

DATE 4-30-93

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

FILED

APR 30 1993

EARL COLEMAN WHITE,)
)
 Plaintiff,)
)
 vs.)
)
 CITADEL MANAGEMENT COMPANY,)
)
 Defendant.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 91-C-752-E

ORDER and JUDGMENT

There being no response or objection filed to the Defendant's motion for summary judgment and more than ten (10) days having passed since the filing of the Defendant's motion and no extension of time having been sought by Plaintiff, the Court, pursuant to Local Rule 15(a), as amended effective May 1, 1988, concludes that Plaintiff has therefore waived any objection or opposition to the Defendant's motion. See Woods Constr. Co. v. Atlas Chemical Indus. Inc., 337 F.2d 888, 890 (10th Cir. 1964). The court therefore will address the merits of the Defendant's motion.

Although the relief contemplated by Federal Rule of Civil Procedure 56 is drastic and should be applied with caution so that litigants will have an opportunity for trial on bona fide factual disputes¹, summary judgment shall be rendered if the pleadings and other documents on file with the Court show that there is no genuine issue as to any material fact and that the moving party is

¹ Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir. 1975); Jones v. Nelson, 484 F.2d 1165, 1168 (10th Cir. 1973); Machinery Center, Inc. v. Anchor National Life Insurance Co., 434 F.2d 1, 6 (10th Cir. 1970).

entitled to judgment as a matter of law. In a case such as this, where Plaintiff has utterly failed to submit any evidence to the Court to contradict the allegations of the Defendant, the last two sentences of subsection (e) of Fed.R.Civ.Proc. 56 must be considered:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Advisory Committee Notes concerning that subsection, and following that rule, provide the following reasons for the addition of the above two sentences:

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some, but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation, Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded" and not suppositious, conclusory, or ultimate. [Citations to Third Circuit Cases omitted].

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice and Procedure 1235.1 (Wright ed. 1958).

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The record establishes in this case that Plaintiff has submitted no evidence beyond the pleadings and that Defendant has demonstrated beyond a reasonable doubt that no genuine issue as to any material fact remains.

The undisputed facts are as follows. Plaintiff's action arises out of an alleged employment relationship whereby Plaintiff acted as a resident manager of Shadow Wood apartments on behalf of Defendant Citadel. Plaintiff was terminated by Defendant. Plaintiff asserts the following three claims against Defendant: (1) termination in violation of Title VII of the Civil Rights Act of 1964, (2) termination in breach of employment contract, and (3) termination in violation of an Oklahoma public policy. Defendant contends that Plaintiff was dismissed for the legitimate business purpose of failing to follow company policy, and not because of race. Defendant disputes whether an employment contract ever existed, and claims that Plaintiff was acting as an employee-at-will.

Plaintiff acted as a resident manager at Shadow Wood from July 7, 1989 to September 25, 1989. Defendant terminated Plaintiff for failing to increase the occupancy levels at Shadow Wood and for violating Citadel's rules and policies. When Plaintiff was hired, sixteen (16) vacancies existed at Shadow Wood. When Plaintiff was terminated, more than sixteen (16) vacancies existed. Specifically, Plaintiff, without authority and in violation of Citadel's rules, continued to employ Jerita Pennington after Citadel had terminated her from her part-time position at Shadow

Wood. Additionally, Plaintiff submitted a tenant's electric bill to Citadel for payment in violation of Citadel's rules and policies. Finally, Plaintiff, in violation of Citadel's rules and policies, allowed a tenant to move into Shadow Wood without first receiving proof that the tenant's utilities had been transferred into the tenant's name.

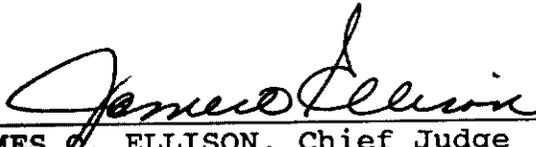
With respect to Plaintiff's claim of discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, Plaintiff must establish as follows: (1) Plaintiff belongs to a racial minority, (2) Plaintiff was qualified for the job and satisfied the normal requirements, (3) Plaintiff was discharged, and (4) after Plaintiff's discharge, Plaintiff's employer was assigned a non-minority employee to perform the same work. The undisputed facts establish that Plaintiff failed to satisfy the normal requirements of the job and that after Plaintiff's discharge, Defendant assigned a minority employee to perform the same work. As a matter of law, judgment should be entered in favor of the Defendant with respect to the Title VII claim and the public policy claim.

With respect to Plaintiff's claim of termination in breach of a contract of employment, Plaintiff has put forth no evidence of such a contract. In fact, Plaintiff has admitted in deposition not only that no written employment contract was entered, but also that Plaintiff was never promised permanent, or a specified term of, employment. Absent an express or implied contract, Plaintiff has no ground for bringing a claim of breach.

