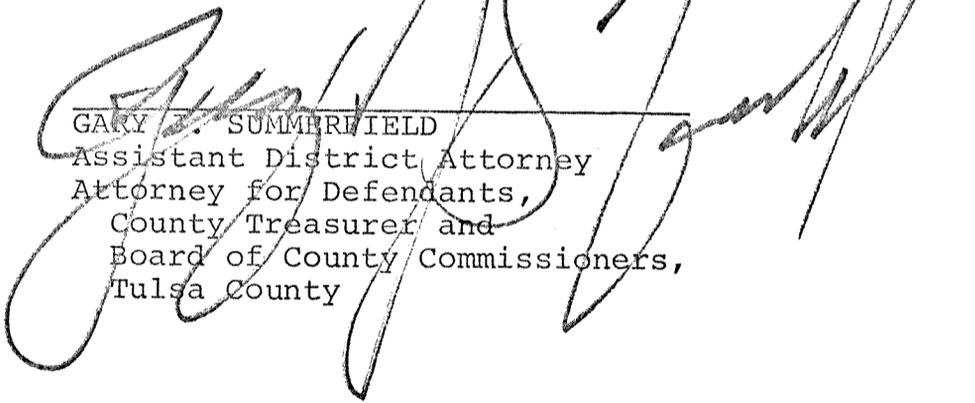
Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest, or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
GARY J. SUMMERFIELD  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 )  
 WILLIAM H. DOUGLAS, JR., )  
 a/k/a WILLIAM HAROLD DOUGLAS, JR. )  
 LULA ANITA DOUGLAS, )  
 CLIFFORD E. CARTER, )  
 SHARON K. CARTER, )  
 WILLIAM K. MYERS, )  
 COUNTY TREASURER, TULSA COUNTY, )  
 BOARD OF COUNTY COMMISSIONERS, )  
 TULSA COUNTY, )  
 )  
 Defendants. )

FILED

MAY 24 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 75-C-495-C ✓

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 24<sup>th</sup> day of May, 1976, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney, and the defendants County Treasurer, Tulsa County, and the Board of County Commissioners, Tulsa County appearing by their attorney, Gary J. Summerfield, Assistant District Attorney, and the defendants William H. Douglas, Jr. a/k/a William Harold Douglas, Jr., Lula Anita Douglas, Clifford E. Carter, Sharon K. Carter, and William K. Myers, appearing not.

The Court being fully advised and having examined the file herein finds that William H. Douglas, Jr. was served with Summons and Complaint on November 6, 1975; that William K. Myers was served with Summons and Complaint on November 4, 1975; that the County Treasurer, Tulsa County, and the Board of County Commissioners, Tulsa County, were served with Summons and Complaint on November 3, 1975, all as appears from the United States Marshal's Service herein; that the defendants Lula Anita Douglas, Clifford E. Carter, and Sharon K. Carter were served by publication, as appears from the Proof of Publication filed herein.

It appearing that the defendants, County Treasurer, Tulsa County, and the Board of County Commissioners, Tulsa County, Oklahoma, have duly filed its answers herein on November 18, 1975;

and that the defendants, William H. Douglas, Jr. a/k/a William Harold Douglas, Jr., Lula Anita Douglas, Clifford E. Carter, Sharon K. Carter, and William K. Myers, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Thirty-Eight (38)  
VALLEY VIEW ACRES SECOND ADDITION to the  
City of Tulsa, Tulsa County, Oklahoma,  
according to the recorded plat thereof

That the defendant, William H. Douglas, Jr., a single person, did, on the 7th day of July, 1973, execute and deliver to the Administrator of Veterans Affairs his mortgage and mortgage note in the sum of \$11,250.00, with 4-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that the defendant, William H. Douglas, Jr. made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon for more than 12 months last past, which default has continued and that by reason thereof the above-named defendant is now indebted to the plaintiff in the sum of \$11,057.17 as unpaid principal, with interest thereon at the rate of 4-1/2 percent per annum from January 1, 1975, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Clifford E. and Sharon K. Carter, the sum of \$42.78 for the year 1971, for personal property taxes, and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

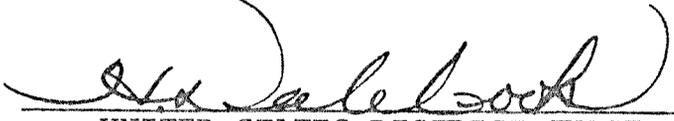
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against William H. Douglas, Jr., in personam, for the sum of \$11,057.17, with interest thereon at the rate of 4-1/2 percent per annum from January 1, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Clifford E. and Sharon K. Carter, for the sum of \$42.78 for the year 1971 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against the defendants Lula Anita Douglas and William K. Myers.

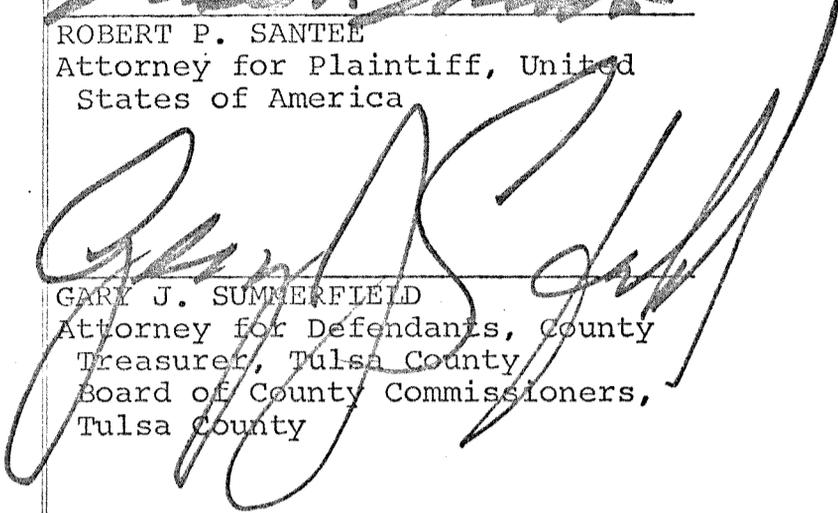
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this Action.

  
UNITED STATES DISTRICT JUDGE



ROBERT P. SANTEE  
Attorney for Plaintiff, United  
States of America



GARY J. SUMMERFIELD  
Attorney for Defendants, County  
Treasurer, Tulsa County  
Board of County Commissioners,  
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DOUGLAS K. HUMPHREYS, d/b/a )  
DOUGLAS EQUIPMENT COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SPERRY RAND CORPORATION, )  
 )  
Defendant. )

No. 75-C-205-C

**FILED**

MAY 24 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

O R D E R

This matter comes before the Court pursuant to a joint submission by the parties of their Settlement and Compromise Agreement.

The parties have announced to this Court that they have reached a settlement and compromise as to all claims pending between the parties. The terms of the Settlement and Compromise Agreement between the parties were announced to the Court as follows:

1. The plaintiff, upon approval of this Order, will dismiss, with prejudice, all claims for relief asserted and alleged in his Complaint and as set forth in the Pre-Trial Order and Supplement thereto and all claims for damages asserted thereunder.

2. The defendant, upon approval of this Order, will pay to the plaintiff the sum of \$7,500.

3. Each party will bear its own attorneys fees and costs.

After hearing the terms of the above Settlement and Compromise Agreement between the parties, this Court finds the Settlement and Compromise Agreement as to plaintiff's claims should be and is hereby approved.

THEREFORE, IT IS ORDERED that all claims asserted and alleged by the plaintiff are dismissed with prejudice to

the bringing of a future action thereon.

IT IS FURTHER ORDERED that the parties shall bear their own attorneys fees and costs expended herein.

DATED this 23 day of May, 1976.

H. Dale Cook  
H. Dale Cook  
United States District Judge

APPROVED AS TO FORM AND CONTENT:

EDGAR, MANIPELLA & HINDS

By: Samuel P. Manipella  
Samuel P. Manipella  
Attorneys for Plaintiff

GABLE, GOTWALS, RUBIN, FOX,  
JOHNSON & BAKER

By: Sidney G. Dunagan  
Sidney G. Dunagan  
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL GLEN MARTIN,  
LINDA JOYCE MARTIN,  
MARVIN L. BENHAM a/k/a  
MARVIN L. DENHAM,  
CAROLYN F. BENHAM,  
R.J. COLLINS,

Defendants.

FILE

MAY 2 1976

Jack C. Silver, Clerk  
U.S. DISTRICT COURT

No. 75-C-515-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 17<sup>th</sup>  
day of May, 1976, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Paul Glen Martin, Linda Joyce Martin, Marvin L. Benham a/k/a  
Marvin L. Denham, Carolyn F. Benham, and R.J. Collins, appearing  
not.

The Court being fully advised and having examined the  
file herein finds that the defendants Paul Glen Martin and R.J.  
Collins, were served with Summons, Complaint, and Amendment to  
Complaint on November 20, 1975 and December 17, 1975, as appears  
from the United States Marshal's Service herein; that the  
Defendants, Linda Joyce Martin, Carolyn F. Benham and Marvin L.  
Benham were served by publication as shown on Proof of Publication  
filed herein.

It appearing that the defendants have failed to answer  
herein and that default has been entered by the Clerk of this  
Court.

The Court further finds that this is a suit based upon  
a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note upon the following described real  
property located in Tulsa County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Two (2), COURSEY ADDITION, An Addition  
in Tulsa County, Oklahoma, according to  
the recorded plat thereof

THAT the defendants, Paul Glen Martin and Linda Joyce Martin, did, on the 16th day of September, 1972, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,000.00, with 7-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that defendants, Paul Glen Martin and Linda Joyce Martin, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than 11 months last past, which default has continued and that by reason thereof the above-named defendants are now indebted to the plaintiff in the sum of \$10,748.45, as unpaid principal, with interest thereon at the rate of 7-1/2 percent per annum from May 1, 1975, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants Paul Glen Martin, in personam, and Linda Joyce Martin, Marvin L. Benham and Carolyn F. Benham, in rem, for the sum of \$10,748.45, with interest thereon at the rate of 7-1/2 percent per annum from May 1, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment, in rem, against the defendant R.J. Collins.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree all of the defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED.



ROBERT P. SANTEE  
Assistant United States Attorney  
(tsi)

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
vs. ) CIVIL ACTION NO. 76-C-180-C  
)  
)  
MARVIN O. G. ADKINS a/k/a )  
MARVIN O. ADKINS a/k/a O. G. )  
MARVIN ADKINS, DOROTHY MARIE )  
ADKINS a/k/a DOROTHY M. ADKINS, )  
WARREN L. McCONNICO, Attorney- )  
at-Law, DORMAN STITES d/b/a )  
DORMAN HOME SUPPLIES, OLLIE W. )  
GRESHAM, SAND SPRINGS STATE )  
BANK, a corporation, FIRST )  
NATIONAL BANK AND TRUST COMPANY, )  
a corporation, POSTAL FINANCE )  
COMPANY, INC., COUNTY TREASURER, )  
Tulsa County, BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
and SUZANNE M. ADKINS a/k/a )  
SUZY ADKINS a/k/a SUZANNE ADKINS, )  
)  
Defendants. )

FILED

MAY 20 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

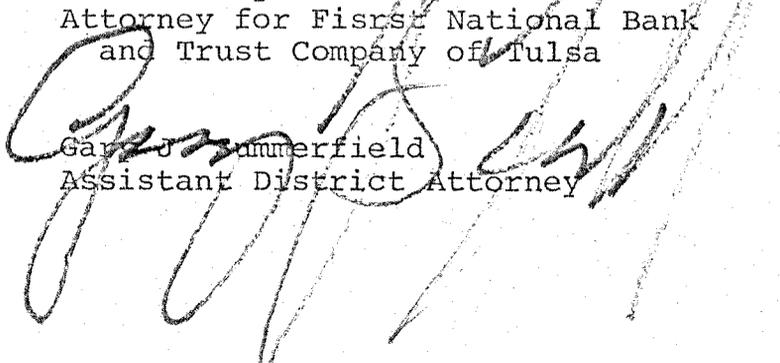
Come now the United States of America, Plaintiff herein, by and through Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, First National Bank and Trust Company of Tulsa, Defendant, by and through its attorney, Paul B. Naylor, John F. Cantrell, Tulsa County Treasurer, Defendant, and the Board of County Commissioners of Tulsa County, Defendant, all by and through their attorney, Gary J. Summerfield, Assistant District Attorney for Tulsa County, and hereby stipulate that this action may be dismissed without prejudice.

Dated this 20th day of May, 1976.

NATHAN G. GRAHAM  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
Paul B. Naylor  
Attorney for First National Bank  
and Trust Company of Tulsa

  
Gary J. Summerfield  
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF

TULSA CRUDE OIL PURCHASING  
COMPANY, and its consolidated  
subsidiaries,

Debtor.

)  
)  
) 72-B-108  
) In Proceedings for th  
) Reorganization of a  
) Corporation  
)

**FILED**

MAY 20 1976

ORDER OVERRULING MOTION FOR STAY Jack C. Silver, Clerk  
OF EXECUTION U S DISTRICT COURT

The Court has for consideration the Motion for Stay of Execution filed by Sam Fulmer Weir, and, being fully advised in the premises, finds:

That said motion should be overruled.

IT IS, THEREFORE, ORDERED that the Motion for Stay of Execution be and the same is hereby overruled.

ENTERED this 20 day of May, 1976.



CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF  
TULSA CRUDE OIL PURCHASING  
COMPANY, and its consolidated  
subsidiaries,

Debtor.

) 72-B-108  
) In Proceedings for t  
) Reorganization of a  
) Corporation  
)  
)  
)

**FILED**

MAY 20 1976

Jack C. Silver, Clerk  
U S DISTRICT COU

ORDER

The Court has for consideration the Motion to Extend  
Time to Appeal filed on behalf of Sam Fulmer Weir on May 19, 1976,  
and, being fully advised in the premises, finds:

That said Motion reads as follows:

"Defendant moves the Court for an order enlarging  
until the 17th day of May, 1976, the period within which  
defendant may appeal to the United States Court of  
Appeals for the 10th Circuit from the judgment entered  
herein on the 17th day of March, 1976, on the ground  
of mistake and excusable neglect based upon the mis-  
calculation of counsel of the time to file Notice  
of Appeal by defendant's counsel, as more particularly  
shown by the Affidavit of Dan Nelson attached hereto."  
(Emphasis supplied)

The affidavit states:

"Dan Nelson, being first duly sworn, deposes and says:

"1. I am an attorney-at-law associated with Ames,  
Daugherty, Black, Ashabranner & Rogers, 219 Couch  
Drive, Oklahoma City, Oklahoma, 73102, attorneys  
for defendant herein, and I am familiar with the  
facts and proceedings heretofore had herein and  
make this affidavit in support of a motion for ex-  
tension of time to file Notice of Appeal.

"2. That as the attorney for defendant, Sam Weir, I  
did not receive a copy of Judgment until several  
days after the Judgment was rendered, and I miscalculated  
the time for filing the Notice of Appeal and respectfully  
request an order to allow this defendant to file this Notice  
of Appeal out of time."

On May 13, 1976, this Court entered its order, denying,  
among other things, the Motion to File Notice of Appeal Out of Time.  
Said order, is incorporated in this order, as though set out in full.

It is noted that the Notice of Appeal was filed on April  
19, 1976. The final judgment was entered on March 17, 1976.

The first motion to file appeal out of time was filed on April 29, 1976.

Although, involving criminal cases, the Court will cite to two recent Tenth Circuit Opinions involving this question, in addition to the cases and citations in its previous order.

In *United States of America v. Steve Maycock and Eddie Bradshaw*, Appeal Numbers 76-1018 and 76-1019 (decided by the Tenth Circuit on April 20, 1976), the notice of appeal was filed 18 days after entry of the judgments. The Tenth Circuit Court said:

"Because the filing of a timely notice of appeal is mandatory and jurisdictional, the appeals must be dismissed. *Wilkinson v. United States*, 278 F.2d 604 (10th Cir., 1960), cert.denied 363 U.S. 829 (1960).

"Although the rigidity of the ten day rule is somewhat relaxed by the power of the district court to extend the period for filing notice of appeal upon a showing of excusable neglect, as well as by the renewed appeal period following denial of motions in arrest for judgment or for a new trial, the defendants have not raised a claim of excusable neglect in the district court \*\*\*. Defendant's sole argument respecting the untimely notice does not begin to run until they receive notice from the Clerk of the district court that the judgment has entered. This contention is without merit. The running of the ten day period for filing of the notice of appeal is not delayed until the defendant is notified of the entry of the judgment in the Clerk's records. *Wilkinson v. United States*, supra.\*\*\*."

In *United States of America v. Corrine Urioste* (10th CCA, Number 76-1145, decided May 12, 1976) no notice of appeal was filed during the ten day appeal period prescribed by Rule 4(b) of the Federal Rules of Appellate procedure. The time expired January 19, 1976. Four days later appellant filed a motion to extend the time for filing notice of appeal, stating that the failure to file the timely notice of appeal was caused by excusable neglect. Specifically, it was alleged that counsel had dictated the notice of appeal to this secretary, "who the day following the dictation became ill and was unable to report to work for two days, during which time the notice of appeal should have been filed". On the same day the district court found "good reason" for granting the motion and directed that the notice of appeal be filed as of that

The question of dismissing the appeal was then raised at the appellate level. The Tenth Circuit said:

"Under Rule 4(b), a district court, may, within certain limitations, extend the time for filing a notice of appeal in a criminal case upon a showing of excusable neglect. The government contends that in this case the district court's finding of 'good reason' was not the equivalent of 'excusable neglect' required by Rule 4(b) and in any event the claimed showing of excusable neglect is not supported by the record. Responding, appellant argues that the district court's order extending the time for filing notice of appeal should not be set aside in the absence of an abuse of judicial discretion.

"Without question, the filing of a notice of appeal within the ten day appeal period of Rule 4(b), or a proper extension thereof, is both mandatory and jurisdictional. *Gooch v. Skelly Oil Co.*, 493 F.2d 366 (10th Cir.1974). However, the authority of a trial judge, in his discretion, to extend the appeal is dependent upon a showing of excusable neglect. *Buckley v. United States*, 382 F.2d 611 (10th Cir.1967). Necessarily, the first step in deciding whether to extend the time is a determination whether excusable neglect has been shown. We recognize that a trial court's determination regarding the presence or absence of excusable neglect should not be set aside on appeal in the absence of a clear showing of an abuse of discretion.

"Unfortunately Rule 4 does not specifically define 'excusable neglect'. Therefore, the excusability of neglect in a particular case must necessarily be gauged by an application of a common sense meaning of the words 'excusable neglect' to the facts of a case. *Gooch v. Skelly Oil Co.*, supra.

"The facts here are not complex. Simply stated, the record shows that a notice of appeal was filed four days out of time and that counsel's secretary, following dictation of the notice of appeal, was unavoidably absent from work for two days, during which time the notice of appeal should have been filed. A real showing of excusable neglect is required before the appeal periods of Rule 4 may be extended. *Gooch v. Skelly Oil Co.*, supra. The record here fails to support the claimed showing that the neglect involved was excusable. In our view, the two day secretarial absence does not excuse a four day delay in filing a routine notice of appeal. Further, we are aware of no 'unique or extraordinary' circumstances which might otherwise authorize an extension of time. \*\*\*."

The Tenth Circuit dismissed the appeal.

The Court, therefore, finds that said Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion to Extend Time to Appeal filed on behalf of Sam Fulmer Weir on May 19, 1976, be and the same is hereby denied.

ENTERED this 20 day of May, 1976.

*Allen F. Barnett*

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MYRTA JOANN MIKEL,

Plaintiff,

vs.

THE CITY OF TULSA,  
a municipal corporation,  
et al.,

Defendants.

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) 75-C-102  
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) FILED  
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) MAY 13 1976  
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)  
) Jack C. Silver, Clerk  
) U. S. DISTRICT COURT  
)

MEMORANDUM AND ORDER

The Court has for consideration the Motion to Dismiss and Motion to Strike filed by the defendants, the briefs in support and opposition thereto; the findings and recommendations of the Magistrate; the objections filed by plaintiff to the findings and recommendations of the Magistrate, the briefs in support and opposition to said objections, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

Plaintiff, Myrta Joann Mikel, in instituting the present litigation, seeks declaratory relief and damages to redress an alleged deprivation of rights secured to her by the 13th and 14th Amendments to the United States Constitution and 42 U.S.C. §§1981, 1982 and 1983; Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.).

She alleges jurisdiction by virtue of 28 U.S.C. §§2201 and 2202; 28 U.S.C. §1343 (3) and (4); and 42 U.S.C. §3000e-5(f).

It appears that the plaintiff is a black female, 27 years of age at the time of the filing of this litigation; and she alleges that she was not employed by the defendants by reason of being a member of the black race.

It appears that plaintiff processed her claim through the Equal Opportunity Employment Commission. Her charge of discrimination, dated February 14, 1973, denotes that she primarily

named the City of Tulsa as the discriminating party, with "Southwestern Bell Telephone Company" listed as "AND (other parties if any)". In item 7 plaintiff was asked: "Explain what unfair thing was done to you. How were other persons treated differently?"

Plaintiff responded:

"I was refused employment at the City Hall because of bad reference given by Charles Fritz at Southwestern Bell. I feel this information was given because of my race and therefore I have been discriminated against by City Personnel Department."

It appears that the Commission terminated the matter without suit and issued its "Notice of Right to Sue Within 90 Days" letter on December 19, 1974, and plaintiff commenced the present litigation on March 21, 1975.

In this connection the Court notes that 42 U.S.C. §2000e-5(f)(1), reads, in pertinent part:

"If within 180 days from the filing of such a charge \*\*\* the Commission has not filed a civil action under this section \*\*\* or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. \*\*\*."

It is apparent that the "Ninety Day Letter" in this litigation was not sent until after the expiration of the 180 days mentioned in the above cited statute. In construing this statute, the Courts have been consistent in holding that the 180-day limitation contained in 42 U.S.C. §2000e-5(f) does not serve as a time deadline for the Commission to issue any notice to the complaining party. *Williams v. Southern Union Gas Company* (10th CCA, decided January 21, 1976) \_\_\_\_\_ F.2d \_\_\_\_\_, and cases cited therein.

Plaintiff has retained private counsel to litigate her alleged claims in this Court.

While plaintiff's original complaint and amendment to complaint still leaves much to be desired from the point of view of precision and specificity, it appears that her contentions essentially

are essentially as follows:

1. On February 8, 1973, she applied for the position of comptometer operator with the defendants; that her job application revealed that she had 74 hours of college credit in business administration, and capabilities to operate five different office machines, including a comptometer.

2. That subsequent thereto and on February 13, 1973, a white female was hired by defendants for the same position and that said white female had less qualifications than did plaintiff.

3. That the act of the defendants in not hiring the plaintiff was discriminatory in nature and was for the sole reason that the plaintiff was black.

4. That the non-hiring of the plaintiff because of her race was wilful, wanton and malicious and in disregard of her civil rights, and that she has suffered severe emotional stress.

5. That the individual defendants had knowledge of the discriminatory act of not hiring the plaintiff because of her race.

6. Plaintiff does not seek equitable relief, but does seek actual damages in the amount of \$2,440.00; damages for emotional pain and suffering in the amount of \$50,000.00; and exemplary and punitive damages in the sum of \$500,000.00.

The theoretical basis for this action is the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1982, 1983; the 13th and 14th Amendments to the Constitution; and Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.)

Jurisdiction over the federal causes of action allegedly rests on 28 U.S.C. §2201 and 2202; 28 U.S.C. §1343 (3) and (4); and 42 U.S.C. §2000e-5(f).

JURISDICTION:

The Declaratory Judgment Act (28 U.S.C. §§2201 and 2202) is not itself a jurisdictional statute. It is procedural in nature and neither aguments nor diminishes the jurisdiction of the

federal courts. Moore's Federal Practice, Volume 6A, ¶57.23.

This Court does, however, have jurisdiction pursuant to Title 28 U.S.C. §1343 (3) and (4) and 42 U.S.C. §2000e-5(f). The Court, further has jurisdiction, by virtue of Title 28 U.S.C. §1331 (although not specifically pled by plaintiff) by virtue of the 13th and 14th Amendments (if in fact there be violations of such amendments).

At the outset, the Court will overrule the Defendants' Motion to Strike, the Motion to Dismiss being dispositive of the matters contained in said motion.

Title 42 U.S.C. §1981 provides:

"Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

Title 42 U.S.C. §1982 provides:

"Property rights of citizens.

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Title 42 U.S.C. §1983 provides:

"Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 U.S.C. §2000e(b) defines employer, in pertinent part, as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, \*\*\*."

Title 42 U.S.C. §2000e(a), provides in pertinent part, as follows:

"(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, \*\*\*."

The Court notes that the 1972 amendment to Title VII of the Civil Rights Act of 1964, removed the exemption of states and political subdivisions from the definition of employers subject to the Act. P.L. 92-261 (1972).

Title 42 U.S.C. §200e-5 provides, in pertinent part, as follows:

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer \*\*\* as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. \*\*\*."

The Thirteenth Amendment to the United States Constitution provides, in pertinent part:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MOTION TO DISMISS FILED BY THE CITY OF TULSA:

Section 1983 Claim:

Monroe v. Pape, 364 U.S. 167 (1961); City of Kenosha v. Bruno, et al., 412 U.S. 507 (1973); Moor et al. v. County of Alameda, 411 U.S. 693 (1973); Church of God of La., Inc. v.

Monrow-Ouachita R.P.C., 404 F.Supp. 175 (USDC, W.D.La., 1975); Naprstek v. City of Norwich, 405 F.Supp. 521 (USDC, N.D.N.Y., 1976), make it clear that plaintiff's claim under 28 U.S.C. §1343, predicated upon Title 42 U.S.C. §1983, cannot be sustained as the City is not a person within the meaning of §1983. Further, it cannot be held vicariously liable for the acts of its officers that allegedly might violate the civil rights of plaintiff so as to permit monetary recovery from them out of the City's treasury. Moor et al. v. County of Alameda, supra.

In Dewell v. Lawson, 489 F.2d 877 (10th CCA, 1974), the Court said:

"Dewell contends that the City of Oklahoma City is a 'person' within 42 U.S.C.A. §1983 and therefore subject to suit for damages. It is well established that a municipality is not a 'person' within the meaning of 42 U.S.C.A. §1983. Monroe v. Pape, 365 U.S. 167 (1961); Egan v. City of Aurora, 365 U.S. 514 (1961). 11 Okl.St. Ann. (1973 p.p.) §1755 constitutes a waiver of liability applicable to any city or town to the extent of a claim not in excess of \$2,000 arising out of the performance of, or the failure to perform, a discretionary function or duty, whether or not the discretion is abused. 11 Okl.St. Ann. (1973 p.p.) §1754. A federal court will take judicial notice of the public laws of the states. Bowen v. Johnston, 306 U.S. 19 (1939); Pure Oil Company v. State of Minnesota, 248 U.S. 158 (1918). In Moor v. County of Alameda, 411 U.S. 693 (1973), the Supreme Court held that all municipalities are excluded from liability under the Civil Rights Act regardless of whether their immunity has been lifted by state law. Therefore, regardless of 11 Okl.Stat. Ann. §1755, Oklahoma City cannot be liable under the Civil Rights Act."

Therefore, plaintiff's alleged claim against the City of Tulsa under §1983 must be dismissed.

Section 1981 Claim:

With reference to the §1981 claim, in Maybanks v. Ingraham, 378 F.Supp. 913 (USDC, E.D.Pa., 1974) the Court said at page 916:

"The applicability of §1981 to municipalities has been sparsely dealt with by the courts. One which has considered the issue suggested that given the exclusion of municipal liability from the ambit of §1983, explicit in its legislative history as interpreted by the Supreme Court, 'an interpretation of section 1981 which authorizes damage actions against states and municipalities deprives section 1983 of its essential significance. Bennett v. Gravelle, 323 F.Supp. 203, 215 (D.Md. 1971). See also Arunga v. Weldon, 469 F.2d 675 (C.A. 9, 1972)."

The Court went on to say:

"In the first place, the word 'person' which in §1983 has been held conclusively not to apply to municipalities, appears in §1981 only to describe those who are protected by the statute, not those who are proscribed from its violation. In the second place, the scope and application of §1981 is vastly different from that of §1983.

"One essential difference is that §1981, like §1982, is based on and intended to enforce the Thirteenth Amendment, and applies, therefore, to actions against private persons as well as those acting under color of law. Section 1983, on the other hand, enacted to implement the Fourteenth Amendment and applying, therefore, only to cases where state action is involved, is of more limited application."

At page 917 the Court said:

"While this language may have been dictum, the Court appeared to recognize a universal application of § 1982 (and therefore similarly of §1981), as contemplated by the Congress which enacted it, which would apply to municipalities, barring any defenses or immunities which they may have. Surely this is sensible, for if purely private citizens are subject to liability under §§1981 and 1982, it would seem anomalous to exempt government, the upholder of law, from similar responsibility for racial discrimination."

While not facing the §1981 argument squarely, the Court did, in *Booth v. Prince George's County, Maryland*, 66 F.R.D. 466 (USDC, Maryland, 1975) have the following statement:

"\*\*\*This Court, however, previously held that the Fourteenth Amendment does give a cause of action against governmental units such as the County and Board (citing cases). The plaintiff's §1981 basis for his cause of action against the two governmental units is more troublesome. In *Bennett* this Court held that §1981 would not support such a cause of action. See 323 F.Supp. at 215-216. Other courts have reached a contrary conclusion. See e.g. *Maybanks v. Ingraham*, 378 F.Supp. 913, 9;6-918 (E.D.Pa., 1974). Given this Court's conclusion that the plaintiff can maintain his action against the County and Board directly under the Fourteenth Amendment there is no need to reexamine the *Bennett* rationale here."

In a footnote the Court stated:

"Should the case ever reach a posture where it will be necessary to decide damages or back pay awards the §1981 problem left open now will have to be reexamined particularly in light of the holding in *Maybanks* that a damage action against a governmental entity will lie under §1981. See 378 F.Supp. at 918. This Court, of course, held in *Bennett* that only injunctive relief was available against a local government under the Fourteenth Amendment. See 323 F.Supp. 217-218."

See also *Patterson v. City of Chester*, 389 F.Supp. 1093 (USDC, E.D.Pa., 1975); *Williams v. Brown*, 398 F.Supp. 155 (USDC, N.D.Ill., 1975).

The Court, therefore, finds that plaintiff has stated a cause of action against the City of Tulsa under Section 1981, and the Motion to Dismiss should be overruled as to this claim.  
Section 1982 Claim:

The Court notes that although plaintiff, in the opening of her complaint, cites to Title 42 U.S.C. §1982, there is no further mention of said section in her prayer for relief or her subsequent pleadings and briefs. The Court, therefore, concludes that plaintiff has abandoned any cause of action against the City of Tulsa, under Title 42 U.S.C. §1982, and will sustain the Motion to Dismiss as to this claim as to the City of Tulsa.

Title 42 U.S.C. §2000e et seq. claim:

Under the provisions of the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964, as amended in 1972, a state or political subdivision thereof is not excluded from coverage under the Act. 14 C.J.S.2d, Civil Rights Supplement, at page 115

Title 42 U.S.C. §§2000e-(a) and (b) provide, in pertinent part:

"(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivision, \*\*\*.

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, \*\*\*."

There is no question that the enactment of the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964, as amended in 1972 and its application does not pre-empt a party seeking redress both under that Act and §1981.

In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Supreme Court said at page 459:

"Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. '[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title vii and other applicable statutes.' Alexander v.

Gardner-Denver Co., 415 U.S., at 48. In particular, Congress notes 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §1981, and that the two procedures augment each other and are not mutually exclusive.' H.R.Rep.No. 92-238, p. 19 (1971). Later, in considering the Equal Opporutnity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under §1981. 118 Cong.Rec. 3371-3373 (1972)."

and at page 461:

"We generally conclude, therefore, that the remedies available under Title VII and under §1981, although related and although directed to most of the same ends, are separate, distinct and independent.\*\*\*."

See also *Ellis v. Naval Air Rework Facility, Alameda, Cal.*, 404 F.Supp. 377 (USDC, N.D.Calif., 1975), wherein the Court said:

"It is clear that the passage of Title VII which provides a specific statutory remedy for discrimination in employment, did not preempt the more general statutory grounds for bringing discrimination complaints. *Morton v. Mancari* (1974) 417 U.S. 535. It is also clear that in actions brought by employees against private employers, Title VII and 42 U.S.C. §1981 are independent and supplemental grounds for jurisdiction. *Alexander v. Gardner-Denver Co.*, 415 U.S. 26 (1974)."

The Court, therefore, concludes, that the Motion to Dismiss as to the City of Tulsa as to the claim asserted by plaintiff pursuant to the Equal Employment Opportunities Subchapter of the Civil Rights Act of 1964, as amended in 1972, should be overruled.

Thirteenth and Fourteenth Amendment Claims:

Since the Court has dismissed the cause of action asserted by plaintiff under Title 42 U.S.C. §1982, upon viewing the Thirteenth Amendment claim, the Court finds that said Motion to Dismiss as to the City of Tulsa should be sustained.

The Court, additionally, finds that the alleged claim of plaintiff asserted under the Fourteenth Amendment as to the City of Tulsa should be overruled. *Hines v. D'Artois*, 383 F.Supp. 184 (USDC, La., 1974).

MOTION TO DISMISS AS TO BALANCE OF DEFENDANTS IN THEIR OFFICIAL CAPACITY AND INDIVIDUAL CAPACITY:

Section 1981 and 1983 Claims:

Official Capacity:

In Schoonfield v. Mayor and City Council of Baltimore, 399 F.Supp. 1069, at 1079 (USDC. D.Maryland, 1975) the Court said:

"Similarly, this Court has noted that when a suit is lodged against a public official with the intent and purpose of obtaining a judgment establishing a liability against the state, the suit is in actuality one against the state. Bennett v. Gravelle, 323 F.Supp. 203, 211 (D.Md.), aff'd, 451 F.2d 1011 (4th Cir. 1971), cert.dismissed, 407 U.S. 917 (1972). Since the Mayor, \*\*\* in their official capacities are extensions of the municipality, damages may not be assessed against them for acting in such capacities. Id. \*\*\*".

The Court will, therefore, sustain the Motion to Dismiss the remaining defendants acting in their official capacities under the alleged claimed violations of §§1981 and 1983.

Individual Capacity:

A thorough discussion of the possible personal liability of these defendants can be found in Scheuer v. Rhodes, 416 U.S. 232 (1974), wherein the Supreme Court stated, commencing at page 239:

"\*\*\*The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine---that the 'King can do no wrong'---did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

and at pages 241, 242:

"\*\*\*Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity ---absolute or qualified---for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such

error than not to decide or act at all. In *Barr v. Matteo*, 360 U.S. 564, 572-573, the Court observed, in somewhat parallel context of the privilege of public officers from defamation actions: 'The privilege is not a badge of emoultment of exalted office, but an expression of a policy designed to aid in the effective functioning of government.'

\*\*\*.

\*\*\*If the immunity is qualified, not absolute, the scope of that immunity will necessarily be related to facts as yet not established either by affidavits, admissions, or a trial record. Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. §1983. In neither of these inquiries do we write a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, supra, Mr. Justice Douglas, writing for the Court, held that the section in question was meant 'to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position.' Through the Civil Rights statutes, Congress intended 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'

In *Hines v. D'Artois*, 383 F.Supp. 184 (USDC., W.D.La., 1974), the Court said at page 191:

"However bland their actions may prove to be on trial of this matter, where racially discriminatory policies are alleged, plaintiffs are not to be denied their day in court, and, along with the Commissioner of Public Safety, Geroge D'Artois, and Chief of Police T. P. Kelley, they are held in this suit personally for damag-s and equitable relief, pursuant to §§1981 and 1983, under 28 U.S.C.A. §1343(3) and (4). *Monroe v. Pape*, supra. *Sullivan v. Little Hunting Park*, supra. *Jones v. Lafred H. Mayer Co.*, supra."

See also *Smith v. City of East Cleveland*, 363 F.Supp. 1131 (N.D.E.D., Ohio, 1973).

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court stated that "Section 1979 [42 U.S.C.A. §1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

In *Basista v. Weir*, 340 F.2d 74 (3rd CCA, 1965), in discussing the above language from *Monroe v. Pape*, supra, that Court said:

"While a specific intent to deprive a person of his constitutional rights is required under criminal sections of the Civil Rights Acts, 18 U.S.C. §§241, 242, neither specific intent nor purpose to deprive an in-

dividual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act. See *Stringer v. Dilger*, 313 F.2d 536 (10th CCA, 1963). \*\*\*."

See also *Bogard v. Cook*, 405 F.Supp. 1202 (USDC, N.D.Miss., 1975).

In *Schoonfield v. Mayor and City Council of Baltimore*, supra, the Court said at page 1080:

"\*\*\*However, the other defendants may still be liable in their individual capacities, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Monroe v. Pape*, supra, although they would have a qualified immunity based on the good faith performance of their discretionary duties. See *Scheuer v. Rhodes*, supra; *Bennett v. Gravelle*, supra, 323 F.Supp. at 212-14; cf. *Wood v. Strickland*, 420 U.S. 380 (1975); *Pierson v. Ray*, 386 U.S. 547 (1967)."

In *Bennett v. Gravelle*, 323 F.Supp. 203 (U.S.D.C., D.Mary., 1971), at page 212, where the Court said:

"As noted above, section 1983 was designed to render a person \*\*\* who deprived another of his civil rights, personally liable for their actions. One exception to holding an individual personally liable is if his acts are privileged or fall into an immunity category."

Thus, the Motion to Dismiss as to the defendants individually must be overruled at this time, with reference to §§1981 and 1983.

Section 1982 Claim and Thirteenth Amendment:

For the reasons hereinbefore set forth with reference to the alleged §1982 claim and the Thirteenth Amendment, the Motion to Dismiss as to the remaining defendants, both in their official capacity and individually, should be sustained.

Fourteenth Amendment Claim:

The Motion to Dismiss as to the alleged Fourteenth Amendment violation as against the remaining defendant in their official capacity should be sustained and overruled at this time as to their individual capacity.

Claim under §2000e et seq.:

The Court finds that as to the defendants individually, an alleged claim under §2000e, et seq. should be sustained, as the Court can find no authority to assert such a claim against the remaining defendants individually.

The Court notes that the plaintiff argues that under Title 42 U.S.C. §2000e(f) that said section provides:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person, \*\*\*." (Emphasis supplied).

Plaintiff argues that the term "any any agent of such person" subjects the remaining defendants in their official capacity to §2000e, et seq.

There is a series of cases holding that a plaintiff may not sue a defendant unless it was named as a respondent before the E.E.O.C.. *Trockio v. Chamberlain Mfg. Co.*, 51 F.R.D. 517 (USDC, W.D. Pa., 1970) and cases cited therein.

The Motion to Dismiss as to the defendants in their official capacity under §2000e, et seq. should be sustained.

CAUSE OF ACTION AS TO REMAINING DEFENDANTS, INCLUDING THE CITY OF TULSA, IN VIEW OF THE ABOVE RULING:

The Court will overrule the Motion to Dismiss as to the remaining defendants, including the City of Tulsa, for failure to state a cause of action, in accordance with the above ruling.

In *Scheuer v. Rhodes*, supra, the Supreme Court said:

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

The basic premise concerning civil rights actions is that such an action, especially one brought under the Civil Rights Act, should not be dismissed at the pleading stage unless it is certain that plaintiff is entitled to no relief under any state of facts which possibly could be proved in support of her claims. 2A Moore, *Federal Practice* ¶12.08 at 2271-2274 (1972). *Kelly v. Wisconsin Interscholastic Athletic Ass'n.* (USDC, E.D.Wis., 1974) 367 F.Supp. 1388.

DAMAGES:

In Johnson v. Railway Express Agency, supra, at page 458, the Supreme Court said:

"Some District Courts have ruled that neither compensatory nor punitive damages may be awarded in the Title VII suit." Loo v. Gerarge, 374 F.Supp. 1338, 1341-1342 (Haw., 1974).

The Court further said at page 459:

"Title 42 U.S.C. §1981, being the present codification of §16 of the century-old Civil Rights Act of 1870, 16 Stat. 144, on the other hand, on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the Federal Court of Appeals---and we now join them--- that §1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.\*\*\*"

See also 14 ALR Fed. 608.

Accordingly, IT IS ORDERED:

1. That the defendants' Motion to Strike be and the same is hereby overruled.
2. The City of Tulsa's Motion to Dismiss as to the Section 1983 claim is sustained.
3. The City of Tulsa's Motion to Dismiss as to the Section 1981 claim is overruled.
4. The City of Tulsa's Motion to Dismiss as to the Section 1982 claim and the Thirteenth Amendment violation is sustained.
5. The City of Tulsa's Motion to Dismiss as to the alleged Fourteenth Amendment violation is overruled.
6. The City of Tulsa's Motion to Dismiss as to the claim asserted under Title 42 U.S.C. §2000e, et seq. is overruled.
7. The Motion to Dismiss on behalf of the individual defendants in their official capacity as to the Section 1981 and 1983 claims is sustained.
8. The Motion to Dismiss on behalf of the individual defendants in their individual capacity as to Section 1981 and 1983 claims is hereby overruled.

9. The Motion to Dismiss on behalf of the individual defendants in their official and individual capacity as to Section 1982 claim and the alleged Thirteenth Amendment violation should be sustained.

10. That the Motion to Dismiss on behalf of the individual defendants as to the alleged Fourteenth Amendment violation in their official capacity should be sustained and overruled at this time as to their individual capacity.

11. That the Motion to Dismiss on behalf of the individual defendants in their official and individual capacity as to §2000e, et seq. should be sustained as well as that claim relating to their official capacity.

12. That the Motion to Dismiss as to the remaining claims for failure to state a cause of action against the defendants should be overruled in accordance with the above memorandum.

13. That all of the above various rulings conform with the memorandum of the Court hereinabove.

ENTERED this 13 day of May, 1976.



---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MALTER INTERNATIONAL CORPORA- )  
TION, A Louisiana Corporation, and )  
MALTER INTERNATIONAL CORPORA- )  
TION, A Texas Corporation, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
UNITED STATES CHEMICAL CORPORA- )  
TION, ROBERT D. KELLEY, HERMAN )  
L. KIFER and LOUIS O. LASITER, )  
 )  
Defendants, )

FILED

MAY 13 1976 K

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 72-C-60(8) ✓

F I N A L J U D G M E N T

THIS CAUSE came on for consideration on the 13 day of May, 1976, pursuant to the Stipulations and Consent of all parties. Plaintiffs were represented by Charles Baker, of Gable, Gotwals, Rubin, Fox, Johnson and Baker; the Defendants were represented by Lloyd K. Holtz, of Whitebook, Knox, Holtz & Harlin. Thereupon the Court having examined the file herein, finds:

I.

On the 5th day of February, 1974, this Court entered a Consent Decree in the above styled matter, ordering, in part, that the Defendants, United States Chemical Corporation, Robert D. Kelley, Herman L. Kiefer and Louis O. Lasiter, file with this Court and serve on Counsel for the Plaintiffs, a Final Report, in writing, under oath, setting forth in detail the manner and form by which the Defendant, United States Chemical Corporation, has complied with the provisions of Paragraphs II & IV of this Consent Decree. If within forty-five (45) days thereafter, the Plaintiffs filed no objection to such Final Report as provided for in Paragraph XV of said Consent Decree, a Final Supplemental Judgment will be entered in this cause not less than forty-five (45) days after the filing of such Final Report adjudging that said Defendants have complied with the restraint provisions of Paragraphs II and IV of this Consent Decree and dissolving and discharging the restraint provisions of Paragraphs II and IV of said Consent Decree and also dismissing with prejudice the Plaintiffs' claims for damages and other relief as against all of the Defendants in this cause.

That the Defendant, United States Chemical Corporation, did file its Final Report on February 25, 1976. That the Plaintiffs, Malter International Corporation, a Louisiana Corporation, and Malter International Corporation, a Texas Corporation, having filed no objection to such Final Report as provided for in Paragraph XV of said Consent Decree, a Final Supplemental Judgment should be entered in this cause, dissolving and discharging the restraint provisions of Paragraphs II and IV of said Consent Decree and also dismissing with prejudice the Plaintiffs' claims for damages and other relief against all of the Defendants in this cause.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, United States Chemical Corporation has complied with Paragraphs II and IV of the Consent Decree answered herein on the 5th day of February, 1974, and that said Defendant United States Chemical Corporation, is hereby released and discharged from the restraint provisions of Paragraphs II and IV of said Consent Decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that since the Defendants, United States Chemical Corporation, Louis O. Lasiter, Robert D. Kelley, Herman Kifer having fully complied with the terms of the Consent Decree entered herein on the 5th day of February, 1974, and having filed their Interim Reports and Final Report, and having obtained Interim Judgments, that they be granted this Final Judgment dismissing with prejudice the Plaintiffs' claims for damages and other relief against all of the Defendants herein, as specified by the terms of said Consent Decree.

ENTERED at Tulsa, Oklahoma, on this 13 day of May, 1976.

  
UNITED STATES DISTRICT JUDGE

AGREED TO AS TO FORM, CONTENT AND FOR ENTRY:

MALTER INTERNATIONAL CORPORATION, a Louisiana Corporation, and MALTER INTERNATIONAL CORPORATION, a Texas Corporation, Plaintiffs

By:



Charles Baker, Attorney for Plaintiffs

GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER

UNITED STATES CHEMICAL CORPORATION, ROBERT D. KELLEY, HERMAN L. KIFER and LOUIS O. LASITER, Defendants

By:



Lloyd K. Holtz, Attorney for Defendants

WHITEBOOK, KNOX, HOLTZ & HARLIN

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

KENNETH RAY CASTLEBERRY, )  
 )  
 ) Petitioner, )  
 )  
 vs. )  
 )  
 RICHARD CRISP, Warden, )  
 Oklahoma State Penitentiary, )  
 McAlester, Oklahoma, )  
 )  
 ) Respondent. )

No. 75-C-422-C

FILED

MAY 13 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER NUNC PRO TUNC

SUE SPONTE it is Ordered that pursuant to Rule 60,  
Federal Rules of Civil Procedure, the scrivner's error  
appearing on page 3 of the Order entered herein on May 5, 1976,  
in the above-styled case is hereby corrected.

It is directed that by interlineation the date of February  
15, 1972, appearing in the final sentence on page 3 is corrected  
to read February 16, 1972.

It is so Ordered this 10<sup>th</sup> day of May, 1976.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

DAMASIO ARTEAGA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
ROADWAY EXPRESS, INC. and )  
CHARLES BENNETT, )  
)  
Defendants. )

NO. 75-C-497

FILED

MAY 13 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

NOW on this 13<sup>th</sup> day of May, 1976 there came on for hearing the joint petition and stipulation of the parties for dismissal.

The Court finds that this matter has been settled and that by stipulation both parties request that the case be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled ~~case~~ <sup>Cause of action & Complaint</sup> be and it hereby ~~is~~ <sup>they</sup> are dismissed with prejudice.

Allen E. Barrow  
ALLEN E. BARROW  
Chief Judge  
United States District Court  
for the Northern District of  
Oklahoma

Approved as to form:  
9/22/76  
Jack E. Johnson  
Attorney for Plaintiff  
[Signature]  
Attorney for Defendant

IEU/ja  
2/25/76

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

T. H. RUSSELL CO., an Oklahoma corporation,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
NORTH AMERICAN INDUSTRIES, INC., a corporation,	)
	)
Defendant.	)

No. 75 C-370-13 ✓

FILED  
MAY 13 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DISMISSING ACTION WITH PREJUDICE

NOW on this 13 day of <sup>May</sup> ~~March~~, 1976, there having been presented to the undersigned Chief Judge of the United States District Court For The Northern District of Oklahoma the Stipulation of the parties herein requesting an entry of an Order dismissing the Plaintiff's action herein with prejudice, and the Court having considered the same, and being well and sufficiently advised in the premises, finds that said Order should issue herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that the Plaintiff's <sup>cause and complaint are</sup> ~~action~~ herein be and the same ~~is~~ hereby dismissed with prejudice.

*Allen E. Benson*

Chief United States District Judge  
for the Northern District of Oklahoma

*Approved:*  
*William E. [unclear]*  
*[unclear]*  
*[unclear]*

LAW OFFICES  
UNGERMAN,  
GRABEL &  
UNGERMAN  
SIXTH FLOOR  
WRIGHT BUILDING  
TULSA, OKLAHOMA





that both deceased and claimant executed the lease. Claimant testified that prior to the leasing of the apartment she and the decedent discussed marriage and he suggested they live with his mother and she declined, evidently having had a "bad" experience in living with relatives in her prior marriage. She testified that they then decided to rent the apartment and live together as man and wife and that they eventually planned on getting married. She further testified that about a week after moving into the apartment she and the deceased discussed marriage once again and concluded they didn't really need to get a "marriage certificate" since they were "common-law man and wife" and if one decided to leave the other they would have to get a divorce. She stated the only reason they wanted the marriage license was for "Public--just for the public--for the public, really". Plaintiff testified, and was corroborated by two employees who worked with her, that she had introduced the decedent as her husband on several occasions; that at one time she discussed changing her name from Dodson to Goss at her place of employment, but did not do so because she had not made the same change on her social security card.

A neighbor testified, who lived next door at the apartment, that she believed they were husband and wife; that the mail box listed the names of Goss, Dodson and that her mail box only had the last name listed thereon. Claimant explained the two names as being for the purpose of receiving mail for her son, but that only one letter was received during the period in question.

Claimant's explanation for lack of certain evidence that could have been used to substantiate the claimed common-law marriage was lack of time to change their bank accounts (she testified that she had a checking and savings in her name and she did not know what kind of account the decedent had; they each had their own individual automobile insurance policies; neither had changed beneficiaries on insurance policies to the other). She testified that each pay one-half of the rent and she did not know what decedent did with his money. She testified that both had furniture and furnishings in the apartment.

With reference to the funeral, she testified that she did not make known that she was decedent's wife on the advice of counsel as

she did not want to be responsible for payment of funeral expenses; that she sat with the family at the funeral and rode with the family to the funeral.

Testimony of co-employees indicated that no mention was made of claimant at the funeral service as being the surviving spouse and no mention was made of her in the obituary.

Contra to this testimony Mr. and Mrs. Nichols, the step-father and maternal parent of the deceased, testified that the parties were not in fact married; that the deceased had commented that he would not marry again; that deceased told his mother he was renting the apartment to share with another man; that Mr. Nichols made the funeral arrangements.