The Court having reviewed the pleadings and filings in this action, finds that no material issues of fact exist to be litigated and that judgment should be entered as a matter of law in favor of Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion for summary judgment is hereby granted in its entirety AND judgment is entered as a matter of law in favor of Defendant.

SO ORDERED, ADJUDGED AND DECREED this 29TH day of April, 1993.



JAMES G. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-30-93

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

FILED

APR 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PAUL BENGELS AND JEROME S.)
HEIMLICH,)
)
Plaintiffs,)
)
vs.)
)
HILTI, INC.,)
)
Defendant.)

No. 89-C-318-E

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT**

The Plaintiffs, former employees of Defendant, brought this action claiming that they were discharged by Defendant because of their religious affiliation, in violation of Title VII (Equal Employment Opportunity Act of 1964, 42 U.S.C. §2000e et seq.) and the public policy of the State of Oklahoma. They alleged that their discharge was part of a pattern of discrimination by Defendant against members of the Jewish faith. Prior to trial the Court reserved ruling on Defendant's Motion for Judgment as a Matter of Law on the state law claims. The matter was heard by a jury on January 25, 1993 through February 2, 1993. The public policy claim was presented to the jury for its determination and, because the Title VII issues and the state law issues were substantially the same, the jury considered the Title VII claim as an advisory jury. On February 2, 1993, the jury rendered its verdict on the state law claim in favor of Defendant and against both Plaintiffs. The matter is now before the Court on the Title

VII claim and Defendant's Renewed Motion for Judgment as a matter of law.

The Court has reviewed the record, including the transcript of proceedings and having considered the arguments of the parties in light of the evidence and the applicable law now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff Heimlich ("Heimlich") and Plaintiff Bengels ("Bengels") are individuals residing in Tulsa County, State of Oklahoma.

2. Defendant Hilti ("Hilti") is a corporation formed and existing under the laws of the State of New York and maintains its principal place of business in the State of Oklahoma.

3. Jurisdiction in this case is predicated upon 28 U.S.C. §§1331 and 1343 and upon 42 U.S.C. §2000e et seq.

4. Both Plaintiffs are Jewish.

5. Heimlich was employed by Hilti from 1977 through 1988.

6. At the time of his discharge he was serving as Director of Internal Audit for Hilti.

7. George Rosenbauer, Chief Executive Officer of Hilti, Inc. at the time of the termination was Mr. Heimlich's direct supervisor.

8. Mr Rosenbauer stated that the reasons for his decision to terminate Mr. Heimlich's employment were that, after working with him for three years, the business judgment was reached that Mr. Heimlich was not the director of internal audit that Hilti needed.

Rosenbauer testified that Mr. Heimlich was a good auditor, but in Mr. Rosenbauer's judgment he did not direct, set goals, set priorities and pursue complex issues as expected of a director.

9. It was Mr. Rosenbauer's testimony that other factors, including the handling of a major accounts receivable problem, the inventory problem, and problems in coordination with outside auditors, influenced his decision to terminate Mr. Heimlich.

10. Because of the account receivables problem, Hilti terminated its external auditors in 1987. Other management employees of equal or greater rank were terminated by Hilti because of the accounts receivable and management performance problems prior to the decision to terminate Mr. Heimlich.

11. Defendant presented evidence that during 1986-88, there were 27 performance-related terminations of management level employees at Hilti, Inc.

12. A number of the terminations for performance problems arose in the financial accounting area of Hilti.

13. Only three of the twenty-seven managers terminated were members of the Jewish religion.

14. Bengels was employed by Hilti from 1979 through 1988.

15. Bengels was the Director of Finance and Administration of Hilti-Ciba Geigy at the time of his termination.

16. Upper management of Hilti was dissatisfied with the skill level and what it perceived to be a lack of precision in the financial accounting area of the company.

17. A number of management-level employees in the company

were terminated during 1986-1988 as a result of the problems in the finance and accounting area of the company.

18. Bengels had served as Assistant Controller under Jerry Sherman, Controller, who was terminated in 1986.

19. Mr. Sherman criticized Plaintiff Bengels' performance as Assistant Controller during the 1983-1986 time period.

20. Bengels' performance was a major factor in the decision to transfer him to Hilti-Ciba Geigy, a smaller, less complex organization, in Fall 1986.

21. Hilti-Ciba Geigy was a joint venture between Hilti and Ciba Geigy which was created in 1986.

22. At Hilti-Ciba Geigy, Bengels reported to Bruce Isentol, who was President of that joint venture.

23. During the start-up phase of Hilti-Ciba Geigy, Mr. Bengels was occupied with setting up accounting systems, obtaining tax permits and similar activities. His performance in those areas was acceptable to Mr. Isentol.

24. In 1988, when the Joint Venture began more complex operations, Mr. Bengels' performance proved unsatisfactory to management.

25. Mr. Isentol terminated Bengels' employment because he "needed someone to do the analysis function of the job". "The issue was the transparency of the data, the analysis and the presentation of why we were doing what we were doing." The evidence revealed that the joint venture was in trouble and Mr. Isentol wanted someone with the expertise to "turn it around."

26. Plaintiffs offered evidence through Walter Frykholm, the Vice President of Human Resources for Hilti, Inc. from October 1978 through 1980 that Alex Lendi, the director of Human Resources for Hilti International, told him "not to hire any more Jews" in 1979.

27. Alex Lendi denied making any such statement.

28. Frykholm testified that he informed Larry Bernhardt, the President of Hilti, and Joe Kastenholz, the Chief Financial Officer of Hilti, of Lendi's remark. Both Bernhardt and Kastenholz are Jewish.

29. Larry Bernhardt testified that he had no recollection of such a conversation. Kastenholz testified that he never heard anyone at Hilti make any anti-Semitic or anti-Jewish remarks.

30. Richard Kesselman, a Jewish Assistant Controller, was terminated in 1986.

31. Mr. Kesselman's supervisor from 1983 through mid-1986, Jerry Sherman, stated that Kesselman would "go off and do some things that were absolutely frightening sometimes because they were very creative, you couldn't document them" or audit them.

32. Sherman's replacement as Controller, Gilbert Morris, similarly described Kesselman as "having a tendency to shoot from the hip" and produce unsubstantiated analyses.

33. John Shearing, Chief Financial Officer of Hilti, testified that Kesselman had a "cavalier approach to accounting". Shearing also found Kesselman's work to be "lacking in analysis and more from his mind and feeling as opposed to really totally factually based".

34. There is no evidence in the record of any non-Jewish employees who had similar performance problems who were treated more favorably than Mr. Kesselman. There also is no evidence concerning the replacement for Mr. Kesselman or that person's religion.

35. Plaintiffs offered evidence through Mr. Kesselman that he had been told by Sherman (as Sherman was departing after having been terminated), that Sherman had been instructed to fire Kesselman and that Sherman had indicated it was because Kesselman was Jewish.

36. Mr. Sherman, however, testified that his comments to Kesselman were the product of his own embellishments.

37. Michael Tupps, formerly an auditor at Hilti, testified that while driving to the airport in Chesapeake, Virginia, on a Sunday afternoon, Gilbert Morris, Controller, asked him if he was Jewish.

38. Tupps did not report to Morris. The conversation was not in the context of a job application or interview.

CONCLUSIONS OF LAW

1. This is a case alleging religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and under state law based upon the tort theory enunciated in Tate v. Browning Ferris, Inc., 833 P.2d 1219 (Okla. 1992).

2. The Court has analyzed the evidence under the standards for termination cases set forth in McDonnell-Douglas Corp. v.

Green, 411 U.S. 792 (1973); and its progeny.

3. The Court finds that Hilti articulated bona fide and legitimate business reasons for the terminations of the Plaintiffs. Plaintiffs retain the ultimate burden of proof and the Court concludes that there is insufficient evidence of any pretext or intent to discriminate against either Plaintiff on the basis of their Jewish religion.

4. The Court concludes that persons who are not Jewish, who were similarly situated were treated no differently from Plaintiffs. There is no evidence of disparate treatment on the basis of religion. Non-Jewish persons who did not perform to the satisfaction of management were terminated in the same manner and under similar circumstances to Plaintiffs.

5. A Plaintiff may present indirect evidence sufficient to support a reasonable probability, that but for the Plaintiffs' religion the challenged employment decision would have been different. See Notari v. Denver Water Dept., 971 F.2d 585 (10th Cir. 1992).

6. The Court concludes that the indirect evidence offered by Plaintiffs does not support a reasonable inference of discrimination on the basis of religion.

7. Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process with respect to the Plaintiffs rarely are given great weight, particularly if they were made temporally remote from the date of decision. See Hopkins v. Price Waterhouse, 490 U.S. at 277, 109 S.Ct. 1775, 1804 (1989) (J.

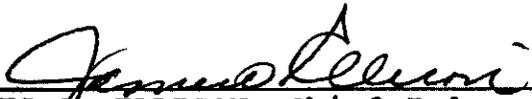
O'Connor concurring); Ezold v. Wolf Block, ___ F.2d ___, 1992 WL 385463, Page 37-38.

8. Plaintiffs have contended that their case consisted of proof of a "pattern" of discrimination. Plaintiffs have failed to establish by preponderance of the evidence that religious discrimination was the Company's standard operating procedure.

9. Having reviewed the evidence presented, the Court concludes that Hilti exercised its business judgment in a nondiscriminatory manner in making the determinations to terminate Plaintiffs Heimlich and Bengels.

10. Accordingly, the Court will enter judgment in favor of Hilti upon the Title VII claim which was tried to the Court. Further, judgment on the jury verdict in favor of Hilti will also be entered. The Court having reserved ruling upon Hilti's Motion for Judgment as a matter of law at the close of all evidence, now denies such motion.