Various documents were submitted with the transcript indicated that the funeral register was signed by "Oliver and Debbie Dotson (sic)"; that the step-father signed as the party responsible for paying the funeral expenses; that decedent listed himself as single with no dependents at his place of employment. There are additionally various statements attached as to whether the parties were married or not.

The deceased's step-father and natural mother do not claim any benefits except the lump-sum benefit, which this Court is now advised has been paid to the Funeral Home.

Submitted with the transcript is a copy of an order (Exhibit 19) of the State Industrial Court, wherein the following finding was made:

"That said deceased left as his sole and only dependent heir at law his widow, Debbie Doston Goss, and that said Debbie Dotson Goss has suffered a pecuniary loss by reason of the death of Samuel Lee Goss."

Goldie Nichol, the mother of the deceased was found not to be an independent heir at law of said deceased.

With reference to the above captioned State Industrial Court proceedings, the following comments are found at page 28 of the transcript:

Are there any objections to the exhibits that were selected?

MR. ASH: We have no objections, Your Honor.

ADMINISTRATIVE LAW JUDGE: Do you have any objections?

MR. NICHOL: I've got some objections on 4, 19 and 25.

ADMINISTRATIVE LAW JUDGE: And what are those?

MR. NICHOL: Statements by Debra and the Industrial Court, and statements referred to lease of the apartment.

ADMINISTRATIVE LAW JUDGE: 4, 19 and 25, you say? Is this Industrial Court Judgment final yet?

MR. ASH: It's on appeal to the Supreme Court by me, respondent, and by Mrs. Nichol; her attorney has appealed it.

ADMINISTRATIVE LAW JUDGE: And the respondent has appealed, also?

MR. ASH: Well, the respondent joined in. I don't think they really had any choice in that matter.

ADMINISTRATIVE LAW JUDGE: In case there is a reversal, they wouldn't have to pay two judgments?

MR. ASH: If they hadn't, then they would have had to have paid, right.

The reason for quoting the above will become apparent later in this memorandum and order.

The general issues before the Administrative Law Judge were whether the claimant is entitled to mother's insurance benefits and whether she was the legal wife of Samuel L. Goss at the time of his death.

Section 202(g) of the Social Security Act, as amended, provides for the payment of benefits to the widow and every surviving divorced mother (as defined in section 216(d)) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother at the time of filing such application has in her care a child entitled to child's insurance benefits.

Section 216(h)(1)(A) of the Social Security Act, as amended, provides that an applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which the insured individual was domiciled at the time of his death, would find that such applicant and such insured individual were validly married at the time the insured individual died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate

personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

The Reconsideration Determination dated May 17, 1974, contains the following statement:

"\*\*\*The finding by the industrial court in workmen's compensation claim is not binding upon the Social Security Administration."

The State Industrial Commission is established in Oklahoma by Title 85 O.S.A. §69.1. Oklahoma Courts have held that the State Industrial Commission is an "administrative tribunal" with limited jurisdiction, and its primary purpose is to adjust speedily settlements between injured workmen engaged in hazardous employment and their employers. *Bryant-Haywary Drilling Co. v. Green* (Okla., 1961) 362 P.2d 676.

The Court, therefore, finds that the State Industrial Commission of the State of Oklahoma is not a Court as contemplated by the statute here involved.

The Court notes with interest, however, that there is evidently a split in the decisions dealing with the problem of state courts.

In the case of *Gray v. Richardson*, 340 F.Supp. 680 (USDC, N.D. Ohio, E.D., 1972), the Court said:

"Plaintiff, relying on the above section, argues that there is a valid state judgment determining the question of whether Tamara Lynn is the Child of Freddy and that the Secretary 'has no right to impeach or collaterally attack the judgment of the State of Ohio as to legitimacy.' In support of her argument plaintiff relies on *Collins v. Celebrezze*, 250 F.Supp., 37, 41 (S.D.N.Y.1966) which holds:

"'If, as here, the state courts have decided the issue the Secretary cannot summarily disregard that adjudication and proceed to re-decide de novo the issue of status.'

"Plaintiff also cites *Zeldman v. Celebrezze*, 252 F.Supp. 167, 171 (E.D.N.Y.1965) which holds:

"'If a state court has previously determined the very issue before the Secretary, then he should accept such determination as the law of the state.'

"There is no question that the Secretary must apply state law to determine questions of family status. 42 U.S.C. §416(h). Accordingly, if a state court has conducted a hearing to determine legitimacy and has made express findings under its state law, the Secretary must refer to and apply the law of the state as determined by the court.\*\*\*."

The Court went on to say:

"\*\*\*it still would not be binding on the Secretary. The Secretary was not a party to the proceeding and he is entitled to make an independent determination of whether Tamara Lynn Gray is the child of the wage earner and, as such, whether Tamara Lynn Gray is entitled to child's benefits pursuant to 42 U.S.C., Section 402(d). See *Dowell v. Gardner*, 6 Cir., 386 F.2d 809; *Old Kent Bank and Trust Company v. United States*, 6 Cir., 362 F.2d 444; *Cruz v. Gardner*, 7 Cir., 375 F.2d 453; *Schultz v. Celebrezze*, D.C., 267 F.Supp. 880; *Cain v. Secretary of Health, Education and Welfare*, 4 Cir., 377 F.2d 55."

But to the contrary, see *Collins v. Celebrezze*, 250 F.Supp. 37 (USDC, S.D.N.Y., 1966), wherein it was held:

"There is authority for the proposition that a state probate decree declaring a claimant to be the widow of the deceased has neither a res judicate nor a collateral estoppel effect as to the Secretary where he was not a party to the state proceeding. E.g., *Miller v. Ribcoff*, 198 F.Supp. 819 (and other cases cited)."

The Court went on to say:

"It seems to me beyond cavil that the initial inquiry of the Secretary as to what the courts of the state 'would find' with respect to an issue of marital status must necessarily focus upon whether or not the courts of the state have already made an adjudication on that precise issue. If, as here, the state courts have decided the issue the Secretary cannot summarily disregard that adjudication and proceed to re-decide de novo the issue of status. He cannot ignore what the state courts already determined on the spurious ground that he was not a party to the proceedings."

But the Court does state, with reference of State law by the Secretary at page 40, 41:

"Congress has frequently provided that state law is determinative of the ingredients upon which federal rights depend. See generally *Hart & Wechsler, The Federal Courts and the Federal System*, 456-57 (1953). But in the Social Security Act it has gone farther and has laid down a specific standard to be applied by the Secretary in ascertaining the state law relevant to the question of status. Thus the crucial basis for a determination of widow's status under section 216(h)(1)(A) of the Act is whether the 'courts of the state' of the deceased wage earner's domicile 'would find' that the wage earner and the applicant were validly married at the time of death. The standard is not what the Secretary himself conceives the result under state law should have been."

The requisite elements of a common law marriage in Oklahoma are set forth in *Maxfield v. Masfield*, 258 P.2d 915 (Okla., 1953).

Such a marriage requires competent parties, who enter the relationship by mutual agreement, exclusive of all others, consummating the arrangement by cohabitation and open assumption of other marital duties.

In Re Estate of Hornback, 475 P.2d 184 (Okla., 1970) the Court said:

"\*\*\*However, the mere contemplation of marriage does not establish a common law marriage. A common law marriage is based on a present assumption of an existing relationship not upon what the parties intended to have agreed to do at a future time. To constitute a valid marriage per verba de praesenti there must be an agreement to become husband and wife immediately from the time when the mutual consent is given.

The sole question remaining is whether the Secretary's determination that plaintiff was not the legal wife of Samuel L. Goss at the time of his death so as to make her eligible for mother's insurance benefits is supported by substantial evidence and is conclusive. In this regard, the scope of review within which this Court is to act is clearly defined by 42 U.S.C. §405(g). The findings of the Secretary as to any facts are to be final if supported by substantial evidence. Mere disagreement on the part of the reviewing court with the Secretary's decision is insufficient to warrant reversal if, upon review of the record it is shown that the Secretary relied upon substantial evidence in reaching his conclusions.

The Court finds that the Secretary's determination is supported by substantial evidence and should be affirmed.

IT IS SO ORDERED.

ENTERED this 13 day of May, 1976.

Charles E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 17 1976

W. J. USERY, JR., Secretary of Labor, )  
(Successor to John T. Dunlop), )  
United States Department of Labor, )  
)  
Plaintiff, )  
)  
V. )  
)  
CHILDREN'S MEDICAL CENTER, a corporation, )  
and JOHN L. BYRNE, an individual, )  
)  
Defendants )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil Action File

No. 75-C-229-B

ORDER OF DISMISSAL

This cause came on for consideration upon the stipulation of the parties, and it appearing that the defendants promised plaintiff and this Court that they will comply with the applicable provisions of the Fair Labor Standards Act of 1938, as amended (29 USC 201 et seq.), hereinafter referred to as the Act, that the defendants will pay to the plaintiff the wages in the amounts stipulated, which the Court finds to be the total due to defendants' employees under the Act to date of this order, and the Court being otherwise fully advised in the premises, it is,

ORDERED, ADJUDGED and DECREED that this <sup>cause of</sup> ~~action~~ <sup>and complaint</sup> be, and the same hereby <sup>are</sup> ~~is~~ dismissed at defendants' costs and it is further

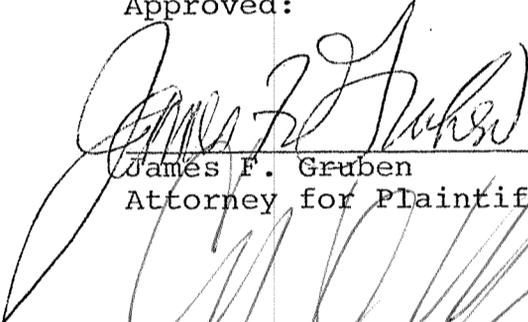
ORDERED that upon receipt by Plaintiff of unpaid wages as provided in this order, he shall promptly proceed to make distribution to the persons named in said stipulation of the parties or to the legal representative of the persons so named if any person should become deceased. If after making reasonable and diligent efforts to disburse said unpaid wages to the persons entitled thereto, plaintiff is unable to do so

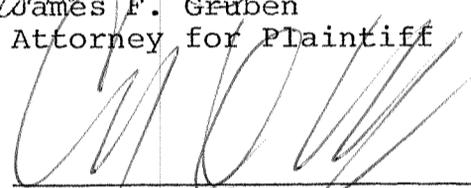
because of inability to locate the proper person, or because of a refusal to accept payment of any such person, he shall, as provided in 28 USC 2041, deposit such unpaid funds with the Clerk of this Court. Any of such funds may be withdrawn for payment to a person entitled thereto upon order of this Court.

*Entered May 17, 1976*

*Allen E. Bonaw*  
UNITED STATES DISTRICT JUDGE

Approved:

  
James F. Gruben  
Attorney for Plaintiff

  
Carl D. Hall, Jr.  
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LELAND E. GRAHAM, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NATIONAL INVESTORS FIRE & )  
 CASUALTY INSURANCE COMPANY, )  
 )  
 Defendant. )

No. 75-C-462 (B)

FILED

MAY 17 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON This 17<sup>th</sup> day of May, 1976, upon the written application of the parties for A Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and same hereby is dismissed with prejudice to any future action.

Allen E. Barron  
JUDGE, DISTRICT COURT OF THE UNITED  
STATES, NORTHER DISTRICT OF OKLAHOMA

APPROVAL:

PHILLIPS BRECKENRIDGE

\_\_\_\_\_  
Attorney for the Plaintiff

RICHARD D. WAGNER

\_\_\_\_\_  
Attorney for the Defendant



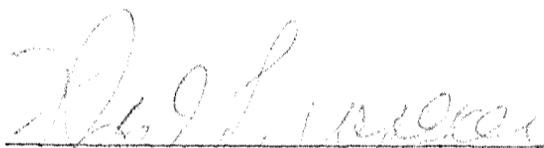
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

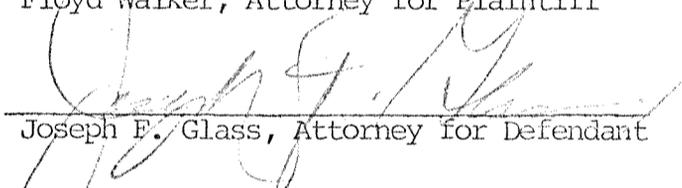
BERTHA BAILEY and D. S. BAILEY, )  
 )  
 Plaintiffs )  
 )  
 vs. )  
 ) No. 75-C-518 B ✓  
 AMERICAN NATIONAL BANK OF BAXTER )  
 SPRINGS, KANSAS, A Foreign Corporation; )  
 and, THE TRUST DEPARTMENT OF THE )  
 AMERICAN NATIONAL BANK OF BAXTER )  
 SPRINGS, KANSAS, Administrator of the )  
 Estate of FRANK G. TEETER, )  
 )  
 Defendants )

**FILED**  
MAR 29 1976 K  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now the plaintiffs through their attorneys, Walker, Jackman and Livingston, and the defendants through their attorneys, Best, Sharp, Thomas & Glass, and stipulate that the Court dismiss the above captioned case with prejudice to the rights of the plaintiffs to bring a future action.

  
Floyd Walker, Attorney for Plaintiff

  
Joseph F. Glass, Attorney for Defendant

ORDER OF DISMISSAL

Comes now the Honorable Judge Allen E. Barrow, United States District Judge for the Northern District of Oklahoma and based upon the stipulation as set forth above and approved by the attorneys for the parties, dismisses this ~~case~~ <sup>Cause of action & Complaint</sup> with prejudice to the plaintiffs' rights to bringing any future action.

*Entered May 17, 1976*

  
Judge Allen E. Barrow  
CHIEF UNITED STATES DISTRICT JUDGE

kt

FILED  
MAY 17 1976  
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 17 1976

UNITED STATES OF AMERICA, )  
 )  
 )  
 Plaintiff, )  
 )  
 -v- )  
 )  
 )  
 LAWRENCE D. SUNBY, ET AL, )  
 )  
 )  
 Defendants. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil Action No. 76-C-75 B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 17<sup>th</sup>  
day of May, 1976, the plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the defendants, Lawrence  
D. Sunby; Jo Anne Sunby; Wanda Mae Norton, Administratrix of  
Estate of Jesse Randall, Deceased; and Aetna Finance Company,  
a corporation, appearing not.

The Court, being fully advised and having examined  
the file herein, finds that Lawrence D. Sunby, Jo Anne Sunby  
and Wanda Mae Norton, Administratrix of Estate of Jesse Randall,  
Deceased, were served with Summons and Complaint on February 25,  
1976; and that Aetna Finance Company, a corporation, was served  
with Summons and Complaint on February 23, 1976; as appears  
from the Marshal's Returns of Service filed herein.

It appears that Lawrence D. Sunby; Jo Anne Sunby;  
Wanda Mae Norton, Administratrix of Estate of Jesse Randall;  
Deceased; and Aetna Finance Company, a corporation, have failed  
to answer herein and that default has been entered by the Clerk  
of this Court.

The Court further finds that this is a suit based upon  
a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note, covering the following-described  
real property located in Craig County, Oklahoma, within the  
Northern Judicial District of Oklahoma:

Lot 1, in Block 1, in Green Brier Sub-division located in the East Half of the Northeast Quarter of Section 24, Township 24 North, Range 19 East of the Indian Meridian, according to the recorded plat thereof, on file and of record in the office of the County Clerk of Craig County, Oklahoma.

THAT the defendants Lawrence D. Sunby and Jo Anne Sunby did, on the 26th day of December, 1973, execute and deliver to the Farmers Home Administration, United States Department of Agriculture, their mortgage and mortgage note in the amount of \$14,500.00, with 8-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

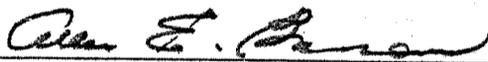
The Court further finds that the defendants Lawrence D. Sunby and Jo Anne Sunby made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly payments due thereon for more than twelve months last past, which default has continued, and that by reason thereof, the above-named defendants are now indebted to the plaintiff in the amount of \$15,717.25, with interest thereon at the rate of 8-1/2 percent per annum from September 30, 1975, until paid, plus the cost of this action, accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against Lawrence D. Sunby and Jo Anne Sunby, in personam, for the sum of \$15,717.25, with interest thereon at the rate of 8-1/2 percent per annum from September 30, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment, in rem, against defendants Wanda Mae Norton, Administratrix of Estate of Jesse Randall, Deceased; and Aetna Finance Company, a corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
Chief United States District Judge

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney  
Attorney for Plaintiff,  
United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 -v- )  
 )  
 ALFRED MONROE LONGCRIER, ET AL, )  
 )  
 Defendants. )

MAY 17 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil Action No. 75-C-539 B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 17th  
day of May, 1976, the plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; the defendant Associates  
Financial Services Co. of Oklahoma, Inc. appearing by its  
attorney, William S. Hall; the defendant Robert L. Yanik, D.O.,  
appearing by his attorney, T.F. Dukes; and the defendants Alfred  
Monroe Longcrier, Gwilda Longcrier, Gary Raymond Horn, Margretta  
Horn, Lucille Ross Hull, Loretta Jo Hager, Margretta C. Cooper,  
Joe W. Raymon and Evelyn F. Raymon appearing not.

The Court, being fully advised and having examined the  
file herein, finds that Alfred Monroe Longcrier was served with  
Summons and Complaint on January 26, 1976; that Gwilda Longcrier  
was served with Summons and Complaint on January 22, 1976; that  
Joe W. Raymon and Evelyn F. Raymon were served with Summons and  
Complaint on December 2, 1975; and Associates Financial Services  
Co. of Oklahoma, Inc. was served with Summons and Complaint on  
December 4, 1975; as appears from the Marshal's Returns of Ser-  
vice filed herein; also that Gary Raymond Horn, Margretta Horn,  
Lucille Ross Hull, Loretta Jo Hager, Margretta C. Cooper, and  
Robert L. Yanik, D.O., were served by publication, as appears  
from the Proof of Publication filed herein.

It appears that Robert L. Yanik, D.O., has duly filed  
his Answer herein on March 24, 1976; that Associates Financial  
Services Co. of Oklahoma, Inc. has duly filed its Answer and

Cross-Complaint herein on December 24, 1975; and that Alfred Monroe Longcrier, Gwilda Longcrier, Joe W. Raymon, Evelyn F. Raymon, Gary Raymond Horn, Margretta Horn, Lucille Ross Hull, Loretta Jo Hager, and Margretta C. Cooper have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note, covering the following-described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 7, in Block 1, in Northern Heights  
Addition to Hominy, Osage County, Oklahoma,  
according to the recorded plat thereof.

THAT the defendants Alfred Monroe Longcrier and Gwilda Longcrier did, on the 10th day of November, 1959, execute and deliver to the Administrator of Veterans Affairs their mortgage and mortgage note in the amount of \$10,850.00, with 4-3/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that the defendants Gary Raymond Horn and Margretta Horn were the grantees in a deed from Alfred Monroe Longcrier and Gwilda Longcrier, dated April 21, 1964, and filed in Book 200, Page 195, records of Osage County, Oklahoma, wherein Gary Raymond Horn and Margretta Horn assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that the defendants Lucille Ross Hull and Loretta Jo Hager were the grantees in a deed from Gary Raymond Horn and Margretta Horn, dated January 7, 1967, and filed in Book 233, Page 63, records of Osage County, Oklahoma, wherein Lucille Ross Hull and Loretta Jo Hager assumed and agreed to pay the mortgage indebtedness being sued upon herein.

THAT the defendants Alfred Monroe Longcrier and Gwilda Longcrier; Gary Raymond Horn and Margretta Horn; and Lucille Ross Hull and Loretta Jo Hager made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon for more than twelve months last past, which default has continued, and that by reason thereof, the above-named defendants are now indebted to the plaintiff in the amount of \$5,537.33, with interest thereon at the rate of 4-3/4 percent per annum from March 10, 1975, until paid, plus the cost of this action, accrued and accruing.

The Court further finds that the defendants Joe W. Raymon and Evelyn F. Raymon were the grantees in a deed dated January 25, 1974 and filed February 19, 1974 in Book 406, Page 26, Records of Osage County, Oklahoma, wherein Joe W. Raymon and Evelyn F. Raymon took the property subject to the mortgage being foreclosed herein.

The Court further finds that the defendants Joe W. Raymon and Evelyn F. Raymon did, on the 23rd day of January, 1974, execute and deliver to defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., their second real estate mortgage and mortgage note in the amount of \$9,000.00 and further providing for payment of attorneys' fees in event of foreclosure; that said defendants have made default under the terms of the aforesaid second mortgage note and that by reason thereof said defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., are owed the principal sum of \$6,479.43, a reasonable attorneys' fee, and the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against Alfred Monroe

Longcrier and Gwilda Longcrier, in personam, and Gary Raymond Horn, Margretta Horn, Lucille Ross Hull, and Loretta Jo Hager, in rem, for the sum of \$5,537.33, with interest thereon at the rate of 4-3/4 percent per annum from March 10, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment, in rem, against defendants Margretta C. Cooper, Joe W. Raymon, Evelyn F. Raymon, Associates Financial Services Co. of Oklahoma, Inc., and Robert L. Yanik, D.O.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., have and recover money judgment, in personam, against defendants Joe W. Raymon and Evelyn F. Raymon for the sum of \$6,479.43, plus a reasonable attorneys' fee in the amount of \$971.90, and the costs of this action, which judgment is inferior to the judgment of the United States of America, plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., have and recover judgment, in rem, against all defendants herein, except the United States of America.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff has a first mortgage lien on the property described below as follows, to wit:

Lot 7, in Block 1, in Northern Heights  
Addition to Hominy, Osage County, Oklahoma,  
according to the recorded plat thereof;

and that the defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., has a second mortgage lien on the property described below as follows, to wit:

Lot 7, in Block 1, in Northern Heights Addition to Hominy, Osage County, Oklahoma, according to the recorded plat thereof;

And that the same be foreclosed as provided by law and that, upon the failure of the defendants to satisfy the money judgments rendered herein, an order of sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, with appraisal, the real property, and thereupon the proceeds of the sale be applied in the following order of priority, subject to unpaid ad valorem taxes, to wit:

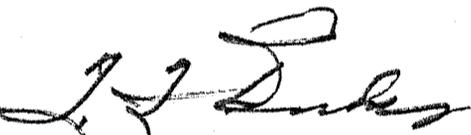
1. To the costs of said sale and the costs of this action;
2. To the principal judgment of the plaintiff herein in the sum of \$5,537.33 with interest thereon at the rate of 4-3/4 percent per annum from March 10, 1975, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property; and,
3. To the principal judgment of the defendant and cross-complainant, Associates Financial Services Co. of Oklahoma, Inc., in the sum of \$6,479.43, and an attorneys' fee in the amount of \$971.90; and
4. To the defendant Robert L. Yanik, D.O., the sum of \$70.00 in satisfaction of his judgment against Joe W. Raymon entered in the Osage County District Court Case No. SC-75-233; and
5. The remainder, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof; with the exception of such interest as may be acquired by a defendant as purchaser at the Marshal's sale.

  
Chief United States District Judge

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney  
Attorney for Plaintiff,  
United States of America

  
T. F. DUKES  
Attorney for Defendant Robert  
L. Yanik, D.O.

  
WM. S. HALL  
Attorney for Defendant Associates  
Financial Services Co. of Okla.,  
Inc.



Corporation, Beneficial Finance, Theo R. Harvey, Marvin E. Beehler, J. Duke Logan, Attorney-at-Law, Richard W. Lowry, Attorney-at-Law, William H. Castor, Attorney-at-Law, Daniel W. Allan, Attorney-at-Law, County Treasurer, Craig County, Board of County Commissioners, Craig County, Carter's, Inc., Valgene Freeman and Clara Mae Freeman d/b/a Freeman's Furniture, and Vinita Lumber and Supply Company, Inc., appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Willis S. Vaughn, Wilma L. Vaughn, and Marvin E. Beehler, were served by publication, as appears from the Proof of Publication filed herein; that Defendants, Lee G. DeMoss a/k/a Lee Gerald DeMoss and Minnie J. DeMoss, were served with Summons, Complaint, and Amendment to Complaint on November 7, 1975, and December 23, 1975, respectively; that Defendants, Larry W. Smith, Frank D. Maple d/b/a Maple D-X Station, Vinita Finance Company, Kenneth Eugene Colvin d/b/a Suttee & Colvin Garage, J. Duke Logan, Attorney-at-Law, Richard W. Lowry, Attorney-at-Law, William H. Castor, Attorney-at-Law, Daniel W. Allan, Attorney-at-Law, County Treasurer, Craig County, and Board of County Commissioners, Craig County, were served with Summons, Complaint, and Amendment to Complaint on October 10, 1975, and December 23, 1975, respectively; that Defendant, Loyd D. Nicely d/b/a R & W Conoco, was served with Summons, Complaint, and Amendment to Complaint on October 10, 1975, and December 29, 1975, respectively; that Defendant, Warehouse Market Corporation, was served with Summons, Complaint, and Amendment to Complaint on October 2, 1975, and December 18, 1975, respectively; that Defendant, Lewis Suttee d/b/a Suttee & Colvin Garage, was served with Summons, Complaint, and Amendment to Complaint on October 21, 1975, and December 29, 1975, respectively; that Defendants, Family Loan and Thrift Company of Bartlesville, and Beneficial Finance, were served with Summons, Complaint, and Amendment to Complaint on October 20, 1975, and December 23, 1975, respectively; that Defendant, Theo R. Harvey, was served with Summons, Complaint, and Amendment to Complaint on October 10, 1975, and January 8, 1976, respectively; that Defendants, Carter's Inc., and Vinita Lumber and Supply Company,

Inc., were served with Summons, Complaint, and Amendment to Complaint on December 23, 1975; and that Defendants, Valgene Freeman and/or Clara Mae Freeman d/b/a Freeman's Furniture, was served with Summons, Complaint, and Amendment to Complaint on December 29, 1975, all as appears from the U.S. Marshals Service herein.