ORDERED this 29th day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE APR 26 1993
FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DANIEL L. WALSH,)
)
 Defendant.)

Civil Action No. 93-C-0087B

DEFAULT JUDGMENT

This matter comes on for consideration this 26 day of April, 1993, the Plaintiff appearing by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, DANIEL L. WALSH, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, DANIEL L. WALSH, was served with Summons and Complaint on March 11, 1993. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

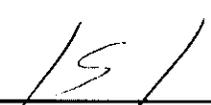
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, DANIEL L. WALSH, for the amount of \$21,361.29, plus accrued interest to

date, plus a fine of \$10,000 per false statement for a total of \$51,361.29, excluding interest and costs and other such relief as the Court may deem just and proper.

S/ THOMAS R. BRETT

United States District Judge

Submitted By:


KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

DATE APR 28 1993

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

FILED
APR 27 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CYNTHIA RUNYAN,)
)
Plaintiff,)
)
v.)
)
LOUIS W. SULLIVAN, M.D.,)
SECRETARY OF HEALTH)
AND HUMAN SERVICES,)
)
Defendant.)

91-C-533-B ✓

ORDER

This order pertains to defendant's **Motion** to Alter or Amend Order (Docket #13)¹ and plaintiff's Brief in Opposition to **Defendant's** Motion to Alter or Amend Order (#15). Plaintiff brought this action pursuant to **42 U.S.C. § 405(g)** for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance **benefits** under §§ 216(i) and 223 of the Social Security Act, as amended. On January 13, 1993, **this** court found that the Administrative Law Judge's decision that plaintiff was not **disabled** was not supported by substantial evidence and that plaintiff was entitled to a period of **disability** commencing on September 17, 1981 and to disability benefits under §§ 216(i) and 223 of Title II of the Social Security Act.

Defendant now asks the court to **amend** its order and find that the relevant evidence does not demonstrate that plaintiff has **an** impairment to her right knee that meets the criteria of § 1.03 of Appendix I of the **Listing** of Impairments. Defendant claims that the court erroneously relied on evidence **dated** before September 17, 1981 and after June 30,

¹ "Docket numbers" refer to numerical **designations** assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

16

1986, after properly finding in its Order that "res judicata was applied by the ALJ for the period of time from claimant's alleged onset date of March 15, 1980 to September 6, 1981, and the earliest date claimant could allege a disability was September 17, 1981. The ALJ also determined that claimant's insurance for purposes of social security benefits expired on June 30, 1986, so evidence subsequent to that date could not be considered unless she proved her disability between September 17, 1981 and June 30, 1986."

Defendant argues that this court's order contains only two sentences concerning the objective medical evidence of record concerning plaintiff's condition between September 17, 1981 and June 30, 1986, the period of time being adjudicated. Defendant discusses portions of the medical reports of plaintiff's treating physician, Dr. Terill Simmons, from August 1981 through June 30, 1986, which were previously discussed in the Brief in Support of Defendant's Administrative Decision Denying Disability Benefits to Plaintiff (#11, pgs. 4-6). Defendant fails to present any new argument which the court did not consider in making its January 13, 1993 decision.

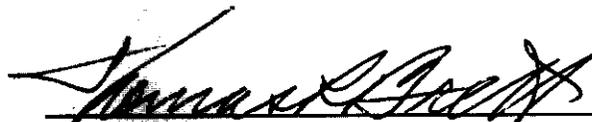
This court noted in its order that on November 15, 1983, claimant underwent an arthroscopic debridement, on June 25, 1986 she underwent conventry osteotomy, and on January 10, 1986, Dr. Simmons noted she was regressing unusually quickly. The court also recognized that plaintiff stated that she had not worked on a sustained basis since 1980. Since then she has had 18 knee surgeries, has consistently required pain medication such as Zomax, Tylenol No. 3, Tylenol No. 2, Wygesic, and Dolobid, and even Class I narcotics, uses a TENS unit to alleviate her pain and requires a brace and cane to ambulate, and even went to the Mayo Clinic Pain Management Center in 1984.

This court concluded in its order that the record is replete with medical evidence substantiating plaintiff's impairment to her right knee, which existed in 1980 and continues to exist and which meets or equals Listing 1.03. The court noted that absolutely no medical evidence in the record contradicts the findings of impairment and that no physician has questioned the credibility of her complaints of pain. Physicians opined from 1981 to 1986 that her knee condition was a progressive condition that was rapidly worsening, during that period she saw her doctors many times for treatment, and the treatments were attempts to put off knee replacement surgery as long as possible. By legitimate inference from the records from 1981-1986, the court concluded that claimant met Listing 1.03, although no specific physician's report generated during the period found her totally disabled. The court could then consider evidence subsequent to those dates which confirmed that the disability continues.

Defendant's Motion to Alter or Amend Order (#13) is denied.

Plaintiff is entitled to a period of disability commencing on September 17, 1981 and to disability benefits under §§ 216(i) and 223 of Title II of the Act, 42 U.S.C. §§ 416(i) and 423, respectively, and the Secretary shall compute and pay benefits accordingly.

Dated this 27th day of Apr., 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

APR 28 1993

FILED

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

ROBERT LEE WILLIAMS,
Petitioner,

vs.

RON CHAMPION and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Respondents.

No. 92-C-595-B

ORDER

Petitioner has filed a motion to reconsider this Court's Order of February 4, 1993, which dismissed his habeas corpus petition. In the motion to reconsider, he invokes the name of the "Harris litigation"; however, the record indicates that petitioner is represented by the Tulsa County Public Defender's Office and is therefore not within the scope of Harris. (See Order of April 9, 1993, entered by the three-judge panel in the Harris case, No. 90-C-448-B). Also, petitioner has not demonstrated significant delay in the appeal of his conviction of April 30, 1992. Accordingly, this Court's prior Order will not be disturbed.

It is the Order of the Court that the motion of the petitioner to reconsider is hereby denied.

IT IS SO ORDERED this 26th day of April, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED IN CLERK'S OFFICE
DATE **FILED**
APR 27 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

JACQUI STARR, an individual,)
)
 Plaintiff,)
)
 v.)
)
 PEARLE VISION, INC.)
 d/b/a PEARLE VISION EXPRESS,)
 a corporation,)
)
 Defendant.)

Case No. 92-C-463-B

ORDER OF DISMISSAL WITH PREJUDICE

Currently before the Court is the Joint Stipulation of Dismissal With Prejudice of Plaintiff's Third and Fourth Causes of Action.

IT IS THEREFORE ORDERED that Plaintiff's Third Cause of Action for violation of Oklahoma public policy for sexual harassment and Fourth Cause of Action for violation of Oklahoma public policy for sexually hostile working environment are hereby dismissed with prejudice.

DATED THIS 27 day of April, 1993.

S/ THOMAS R. BRETT

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
OKLAHOMA

ENTERED CLERK'S OFFICE
APR 28 1993

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

REX McCracken and CARL OWENS,)
)
 Plaintiffs,)
)
 vs.)
)
 JOHN MEIER, and MID-STATES)
 ADJUSTMENT, INC., a corporation,)
)
 Defendants.)

No. 92-C-728-B

FILED
APR 26 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER DISMISSING WITH PREJUDICE
THE CLAIMS OF PLAINTIFF, REX McCracken

Upon the Joint Motion of Plaintiff, Rex McCracken and the Defendants, Mid-States Adjustment, Inc. and John Meier, this Court hereby dismisses the claims of Plaintiff, McCracken, with prejudice because the parties have entered into a settlement agreement, with each party to bear its own attorneys fees and costs.

IT IS SO ORDERED.

DATED this 26 day of Apr, 1993.

S/ THOMAS R. BRETT

Thomas R. Brett
United States District Judge

APR 28 1993

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DAN CORBIN JONES; SHARON KAY)
 JONES a/k/a SHARON K. JONES)
 a/k/a SHARON JONES; LUKE)
 DRAFFIN; PAIGE DRAFFIN a/k/a)
 PAIGE E. DRAFFIN; COMMERCIAL)
 CREDIT PLAN, INC.; COUNTY)
 TREASURER, Creek County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Creek County,)
 Oklahoma,)
 Defendants.)

FILED

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-19-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26 day
of April, 1993. The Plaintiff appears by Tony M.
Graham, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, County Treasurer, Creek County, Oklahoma, and
Board of County Commissioners, Creek County, Oklahoma, appear by
Wesley R. Thompson, Assistant District Attorney, Creek County,
Oklahoma; and the Defendants, Dan Corbin Jones; Sharon Kay Jones
a/k/a Sharon K. Jones a/k/a Sharon Jones; Luke Draffin; Paige
Draffin a/k/a Paige E. Draffin; and Commercial Credit Plan, Inc.,
appear not, but make default.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Dan Corbin Jones, was
served with Summons and Complaint on February 8, 1993; that
Defendant, Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon
Jones, was served with Summons and Complaint on February 12,

1993; that Defendant, Luke Draffin, acknowledged receipt of Summons and Complaint on January 25, 1993; that Defendant, Paige Draffin a/k/a Paige E. Draffin, acknowledged receipt of Summons and Complaint on January 25, 1993; and that Defendant, Commercial Credit Plan, Inc., was served with Summons and Complaint on February 3, 1993; and that Defendant, County Treasurer, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on January 11, 1993.

It appears that the Defendants, County Treasurer, Creek County, Oklahoma, and Board of County Commissioners, Creek County, Oklahoma, filed their Answer on February 11, 1993; that the Defendants, Dan Corbin Jones; Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones; Luke Draffin; Paige Draffin a/k/a Paige E. Draffin; and Commercial Credit Plan, Inc., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 26, 1992, Luke Leonidas Draffin, Jr. and Paige Elizabeth Draffin filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-01871-C, were discharged on September 11, 1992, and the case was closed on January 6, 1993.