It appearing that Defendant, Loyd D. Nicely d/b/a R & W Conoco, has duly filed his Disclaimer herein on January 5, 1976, that Defendant, Warehouse Market Corporation, has duly filed its Disclaimer herein on October 7, 1975, that Defendants, Willis S. Vaughn, Wilma L. Vaughn, Lee G. DeMoss a/k/a Lee Gerald DeMoss, Minnie J. DeMoss, Larry W. Smith, Frank D. Maple d/b/a Maple D-X Station, Vinita Finance Company, Lewis Suttee and Kenneth Eugene Colvin d/b/a Suttee & Colvin Garage, Family Loan and Thrift Company of Bartlesville, Beneficial Finance, Theo R. Harvey, Marvin E. Beehler, J. Duke Logan, Attorney-at-Law, Richard W. Lowry, Attorney-at-Law, William H. Castor, Attorney-at-Law, Daniel W. Allan, Attorney-at-Law, County Treasurer, Craig County, Board of County Commissioners, Craig County, Carter's, Inc., Valgene Freeman and Clara Mae Freeman d/b/a Freeman's Furniture, and Vinita Lumber and Supply Company, Inc., have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Craig County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot One (1), in Block Five (5), in BADGETT'S ADDITION to the City of Vinita, Oklahoma, according to the recorded plat thereof, on file and of record in the office of the County Clerk of Craig County, Oklahoma.

THAT the Defendants, Willis S. Vaughn and Wilma L. Vaughn, did, on the 11th day of May, 1972, execute and deliver to the United States of America, acting through the Farmers Home

Administration, the Department of Agriculture, their mortgage and mortgage note in the sum of \$7,000.00 with 7 1/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Lee G. DeMoss and Minnie J. DeMoss, assumed the real estate mortgage for foreclosure herein by reason of an Assumption Agreement dated July 9, 1974.

The Court further finds that Defendants, Willis S. Vaughn, Wilma L. Vaughn, Lee G. DeMoss, and Minnie J. DeMoss, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$7,305.70 as unpaid principal, plus \$406.42 accrued interest, with interest thereon at the rate of 7 1/4 percent per annum from November 30, 1975, until paid, plus the cost of this action accrued and accruing.

The Court further finds that as of the entry of this Judgment there are no real estate taxes owed Craig County by Defendants, Lee G. DeMoss and Minnie J. DeMoss, which are a lien against the property being foreclosed herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Willis S. Vaughn and Wilma L. Vaughn, in rem, and Lee G. DeMoss and Minnie J. DeMoss, in personam, for the sum of \$7,305.70, plus \$406.42 accrued interest, with interest thereon at the rate of 7 1/4 percent per annum from November 30, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants,

Larry W. Smith, Frank D. Maple d/b/a Maple D-X Station, Vinita Finance Company, Lewis Suttee and Kenneth Eugene Colvin d/b/a Suttee & Colvin Garage, Family Loan and Thrift Company of Bartlesville, Beneficial Finance, Theo R. Harvey, Marvin E. Beehler, J. Duke Logan, Attorney-at-Law, Richard W. Lowry, Attorney-at-Law, William H. Castor, Attorney-at-Law, Daniel W. Allan, Attorney-at-Law, Carter's, Inc., Valgene Freeman and Clara Mae Freeman d/b/a Freeman's Furniture, and Vinita Lumber and Supply Company, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

  
Chief United States District Judge

APPROVED



ROBERT P. SANTEE  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MAY 14 1976 8

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NO. 76-C-204-B ✓

IN RE: )  
 )  
ROBERT MICHAEL SUGG )

O R D E R

The Court has for consideration the Application for Writ of Habeas Corpus filed on behalf of Robert Michael Sugg. Therein, Petitioner seeks relief from allegedly excessive bail imposed by a United States Magistrate for this Northern District of Oklahoma on a complaint charging the Petitioner with violating 21 U.S.C. § 841(a)(1).

Although Petitioner has complied with the provisions for release in non-capital cases prior to trial, 18 U.S.C. § 3146(d), he has not appealed the magistrate's denial of his motion for reduction of bail pursuant to the provisions for appeal from conditions of release, 18 U.S.C. § 3147(a). Petitioner, therefore, has an adequate and available remedy open to him in the criminal proceeding which has not been exhausted, and the Court finds that the habeas corpus petition should be denied without prejudice.

The United States Supreme Court in Stack v. Boyle, 342 U. S. 1, 6-7 (1951) held that, ". . . the District Court should withhold relief in . . . collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted." Also see, United States v. Marx, 485 F.2d 1179, 1184 (10th Cir. 1973), in which our appellate Court, citing Stack, stated that the proper procedure to raise an issue regarding bail is by appeal.

IT IS, THEREFORE, ORDERED that the application for writ of habeas corpus of Robert Michael Sugg be and it is hereby denied without prejudice.

Dated this 14th day of May, 1976, at Tulsa, Oklahoma.

*Allen E. Barrow*  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA



There were several plaintiffs involved, but since the only complaining party before the Court in this matter is Keith Troupe, the Court will concern itself only with that portion of the judgment pertaining to Keith Troupe. The Judgment provided:

"The Plaintiff TROUPE shall have the right to reapply for admission to Carver at the end of the first semester of the 1975-76 school year and in the event such application is received, the bi-racial screening committee at CARVER shall review such application based upon the Plaintiff TROUPE'S grades, discipline record and other relevant factors at the school of his attendance during the first semester of the 1975-76 school year. If the Plaintiff TROUPE is again rejected for admittance to Carver at such time, the plaintiff TROUPE shall have the right to reopen this case if he deems such rejection has been in violation of his rights under 42 U.S.C. §1983."

The following colloquy was had at the September 24, 1975, hearing, as reflected in the portion of the transcript transcribed and filed in this Court on March 30, 1976, commencing at page 19:

MR. McALLISTER: No. We have one remaining student, Keith Troupe.

THE COURT: Yes. Now, he had a conduct problem too and a grade problem, also.

MR. McALLISTER: Yes, the School Board alleges that, Your Honor, and we, of course, allege that that was due to his structured environment.

If the Court would consider, perhaps, passing the date of this trial to another date, perhaps we can come to a solution as far as he's concerned and the other children.

THE COURT: Well, here's what I'll do, rather than pass the trial. Let's just close this trial on the merits as this. If you withdraw your request for Temporary Restraining Order, based on the compromise by Mr. Fist, and then ask the Court to reopen in light of any improvement in the Troupe boy's ability and conduct, and showing, at a semester, change, and the Court would consider it. But, maybe you can work that out with Mr. Fist in the meantime. But, he would have to show improvement and conduct and all before the Court would ever order admission to the screening committee, because if the screening committee is going to be effective and have authority, then I have to back them. If they say he's unsuitable, then I don't want to inject myself.

In the meantime, if he can get prepared for it, and Carver will be helpful to him, and not hurt him psychologically, I'll be glad to consider that.

We can consider this as a closed case, subject to your reopening it at the turn of the semester if you have proof and can prove to this Court that this Troupe boy has developed in manner of conduct and grades to the extent he would be a good student for Carver.

MR. McALLISTER: Yes, Your Honor.

THE COURT: And I think if you do that, Mr. Fist will not have to come in here, even. I think that you all can work that out.

MR. McALLISTER: If I might have some time to confer with my clients, I'm in a rather precarious position representing three clients with three separate interests.

THE COURT: I know you are, and you have the Court that you are trying to convince of something. You have a difficult row to hoe. I know.

You may, but I must -- I must, at this time, based on his offer, I would have to decline the TRO and Preliminary Injunction, but I'll consider reopening it if you think that your third client was treated unfairly and if he shows, over the period that he is enrolled in another school, and still wants to enroll at semester time, if he shows he's improved in his deportment and his grades and the screening committee would state that they now would find him acceptable, why the Court would so have the School Board to consider his acceptance.

MR. McALLISTER: Would that, Your Honor, be based solely on his progress during this semester?

THE COURT: Yes.

MR. McALLISTER: And the semester would end December? Is that what we are considering?

THE COURT: Whenever the second semester begins.

MR. McALLISTER: I see.

MR. FIST: I beg your pardon?

MR. McALLISTER: Mr. Richardson, when does the second semester start?

MR. RICHARDSON: In January.

THE COURT: So if he has had this time to improve and make a record, I'm sure the parents will help him make a record, see that he does, why I'll consider that. But, I think if he does that, that Mr. Fist would be the first to recommend to the screening committee reconsideration.

But, Mr. McAllister, you have a -- here when you take a 50/50 desired ratio, and we already know that before you start --

MR. McALLISTER: I understand.

THE COURT: But, I'm taking into consideration this is essentially -- this is their school, this is a black persons school, as far as I'm concerned.

MR. McALLISTER: I appreciate that.

THE COURT: The way I look at it. But, I know they are seeking 50/50, but you can't always balance those in numbers.

But, I'm willing to, based on what Mr. Fist said, and he's always very honorable with this Court, anything he says that's it, just like a written contract, why he'll carry out what he says, and I think this is about the best way to handle it.

In the meantime, if Mr. and Mrs. Troupe condition their son to a conduct expected of them at Carver and raise his grade level up, I'll consider reopening if Mr. Fist and the screening board do not consider him on the second semester.

MR. McALLISTER: Would the matter, then -- the only ruling the Court is making today is on the Temporary and Preliminary Injunction?

THE COURT: And the merits, today.

MR. McALLISTER: My action would be dismissed as of today?

THE COURT: I was going to ask that you ask that it be dismissed as of today, if you wish, based on the settlement agreement between you and Mr. Fist.

MR. McALLISTER: And again, Your Honor, without trying to contrary, I do represent three clients with three diverse interests. If I could have a short period of time, I'll discuss the matter with them and make an announcement to the Court.

THE COURT: All right.

Mr. and Mrs. Troupe, I'll tell them, I wish you would consider what I have stated and what you heard me state to counsel, and work this out and this will give your son a semester to work out and prove his deportment -- has improved, his grades have improved, and if the school board then at that time doesn't recommend, then I'll look at it in January and let Mr. McAllister reopen.

MRS. TROUPE: I hear what you're saying, but they have not told me what that is. I've waited for somebody to tell me on what basis he was denied.

MR. McALLISTER: Well, could we do this, Your Honor? Could we assume that the criteria used would be that criteria that was established by the defendants answer in their interrogatories; that being grades, behavior

THE COURT: Yes. Yes. The very standards that he stated in his answer will be the judgment which they arrive at. Yes. Isn't that true, Mr. Fist?

MR. FIST: Yes. One of the exhibits that I furnished you last night, Mr. McAllister, shows the criteria that the co-principals at Carver look at when they act as the screening committee for admission.

THE COURT: That will be the criteria.

MRS. TROUPE: I saw that. I looked at the record. I saw nothing in those records to indicate the action they took. In fact, the only comments on the back, for the last two years, the teacher's comments aren't there.

MR. McALLISTER: That's a problem, Your Honor.

MRS. TROUPE: I have the report cards that show "S". I saw what they listed. There is one item added to. I found nothing in the record and I'm simply waiting for somebody to tell me.

THE COURT: Well, I would suggest that you use this time to get the School Board -- but I'm holding them to the record on your son attending another school for this semester, and the allegations are, and the testimony before the Court is that he did not pass the discipline test or the grades for Carver, and that as recommended to him by his school he just left, and that both evaluating committee for the entrance rejected him. So --

MRS. TROUPE: Your Honor, I'm saying that is not true. It's not in the record. Nothing they have asked -- their interrogatories speak to that and I can't do anything until I hear from them and see what it is they are using, because the records differ from what they are saying to you.

THE COURT: Where do you keep these reports?

MR. RICHARDSON: Your Honor, I have talked to Mr. Jenkins, the former principal. He was supposed to have made a recommendation. I think that you understand that he made a recommendation. Is that correct?

THE COURT: Yes.

MRS. TROUPE: He told me there was no such recommendation made. He was not requested to make one.

THE COURT: Who? Carver?

MRS. TROUPE: That's right, from Carver or any other school, as far as he was concerned.

THE COURT: Did he say he did not recommend?

MRS. TROUPE: I talked with Mr. Williams time after time and he told me Keith was on the waiting list.

THE COURT: Well --

MRS. TROUPE: I would ask you to look into it, sir.

THE COURT: I'll tell you this, if they don't work it out, I'll allow Mr. McAllister to reopen this case at the semester change, and I hate to inject myself into the operations of the school, but I'll inject myself, if necessary, at the change of the semester, if they haven't worked this out, and I would like for them to be apprised of who stated it and in my testimony and evidence here and the exhibits before me and the complaint, he was rejected because of conduct and grades, I was given to understand.

MR. FIST: This is correct, Your Honor, and the --

MRS. TROUPE: The first time we heard that was in Court that day with Mr. Richardson on the stand. Mr. Williams told my husband he was on the waiting list. Every time I talked to him he said he couldn't do anything until the school opened and he looked at the list.

THE COURT: Well, we will have something different worked out.

Based on your record that you stated you arrive at the record of the defendants, or the applicants, applying this to the young Troupe boy, I'll give you until the semester change to advise them and so they will know and so this Court will know whether or not to reopen the case. Otherwise, it will be --

Two affidavits have been filed on behalf of the plaintiff, Keith Troupe. One affidavit has been signed by his mother, Dorothy Troupe (with exhibits attached), and one by Brenda Barre, mother of Anthony Barre, who was one of the original plaintiffs in this litigation

W. Q. Williams, Principal of Carver Middle School and Scott Richardson, Director of Alternative Schools of the Tulsa Public Schools, have filed a joint affidavit with exhibits attached.

The Court has carefully examined these sworn statements, and, finds that they are diametrically opposed.

The Court additionally notes that Keith Troupe was not enrolled in a Public School from the end of the semester in January of 1976, and was not attending school as of March 5, 1976, as reflected by the affidavit of his mother, Dorothy Troupe, executed on March 5, 1976.

Turning to the policy of the School Board, the following excerpts from the testimony of Scott G. Richardson on September 9, 1975, might be helpful:

MR. FIST: Briefly and generally, what do your duties as Director of Alternative Schools involve, sir?

MR. RICHARDSON: My duties are to coordinate the individual school's administrative function; that is record keeping. In the case of alternative schools, it has also to do with the screening processes, in general; the organization of the school, itself.

MR. FIST: Is Carver one of the alternative schools that falls within your responsibility?

MR. RICHARDSON: Yes, sir, it is.

MR. FIST: Are you familiar with the situation of the Troupe child?

MR. RICHARDSON: Yes, I'm familiar with it.

MR. FIST: Is there any reason, to your knowledge, why the Troupe child cannot attend Hamilton Junior High School?

MR. RICHARDSON: No.

MR. FIST: In fact, did I call you yesterday, after a conversation with Mr. McAllister, and ask you to be sure that his records were sent to Hamilton, and in addition to that, ask you to call the principal at Hamilton and advise the principal that the boy was to be enrolled if he appeared for enrollment?

MR. RICHARDSON: That's correct. You did call.

MR. FIST: And did you so advise the principal?

MR. RICHARDSON: Yes, I did. I advised Mr. Stinnett, the assistant principal who was on duty at that time.

and further in his testimony:

MR. FIST: Are you familiar with the transfer policy of the Tulsa Public Schools?

MR. RICHARDSON: Yes.

MR. FIST: Are you familiar with the fact that that transfer policy has been mandated by this

Court in another action?

MR. RICHARDSON: Yes.

MR. FIST: Are you familiar with the majority to minority transfer policy?

MR. RICHARDSON: Yes.

MR. FIST: Under that transfer policy, is it not correct that the Troup (sic) boy can, in fact, attend any Junior High School in Tulsa that he wants to?

MR. RICHARDSON: Yes, he can attend eleven Junior High Schools in which there is no detriment to the minority to majority relationship.

THE COURT: He could attend how many?

MR. RICHARDSON: Eleven.

MR. FIST: And he will be transported free of charge, will he not, by the school system?

MR. RICHARDSON: Yes. Transportation is provided for those schools that have busses running to them, only on the condition that there is a position on the bus.

THE COURT: All right, now, just a moment, Doctor.

If he can attend eleven, in that eleven I assume Carver is not included?

MR. RICHARDSON: That's true.

THE COURT: Now, I want to get down to basics.

Why is Carver not included? Are you full, or what?

MR. RICHARDSON: Carver is considered as a separate unit because of the mandate of the Courts concerning its reopening two years ago.

THE COURT: Separate unit?

MR. RICHARDSON: Yes. And the structure of the school is such that its actual area, its attendance area, includes the whole of the public school district.

THE COURT: Includes the whole --

MR. RICHARDSON: The whole district. It also has been mandated on a 50/50 black/white ratio.

THE COURT: All right. Has that been accomplished?

MR. RICHARDSON: Yes, it has.

THE COURT: You have a 50/50 ratio now?

MR. RICHARDSON: Yes. We are -- we are, as close as we can tell for the opening days of school, within a few members either way

Mr. Richardson, at said hearing, further testified in response to questions.

MR. FIST: Mr. Richardson, was Carver intended as a school to accommodate children that had the specialized needs that Mrs. Troup (sic) spoke of; either slow learners or advanced learners?

MR. RICHARDSON: No.

MR. FIST: What is the roll of Carver in the Tulsa Public Schools?

MR. RICHARDSON: The basic purpose of the program at Carver is to provide a magnet feature that would be of interest to white parents and students in the community, so that it could be a voluntarily desegregated unit.

THE COURT: Carver is voluntarily desegregated?

MR. RICHARDSON: Yes.

The exhibits submitted by defendants consist of copies of the following:

1. Report Card
2. Referrals for Disciplinary Reasons
3. Special Progress Reports to Parents
4. Confidential Reports to Counselor

The Court will delineate these exhibits in the order above designated.

The report card for the year 1975-76, grade 7 at Horace Mann indicates that Keith Troupe was transferred to home on 1/21/76.

His grades appear as follows:

<u>Subject</u>	<u>1st 9 wk</u>	<u>2nd 9 wk</u>	<u>Sem Gr</u>
English	C	C	C
World Geog.	C	C	C
Math.	B	B	B
Art	D	C	C
Ind. Arts	C	D	D
Physical Ed.	B	A	A

The Referrals for Disciplinary Reasons reflect the following:

November 3, 1975. EXPLANATION: Keith took another boys drawing refused to give it back. He then struck the boy in the stomach. He refused to take swats. Keith is a constant trouble maker. He ignores me when I call him down.

November 4, 1975. EXPLANATION: Keith bothers others a

great deal of the time. He is away from his work station bothering or talking. He tries to "bully" the smaller boys. He was sent to the office with a discipline slip, which he failed to deliver.

October 2, 1975. EXPLANATION: Keith and Tony Potorff were fighting in class. Keith refuses to take his punishment. A further notation was made to this slip--Punishment was given

Two Special Progress Reports to Parents are exhibited, one in geography and one in industrial arts.

The report in Georgraph dated 10/9/75 reflects "Low achievement on tests" and "Low achievement in daily work"; the industrial arts contains the language "Doesn't try to concentrate and work. Bothers other a great deal instead of working".

There is an undated copy of a hand-written note that states:

"Keith 10:15

"Pass Mrs. Bode--

"Keith was messing with a borrowed filmstrip -- while we were waiting to get instructions for runing the projector.

"Mrs. Tatro"

Another dated hand-written note reveals the following:

"10-14-75

"Keith Troupe	4
"Paul Hobbs	3
"Teddy Gregory	2
"John McSollum	pushed 1

"Keith pushed Teddy down stairs --

"Teddy pushed Keith and Keith pushed Teddy --

"\* Mrs. Wolf -- let class leave without her --"

Six separate Confidential Reports to Counselor, all dated January 19, 1976, reflect the following:

1. "A" student - Won't leave other student alone. --This is getting to be a problem.
2. Keith has a B average. He's a bit restless in class at times but responds to correction.
3. Keith doesn't apply himself to his work. He bothers others daily. He can't seem to leave others alone. He has been caught taking others projects after having goofed up his. He also has been guilty of having in his possession a box belonging to me. He has earned a D for this quarter.
4. C- Keith needs to listen more closely to class assignments and be ready to take notes. Often he is distracted by Brian Summers. Keith has an excellent attitude and I've never had any real discipline problems with him.

5. Keith is a pleasant boy to work with. He seems respectful to the teacher. He has been an average and below average student on his test scores and verbal responses. In my opinion he is not a superior student in any way so far as his work in English is concerned. This includes reading, spelling, written expression, verbal expression, some technical grammar, interpretation and appreciation of literature, listening and retention of directions and instruction, etc.

6. Keith will probably get a D in geography. He does his work most of the time, but doesn't have it up close when it is needed. Keith needs to learn a lot about self-discipline. He doesn't cause any serious discipline problems in class.

The affidavit of Q. T. Williams and Scott Richardson reflect that Q. T. Williams is the Principal of Carver Middle School and is a member of the black race. Scott Richardson is the Director of Alternative Schools of the Tulsa Public Schools. Carver Middle School is classified an alternative school because of its unique program. Scott Richardson functions in an administrative capacity in connection with Carver Middle School and other alternative schools in the system and is a member of the white race. That pursuant to the order of the Court the two of them, Q. T. Williams and Scott Richardson, acting as a bi-racial committee jointly and reviewed the records of Keith Troupe for the first semester of the 1975-1976 school year at Horace Mann Junior High School; that the material was assembled by Scott Richardson; that in order to fully comply with the order, Scott Richardson requested the Principal of Horace Mann Junior High School to obtain special reports from Troupe's teachers, together with his grades and copies of all material in his school file relating to discipline or other matters. Based upon a review of the materials it was the joint decision of Q. T. Williams and Scott Richardson that Keith Troupe should not be admitted to Carver Middle School. This decision was communicated to the student's mother by letter dated January 27, 1976, with a summary. The letter states:

"In accordance with the instructions of Judge Barrow, I have asked for an analysis of Keith's performance at Horace Mann Junior High School during the first semester.

"A summary of his performance indicates that he has not improved his behavior to the extent that we feel that he could accept the responsibility for his actions in

a way that would be acceptable for the program at Carver Middle School.

"I would suggest that he make a conscientious effort to improve his relationship with the peers and teachers during the second semester if he is to consider applying for Carver Middle School for the 1976-77 school year."

The letter was signed by Scott G. Richardson. The summary attached was to Mr. Scott Richardson from Mr. W. E. Walker - Horace Mann, dated January 20, 1976. It stated the following:

"A survey of Keith's teachers is summarized below. The three discipline referrals Keith has received are based on bothering other students and misusing equipment and refusing consequent punishment.

"Observations of school personnel of Keith indicates a lack of respect and cooperation for fellow students.

"Below average in tests and verbal responses. Shows respect to teacher.

"Doesn't listen or take notes in class. Has nice attitude.

"Doesn't apply himself to his work. Guilty of having in his possessin (sic) articles belonging to the teacher. Guilty of taking articles belonging to other students. Grade D for semester

"Restless in class. Responds to correction. Lacks self discipline and does not pay attention in class. Does follow directions but continually aggravates other students in class to the point of possible retaliation.

"Grades:            Geography D  
                  Math            B  
                  Wood Shop D  
                  Vocal Music C  
                  English C  
                  P.E.            A"

The affidavit further states that it was and is the judgment of Q. T. Williams and Scott Richardson, as professional educators, that Keith Troupe would not have a successful educational experience at Carver; that the nature of the program at Carver is such that it imposes an increased degree of individual responsibility on the Student; that the materials indicate to them that Keith Troupe lacks the necessary degree of self-discipline, particularly in his relationship and interaction with his fellow students. They further state that the official records of the Tulsa Public Schools indicate that Keith Troupe has not attended the Tulsa Schools since January 21, 1976, and are advised he has not attended any school since that date; that he has a right to attend the junior high school serving his residential attendance area and in addition, under

the "majority to minority" transfer policy, has a right to attend a number of other junior high schools of his choice in the Tulsa system.

This Court does not mean to intimate that Keith Troupe is not presently in school, as this knowledge has not been imparted to the Court, but only that as of the time of the various filings in this litigation, it was stated that he was not in attendance.

Mrs. Troupe's affidavit contradicts the statements of the above affidavit. She delineates the procedure she followed, and in effect states, that the Court order was not complied with and that Scott Richardson was the person who made the decision and not the bi-racial committee ordered by the Court. She further states that she did not receive the January 27, 1976, letter until some two weeks after the beginning of the next semester; that the letter was postmarked February 5, 1976. Mrs. Troupe attaches to her affidavit documents she states she obtained from the school, that she alleges controvert the documents submitted by the defendants. She further submits that in a letter her attorney received from Mr. Fist, attorney for the School that the following statement was made:

\*\*\*Obviously, there may be an element of subjective judgment in the evaluation, but we believe that the principal exercises his best judgment in good faith as a professional educator on the basis of the information available."

The affidavit of Brenda Barre does not bear on the matter in controversy except that she states that the Court order was not complied with with reference to her being a member of the screening committee considering her son Anthony Barre. She has not complained to this Court in seeking relief. The Court feels that this affidavit must be considered only as to showing, if that is possible, that the Court order was not complied with.

As the parties to this litigation will recall from the hearing in September, 1975, the evidence was that there were many more applicant for admission to Carver School than there were vacancies and that there was some problem in keeping the 50/50 ratio that was required.

After reviewing the evidence and affidavits presently before the Court, the Court finds as follows:

The Court finds that its Order heretofore issued has been complied with. As indicated above, special reports were requested and compiled on behalf of Keith Troupe; his application for admission was considered as ordered by the Court. There is now showing that if Keith Troupe improves in the future and reapplies that his application will not be considered. The Court finds that there has been no showing that the rejection of Keith Troupe's application for admittance to Carver Middle School was based on any racial discrimination. It is apparent to this Court that both Mr. and Mrs. Troupe are most desirous of their son attending Carver Middle School. In this connection the Court notes that the Troupe child, apparently with the approval of his parents, did not re-enter school after the end of the first semester in January of 1976, and as of March 5, 1976, was not attending school. But, as this Court found earlier, there has been no showing that the rejection of the application of Keith Troupe to attend Carver Middle School has any basis in race discrimination. The Court finds that the words relied on by Mrs. Troupe to evidence the lack of bi-racial screening fall into the quagmire of what is called questions of "semantics".

It is not the duty of this Court to review every finding of the School Administration each time a parent feels aggrieved thereby. As was stated in *Wood v. Strickland*, 420 U.S. 309 (1975):

"\*\*\*It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. \*\*\* But §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and §1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Tinker*, supra (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 [1969])."

The Supreme Court said in Epperson v. Arkansas, 393 U.S. 97, at page 104 (1968):

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. \*\*\*."

IT IS, THEREFORE, ORDERED that the Application for Order to Show Cause be and the same is hereby denied.

ENTERED this 17 day of May, 1976.



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CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

CAPITAL RESOURCES REAL )  
ESTATE PARTNERSHIP II, )  
a limited partnership, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE BROOKHOLLOW JOINT )  
VENTURE, a joint venture )  
composed of Hal R. Sundvahl, )  
II, J. Donald Walker, Fred )  
N. Chadsey and Harold R. Patrick, )  
 )  
Defendants. )

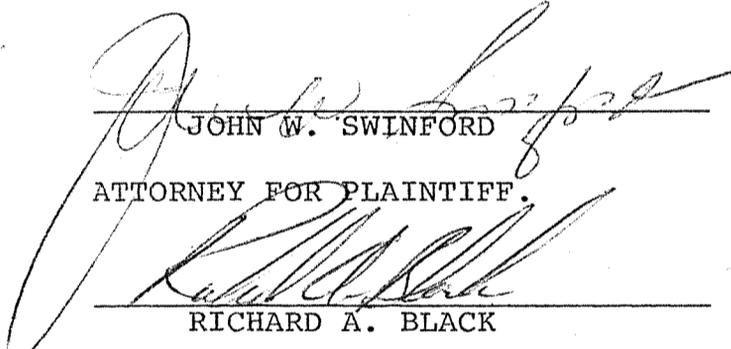
MAY 17 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

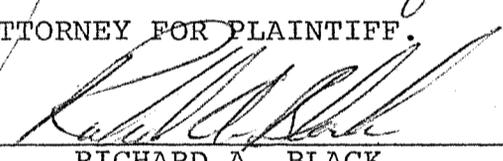
NO. 75-C-152

STIPULATION AND ORDER OF DISMISSAL

It is stipulated and agreed by and between plain-  
tiff and defendants, J. Donald Walker and Fred N. Chadsey,  
that the above entitled cause/<sup>*of action and complaint*</sup>may be dismissed, without  
prejudice, as against the said defendants only and that the  
cross petitions/<sup>*and causes of action*</sup>of said defendants may also be dismissed  
without prejudice.

  
\_\_\_\_\_  
JOHN W. SWINFORD

ATTORNEY FOR PLAINTIFF.

  
\_\_\_\_\_  
RICHARD A. BLACK

ATTORNEY FOR J. DONALD WALKER  
AND FRED N. CHADSEY.

O R D E R

The foregoing Stipulation is approved and plaintiff's  
cause of action/<sup>*and complaint*</sup>against the defendants, J. Donald Walker and  
.Fred N. Chadsey, together with their cross petitions/<sup>*and causes of action*</sup>are hereby  
dismissed without prejudice.

DATED this 19th day of May, 1976.

  
\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

FILED

MAY 19 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT



At the times in question, Carroll E. Griffith was the duly elected Police and Fire Commissioner of the City of Tulsa, Oklahoma; Jack Purdy was the duly appointed Chief of Police; Dan Phillips was the Deputy Chief of Police. Plaintiff alleges that the individual defendants are all citizens, agents, and employees of the City of Tulsa and that the defendants were acting under color of their official duties and under the color of statutes and ordinances of the State of Oklahoma.

Plaintiff maintains he was discriminated against by the defendants.

The crux of his complaint is as follows: He alleges that on or about September 15, 1972, he made proper application to the Police Department for the City of Tulsa, and, that subsequent thereto and during the month of March, 1972, he took and passed the Civil Service examination for service with the Police Department. Sometime in January, 1973, after all the preliminary interviews, plaintiff appeared before the Screening Board for appointment to the Police Department, and, that he passed the Screening Board satisfactorily. He was thereafter referred to the Police Department for routine investigation and background check. He was then informed that he would be further processed and would be enrolled in the Police Academy to commence training on February 28, 1973. On or about February 15, 1973, plaintiff contends that he was notified by a Sgt. Young of the Tulsa Police Department, acting under the direct supervision and control of the defendants, that he was rejected by the Tulsa Police Department, and that Dan Phillips, Assistant Chief of Police, would see plaintiff and explain why he has been rejected.

That on February 22, 1973, Assistant Chief Phillips, informed plaintiff that he had been rejected for the sole and only reason that his natural father, Herman Ray Cornelius, had been

arrested by the Tulsa Police Department, more than 5 years prior to the date of plaintiff's application, for alleged felonious conduct, notwithstanding the fact that petitioner's father was acquitted on appeal, and notwithstanding the fact that plaintiff had not lived with or resided with his natural father since he had been a child of tender years.

Plaintiff contends that he was fully and completely qualified physically, mentally and emotionally in every way for service and that he had successfully completed one semester or 12 hours in Police Science at Tulsa Junior College.

He alleges that by reason of the wrongful acts he has suffered mental anguish and humiliation and has been damaged in the sum of \$50,000.00 and that he has lost pay and emoluments in excess of \$10,000.00; plus an injunction.

Plaintiff alleges the defendants conspired against him in discriminating and rejecting him as a potential Police Officer.

It is noted by the Court that in one of his briefs, plaintiff raises, for the first time, Title 42 U.S.C. §1986. Plaintiff has not moved to amend his complaint to encompass the provisions of §1986, and the Court will not consider such section until such time as plaintiff moves to amend his complaint.

The Court notes that this is not a case where plaintiff is appearing pro se, but plaintiff has been represented since the inception of this litigation by competent counsel.

The above facts constitute the "gist" of plaintiff's complaint.

The following evidence has been considered by the Court in a review of the motions in question.

In the deposition of Tom Yerton, a Police Officer, taken October 16, 1974, he testified that plaintiff brought the background questionnaire in completed, but that he did go over the application with plaintiff item by item (commencing at page 5 of the deposition).

He further testified that after the interview he conducted a general background investigation and it was at this time he found a discrepancy in information furnished by plaintiff (i.e. the arrest of his father)---(commencing at page 11 of the deposition).

Officer Yerton further testified that he had discussed uniforms, policies, civil service, fringe benefits, etc. with the plaintiff, and, additionally interviewed his wife. (Commencing at page 13 of the deposition). At page 17 Officer Yerton testified that plaintiff called him (he did not remember the date) and Officer Yerton advised that he told him at that time that he had not been accepted for the Academy because of his background and he further told him that if he wanted it explained to him he would have to see Chief Phillips (deposition, page 17). He further testified that he did not complete the background investigation before plaintiff was advised that he had not qualified. He stated that the reason plaintiff was "dropped as a recruit" was due to this father's arrest, his education. He testified that plaintiff had not told him of his father's arrest, and, further, that plaintiff had told him he had a "C point---or a C average in school." Officer Yerton testified that according to plaintiff's high school transcript he did not have a "C" average and graduated last in his graduating class. He further testified that plaintiff's insufficient checks, his credit and the above were brought to the attention of the Police Chief. In connection with the statement made by Officer Yerton, it should be noted that plaintiff, on the application in the blank where it asked if any member of his family had been convicted of a crime, answered ---"No, not that I know of". Further the application reflects that he had several insufficient checks, but had never had any trouble with the banks. The application further reflects that he had been one month behind in his car payments, but that had been taken care of, and that the reason was that he was not

paid at his employment on time. Plaintiff's high school transcript, attached to the Motion for Summary Judgment, reflects a "1.000 GPA" and that he ranked 429 out of a class graduating of 429. Returning to the deposition, Officer Yerton testified, at page 33, that the background investigation caused him to check and ascertain that plaintiff was enrolled at TJC in police science courses (he checked no further). Officer Yerton additionally testified that plaintiff told him he had dropped out of high school and went into the Marine Corps and after his discharge he went back to high school and graduated from East Central.

The deposition of Dan Phillips, taken October 16, 1974, has also been considered by the Court. He testified that the first time he met plaintiff was at the Screening Board on January 23, 1973 (deposition, page 3). He stated that Chief Purdy was not on the screening board. There were seven members of that Board. He testified that if a candidate is rejected by 3 members of the Board, he is rejected. He testified that plaintiff was rejected by 2---"so he passed, by a narrow margin he passed the Screening Board"(deposition, page 5). This took place prior to filling out the background questionnaire and the interview with Officer Yerton. Chief Phillips testified that he reviewed the file brought to him by Officer Yerton on February 7, 1973, (deposition, page 8). Chief Phillips testified as follows at pages 8 and 9 of the deposition:

"A. In the Screening Board meeting, I believed in my own mind that David Cornelius was a son of Herman Ray Cornelius, but I couldn't remember the name because his arrest had been a number of years before that, but Tulsa Sign Company, I knew it was a sign company and so forth, so I asked David, 'Do you have any relatives living in Tulsa by the name of Cornelius who have been arrested, or arrested by the police department, Tulsa Police Department.' And I asked him this question twice, not one right behind the other, and each time his answer was no, without any reservation whatsoever."

and further at pages 10 and 11 of the deposition:

"A. Secondly, I was concerned about the scholastic record, placing 429th out of 429 students isn't exactly the type of individual we are looking for as a police officer.

"Q. Now, to interrupt again, at the present time you are No. 2 man in the police department, you are generally familiar with the qualifications, of course not of every officer, but those that go through.

"A. Uh-huh.

"Q. To your knowledge, are there any other police officers serving the City of Tulsa at this time that have been accepted for appointment since 1960, that have a D average in high school or less, or that completely lack a high school education?

"A. There are some that completely lack a high school education, but to my knowledge, we have no one with that low a grade average."

and at page 12 of the deposition:

"Q. And when you reviewed the file, did you see any cause or have any occasion to compare and look at his history of the place of his residence and the fact that his mother--that he lived with his mother and not in Tulsa since he had been a small child? Or did you notice that?

"A. Yes, I reviewed that. I also noticed that he had been employed and living in Tulsa and a marriage and a divorce and several other things that were during the period of time that there would have been a lot of public information concerning Herman Ray Cornelius in the newspaper."

At pages 15 and 16 of the deposition the following questions and answers are found:

"Mr. LARKIN: The residences, Section 3 under Residences, it starts with starts living in Tulsa in '57 and '58, 216 South Toledo, you start at the bottom the way he filled this out. He started in '72 and went down, and in other words, I'm starting at the bottom and going up, Chief. From '57 to '58, lived at 216 South Toledo, Tulsa, Oklahoma. From 1958 to 1965, a total of seven years, he lived in Goldsboro, North Carolina. From August, '65 until 1966, the record reflects he lived in Norman, Oklahoma. From 1966 through 1967, it shows his residence at 3211 South Braden, but at the same time, the next section shows that in 1967, September, he was accepted by the United States Marine Corps. And if the document represents the truth, then, of course, he could have only been in Tulsa even in the same physical political environment of his father for a period of approximately nine months, since he was a small boy.

"A. If I may, let's look at Section 9 on Employment History.

"Q. Yes, I know that.

"A. And he shows that he was employed by the Tulsa Neon Service, which I believe is owned by his father, from 1966 until 1973. And while I had difficulty in determining exactly where he lived, I didn't see anything in here to say that he did not live or did not work with his father during that period of time between 1967 and 1968 whenever there were numerous newspaper accounts concerning his father."

The deposition reveals that the father was arrested in 1965, and that his conviction was reversed in 1967. (Deposition, pages 16 and 17).

Chief Phillips went on to testify at pages 18 and 19 of the deposition:

"A. After I reviewed it and found the insufficient funds checks, which is a thing we always consider in every applicant, the scholastic record, the fact that he had misrepresented something to the Screening Board, the fact that it was difficult for us to evaluate his work record because he had worked for his father only, I made a recommendation to the Chief of Police that he be rejected."

And on page 21 of the deposition:

"Q. In your---you have certain guidelines which you follow, which I suppose the Commissioners and the police department and everybody help make up. Is one of your guidelines---do any of your guidelines have anything to do with rejecting an applicant if a member of his family has been arrested or convicted?

"A. Not solely on that, no sir. It is a factor that is considered sometimes if they are both living in the same household or they have a close association, but we have hired people where their father's have been arrested.

"Q. That was going to be the next question.

"A. In fact, I have argued at our Screening Board that we should hire people, a person, a particular person where they are completely honest with us about something and their father has been convicted."

Commencing at page 21 of the deposition, Chief Phillips goes on to give his version of the interview he had with plaintiff when he advised him as to why he was rejected. He testified that in addition to the personal conference he had three telephone conversations with plaintiff prior to the personal conference.

At pages 29 and 30 of the deposition the following testimony was elicited:

"Q. Now, you have testified that following Sergeant Yerton's background investigation and his presentation to you of at least what he had found up to that point, you reviewed that and based upon that you recommended to Chief Purdy that Mr. Cornelius not be accepted for employment; is that correct?

"A. Yes, I felt he was a substandard applicant at that time, and we had 83 applications and 28 positions to fill, and I felt like he was just not as good as some of the other applicants.

"Q. You say 28 positions to fill, to fill what?

"A. To fill---well, this is the total number of vacancies that we had at this point, and we are starting a Police Academy on the 19th day of February, and we wanted to get these positions filled so that we could get our Academy started on the 19th.

"Q. And that was the 19th of February, 1973?

"A. Yes, sir.

"Q. And you say that you had 83 applications and you only had actually 28 positions to fill?

"A. True."

Commencing at page 31 of the deposition, Chief Phillips testified that the father's arrest was not the only reason he wasn't hired, but that this reason might be the only one he gave him at the time because "he (plaintiff) terminated the conversation or something like that, or directed the line of conversation in another direction."

At page 32 of the deposition, Chief Phillips testified:

"Q. Then if I understand your testimony, the basis for his rejection in addition to these questions that were asked him before the Screening Board dealt with his past scholastic record in high school, ---

"A. That was one of the things considered, yes sir.

"Q. ---and the information contained on his questionnaire concerning insufficient funds and his debts?

"A. Right.

"Q. And then further, his work record, the fact that he only worked with his father?

"A. That it would be difficult to get a true evaluation, yes, sir.

"Q. I realize it's been a long time ago, but to the best of your recollection, how did his general background, educational background, financial situation, past work record, and his presentation before the Screening Board, compare with the applicants who were in fact accepted for those positions available at that time?

"A. Well, I think the fact that he got two rejections pretty well points that out. Most of the people that we hire, there are no rejections. They come through with everybody agreeing they are a good applicant. So comparing him with the scholastic record and the Screening Board, I would say he would be in the lower--- and this is strictly a guess, but I would say he would be in the lower 10 or 15 percent.

"Q. You are speaking now of those 83 applicants at the time?

"A. Yes.

and on pages 35 and 36 of the deposition:

"Q. Now, I have oneother question, Chief Phillips. After he was rejected, you do recall that I was employed first and that I called you and made an appointment and came down and talked to you about this case, don't you? Do you remember?

"A. I remember you coming to talk to me, I don't recall the telephone call.

"Q. I talked to your secretary first.

"A. I remember you came to my office.

"Q. And at that time, I realize when a lawyer come in with a thing like this, that makes everybody wonder what's going on, but do you now remember what you told me was the reason that he was rejected?

"A. I do.

Q. What did you tell me?

"A. I told you that we had asked him about his arrest record at the Screening Board, he told us no, and that ---his father's arrest record, rather, and that our investigation showed that his father in fact had been arrested and that this had been a factor in turning him down.

"MR. LARKIN: I have no further questions of this witness."

Both Chief Phillips and the plaintiff, David Ray Cornelius, have filed sworn affidavits, which in some respects are in conflict one with the other.

MOTION TO DISMISS AS TO THE CITY OF TULSA:

Section 1983 Claim:

Monroe v. Pape, 364 U.S. 167 (1961); City of Kenosha v. Bruno, et al., 412 U.S. 507 (1973); Moor et al. v. County of Alameda, 411 U.S. 693 (1973); Church of God of La., Inc. v. Monrow-Ouachita R.P.C., 404 F.Supp. 175 (USDC, W.D.La., 1975); Naprstek v. City of Norwich, 405 F.Supp. 521 (USDC, N.D.N.Y., 1976), make it clear that plaintiff's claim under 28 U.S.C. §1343, predicated upon Title 42 U.S.C. §1983, cannot be sustained as the City is not a person within the meaning of §1983. Further, it cannot be held vicariously liable for the acts of its officers that allegedly might violate the civil rights of plaintiff so as to permit monetary recovery from them out of the City's treasury. Moor et al. v. County of Alameda, supra.

In Dewell v. Lawson, 489 F.2d 877 (10th CCA, 1974), the Court said:

"Dewell contends that the City of Oklahoma City is a 'person' within 42 U.S.C.A. §1983 and therefore subject to suit for damages. It is well established that a municipality is not a 'person' within the meaning of 42 U.S.C.A. §1983. Monroe v. Pape, 365 U.S. 167 (1961); Egan v. City of Aurora, 365 U.S. 514 (1961). 11 Okl.St. Ann. (1973 p.p.) §1755 constitutes a waiver of liability applicable to any city or town to the extent of a claim not in excess of \$2,000 arising out of the performance of, or the failure to perform, a discretionary function or duty, whether or not the discretion is abused. 11 Okl.St. Ann. (1973 p.p.) §1754. A federal court will take judicial notice of the public laws of the states. Bowen v. Johnston, 306 U.S. 19 (1939); Pure Oil Company v. State of Minnesota, 248 U.S. 158 (1918). In Moor v. County of Alameda, 411 U.S. 693 (1973), the Supreme Court held that all municipalities are excluded from liability under the Civil Rights Act regardless of whether their immunity has been lifted by state law. Therefore, regardless of 11 Okl.Stat. Ann. §1755, Oklahoma City cannot be liable under the Civil Rights Act."

Therefore, plaintiff's alleged claim against the City of Tulsa under §1983 must be dismissed.

Section 1981 and 1982 Claims:

In *Agnew v. City of Compton*, 239 F.2d 226 (CCA 9th, 1957), the Court said:

"The statutes next referred to are 42 U.S.C.A. §§1981 and 1982. These are the first two sections of the Civil Rights Act, as now codified. The plain purpose of these statutes is to provide for equality of rights as between persons of different races. The complaint under review does not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race. It follows that no cause of action is stated under these sections."  
(Emphasis supplied)

In *Ambrek v. Clark*, 287 F.Supp. 208 (USDC, E.D.Pa., 1968) the Court said:

"At the outset, we note that 42 U.S.C. §1981 is clearly inapplicable, since there has been no allegation in either complaint, of any racial discrimination being practiced by the defendants, against the plaintiff. *Snowden v. Hughes*, 321 U.S. 1 (1944); *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir., 1957)."

In *Stambler v. Dillon*, 288 F.Supp. 646 (USDC, S.D.N.Y., 1968) the Court said:

"Sections 1981 and 1982 of Title 42 U.S.C. both provide for equality of rights regardless of color. Here it is neither alleged nor shown that Justice Dillon discriminated against any plaintiff because of color. Accordingly, the complaint fails to state a claim against Justice Dillon on which relief may be granted under either of these sections." (Emphasis supplied)

In *Braden v. University of Pittsburgh*, 343 F.Supp. 836 (USDC, W.D.Pa., 1972), the Court said:

"The Supreme Court has made it clear that the Civil Rights Act of 1866, predecessor of 42 U.S.C.A. §1981, and termed the model for the phrase 'any law providing for ... equal civil rights,' *Georgia v. Rachel*, 384 U.S. 789 (1966), was not intended to and should not be construed to apply to discrimination on any basis other than race: \*\*\*."

In *Abshire v. Chicago and Eastern Illinois Railroad Co.* (USDC, N.D.Ill., 1972), the Court said:

"The plaintiff is a white male United States citizen who alleges discrimination in his employment based on his sex, pursuant to 42 U.S.C. §1981. The clear purpose of §1981 is to provide for equality between persons of different races. In order for a plaintiff to predicate an action on this section, he must have been deprived of a right, which, under similar circumstances, would have been accorded to a person of a different race. The applicability of this section

is clearly limited to racial discrimination on the grounds of religion, national origin or sex. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Georgia v. Rachel, 384 U.S. 790 (1966); United States v. Cruikshank, 92 U.S. 542 (1875); Agnew v. Compton, 239 F.2d 226 (9th Cir. 1956), cert.denied, 353 U.S. 959 (1957); Schetter v. Heim, 300 F.Supp. 1070 (E.D.Wis.1969). Thus, the plaintiff's complaint based on allegations of sex discrimination fails to state a cause of action pursuant to §1981." (Emphasis supplied)

In Willis v. Chicago Extruded Metals Company, 358 F.Supp. 848 (USDC, N.D.Ill., 1973), the Court said:

"In order for a plaintiff to predicate an action on Section 1981, he must allege that he has been deprived of a right, which under similar circumstances, would have been accorded to a person of a different race. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); \*\*\*."

In Veres v. County of Monroe, 364 F.Supp. 1327 (USDC, E.D. Mich., 1973), the Court said:

"Unlike §1983, §1981 does not state whom may be sued under the statute. However, §1981 reads, 'All persons . . . shall have the same right . . . as is enjoyed by white citizens . . .'. This statutory language raises the question whether the plaintiff in the present action may invoke the statute at all. The phrase 'as is enjoyed by white citizens' implies that the statute applies only to cases of racial discrimination. Plaintiff has made no allegation or racial discrimination nor does a reading of his complaint reveal any basis for such an allegation. It may be inferred from Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) that §1981 indeed applies only to racial discrimination. In Jones the Court held that a companion statute, §1982, 'deals only with racial discrimination . . .'. (in owning and conveying property). The Court traced the legislative history of §1982, and found that when first enacted §§1981 and 1982 were part of the same statute, §1 of the Civil Rights Act of 1866, Id., 392 U.S. at 422. Moreover, both sections create a cause of action using the identical language, ' . . . as is enjoyed by white citizens.' When two statutes, enacted at the same time by the same Congress, which were originally part of the same Act of Congress, use identical language to describe the nature of the right created, and one of the statutes (§1982) has been held to apply only to racial discrimination, the other statutes (§1981) must also be held to apply only to racial discrimination. This Court feels bound by the clear implication to that effect in Jones, supra, and so holds. One Court of Appeals and several U.S. District Courts have agreed that §1981 applies only to racial discrimination (citing cases). \*\*\*."

See also Van Hoomissen v. Xerox Corporation, 368 F.Supp. 829 (U.S.D.C. N.D.Calif., 1973).

In Olson v. Rembrandt Printing Company, 375 F.Supp.

413 (USCS. E.D.Mo., 1974), the Court said:

"This Court finds that the absence of an allegation of racial discrimination such as in the instant case is fatal to a cause of action brought under 42 U.S.C. §1981 because the applicability of that section is clearly limited to racial discrimination on the grounds of religion, national origin or sex. (Citing cases.)"

Therefore, plaintiff's alleged claim against the City of Tulsa under §§1981 and 1982 must be dismissed.

Constitutional Claims and State Law Claims:

As to the Constitutional Claims and State Law Claims asserted by the plaintiff in his complaint, they are only mentioned and nowhere in the proceedings after the institutional is reference to them found again.

After independent research on these questions, the Court finds that the Motion to Dismiss of the City of Tulsa should be sustained.

MOTION TO DISMISS AS TO CARROLL E. GRIFFITH, JACK PURDY, and DAN PHILLIPS:

Section 1981, 1982 and constitutional and state law claims:

Based on the reasoning of the Court above stated, the Motion to Dismiss of Carroll E. Griffith, Jack Purdy and Dan Phillips as to the claims made under Sections 1981 and 1982 and the constitution and state law should be sustained.

Section 1983 Claim:

In connection with the §1983 claim, the Court notes that Carroll E. Griffith, Jack Purdy and Dan Phillips are sued in their official capacity.