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

The South 100 feet of Lot 7 and the South 100 feet to the West 12.8 feet of Lot 8, in Block 3, FRANK AND ROOT ADDITION, to the City of Sapulpa, CREEK County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 3, 1987, the Defendants, Dan Corbin Jones and Sharon Kay Jones, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$25,000.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Dan Corbin Jones and Sharon Kay Jones a/k/a Sharon K. Jones, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 3, 1987, covering the above-described property. Said mortgage was recorded on December 4, 1987, in Book 229, Pages 4-7, in the records of Creek County, Oklahoma.

The Court further finds that the Defendants, Dan Corbin Jones and Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Dan Corbin Jones and Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones, are indebted to the Plaintiff in the principal sum of \$24,334.06, plus interest

at the rate of 10.5 percent per annum from June 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$35.84 (\$27.84 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Creek County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$147.63, plus penalties and interest, for the year of 1992. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Creek County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$15.19 which became a lien on the property. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Dan Corbin Jones; Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones; Luke Draffin; Paige Draffin a/k/a Paige E. Draffin; and Commercial Credit Plan, Inc., are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Dan Corbin Jones and Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones, in the principal sum of \$24,334.06, plus interest at the rate of 10.5 percent per annum from June 1, 1992 until

judgment, plus interest thereafter at the current legal rate of 3.37 percent per annum until paid, plus the costs of this action in the amount of \$35.84 (\$27.84 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens), 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 Defendant, County Treasurer, Creek County, Oklahoma, have and recover judgment in the amount of \$147.63, plus penalties and interest, for ad valorem taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Creek County, Oklahoma, have and recover judgment in the amount of \$15.19 for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Dan Corbin Jones; Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones; Luke Draffin; Paige Draffin a/k/a Paige E. Draffin; and Commercial Credit Plan, Inc. have no right, title or interest in the subject real property,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Dan Corbin Jones and Sharon Kay Jones a/k/a Sharon K. Jones a/k/a Sharon Jones, to satisfy the money judgment of the Plaintiff 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, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, County Treasurer, Creek County, Oklahoma, in the amount of \$147.63, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, County Treasurer, Creek County, Oklahoma, in the amount of \$15.19, personal property taxes which are currently due and owing.

The surplus from said sale, 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 the above-described real property, under

and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. B. MITT

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



WESLEY R. THOMPSON, OBA #8993
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Creek County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-19-B

PP/esr

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 28 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND ASSIGNS)
OF LARRY M. GLIDEWELL a/k/a LARRY)
MAC GLIDEWELL, Deceased, et al.,)
)
Defendants.)

EOD 4/28/93

CIVIL ACTION NO. 91-C-312-C

ORDER

Upon the Motion of the United States of America, acting through the Farmers Home Administration, by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure entered herein on the 19th day of March, 1993, is vacated.

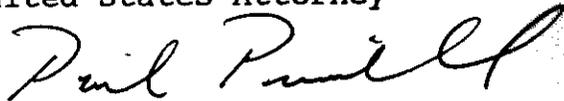
Dated this 28th day of April, 1993.

(Signed) *M. Dale Cook*

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

F. L. DUNN, III
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP/css

THIS ORDER IS TO BE MAILED
TO ALL COUNSEL AND
FILED IMMEDIATELY
UPON RECEIPT.

ENTERED ON DOCKET

DATE 4-28-93

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

F I L E D

APR 27 1993

DAVID HUMPHREYS,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF BROKEN ARROW, et al,)
)
 Defendants.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

92-C-1061-E

ORDER GRANTING MOTION TO REMAND

This order addresses Plaintiff's Motion to Remand and For Sanctions (docket #3) in which Plaintiff contends the instant **action** was improvidently removed, beyond the time limitations of 28 U.S.C. §1446(b).

The Facts

Plaintiff originally filed his action **before** the Tulsa County District Court, Fourteenth Judicial District, Tulsa, Oklahoma on October 25, 1990. The parties to the action were Plaintiff (a Mississippi resident); Defendant ALFA Insurance Corporation (a citizen of Alabama) and Defendant City of Broken Arrow (an Oklahoma municipality). The amount pled in the original pleading was said to be in excess of "\$10,000". An Amended Petition was filed on August 28, 1991, deleting the cause of action against the City of Broken Arrow, but maintaining the claim as in excess of "\$10,000". As part of settlement negotiations, "Plaintiff submitted a Settlement Conference Statement on October 22, 1992, which indicated a settlement demand in the amount of \$50,000." (*Plaintiff's Brief in Support of Motion to Remand and For Sanctions*, at p. 3).