The Court recognizes that governmental officers can be personally liable. Scheuer v. Rhodes, 416 U.S. 232 (1974); Hines v. D'Artois, 383 F.Supp. 184 (USDC, W.D.La., 1974); Smith v. City of East Cleveland, 363 F.Supp. 1131 (N.D.E.D., Ohio, 1973); Bogard v. Cook, 405 F.Supp. 1202 (USDC, N.D.Miss., 1975); Bennett v. Gravelle, 323 F.Supp. 203 (U.S.D.C. D.May., 1971).

However, the Court said in Schoonfield v. Mayor and City Council of Baltimore, 399 F.Supp. 1069 (USDC, D.Maryland, 1975),

"Similarly, this Court has noted that when a suit is lodged against a public official with the intent and purpose of obtaining a judgment establishing a liability against the state, the suit is in actuality one against the state. Bennett v. Gravelle, 323 F.Supp. 203, 211 (D.Md.), aff'd, 451 F.2d 1011 (4th Cir. 1971), cert.dismissed, 407 U.S. 917 (1972). Since the Mayor, \*\*\* in their official capacities are extensions of the municipality, damages may not be assessed against them for acting in such capacities. Id. \*\*\*."

Cause of Action as to all Defendants:

The Court said in Roberts v. Barbosa, 227 F.Supp. 20 (U.S.D.C., S.D.Calif., 1964) the Court said:

"In a civil action for damages under the Civil Rights Act against public officials, highly specific facts are required to be alleged. [Agnew v. City of Compton (9th-1956) 239 F.2d 226, 231, Cert.den. 353 U.S. 959. A complaint does not state a cause of action under the Civil Rights Act, absent allegations that the conduct alleged was in pursuance of a systematic policy of discrimination against a class or group of persons. \*\*\*."

A complaint alleging purposeful discrimination towards an individual with no allegation of racial or other class-based motivation is insufficient. Schoonfield v. Mayor and City Council of Baltimore, supra. The mere conclusory allegations of discrimination contained in the instant complaint are insufficient. As was said by the Supreme Court in Snowden v. Hughes, 321 U.S. 1, 8 (1944):

"\*\*\*a discriminatory purpose if not presumed, Tarrance v. State of Florida, 188 U.S. 519; there must be a showing of 'clear and intentional discrimination.' Gundling v. City of Chicago, 177 U.S. 183; \*\*\*."

In the instant case the facts alleged do not show any class-based discrimination; there is no allegation of any ongoing discriminatory activity, nor is there any allegation of a systematic pattern of discrimination.

The Court, therefore, finds, that the Motion to Dismiss as to all defendants for failure to state a cause of action should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendants be and the same is hereby sustained and the cause of action and complaint are hereby dismissed.

IT IS FURTHER ORDERED that the Motion for Summary Judgment

be and the same is hereby overruled as being moot, the ruling on the Motion to Dismiss being dispositive of the action.

ENTERED this 19<sup>th</sup> day of May, 1976.

*Allen E. Barrow*

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CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

HORTENSE KROW HAMILTON SMITH, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ROSE COLOMBE AND ROBERT COLOMBE and )  
 McDOWELL OIL PROPERTIES, INC., )  
 )  
 Defendants. )

No. 75-C-500 ✓

FILED

MAY 17 1976 T

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Defendant McDowell Oil Properties, Inc. Motion to Dismiss in its entirety and have carefully perused the entire file, the briefs and all of the recommendations concerning said motion, and being fully advised in the premises, finds:

That the Defendant McDowell's Motion to Dismiss should be granted because there are no allegations in the Petition of the Plaintiff that set a cause of action against the Defendant McDowell nor were there allegations in the Petition which implicate the Defendant McDowell in the alleged actions of the Defendants Colombe.

IT IS, THEREFORE, ORDERED that the Motion of the Defendant McDowell Oil Properties, Inc. should be and is hereby granted.

Dated this 17<sup>th</sup> day of May, 1976.

Allen E. Barrett  
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JO ANN MCDONALD, )  
 )  
 ) Plaintiff, )  
 )  
vs. )  
 )  
JESS O. WALKER, ROBERT M. )  
THOMPSON, FLOYD MOSS, HAROLD )  
D. MORGAN, KENNETH MCDONALD, )  
ARCHIE JONES, EMMETT HULL, )  
JOE DAVENPORT, JOHN DOE, )  
Unknown Policy Officer for )  
the City of Vinita, Oklahoma, )  
and SOUTHWESTERN BELL TELE- )  
PHONE COMPANY, )  
 )  
 ) Defendants. )

No. 75-C-469 ✓

FILED

MAY 17 1976 /

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

After reviewing the file and record in this cause, the recommendations of the Magistrate are hereby approved, and

IT IS, THEREFORE, ORDERED that the motion of Defendant Southwestern Bell Telephone Company to dismiss the complaint for failure to state a claim upon which relief can be granted be and the same is hereby granted.

The Clerk of the Court shall forward by mail a copy of this Order to each of the attorneys for the above named Plaintiff and Defendants.

Dated this 17<sup>th</sup> day of May, 1976.

*Allen E. Barrow*

CHIEF JUDGE OF THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MILDRED AGEE, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 PREFERRED SECURITY LIFE )  
 INSURANCE COMPANY OF )  
 OKLAHOMA, et al., )  
 )  
 Defendants. )

72-C-410

FILED

MAY 17 1976

Jack C. Silver, Clerk

ORDER APPROVING FERRILL ROGERS'  
SETTLEMENT AGREEMENT

Upon consideration of the Application of Plaintiff Class for Approval of Settlement Agreement with Defendant Ferrill H. Rogers, the Court finds that adequate notice has been given by virtue of the notice of prior settlements and notice to the Named Plaintiffs and that, in light of the cost of notice in relation to the proposed settlement, notice to counsel to the Plaintiff Class is proper and sufficient.

IT IS ORDERED, ADJUDGED AND DECREED That the Settlement Agreement is fair, reasonable and adequate, and hereby approved.

  
\_\_\_\_\_  
Royce H. Savage, Special Master

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, ex rel )  
Gerald Grimes, Insurance )  
Commissioner, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PREFERRED SECURITY LIFE IN- )  
SURANCE COMPANY, an Oklahoma )  
Stock Insurance Corporation, )  
 )  
Defendant. )

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.  
APR 26 1976  
DAN GRAY, Court Clerk  
BY \_\_\_\_\_ DEPUTY

NO. CJ-74-704

ORDER APPROVING SETTLEMENT AGREEMENT

NOW, on this 20th day of April, 1976, came on for hearing the Receiver's Request for Instructions approving a Settlement attached as "Exhibit A" to said Request. The Receiver appeared by his attorney of record, James W. Swank, Jr., and the Settling Defendant appeared pro se, same being Ferrill H. Rogers. The Court, having considered the Request and attached exhibit, and the evidence presented by the aforesaid parties, finds as follows:

1. That Ferrill H. Rogers was named as a party defendant in that cause of action styled "Gerald Grimes, Insurance Commissioner of the State of Oklahoma, as Receiver for Preferred Security Life Insurance Company, an Oklahoma Stock Insurance Corporation, vs. Bobby Jack Rogers, et al., No. CJ-76-622", filed in the District Court within and for Oklahoma County, State of Oklahoma, on February 28, 1976, pursuant to the Instructions of this Court.

2. That Ferrill H. Rogers was named as a defendant in that action styled "Agee, et al., vs. Preferred Security Life Insurance Company, et al., No. 72-C-410", in the United States District Court for the Northern District of Oklahoma.

3. That the proposed Settlement Agreement, in conjunction with the previously approved Settlement Agree-

ments, will assist in fully settling and disposing of the litigation insofar as the Receiver and the Receivership Estate is concerned.

4. That pursuant to the terms of the proposed Settlement, the Receiver would receive a sum of money which would be helpful in further efforts to rehabilitate the company, and, unless the Receiver is successful in recovering assets of the company as a result of the some of the lawsuits on file, there is little likelihood of rehabilitation.

5. That rehabilitation is most desirable and in the public interest, and liquidation should only be considered as the last resort.

6. That the defendant, Ferrill H. Rogers, presented testimony and evidence that his liabilities exceed his assets, that he has suffered from much adverse publicity, and that he was not an active participant in the management of the company, owned no stock in the company, was not an officer, received no sum of money or thing of value, but did serve on the Board of Directors of Preferred Security Life Insurance Company.

7. That, in consideration of all of the aforesaid, the Settlement Agreement is fair, reasonable and adequate and in the best interests of the Receivership Estate.

NOW, THEREFORE, IT IS THE ORDER OF THE COURT that the terms of the proposed Settlement Agreement are reasonable and fair under the circumstances, and such Settlement Agreement is hereby approved, and the Receiver is hereby ordered and directed to do those things reasonably necessary to consummate and finalize the said Settlement which are within his authority and jurisdiction.

I, DAN GRAY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as a part of record in the District Court Clerk's Office of Oklahoma County, Okla., this

day of

April

1976

DAN GRAY, Court Clerk

By

Ronald Dillab Deputy

  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

FERGUSON, FISHER & SWANK, P.C.  
Suite 204, Law Title Bldg.  
325 Robert S. Kerr Avenue  
Oklahoma City, Oklahoma 73102  
(405) 272-0281

Attorneys for the Receiver for  
Preferred Security Life Insurance Company

By James W. Swank, Jr.

FERRILL H. ROGERS  
Room 450, 101 Park Avenue Bldg.  
Oklahoma City, Oklahoma 73102  
(405) 235-1565

By Ferrill H. Rogers  
Ferrill H. Rogers, pro se

COVENANT

THIS COVENANT is made this 30th day of April, 1976, by FERRILL H. ROGERS, whose address is Room 450, 101 Park Avenue, Oklahoma City, Oklahoma 73102. In order to induce the "named Plaintiffs" and the "Receiver" to enter into that certain Settlement Agreement approved on April 20, 1976, by Carmon C. Harris, Judge of the Oklahoma County District Court, State of Oklahoma, in Case No. CJ-74-704, styled "Grimes v. Preferred Security Life Insurance Co.", intending the "named Plaintiffs" and the "Receiver" to rely upon this inducement and acknowledging that the "named Plaintiffs" and "Receiver" are relying upon this inducement in entering into the Settlement Agreement, FERRILL H. ROGERS hereby covenants, represents and warrants:

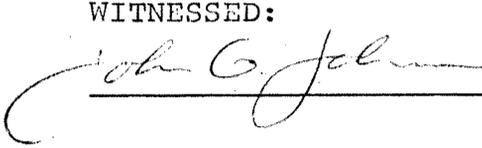
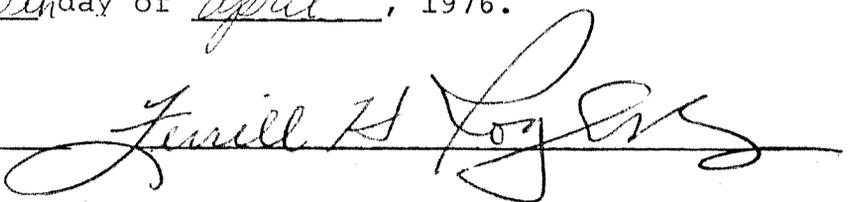
1. The balance sheet dated March 26, 1976 which is attached hereto as Exhibit "A" has been prepared in accordance with generally accepted accounting principles and fully and fairly represents the financial position of FERRILL H. ROGERS.

2. Except as reflected on Exhibit "A", FERRILL H. ROGERS owns no property or assets, whether personal or real, fixed or contingent, accrued or unaccrued, and whether owned legally or beneficially or directly or indirectly. FERRILL H. ROGERS represents that no person holds or owns any such property of which FERRILL H. ROGERS is the beneficial owner, or to which FERRILL H. ROGERS has any right, title or interest whether arising now or in the future, or which is held by such party for the use or benefit of FERRILL H. ROGERS.

3. FERRILL H. ROGERS has no expectancy, whether by inheritance, gift or otherwise, of acquiring any property described in the preceding paragraph.

DATED this 30th day of April, 1976.

WITNESSED:

FINANCIAL STATEMENT OF DEBTOR

(Submitted for Government Action on Claims due the United States)  
OR CONTINUE ON BACK OF PAGES

NOTE - USE ADDITIONAL SHEETS WHERE SPACE ON THIS FORM IS INSUFFICIENT

1. NAME (Last, first) <b>FERRILL H ROGERS</b>	2. BIRTH DATE (mo., day, yr.) <b>Apr 2, 1931</b>	3. SOCIAL SECURITY NO. <b>443-10-8552</b>
4. HOME ADDRESS <b>3017 Viorice Blvd, Okla City, Okla.</b>	(Send No Reply To My Home)	5. PHONE NO. <b>042 4716</b>
6. NAME OF SPOUSE (Give address if different from yours) <b>Shirley Mae Rogers</b>		7. DATE OF BIRTH (mo., day, year) <b>August 1, 1933</b>

DEBTOR EMPLOYMENT DATA

8. OCCUPATION <b>Lawyer</b>	9. HOW LONG IN PRESENT EMPLOYMENT? <b>8 years</b>	
10. PRESENT EMPLOYER'S NAME <b>Sell</b>	ADDRESS <b>Room 450, 101 Penn Ave, Okla 73102</b>	PHONE NO. <b>255-1565</b>

11. OTHER EMPLOYMENT - WITHIN LAST THREE YEARS			
EMPLOYER'S NAME	ADDRESS	PHONE NO.	EMPLOYMENT DATES
<b>None</b>			

12. PRESENT MONTHLY INCOME **Payment on fee basis after completion of work, I have no retained**

SALARY OR WAGES \$ **None** COMMISSIONS \$ **None** OTHER (state source) \$ **None** TOTAL \$ \_\_\_\_\_

SPOUSE'S EMPLOYMENT DATA

13. OCCUPATION <b>Secretary - Last Position</b>	14. HOW LONG IN PRESENT EMPLOYMENT? <b>Not Working - Severe Mental Problems - SCHIZOID - PARANOID</b>	
15. SPOUSE'S PRESENT EMPLOYER'S NAME <b>None</b>	ADDRESS <b>None</b>	PHONE NO.

16. OTHER EMPLOYMENT - WITHIN LAST THREE YEARS			
EMPLOYER'S NAME	ADDRESS	PHONE NO.	EMPLOYMENT DATES
<p><b>NO Employment in last 5 years - Do not know how address can be located - Do not know how to find in the name of a business.</b></p> <p><b>A real business checked to pay 1976 (Box belongs to Marilyn Shepard a friend of hers) I am restrained by Court Order from inquiring etc.</b></p>			

17. PRESENT MONTHLY INCOME - **Alimony**

SALARY OR WAGES \$ **None** COMMISSIONS \$ **None** OTHER (state source) \$ **550.00** TOTAL \$ **550.00**

DEPENDENTS

18. TOTAL NUMBER	RELATIONSHIP	AGE	RELATIONSHIP	AGE	RELATIONSHIP	AGE	19. TOTAL MONTHLY INCOME OF DEPENDENTS (except spouse)
<b>2</b>	<b>WIFE</b>	<b>34</b>					<b>Son - Student at Univ. of Okla. None</b>
	<b>Son</b>	<b>21</b>					

FINANCIAL DATA

20. FOR WHAT PERIOD DID YOU LAST FILE A FEDERAL INCOME TAX RETURN <b>1974</b>	21. WHERE FILED <b>Okla City, Okla.</b>	22. AMOUNT OF GROSS INCOME REPORTED <b>\$16,705.73</b>
--	--	---

23. FIXED MONTHLY EXPENSES			
RENT	FOOD	UTILITIES	INTEREST
<b>290.00 month or Anticipated Loan on Home</b>	<b>Estimate on Son 300.00 est.</b>	<b>200.00</b>	
DEBT REPAYMENTS (including installments)	OTHER (specify)		
<b>ESTIMATE - 1500 - 2000</b>	<b>Alimony 550.00</b> <b>Home 290.00</b> <b>Utilities 200.00</b> <b>Food 300.00</b> <b>Medical - ? For Shirley</b>		
	<b>Personal { Purchase of Furniture - 100.00</b> <b>House hold effects (Loss in Divorce)</b> <b>Car payment (1973 Cougar) - 102.00</b>		

24. LOANS PAYABLE

OWED TO	PURPOSE & DATE OF LOAN	ORIGINAL AMOUNT	PRESENT BALANCE
<b>City National Bank Okla City</b>	<b>Feb, 1976 Purchase 1973 Cougar Automobile</b>	<b>3,000</b>	<b>\$ 2,800</b>
<b>SHAWNEE National Bx Shawnee Okla.</b>	<b>March 1975 Pay Psychiatrists Co - signed by Personal Friend</b>	<b>2,000</b>	<b>\$ 1,620</b>
<b>LIBERTY NATL BK. Okla City</b>	<b>June 9, 1967 { BUY Stock in American Timber Treating Co - Bankrupt. - Subject of this Judgment (See EXHIBIT F)</b>	<b>\$ 30,087.00</b>	<b>\$ 37,074.70</b>

25. ASSETS AND LIABILITIES

Assets (Fair market value)			
CASH	March 26, 1976	\$	298.55
CHECKING ACCOUNTS (show location)	City National Bank Old City, Okla.		
SAVINGS ACCOUNTS (show location)	None		
MOTOR VEHICLES	YEAR	MAKE	License No. / Value
	1970	Cutlass	Don't Know / Leased
	1973	Cougar	YF-8759 / 2,800
DEBTS OWED TO YOU (give name of debtor)	None - Except Accounts Receivable (See EX "E") \$69,000		
JUDGMENTS OWED TO YOU	None		
STOCKS, BONDS AND OTHER SECURITIES (itemize)	None		
HOUSEHOLD FURNITURE AND GOODS (itemize)	\$1,000 Est.		
ITEMS USED IN TRADE OR BUSINESS	#2,000 Est.		
OTHER PERSONAL PROPERTY (itemize)	Clothing - Personal \$1,000 Est.		
REAL ESTATE	None Except Home #0 (will carry maximum mortgage at be sold at Public Auction by I.R.S. Apr. 9, 1976)		

Liabilities	
ACCOUNTS, PERSONAL - See EXHIBIT	BILLS OWED (grocery, doctor, lawyer, etc.) \$E-11
INSTALLMENT DEBT (car, furniture, clothing, etc.)	
TAXES OWED INCOME	(Income) STATE - 2,923.68 Federal 24,430.96
OTHER (itemize)	
LOANS PAYABLE (to banks, finance Co. etc.)	2,800 - 1,000 - 37,074.72
JUDGMENTS YOU OWE	84,902.40
REAL ESTATE MORTGAGES (anticipated)	\$30,000
OTHER DEBTS (itemize)	
Business debts (Exhibit "G")	\$11,185.82
Business Taxes	174.31
CORP LAB (Exhibit "H")	\$37,342.92
BAILEY & HICKMAN (Exhibit "I")	27,583.40

CONTINGENT LIABILITY IN TWO LAW SUITS:

- GERALD GRIMES INSURANCE CO. VS Bobby Jack Rogers et al. (Exhibit "J") \$2,370,950.  
Second cause (Exhibit "J") 1,786,130.2
- AGG ET AL VS PREFERRED SECURITY ET AL (Exhibit "K") 1,500,000.

TOTAL LIABILITIES \$ 5,924,844.6

25. REAL ESTATE OWNED

ADDRESS	HOW OWNED (family, individually, etc.)	DATE ACQUIRED	COST	UNPAID AMOUNT OF MORTGAGE
NONE				

27. REAL ESTATE BEING PURCHASED UNDER CONTRACT

ADDRESS	NAME OF SELLER		
NONE			
CONTRACT PRICE	PRINCIPAL AMOUNT STILL OWING	NEXT CASH PAYMENT DUE (date)	AMOUNT (of next payment due)

29. LIFE INSURANCE POLICIES

COMPANY	FACE AMOUNT	CASH SURRENDER VALUE	OUTSTANDING LOANS
NONE			

29. ALL REAL AND PERSONAL PROPERTY OWNED BY SPOUSE AND DEPENDENTS VALUED IN EXCESS OF \$200 (List each item separately)

None by Rusty - MY SON.

ANYTHING SHIRLEY OWNS IN EXCESS (OR LESS) OF 200.<sup>00</sup> Will be AWARDED TO HER

30. ALL TRANSFERS OF PROPERTY INCLUDING CASH (by loan, gift, sale, etc.) THAT YOU HAVE MADE WITHIN THE LAST THREE YEARS (Items of \$200 or over)

DATE	AMOUNT	PROPERTY TRANSFERRED	TO WHOM
NOV 15 1974	550. per month	Money	Shirley ROGERS For Alimony
march 24 1974			Rusty Rogers son
Sept + Jan 1973 thru 1974	350. per semester	Money	
MARCH 16, 1976	650. <sup>00</sup>	Money	Corinne Rogers Graham - First Home Alimony For Release of Property Judgment

31. ARE YOU A PARTY IN ANY LAW SUIT NOW PENDING?

YES, GIVE DETAILS BELOW  NO

Yes - see Exhibit "J" AND EXHIBIT "K" AND ROGERS vs ROGERS JFD 75-7809 (DIST. CT. OKLA County)

32. ARE YOU A TRUSTEE, EXECUTOR, OR ADMINISTRATOR?

YES, GIVE DETAILS BELOW  NO

~~COMBETACK~~ TRUST - NOW DEFUNCT. See EXHIBIT "L" TRUSTEE FOR FRANK JONES Clover Energy Corp, 1800 St. James Suite 218, Houston Texas.

33. IS ANYONE HOLDING ANY MONIES ON YOUR BEHALF?

YES, GIVE DETAILS BELOW  NO

NO.

34. IS THERE ANY LIKELIHOOD YOU WILL RECEIVE AN INHERITANCE?  YES, FROM WHOM?  NO

NO

35. DO YOU RECEIVE, OR UNDER ANY CIRCUMSTANCES, EXPECT TO RECEIVE BENEFITS, FROM ANY ESTABLISHED TRUST, FROM A CLAIM FOR FROM A CLAIM FOR COMPENSATION OR DAMAGES, OR FROM A CONTINGENT OR FUTURE INTEREST IN PROPERTY OF ANY KIND?

YES, EXPLAIN BELOW

NO

With knowledge of the penalties for false statements provided by 18 United States Code 1001 (\$10,000 fine and/or five years imprisonment) and with knowledge that this financial statement is submitted by me to affect action by the Department of Justice, I certify that I believe the above statement is true and that it is a complete statement of all my income and assets, real and personal, whether held in my name or by any other.

March 26, 1976

DATE

Jessie H. Rogers

SIGNATURE

For the year January 1–December 31, 1974, or other taxable year beginning 1974, ending 19

Name (If joint return, give first names and initials of both) Last name COUNTY OF RESIDENCE Your social security number Present home address (Number and street, including apartment number, or rural route) Spouse's social security no. City, town or post office, State and ZIP code Occupation Spouse's

Filing Status (check only one) 1 Single 2 Married filing joint return (even if only one had income) 3 Married filing separately. If spouse is also filing give spouse's social security number in designated space above and enter full name here 4 Unmarried Head of Household (See instructions on page 5) 5 Widower with dependent child (Year spouse died > 19)

Exemptions Regular / 65 or over / Blind 6a Yourself 6b Spouse 6c First names of your dependent children who lived with you 6d Number of other dependents (from line 27) 7 Total exemptions claimed

8 Presidential Election Campaign Fund Do you wish to designate \$1 of your taxes for this fund? If joint return, does your spouse wish to designate \$1?

Table with 5 columns: Line number, Description, Amount, and Total. Rows include: 9 Wages, salaries, tips, and other employee compensation; 10a Dividends; 11 Interest income; 12 Income other than wages, dividends, and interest; 13 Total; 14 Adjustments to income; 15 Subtract line 14 from line 13 (adjusted gross income).

If you do not itemize deductions and line 15 is under \$10,000, find tax in Tables and enter on line 15. If you itemize deductions or line 15 is \$10,000 or more, go to line 44 to figure tax. CAUTION: If you have unearned income and can be claimed as a dependent on your parent's return, check here and see instructions on page 7.

Table with 5 columns: Line number, Description, Amount, and Total. Rows include: 16 Tax, check if from: Tax Tables 1-12, Tax Rate Schedule X, Y, or Z, Schedule D, Schedule G OR Form 4726; 17 Total credits; 18 Income tax; 19 Other taxes; 20 Total; 21a Total Federal income tax withheld; 21b 1974 estimated tax payments; 21c Amount paid with Form 4868; 21d Other payments; 22 Total.

Table with 5 columns: Line number, Description, Amount, and Total. Rows include: 23 If line 20 is larger than line 22, enter BALANCE DUE IRS; 24 If line 22 is larger than line 20, enter amount OVERPAID; 25 Amount of line 24 to be REFUNDED TO YOU; 25 Amount of line 24 to be credited on 1975 estimated tax.

Sign here Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which he has any knowledge. Your signature: [Signature] Preparer's signature (other than taxpayer): George F. Saunders Date: [Date]

Please attach Copy B of Forms W-2 here

Please attach Check or Money Order here

EXHIBIT "D"



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ANN McALLISTER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CASPER WEINBERGER, THE SECRETARY )  
 OF HEALTH, EDUCATION AND WELFARE, )  
 )  
 Defendant. )

74-C-488 FILED

MAY 13 1976 K

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

In this action plaintiff seeks reversal of the final decision of the defendant, the Secretary of Health, Education and Welfare, denying her application for a period of disability and disability insurance benefits under Sections 216(i) and 223 of the Social Security Act, 42 U.S.C., Sections 416(i) and 423. Jurisdiction is pursuant to 42 U.S.C., Section 405(g).

Plaintiff filed her application for a period of disability and disability insurance benefits on January 23, 1973 alleging that she became disabled in June of 1964 at age 53 by a number of impairments (Tr. 59-62). The application was denied initially and upon reconsideration by the Bureau of Disability Insurance of the Social Security Administration (Tr. 63, 66-67). Plaintiff requested a hearing. The Administrative Law Judge before whom plaintiff appeared found that plaintiff was not entitled to benefits (Tr. 7-11). This determination was affirmed by the Appeals Council (Tr. 4). Plaintiff brought this action.

An applicant for Social Security Disability Benefits has the burden of establishing that she was disabled on or before the date on which she last met the Act's statutory earnings requirements. McMillan vs. Gardner, 384 F.2d 596 (10th Cir. 1967). For purposes of Plaintiff's claim "disability" means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last a continuing period of not

less than 12 months. 42 U.S.C., Sections 416(i) and 423.

The Secretary's administrative decision in this case must be affirmed if supported by substantial evidence. 42 U.S.C., Section 405(g). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson vs. Perales, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971). Substantial evidence is sufficient evidence to justify, if the trial were to a jury, a refusal to direct a verdict where the conclusion sought to be drawn from the evidence is one of fact for the jury. Oldenburg vs. Clark, 489 F.2d 839 (10th Cir. 1974). Substantial evidence is less than the weight of the evidence. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported from substantial evidence. Consolo vs. Federal Maritime Commission, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). The elements of proof which should be considered in determining whether plaintiff has established a disability within the meaning of the Act are: 1) Objective medical facts; 2) medical opinions and diagnosis; 3) subjective evidence of pain and disability; and 4) background, education and work history and age. Hicks vs. Gardner, 393 F.2d 299 (4th Cir. 1968). If a claimant establishes that she is unable, by reason of a medically determined physical or mental impairment, to do her previous work, the burden of proof shifts to the Secretary to come forward with evidence which establishes the reasonable availability of work which the claimant is able to do. Kirby vs. Gardner, 369 F.2d 302 (10th Cir. 1966).

In conducting an administrative review it is the duty of the court to examine the facts contained in the administrative record, evaluate the conflicts, and make a determination therefrom whether the facts support the several elements which make up the ultimate administrative

decision. Herber Valley Milk Company vs. Butz, 503 F.2d 96 (10th Cir. 1974).

In this case the ultimate administrative decision is evidenced by the Administrative Law Judge's "Hearing Decision" and by the "Decision of the Appeals Council". At page 4 of "Hearing Decision" appears the following language:

"At the hearing, claimant related that she had not worked since 1961. Previously, she had worked as a receptionist and stenographer in an attorney's office, for Standard Oil Company in the Lease Records Section, and as a secretary for the Shell Oil Company.

"Subsequent to the hearing, additional evidence was submitted which suggests that claimant was not completely candid in her testimony, and that the possibility exists that she has not filed tax returns relating to self-employment income since 1961. In Exhibit 23 which consists of the Report of the National Institute of Allergy and Infectious Diseases, the history taken from claimant reveals that she was living alone and earning a living dealing in real estate. This history was taken from claimant in January of 1969, and does not suggest an individual who was disabled within the meaning of the Social Security Act or one who was not engaged in some work activity. The mere fact that claimant did not file an application for disability benefits until subsequent to the filing of an application for retirement benefits suggests that she did not consider herself disabled, as alleged".

The Administrative Judge made the following findings and decision (Tr. 10-11):

1. Claimant states that she was born April 3, 1911, completed the equivalent of two years of college, and had worked as a secretary, lease records clerk, legal stenographer, and a switchboard operator.
2. Claimant met the special earnings requirements of the Act for disability purposes in June of 1964, the alleged date of disability onset, and last met said earnings requirements on June 30, 1968.
3. In 1961 it was discovered that claimant suffered from leukopenia; however, such condition did not result in any serious or disabling infections on or prior to June 30, 1968.

4. Medical evidence does not establish that claimant has received treatment for or been significantly impaired in any way by chronic anxiety, depression, or a chronic and unstable back condition.
5. As recently as 1969 claimant was earning a living through real estate transactions.
6. The medical evidence does not demonstrate that claimant had an impairment which prevented her from engaging in work which was within her vocational competency at any time on or prior to June 30, 1968.
7. The claimant was not prevented from engaging in all substantial gainful activities for a continuous period beginning on or before June 30, 1968, which has lasted or could be expected to last for at least 12 months.
8. The claimant was not under a disability, as defined by the Social Security Act, as Amended, at any time prior to June 30, 1968.
9. The claimant was not prevented by any impairment or combination of impairments from engaging in all substantial gainful activity for any continuous period beginning on or before June 30, 1968, which continued to within 14 months of January, 1973.

Plaintiff was born on April 3, 1911. She had approximately two years of college and one year of law (Tr. 24). Plaintiff worked as a stenographer clerk and secretary (Tr. 25-27). In her application for disability insurance benefits plaintiff contended that she became disabled in June of 1964 by leukopenia (Tr. 59) and at time of filing her application for disability insurance benefits (January 23, 1973), she was still disabled.

There is a variety of medical reports pertaining to plaintiff's condition in the record. However, there is no medical evidence that the ailments complained of would keep her from working in a number of substantial gainful activities.

On this state of the record the court concludes that defendant's decision is supported by substantial evidence. Plaintiff testified to symptoms of total disability but these symptoms are not entirely borne

out by the medical evidence. The Secretary is not required to believe the testimony of plaintiff. Foss vs. Gardner, 363 F.2d 25 (8th Cir. 1966). Plaintiff possibly would be unable to return to her former types of employment. However, the record does not sustain her position that she is unable to engage in any substantial gainful activity.

On this record, the Secretary would be justified in finding that plaintiff had such a limited degree of impairment that she could engage in some type of substantial gainful activity. Accordingly, the Secretary's decision must be affirmed.

IT IS SO ORDERED.

Dated this 13<sup>th</sup> day of May, 1976.

Alan E. Barrow  
CHIEF JUDGE, UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MONSANTO COMPANY, a Corporation,  
Plaintiff,

vs.

ACOUSTICAL ENGINEERING COMPANY, a  
Corporation, LEONARD GAINES and  
JAMES O. CAMERON,

Defendants.

FILED

MAY 13 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. Civil 69-C-167

ORDER DISMISSING CAUSE OF ACTION OF MONSANTO COMPANY, A  
CORPORATION, PLAINTIFF, AGAINST DEFENDANT, LEONARD GAINES,  
WITH PREJUDICE AND WITH COSTS TO THE PLAINTIFF

On Joint Application and Stipulation of the Plaintiff, Monsanto Company,  
a Corporation, and the Defendant, Leonard Gaines, it appearing to the Court  
that said parties have entered into a settlement of the controversy between  
them, and Plaintiff has received payment in the amount of said settlement;

IT IS BY THE COURT HEREBY ORDERED that the cause of action of the  
Plaintiff, Monsanto Company, a Corporation, against the Defendant, Leonard  
Gaines, be and the same is hereby dismissed with prejudice and with costs to  
the Plaintiff.

Dated at Tulsa, Oklahoma, this 13 day of <sup>May</sup>~~March~~, 1976.

*Allen E. Barrow*

ALLEN E. BARROW  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

KENNETH RAY CASTLEBERRY, )  
 )  
 Petitioner, )  
 )  
 vs. ) No. 75-C-422-C  
 )  
 RICHARD CRISP, Warden, )  
 Oklahoma State Penitentiary, )  
 McAlester, Oklahoma, )  
 )  
 Respondent. )

FILED

MAY 6 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Court has before it for consideration a petition for Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2254 by Kenneth Ray Castleberry. Petitioner attacks the validity of the judgment and sentence rendered by the District Court of Tulsa County, State of Oklahoma, in Case Nos. CRF-72-359, CRF-72-360 and CRF-72-361. After a trial by jury, petitioner was found guilty as to each charge of the crime of murder and his punishment was fixed at confinement in the state penitentiary for life as to each charge. The judgment and sentence were affirmed on direct appeal, Castleberry v. State, 522 P.2d 257 (Okla. Cr. 1974). Petitioner subsequently appealed to the United States Supreme Court which denied certiorari. Castleberry v. State, 419 U.S. 1079 (1974).

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

- "1. [T]he State Court's admission of certain incriminatory statements made by the petitioner were procured in violation of his Fifth Amendment privilege against self-incrimination and thereby denied petitioner due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

- "2. [P]etitioner was denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by the prosecution's failure to stipulate to the admissibility of favorable polygraph results for the limited purpose of showing that incriminatory statements made by petitioner were procured in violation of his Fifth Amendment privilege against self-incrimination.
- "3. [T]he prosecution's failure to produce evidence favorable to the accused violated petitioner's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution."

On March 19, 1976, oral arguments were presented in regard to petitioner's claims. At that time Mr. Ron Mook, on behalf of petitioner, stated that he considered "the question of polygraph at this time moot," and presented no arguments going to this issue. Based upon the Court's having determined that petitioner's second claim in regard to the granting of Habeas Corpus relief based upon admissibility of polygraph results is without merit, this contention will not be given further consideration.

Petitioner alleges in his third claim, as stated, that the prosecution's failure to produce evidence favorable to the accused violated petitioner's right to due process of law. Based upon a thorough examination of the briefs filed herein, a reading of the transcript of trial and hearing on motion for new trial and the law applicable to the production of exculpatory evidence, the Court has determined that petitioner's contention in this regard merits further consideration.

Petitioner asserts that the prosecution failed to provide the defense exculpatory information indicating someone other than the defendant may have committed the crime. From an examination of the entire transcript it would appear that prior to trial the police had a statement, probably written but unsigned, by one Michael Roger Lee Cozart. According to Cozart's testimony at the Motion for New Trial, prior to trial he told the police that on the evening of the day the bodies were discovered, February

16, 1972, he saw one Jackie Dean Tandy in front of Tandy's residence, which was a few blocks from the murder scene, crying and shaking. In addition, Cozart stated that Tandy had blood on his clothing. According to the affidavit of the police officer who interviewed Cozart, attached to the Supplemental Response filed herein, Cozart did not make any statement in regard to seeing blood. Since Cozart indicated under oath that he made such a statement, this question would appear to require an evidentiary hearing.

In addition, evidence was presented at the Motion for New Trial which indicates that one Larry Lowther telephoned the police in regard to his suspicions that Tandy had committed the murders. Lowther was with Cozart on the evening of February 16th, 1972, and testified he also saw a brown spot on Tandy's pants that looked like blood and that Tandy had a knife in his boot. Lowther further stated that Tandy was shaking badly and acting suspiciously. The police not only apparently had a record of Lowther's phone call, but Lowther accompanied Cozart to the police station. The record does not reflect the content of any discussions Lowther may have had with the police.

In addition one Joyce Anglen, who lived next door to Tandy, observed Tandy acting strangely and shaking, and instructed her husband to call the police and tell them she thought Tandy had committed the crime. Her husband did call the police and apparently informed them of same. Further, Mrs. Anglen talked to the police the next day in her back yard concerning her suspicions. Presumably the police made some record of this conversation. Mrs. Anglen further stated that "as a result of the conversation had with" the police she helped Tandy's wife look for a knife that was apparently missing from the Tandy home and never found. The police, therefore, likely have some reports in regard to the missing knife. (Evidence presented at trial indicated that the murder weapon was a knife. No knife was produced at trial.) The evening of February <sup>16</sup>15, 1972 the police arrested Tandy presumably

based upon probable cause to believe he committed the murders. It appears from the testimony at the Motion for New Trial that the police also had a written statement by Tandy. He was released shortly thereafter.

At the hearing on the motion for new trial, the defense called two additional witnesses. At the time of trial the police did not know of these witnesses, but had the defense been given the initial information in regard to Tandy, it may be presumed they could have located these additional witnesses for trial, since they were able to do so for the hearing on the motion for new trial. Jimmy Lee Mize testified he saw Tandy in January or February at Tandy's residence a few blocks from the murder scene and that Tandy had blood on his clothes from the knees down and on his boots. Mize was not allowed to testify in regard to a statement allegedly made by Tandy because Oklahoma did not recognize statements against penal interest as an exception to the hearsay rule. An offer of proof was made, however, to the effect that Tandy told Mize's father that he had been at the Castleberry house to "hit" it and got in some trouble, and Tandy said he needed to get out of town. The father of Jimmy Lee Mize, James Martin Mize, testified that Tandy appeared the "day before the news broke on Castleberry" and that Tandy had blood on him and he said he was in trouble and needed to get out of town.

None of the above information was made available to the defense at time of trial.

The United States Supreme Court has made it clear that the prosecution's failure to disclose evidence materially favorable to the defense raises a due process issue of constitutional dimensions, properly the subject of a petition for habeas corpus. Simos v. Gray, 356 F.Supp. 265 (E.D. Wisc. 1973). In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Court declared:

"We now hold that the suppression by the prosecution of evidence favorable to an

accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Clearly the rationale of Brady focuses not on misconduct of the prosecutor but on harm to the defendant. As noted by the court in Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967), the State's facilities for discovering evidence are usually far superior to the defendant's.

"This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government [or State] aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the Constitution has been violated. The concern is not that law enforcers are breaking the law but that innocent people may be convicted." Levin v. Clark, supra.

There is, of course, no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1971). Brady does not sanction a "fishing expedition." United States v. Burnett, D.C. Super. Ct., Cr. No. 73588-73, April 23, 1974. It does not require "the prosecution to prepare the case for the defense." United States v. Gleason, 265 F.Supp. 880 (S.D.N.Y. 1967). Nor can the accused search the prosecutor's files for anything potentially favorable. United States v. Washington, 463 F.2d 904 (D.C. Cir. 1972).

A prerequisite to relief for the nondisclosure of required information is that the defense did not have independent knowledge of and access to the evidence in question. Smith v. United States, 375 F.Supp. 1244 (E.D. Va. 1974); Rosenberg v. United States, 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1958); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965). An examination of the record in the case at bar indicates that although the names of Mike Cozart, Larry Lowther and Joyce Anglen's husband were endorsed by the State on the information, Mike Cozart refused to talk with defense counsel, the Anglens had moved and

left no forwarding address, and defense counsel were similarly unable to locate Larry Lowther. Therefore, not only was the defense not given any indication of the potential significance of these witnesses, but the efforts of defense counsel to discover on their own the content of their possible testimony was fruitless. In Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968), the State contended it met its duty when it revealed a witness' name and address to the defendant's attorney before the trial and by subpoena produced her at trial. But the court noted the attorney had not been given a hint as to the exculpatory nature of the witness' possible testimony and the court held:

"A defense lawyer cannot be expected to assume that a witness subpoenaed by the State, even if not called to testify, has evidence favorable to the defense."

Furthermore, as recognized in United States v. Poole, 379 F.2d 645 (7th Cir. 1967), even if defense counsel might have been more diligent, the defendant should not suffer for the mistakes of his counsel.

To make out a case under Brady, as stated by the court in Lewis v. State, 304 F.Supp. 116 (W.D. Okla. 1969), petitioner must state facts showing:

- "(1) Evidence which is favorable to him;
- (2) Such evidence was in the possession of the prosecution at some time during petitioner's trial;
- (3) The evidence was suppressed and not made available to the petitioner on his request therefor, and;
- (4) The evidence was material either to the issue of Petitioner's guilt or punishment."

While the courts in Brady and Lewis considered suppression after a request, more recent federal court decisions have required disclosure even though defense counsel did not request it. Smith v. United States, supra; Simos v. Gray, supra; United States v. Poole, supra. The decisions reflect the evolving belief that a criminal trial should be more a quest for truth than a sporting event where counsel's oversight is fatal. Giles

v. Maryland, 386 U.S. 66, 87 S.Ct. 783, 17 L.Ed.2d 737 (1967) (Fortas, J., concurring); Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287 (1967); Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966). In the case at bar, the Court notes that petitioner asserts that "timely pre-trial motions were filed in the trial court to require the prosecution to provide evidence, under state law, especially that which would tend to negate guilt and upon the prosecution's statements that no such evidence existed the case proceeded to trial." Respondent does not contest this allegation. As noted by Justice Marshall in the dissent in Moore v. Illinois, supra, "a motion for extensive discovery places the prosecution on notice that the defense wishes to see all statements by any witness that might be exculpatory. The motion serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files." United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968).

The issue of intentional versus unintentional suppression adds another variable to the Brady question. Petitioner alleges that the failure to disclose certain exculpatory evidence known by the prosecution was not an omission by the state, but an affirmative misrepresentation when in response to a defense request to produce any and all exculpatory evidence in his possession or control, the prosecutor stated: "All of the evidence I have shows that he is guilty, your Honor." The courts in United States v. Keogh, supra; Kyle v. United States 297 F.2d 507 (2nd Cir. 1961); Grant v. Alldredge, 498 F.2d 326 (2nd Cir. 1974) and others, suggest that the burden on the criminal defendant to demonstrate prejudice resulting from the non-disclosure of evidence in the government's possession should be less where it is found that the government was negligent or has deliberately suppressed requested information. Smith v. United States, supra. In United States v. Harris, 462 F.2d 1033 (10th Cir. 1972) the Tenth Circuit stated:

"In cases involving the deliberate suppression of exculpatory evidence the courts will not inquire into the elusive question of actual prejudice affecting the result of a criminal prosecution. But where . . . the denied evidence results from what might be termed unintentional and passive (though not excusable) nondisclosure a different test is indicated. The test must be whether the trial was merely imperfect or was unacceptably unfair."

While it is relevant to determine whether defense counsel had independent knowledge of the evidence, whether a request was made, and whether the evidence was intentionally or unintentionally withheld, the basic test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial. As stated by the court in United States v. Hibler, 463 F.2d 455 (9th Cir. 1972):

"That defense counsel did not specifically request the information, that a 'diligent' defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process can be denied by failure to disclose alone."

Courts have further been faced with determining whether the information suppressed is "favorable" and "material" within the meaning of Brady. As stated by the court in Levin v. Clark, supra:

"The question is what kinds of evidence must the prosecutor reveal? Various courts have talked about 'favorable' evidence, 'material' evidence, 'pertinent facts to (the) defense,' 'information impinging on a vital area in (the) defense,' evidence vital 'to the accused person in planning and conducting their defense,' and 'evidence that may reasonably be considered admissible and useful to the defense.'"

The court in Levin then held that without excluding any of these relevant considerations, it would focus upon the ultimate possibility of harm to the defendant -- the possibility of erroneous conviction -- and the standard would be in terms of whether the evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt." In Shuler v. Wainwright, 491 F.2d

1213 (5th Cir. 1972) the court, quoting from United States v. Miller, 411 F.2d 825 (2nd Cir. 1969) stated:

"The test, however, is . . . whether . . . there was a significant chance that this added item, developed by a skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

See also United States v. Rosner, 516 F.2d 269 (2nd Cir. 1975) and United States v. Morell, 524 F.2d 550 (2nd Cir. 1975). The court in Smith v. United States, supra, determined that "the question is whether, considering the use to which the undisclosed evidence might have been put, there is a reasonable possibility that such use could have affected the result reached at trial." According to the court in United States v. Hibler, 463 F.2d 455 (9th Cir. 1972), "the test is whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial." The test to be applied according to the court in United States v. Marrero, 516 F.2d 12 (7th Cir. 1975), is simply whether the accused was insured of and accorded the genuine fairness to which he was entitled during the progress of the trial. In United States v. Harris, 462 F.2d 1033 (10th Cir. 1972), the Tenth Circuit similarly stated that "the test must be whether the trial was merely imperfect or unacceptably unfair." Several courts have recognized the possibility that "useful" or helpful" information may be sufficient to meet the test of "materially favorable". Smith v. United States, supra; Simos v. Gray, supra. Furthermore, courts have recognized that the requirement of materiality should not be narrowly construed. As stated by Justice Fortas in the concurring opinion in Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1966):

"No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

See also Simos v. Gray, supra. The court in Levin v. Clark,

supra, in recognizing the difficulty of determining the effect the suppressed information might have had on a jury, stated:

"This standard requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial -- whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically. In Griffin v. United States [supra] the Supreme Court directed us to consider 'whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.'"

Courts have also grappled with the meaning of the word "evidence" as used in Brady. Justice Fortas noted in Giles v. Maryland, supra, that the State may not be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial. Similarly in United States v. Gleason, 265 F.Supp. 880 (S.D.N.Y. 1967) the court held that "the prosecution's duty of disclosure as affirmed in Brady, cannot be limited to materials or information demonstrated in advance to be 'competent evidence.'" As noted in Smith v. United States, supra, "it may be sufficient that the undisclosed information, though not admissible into evidence, would have been somehow useful to the defense in structuring its case."

The Court recognizes that in a case where several eye witnesses identify a defendant as the perpetrator of a crime, or where the physical evidence clearly points to the guilt of a defendant, evidence indicating that someone else may have committed the crime would have to be almost conclusive in order to be material. However, in a case where the evidence pointing to guilt is more questionable, there is a greater likelihood that if evidence had been presented which indicated another individual

committed the crime, the jury might have entertained a reasonable doubt. In the case at bar, the Court notes that there was almost a total lack of physical evidence to indicate defendant's guilt. (Evidence that a substance which might have been blood was found under two of defendant's fingernails which could not be identified as animal or human was certainly not substantial.) The most damaging evidence presented was defendant's confession which according to petitioner was psychologically coerced. (The Court does not rule on the voluntariness of the confession at this time.) The Court notes that based upon an examination of the evidence presented at trial and at the hearing on the motion for new trial, Judge Brett stated in the dissent in Castleberry v. State, 522 P.2d 257 (Okla. Cr. 1974):

"[T]here was more testimony at [the hearing on motion for new trial] implicating one Jackie Dean Tandy with the commission of these homicides than was offered against the defendant at his trial."

It is clear that exculpatory evidence could have played a vital part in the defense presented and the ultimate determination of the jury. Absent the presentation of any exculpatory evidence on behalf of the defendant, the evidence presented by the State could have taken on greater significance in the minds of the jury.

In Grant v. Alldredge, 498 F.2d 376 (2nd Cir. 1974), the court ruled that suppression of information which might have led the defense counsel to evidence showing someone else may have committed the crime deprived defendant of his constitutional rights. In Grant, the prosecutor failed to inform defense counsel that an eye witness to the robbery initially identified a man named Walsh from a picture "spread" as the perpetrator of the crime. Pursuant to a defense request for all exculpatory evidence, the prosecutor had informed defense counsel that the witness was unable to identify the defendant Grant from a spread of fourteen pictures, but failed to inform the defense that Walsh's picture had been selected as the one most resembling the robber. (The court noted that the FBI must have known that Walsh's

physique approximated the robber's because his height and weight had been marked on the back of the photo.) In Grant the government contended, as does the State in the case at bar, that the information was not given the defense "because the investigators were satisfied to 'wash out' Walsh as a suspect." After trial it was learned that city police had previously questioned Walsh in regard to the robbery because his car fit the description of a car in the vicinity of the robbery. Although the court did not reach the issue of whether the federal authorities were responsible for knowledge contained in the files of the local police agency the court held:

"A full disclosure could have, indeed probably would have, led to defense discovery of all the information involving Walsh. That information, in the aggregate, could then have been used by Grant's attorney to support a theory that it was likely that Walsh had committed the crime. Such a defense, it seems to us, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

It may be impractical and unfair to leave to the prosecution the determination of whether evidence is materially favorable to an accused. Several courts have recognized both the need for impartial judicial determination of whether the evidence is exculpatory as well as the burden such a procedure places on the courts, and have established procedures to meet the need. For example, the court in United States v. Eley, 335 F.Supp. 353 (N.D.Ga. 1972), set upon the following procedure for the Atlanta Division of the Northern District of Georgia:

- "(1) The United States Attorney, upon request of an accused, shall permit the accused to inspect and copy any information in the possession of the prosecution which might be considered helpful to the accused's case.
- (2) If the United States Attorney entertains a genuine doubt as to whether he must disclose certain information or questions the necessity of granting an accused pretrial discovery of certain information which must be disclosed, he may withhold such information from the accused. If he chooses to withhold such information,

he shall notify the accused of the reason for this action and generally describe the information in question.

- (3) If the accused, upon receipt of such notice from the United States Attorney, nevertheless desires discovery of such information, he shall so move in this court within ten days after arraignment or waiver thereof. . . . Should the accused so move, the court will order the prosecution to submit the information in question for in camera inspection and proceed to dispose of the controversy on its merits."

Subsequent to the oral arguments presented in this Court March 19, 1976, petitioner and respondent were given an opportunity to further brief the Brady issue. In the Supplemental Response filed by the Attorney General of Oklahoma on April 14, 1976, respondent asserts that petitioner's allegation in regard to the suppression of exculpatory evidence was not presented to the state appellate courts.

From a reading of the opinion rendered by the Oklahoma Court of Criminal Appeals, Castleberry v. State, 522 P.2d 257 (Okla. Cr. 1974), it would appear that the court did not deal directly with the constitutional mandate of Brady but rather solely considered whether the statements taken during the investigation by police authorities were discoverable or fell within the category of 'work product' and were therefore not within the defendant's right of discovery as measured by State law. The court was obviously faced with a monumental task in reviewing all the evidence, considering the extensive briefs, and ruling on the numerous propositions of error. This Court notes that petitioner raised eight propositions of error, and that reference to Brady was only made in subdivision E of the eighth proposition of error entitled: "An accumulation of irregularities prejudicial to defendant occurring at trial and during defendant's hearing on his motion for new trial, denied this defendant a fair and impartial trial and due process." Of the 188-page brief filed by appellant, only pages 183 through 188 touched on the issue here considered.