Defendant ALFA Insurance Corporation filed its Notice of Removal (docket #1) on November 19, 1992, alleging:

Plaintiff has now made a settlement demand of \$50,000 as evidenced by Plaintiff's Settlement Conference Statement submitted at the Settlement Conference on October 22, 1992. The Defendant ALFA Insurance Corporation, has already made payment for vehicle damage to the Plaintiff's auto sustained in the accident. Defendant, ALFA Insurance Corporation, is therefore of the good faith belief that Plaintiff seeks damages in excess of \$50,000, exclusive of interest and costs.

These facts, argue Plaintiff, are insufficient to sustain the now-accomplished removal.

Applicable Law

The pertinent statute is Title 28 U.S.C. §1446(b), which provides in-part:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief on which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Title 28 U.S. C. §1447(c) provides that the District Court must remand a case any time before final judgment which appears to have been removed improvidently. See also, *First National Bank & Trust in Great Bend v. Nicholas*, 768 F.Supp. 788, 790, 1991 U.S. Dist. LEXIS 10691 (D. Kan. 1991).

In applying these statutes the court is constrained to strictly construe their requirements. "Removal statutes are strictly construed to limit the federal court's authority to that expressly provided by Congress and to protect the states' judicial powers." *Cohen v. Hoard*, 696 F.Supp. 564, 565 (D. Kan. 1988). The burden of showing the propriety of removal always rests with the removing party. *Id.* at 566; *Dawson v. Orkin Exterminating Co., Inc.*, 736 F. Supp. 1049, 1050 (D. Colo. 1990).

Section 1446(b) was added in 1949 to allow removal beyond the thirty day limitation previously part of codified law. The Tenth Circuit Court of Appeals notes:

This provision, added in 1949, codifies prior holdings that the period for filing the removal petition will be extended or renewed at the time when a case that did not seem to be removable at first later becomes or is discovered to be removable. This transformation may occur in a number of ways. Plaintiff may amend the initial pleading to include a claim for relief within the jurisdiction of the federal courts, such as a federal claim or a separate and independent claim that is removable. Or Plaintiff or events beyond plaintiff's control may increase the amount in controversy to the requisite jurisdictional level.

...[W]here the plaintiff, by voluntary action, changes the situation, such as by dismissing a non-diverse defendant to bring about a diversity situation, the statute does apply. We regard that condition...to be the proper guide to follow in seeking a meaning for the §1446 amendment. (Emphasis added.)

The controversy that is apparent in the decisions exists in situations in which the plaintiff has not acted voluntarily to set in motion the condition which causes the case to become removable. Where the plaintiff has acted voluntarily, the Supreme Court rule in *Powers*, supra, allows a case to be removed. *Debry et al v. Transamerica Corporation*, 601 F.2d 480, 485, 486 (10th Cir. 1979).¹

¹ *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92, 18 S.Ct. 264, 42 L.Ed. 673 (1898). The Tenth Circuit noted that "[t]he voluntary-involuntary test originated some years ago apparently in *Powers*. What it requires is a voluntary act of the plaintiff which effects a change rendering a case subject to removal (by defendant) which had not been removable before the change." *Id.*

The record of the state court is generally considered the sole source from which it may be ascertained whether a case originally not removable has since become removable. *Miller v. Stauffer Chemical Co.*, 527 F.Supp. 775, 777 (D.Kan 1981), citing, 1A Moore's Federal Practice p 0.168(3.-5) at 488-89. (Emphasis added.) In interpreting the term "ascertained" as used in §1446(b) the Tenth Circuit has adopted the definition found in Webster's New Collegiate Dictionary (1975), to-wit: "to find out or learn with certainty." *Debry et al v. Transamerica Corporation*, supra at 601 F.2d 488.

Merely filing a motion to amend a complaint does not in itself make removable a state court action that otherwise lies outside the perimeters of federal court jurisdiction. *Miller v. Stauffer Chemical Co.*, supra at 527 F.Supp. 777. The Plaintiff's deposition does not constitute notice sufficient to warrant removal. *Debry et al v. Transamerica Corporation*, supra at 601 F.2d 488. Simply sending a courtesy copy of a motion for interpleader does not constitute sufficient notice on which to base removal. *Christian et al v. College Boulevard National Bank et al*, 795 F.Supp. 370, 371, 1992 U.S. Dist. LEXIS 11859 (D. Kan. 1992).

Analysis

Defendant argues that it first became aware that this action was removable when it received a Settlement Conference Statement from Plaintiff demanding \$50,000.00 to settle the case. Plaintiff's Settlement Conference Statement of October 16, 1992 is appended to the Notice of Removal (docket #1).

Two questions thus arise. First, is the "Settlement Conference Statement" the type of "other paper" referenced in the statute by which one may ascertain "that the case is one

which is or has become removable"? **Second**, was the removal timely? Both questions are answered in the negative.

a. The Settlement Conference Statement

Rule 408, *Federal Rules of Evidence* provides, in-part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

A companion rule exists in the Oklahoma evidence code.