While this Court recognizes that 22 O.S.1971 § 749 does not provide for discovery of statements unless they are sworn statements, and further that the court in State v. Truesdell, 493 P.2d 1134 (Okla. Cr. 1972) provided that an accused is not entitled to discovery and inspection of unsworn statements of a prosecution witness in the possession of the State, such statute and the "work product" discovery rule cannot, of course, be applied in a manner which ameliorates a defendant's constitutional rights as propounded in Brady. Judge Brett in the dissenting opinion in Truesdell recognized that a defendant is not entitled to the "work product" of the prosecutor "unless such item, or items tends to negate the guilt of the accused." In Giles v. Maryland, supra, the Supreme Court sent the case back to the Maryland Court of Appeals for a determination of what the State knew at trial in comparison to the knowledge held by the defense. The evidence in issue was a police report which the trial judge had ruled was "work product" and therefore not producible under Maryland's Rules of Procedure. In remanding the case, the Supreme Court expressed confidence that the Maryland Court of Appeals would reverse as unconstitutional a conviction in a trial that included suppression of evidence materially favorable to the defense.

This Court recognizes that in regard to exhaustion of state remedies all that is required is that the state courts have a "fair opportunity" to consider a constitutional claim before federal habeas corpus is available. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); United States v. Damon, 496 F.2d 718 (2nd Cir. 1974). However, in light of the fact that the Brady issue appears to have been raised only in passing in the state court and since the case presents an important and vital constitutional question, it is the determination of the Court that the court of the State of Oklahoma should first have a clear opportunity to rule on the issue as requested by the Attorney General of the State of Oklahoma.

This Court adopts the reasoning in United States v. Rundle,  
332 F.Supp. 30 (E.D. Pa. 1971) wherein the court stated:

"In the present case . . . there has not yet been a substantial investment of Federal judicial resources in the consideration of relator's petition; [an evidentiary hearing not having been held] further, if relator's petition is promptly considered by . . . state courts, he will in no way be prejudiced, nor will consideration of his claim be unfairly delayed. Without holding that 28 U.S.C. § 2254 compels this Court to decline to exercise its jurisdiction for failure to exhaust state remedies, I conclude that dismissal of the present application without prejudice will favor the interest of comity with state courts, without causing a significant sacrifice of judicial economy, or unfairly delaying consideration of petitioner's claim on the merits."

It is likewise the determination of this Court that petitioner's petition for writ of habeas<sup>corpus</sup> is dismissed without prejudice in order to permit the proper review by the State court.

It is so Ordered this 6<sup>th</sup> day of May, 1976.

  
H. DALE COOK

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GRANADA ENTERPRISES, INC., ) No. 75-C-448-C  
 )  
 Defendant. )

**FILED**  
MAY 6 - 1976  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

NOW ON THIS 6<sup>TH</sup> day of May, 1976,

this matter coming on for consideration, the plaintiff, United States of America, appearing by and through its attorney, Kenneth P. Snoke, Assistant United States Attorney for the Northern District of Oklahoma, and the defendant, Granada Enterprises, Inc., appearing by and through its attorney, Frank M. Hagedorn, and it appearing that this is a suit based on a Note and for foreclosure of certain Financing Statements, and a Security Agreement, all securing said Note; and

It further appearing that due and legal personal service of summons was made upon the defendant, Granada Enterprises, Inc. on October 7, 1975, that said defendant filed its answer herein on December 15, 1975, and that, on April 13, 1976, at a pre-trial conference in the Court's chambers, the defendant confessed judgment in the case.

The Court, being fully advised, finds that the allegations and averments in the Complaint of the plaintiff filed herein are true and correct and that there is due and owing from the defendant, Granada Enterprises, Inc., to the plaintiff, United States of America, the sum of \$20,549.80, with interest accrued thereon in the sum of \$2,114.35 through April 18, 1975, and interest accruing thereafter at the rate of \$5.7083 per day.

The Court further finds that the plaintiff has a first and prior lien upon certain personal property described in the Complaint by virtue of a Security Agreement dated May 3, 1971, and certain

Financing Statements filed thereafter, given as security for the payment of the indebtedness, interest and costs, which personal property is described in the Complaint and listed in Exhibit "B" attached thereto.

The Court further finds that by assignment the plaintiff, United States of America, became the owner and holder of a Promissory Note (Exhibit "A" attached to the Complaint), Security Agreement (Exhibit "B" attached to the Complaint), Financing Statements (Exhibits "C", "D", "E", and "F" attached to the Complaint), all of which were originally executed in favor of the Fourth National Bank of Tulsa, Oklahoma.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT the plaintiff, United States of America, have and recover from the defendant Granada Enterprises, Inc., judgment in the amount of \$20,549.80 with interest accrued thereon in the sum of \$2,114.35 through April 18, 1975, and interest accruing thereafter at the rate of \$5.7083 per day, and for the cost of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon failure of the defendant Granada Enterprises, Inc., to satisfy the judgment of the plaintiff, United States of America, an order of sale shall issue to the United States Marshal for the Northern District of Oklahoma commanding him to levy upon, advertise and sell, according to law, with appraisal, the personal property herein above referred to as being listed in Exhibits "B", "C", "D", "E" and "F" attached to the Complaint, and to apply the proceeds of such sales of personal property as follows:

1. In payment of the costs of the sales and the cost of this action.

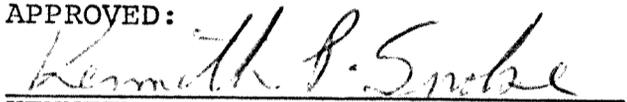
2. In payment to the plaintiff, United States of America, of the sum of \$20,549.80 with interest accrued thereon in the sum of \$2,114.35 through April 18, 1975, and interest accruing thereafter at the rate of \$5.7083 per day.

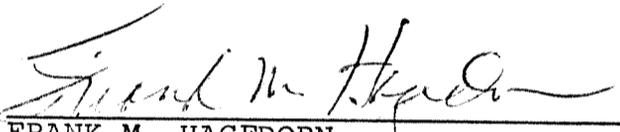
3. The residue, if any, to be paid to the Clerk of this Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the hereinabove described personal property be sold, with appraisement, and after such sale by virtue of this judgment and decree, the defendant, and all persons claiming under it since the filing of the Complaint herein, be and they are forever barred and foreclosed of and from any and every lien upon, right, title, interest, estate or equity in or to the real and personal property described herein.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
KENNETH P. SNOKE  
Assistant United States Attorney  
Attorney for Plaintiff  
United States of America

  
FRANK M. HAGEDORN  
Attorney for Defendant



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

ALFRED ALLEN LOWE, and THE )  
COMMITTEE ON EQUAL EMPLOYMENT )  
PRACTICES, )

Plaintiffs, )

vs. )

LEE WAY MOTOR FREIGHT, INC., )  
THE INTERNATIONAL BROTHER- )  
HOOD OF TEAMSTERS, CHAUFFEURS, )  
and WAREHOUSEMEN, and THE )  
TEAMSTERS UNION, LOCAL )  
NUMBER 523, )

Defendants. )

MAY 5 - 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 75-C-45-C

JUDGMENT

This action was initially brought by the plaintiff, Alfred Allen Lowe, against the defendants, Lee Way Motor Freight, Inc., and The International Brotherhood of Teamsters, Warehousemen, and Chauffeurs, alleging employment discrimination on the basis of race in violation of Title 42 U.S.C. § 2000e et seq. (1974), and Title 42 U.S.C. §§ 1981, 1983 (1974). The Complaint also charged violations of the 5th and 14th amendments to the Constitution of the United States. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201.

On March 6, 1975, plaintiff amended its Complaint and included The Committee on Equal Employment Practices as a party plaintiff and The Teamsters Union, Local Number 523 as a party defendant.

On April 21, 1975 by consent of the parties the Court dismissed the defendant International Brotherhood of Teamsters, Chauffeurs and Warehousemen.

On August 27, 1975, the Court held a pre-trial conference with the plaintiffs present by and through their counsel of record Messrs. Gerald E. Kamins and Darrell L. Bolton and defendant,

Lee Way Motor Freight, Inc., present by and through its counsel of record Messrs. Donald E. Hammer, Paul Scott Kelly, Jr., and Lloyd E. Owens and defendant Teamsters Union Local 523 present by and through its counsel of record Mr. Maynard I. Ungerman. At the pre-trial conference the parties stipulated that: 1) the Committee on Equal Employment Practices should be dismissed as a party plaintiff; 2) The Teamsters Union Local 523 should be dismissed as a party defendant; 3) the causes of action alleging violations of 42 U.S.C. §§ 1981 and 1983 should be dismissed. The parties further stipulated that plaintiff's only remaining cause of action was that brought under Title VII of the Civil Rights Act of 1964.

This case was tried to the Court on February 11, 1976. After the parties had presented all of the evidence they requested to submit written briefs in summation. The parties have now submitted briefs and proposed findings of fact and conclusions of law. The Court has perused the entire record. The case is ready for disposition.

#### FINDINGS OF FACT

Plaintiff, Alfred Allen Lowe, is a black male, born July 6, 1944, residing in Tulsa, Oklahoma. Defendant, Lee Way Motor Freight, Inc., (hereinafter, "defendant") is incorporated under the laws of the State of Oklahoma. Defendant is engaged in the commercial transportation of freight as a common carrier and is subject to the rules and regulations of the Interstate Commerce Commission and the Department of Transportation. At all times relevant herein, the defendant was an employer within the meaning of 42 U.S.C. § 2000e(b). Defendant's home office is located at Oklahoma City, Oklahoma. Defendant operates and maintains a terminal facility in Tulsa, Oklahoma.

On the 15th day of June, 1971 in Case No. 7787 plaintiff was found guilty by a jury in the United States District Court for the Central District of California of knowingly and unlawfully

selling, bartering, exchanging and giving away approximately 19 grams of cocaine in violation of Title 26 U.S.C. § 4705(a). On the 20th day of July 1971 plaintiff was sentenced to five (5) years imprisonment. (Defendant's Exhibit #31).

On June 26, 1972, in Case No. 10620, plaintiff was sentenced in the Central District of California to two (2) years imprisonment with the first six months of said sentence to be served in a jail-type institution and execution of the balance of the sentence suspended after a plea of guilty to the illegal distribution of narcotics in violation of Title 26 U.S.C. § 4704(a). (Defendant's Exhibit #31).

In 1973, prior to being employed as a "casual" by defendant, plaintiff graduated from Central Vo-Tech in Drumright, Oklahoma where he completed a course in the driving and maintenance of trucks.

Plaintiff was hired by defendant as a "casual" employee in June, 1973 and was assigned duties as a dock worker or city pick-up and delivery driver. A "casual" employee is an employee who is used to supplement a regular shift during periods of increased workload. A "casual" employee does not accrue seniority (Defendant's Exhibits Nos. 40 & 41).

Mr. J. A. Ball, a black, was employed by defendant as a regular city driver on June 4, 1973 prior to the employment of plaintiff as a "casual".

At the time of plaintiff's employment as a "casual", defendant was actively seeking black employees for positions as regular city drivers and as office employees. Plaintiff was told at various times by defendant's terminal manager in Tulsa, Mr. Jim Teegerstrom, that if plaintiff worked hard and compiled a good employment record he would be hired as a regular city driver. Teegerstrom had the authority to hire "casual" employees without approval of defendant's home office in Oklahoma City, Oklahoma. Applications for regular employees were reviewed by defendant at

its home office in Oklahoma City to determine whether or not the applicant met the standards and qualifications for the job sought. Plaintiff's application for regular employment was submitted to defendant's home office. After a background investigation was made on plaintiff, his application was rejected on July 19, 1973 for the reason that he had been convicted of a felony. (Defendant's Exhibit #4).

For some time prior to July 3, 1973, defendant had an established job qualification standard for a truck driving job to the effect that the applicant for such a job could not have had a felony conviction. This standard was established as a result of the defendant having uncovered a theft ring at its Oklahoma City terminal which involved employees who had felony convictions. In addition to the fear of cargo theft, the defendant established the "no-felony" rule for the reasons that;

- (a) truck drivers handled company funds,
- (b) convicted felons were subject to impeachment as a witness in accident or other litigation,
- (c) the defendant was subject to liability for negligent entrustment, and
- (d) convicted felons generally lacked moral character.

After being rejected for regular employment by defendant plaintiff was advised by Teegerstrom that plaintiff could not be hired as a regular employee but that if he continued to work hard his good record might overcome the defendant's policy of not hiring convicted felons. Teegerstrom also informed plaintiff that regulations of both the United States Department of Transportation and the defendant were subject to change and that the future may provide for a change so that plaintiff could be hired as a regular employee.

The opening in July, 1973 for which plaintiff was being considered was given to B. H. Rogers, a white, who had been working for defendant as a "casual" city driver since March of 1970.

After Mr. Rogers was employed, the next openings for regular city driving jobs were filled by the following persons: J. E. Ellis, a white, was hired on October 8, 1973; D. L. Howard, a white, was hired on November 12, 1973; G. W. Hunsucker, a white, was hired on February 21, 1974; Darnell Ebbs, a black, was hired on May 13, 1974.

There is no evidence in the record that during the period from July, 1973 to May 13, 1974, a position for regular city driver became available for which a black had applied and was qualified and was refused on the basis of his race and which position was then given to a white person. During this period the defendant actively sought qualified black regular employees but was unable to find such an employee until Ebbs was hired.

Defendant maintained production records to determine the productivity of its "casual" employees. Productivity was considered in hiring casual employees as regular employees, determining which "casual" was called first for available work, and which "casuals" were retained as employees. Plaintiff's productivity was generally high. During the months of January, 1974 through May, 1974 plaintiff worked a high percentage of the total "casual" hours worked. The percentage of minority hours worked increased from January, 1974 through May, 1974. (Defendant's Exhibits Nos. 42, 43, 43-A, 44, 45)

After May 13, 1974, the date on which Ebbs was hired as a regular employee, plaintiff began to show discontent and impatience as a result of not being hired as a regular. A confrontation between plaintiff and Donald Cox, defendant's Operations Manager, occurred on or about May 22, 1974, which Cox considered to be an act of insubordination. Cox informed plaintiff that he considered plaintiff's disposition unacceptable and that he considered plaintiff's conduct insubordination. Thereafter plaintiff's name was stricken from the list of available "casual" employees.

There is no evidence that defendant discriminated by hiring white employees who had been convicted of a felony and refusing to hire blacks who had been convicted of a felony. The evidence shows that defendant refused to hire felons whether they were white or black. (Defendant's Exhibit #3)

There is no evidence in this case which indicates that the defendant's "no-felony" rule has a racially disproportionate impact on blacks by disqualifying blacks at a greater rate than whites.

Plaintiff filed several complaints with the Oklahoma Human Rights Commission. (Defendant's Exhibits Nos. 9, 12 & 48) Plaintiff alleged employment discrimination on the basis of race and retaliation by defendant for pursuing his remedies with the Oklahoma Human Rights Commission and the Equal Employment Opportunity Commission. Defendant was notified of the plaintiff's complaints by the Oklahoma Human Rights Commission in a letter dated May 10, 1974, (Defendant's Exhibits Nos. 11 & 48), and a letter dated May 28, 1974. (Defendant's Exhibits Nos. 8, 10, & 13) Defendant was notified of plaintiff's complaints by the Equal Employment Opportunity Commission on two different occasions. (Defendant's Exhibits Nos. 6 & 7) Defendant's Exhibit #6 is dated 3/12/74 and signed by Tom E. Robles, E.E.O.C. District Director. However, defendant's Exhibit #6 states that the discrimination began on "4/18/74" more than one month subsequent to the notification by the E.E.O.C. Defendant's Exhibit #7 is dated "5/30/74" which is clearly after defendant had stricken plaintiff's name from its roster of available "casual" employees. The evidence is conflicting as to whether any of defendant's employees at the Tulsa Terminal were aware of plaintiff's complaints to the Oklahoma Civil Rights Commission or the E.E.O.C. prior to the decision to strike plaintiff's name from the "casual" roster. However, the weight of the evidence is sufficient to support a finding that defendant did

not delete plaintiff's name from its "casual" roster in retaliation for having filed complaints with the Oklahoma Human Rights Commission or the E.E.O.C. The weight of the evidence supports the conclusion that plaintiff was deleted from the defendant's "casual" roster because plaintiff became insubordinate and belligerent after Ebbs was given the position which plaintiff considered to be his own position. Therefore, the Court finds that defendant took no retaliatory action against plaintiff as a result of plaintiff's complaints to the Oklahoma Human Rights Commission and the E.E.O.C.

Plaintiff received a right-to-sue letter dated January 9, 1975 from the E.E.O.C.

Plaintiff failed to list traffic violations on his application for employment as required by 49 C.F.R. § 391.21(b)(8) when in fact plaintiff had been convicted of speeding on June 15, 1972 and June 16, 1972. (Defendant's Exhibits Nos. 4 & 28) Plaintiff was not qualified for employment with defendant as he failed to satisfy the requirements of 49 C.F.R. § 391.21(b)(8).

#### CONCLUSIONS OF LAW

The Court has jurisdiction pursuant to 42 U.S.C. § 2000e 5(f)(3).

This case is governed by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) Title 42 U.S.C. § 2000e-2 provides in pertinent part:

"(a) It shall be an unlawful employment practice for an employer --  
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or  
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

The Supreme Court of the United States in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed 2d 668, 677 (1973) has set out the criteria which may be used in determining whether the plaintiff has established a prima facie case of racial discrimination.

"This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Plaintiff has not satisfied two of the criteria which were announced in Green in that plaintiff has failed to show that he was qualified for employment as a regular city driver and that after he was rejected the defendant continued to seek applicants from persons of complainant's qualifications. Plaintiff was not qualified for employment as a regular city driver as he had been convicted of a felony. While the requirement of no felony convictions is a requirement of the defendant only, there is no evidence in this case which indicates that the "no-felony" rule has a disproportionate impact and functions to exclude one race from employment opportunities to a greater extent than any other race. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, (1st Cir. 1974), cert. denied 421 U.S. 910 (1974); Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973). The evidence presented by defendant supports the conclusion that a proportionate number of whites are excluded from employment opportunities with the defendant due to its "no-felony" rule.

The weight of the evidence presented in this case is sufficient to conclude that defendant's stated reason for rejecting plaintiff's application for regular employment was not in fact a pretext for racial discrimination in employment practices.

McDonnell Douglas v. Green, supra. The "no-felony" rule bears a reasonable relationship to the plaintiff's job performance as a regular city driver. The Court has examined the evidence and finds that the preemployment standard of no-felony convictions is job related. While there is no evidence which indicates that the "no-felony" rule was inherently discriminatory in the past, where it has a business justification as it has in the type of business in which the defendant is engaged, it is valid. Spurlock v. United Airlines, Inc. 475 F.2d 216 (10th Cir. 1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

The rules of the United States Department of Transportation, Federal Highway Administration, provide in part:

"(a) Except as provided in Subpart G of this part, a person shall not drive a motor vehicle unless he has completed and furnished the motor carrier that employs him with an application for employment that meets the requirements of paragraph (b) of this section.

(b) The application for employment shall be made on a form furnished by the motor carrier. Each application form must be completed by the applicant, must be signed by him, and must contain the following information:

. . . .  
(8) A list of all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the 3 years preceding the date the application is submitted; . . . ."  
49 C.F.R. § 391.21 (Amended Nov. 13, 1970)

Plaintiff failed to list the violations of June 15, 1972 and June 16, 1972 on his application and was therefore not qualified under rules of the United States Department of Transportation.

Title 42 U.S.C. § 2000e-3(a) provides in pertinent part:

"(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The evidence is clear that defendant rejected plaintiff's application for employment as a regular city driver months before

plaintiff filed a complaint with the Oklahoma Human Rights Commission or the Equal Employment Opportunity Commission. The only question raised by the evidence is whether plaintiff's name was stricken from the "casual" roster because he had filed a complaint alleging racial discrimination. As stated herein defendant's officials in Oklahoma City were informed of a complaint on or about May 10, 1974. Defendant's officials at the Tulsa terminal testified that they did not know of any such complaint until after plaintiff was stricken from the "casual" roster. Plaintiff testified that Teegerstrom confronted him about the complaint well before May 22, 1974, the date on which plaintiff's name was stricken from the "casual" roster. Defendant's Exhibit #45 indicates that during the second week of May and thereafter plaintiff was employed considerably less than he had been employed during the first week in May and during the month of April of 1974. (Defendant's Exhibit #44) A sharp decline in the number of hours worked by plaintiff is shown to have occurred about May 10, 1974. Yet defendant's Exhibit #45 shows that plaintiff worked until approximately May 22, 1974 when on this date plaintiff confronted Donald Cox, defendant's operation manager, in an insubordinate manner.

Both Teegerstrom and Cox testified that plaintiff's name was stricken from the "casual" roster because of his attitude after Ebbs was hired as a regular employee and because plaintiff was insubordinate. After considering the testimony and demeanor of the witnesses and all of the evidence presented at trial, it is the conclusion of the Court that plaintiff was finally discharged as an employee of defendant because of his attitude, declining productivity and insubordination and not because plaintiff had filed a complaint with the Oklahoma Human Rights Commission or the E.E.O.C. Therefore, defendant did not violate the provisions of Title 42 U.S.C. § 2000e-3(a) in striking plaintiff from its "casual" roster.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the defendant was not refused employment on the basis of his race.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that no violation of Title 42 U.S.C. § 2000e-2 was committed by the defendant, Lee Way Motor Freight, Inc. in failing to employ plaintiff, Alfred Allen Lowe, as a regular city driver.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that no violation of Title 42 U.S.C. § 2000e-3 was committed by the defendant, Lee Way Motor Freight, Inc. in failing to retain the plaintiff, Alfred Allen Lowe, as a "casual" employee.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that no attorney fee is awarded to either party to this action and that each party suffer his or its own costs of this action.

IT IS FINALLY ORDERED that judgment be entered in favor of the defendant and against the plaintiff on this 5<sup>th</sup> day of May, 1976.



H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**  
NORTHERN DISTRICT OF OKLAHOMA

MAY 4 - 1976

United States of America, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FRANK A. CROWN, )  
 )  
Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CIVIL NO. 76-C-195-C

*Notice of*

VOLUNTARY/DISMISSAL

COMES Now the Petitioner, United States of America,  
and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Pro-  
cedure, hereby voluntarily dismisses this action, and hereby  
gives notice of said dismissal.

This dismissal is with the consent and knowledge of  
the patient, Frank A. Crown, who, after receiving additional in-  
formation about the Title III N.A.R.A. program, has decided to  
withdraw his request to be handled under the program.

UNITED STATES OF AMERICA

NATHAN G. GRAHAM  
United States Attorney

*Kenneth P. Snoke*

KENNETH P. SNOKE  
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy  
of the foregoing pleading was served on each  
of the parties hereto by mailing the same to  
them or to their attorneys of record on the  
4<sup>th</sup> day of May, 1976.

*Kenneth P. Snoke*  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 4 - 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

COMMERCIAL UNION INSURANCE )  
COMPANY, an insurance )  
corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SAM BOOKMAN, d/b/a )  
SAM BOOKMAN & ASSOCIATES, )  
 )  
Defendant. )

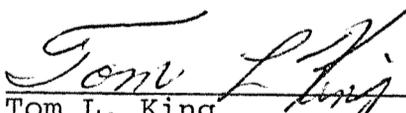
No. 75-C-425-C ✓

STIPULATION FOR DISMISSAL

Comes now the plaintiff through its attorneys of record, King & Roberts, joining with the defendant through its attorneys of record, Donovan, Freese & March, and submit the following Stipulation to the Court for an Order of Dismissal of the above captioned cause.

It is stipulated and agreed by and between the parties that the Court may enter an Order dismissing the above captioned cause with prejudice against the filing of a future action thereon, for the reason that on the 4th day of March, 1976, the parties entered into a compromise settlement whereby the defendant paid to the plaintiff the sum of \$24,726.15 and obtained a full, final, and complete release of any and all claims of the plaintiff.

KING & ROBERTS  
2301 First National Center  
Oklahoma City, Oklahoma 73102

  
\_\_\_\_\_  
Tom L. King  
Attorneys for Plaintiff

DONOVAN, FREESE & MARCH  
100 Mid-Continent Building  
Tulsa, Oklahoma 74103

  
\_\_\_\_\_  
John M. Freese  
Attorneys for Defendant

FILED

MAY 5 - 1976

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

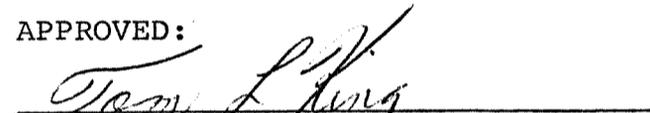
Now on this 5<sup>th</sup> day of May, 1976, the above styled and numbered cause coming on for hearing before the undersigned, Judge of the United States District Court in and for the Northern District of Oklahoma, upon the Stipulation for Dismissal of the plaintiff and defendant herein; and the Court having examined the pleadings and being well and fully advised in the premises, is of the opinion that said cause should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the above styled and numbered cause be and the same is hereby dismissed with prejudice.



H. DALE COOK, U. S. DISTRICT JUDGE

APPROVED:

  
Tom L. King  
Attorneys for Plaintiff  
John M. Freese  
Attorney for Defendant