The **Settlement Conference Statement** and the offer made by Plaintiff to Defendant to resolve this dispute by way of compromise and settlement was not filed of record in the state court action and is neither admissible there nor in the federal court to prove either "validity or amount" of the claim made. Thus, while the offer by Plaintiff to settle the case can be characterized as a "voluntary act" it is not done or made "of record" and is not the type of "other paper from which it may first be ascertained that the case is one which is or has become removable". Indeed, a settlement offer is usually negotiable in character and is not meant to be firm unless so stated (and even then, usually open to further parlay between the parties). Thus a settlement offer, *per se*, is not the type of communication or notice which one can use or rely upon to ascertain the amount of the claim; nor is a settlement offer, as a matter of form, the type of "other paper" which the court should use to determine whether a case is removable. Such offers are not of record, and are not admissible. To utilize such offers as a matter of strategic or tactical maneuvering is to defeat the very purpose of the rule prohibiting disclosure. Settlement offers are protected

from disclosure as a means of encouraging resolution of disputes before trial. To make such offers usable in the "removal war" will in all probability have a "chilling effect" on serious settlement efforts. If settlement offers can indeed be made part of the record through the removal process, there is a likelihood they will not be made. Settlement has traditionally been regarded as a confidential process -- one which flourishes in the absence of public attention.² Accordingly, the undersigned finds that the Settlement Conference Statement is not the type of "other paper" which can be used as a basis for determining removability.

b. Was the removal timely?

Removal was accomplished on October 22, 1992. Section 1446(b) states in-part:

...[A] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Here, the action was originally filed and hence, "commenced" October 25, 1990. Removal was accomplished almost two years later. The time frame contemplated by the statute is one year. Counsel for Defendant had ample opportunity to conduct discovery on the question of damages, but did not do so within the first year after the commencement of the action. The undersigned finds that the plain language of §1446(b), above, should be read in its common sense understanding. This action began with the filing of the Petition in state court in October 1990. Removal did not occur until almost two years later. Section 1446(b) limits removal such that, regardless of when removability becomes an issue, a case may not be removed if more than one year has passed from its original

² Local Rule 17.1 provides in part: "...any conversation relative to settlement will not constitute an admission and will not be used in any form in the litigation or in the event of trial."

commencement. There are sound policy reasons for this action, not the least of them being deference to state judicial processes and the integrity of same. Efficient use of judicial resources demands a cap be placed on the time cases can be removed and such is the case under S1446(b).

The undersigned thus finds that Defendant's removal was contrary to the time constraints under S1446(b).

Sanctions

For the reasons set forth above, the Court further finds that Defendant shall pay the reasonable cost and attorney's fees incurred by Plaintiff in bringing this Motion to Remand. Removal was not timely on its face and use of settlement negotiations to justify removal, particularly in the absence of diligent discovery, is inappropriate. Accordingly, Plaintiff is to submit, by May 7, 1993 an Affidavit setting forth the time spent and expenses incurred in bringing the instant motion, setting forth therein the hourly rate charged. Thereafter, Defendant shall either elect to pay same, or, file a response on or before May 14, 1993. Any request for hearing on the matter shall be addressed to Magistrate Judge Jeffrey S. Wolfe, who shall promptly schedule a hearing on the question of the costs and fees to be awarded Plaintiff.

Conclusion

For the reasons set forth above, Plaintiff's Motion to Remand is granted. The case is remanded to the Tulsa County District Court, Fourteenth Judicial District, State of Oklahoma for further proceedings. Plaintiff's Motion for Sanctions is also granted, as above; and the court retains jurisdiction over the parties for the purpose of assessing

reasonable costs and attorneys fees and enforcing same, in connection with this order.

SO ORDERED THIS 27th day of April, 1993.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-28-93

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

FILED

APR 27 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HOLDEN DUNFORD, JR.,)
)
 Plaintiff,)
)
 v.)
)
 SGT. JOHNSON, et al.,)
)
 Defendants.)

Case. No. 91-C-772-E

ORDER

Now before this Court is Defendants' Motion For Summary Judgment (docket #16). Plaintiff Holden Dunford Jr. filed a Civil Rights Complaint pursuant to 42 U.S.C. § 1983, claiming that Defendants violated his constitutional rights during his incarceration in the Tulsa City-County Jail.

On October 23, 1991, Dunford filed the instant Civil Rights Complaint (docket #4). He alleges that Defendants, who are Tulsa County Sheriff deputies, unconstitutionally denied him access to the courts and prohibited him from outdoor exercise.

I. Legal Analysis

Plaintiff Holden Dunford is proceeding *pro se*. *Pro se* pleadings are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). As a result, *pro se* motions and complaints are held to less stringent requirements.

Rule 56 states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)

The non-moving party may oppose the motion, setting forth evidence raising genuine issues of material fact per Rule 56(c); but reliance on the pleadings alone is not sufficient to withstand summary judgment. See *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983).

A court, in ruling on a summary judgment motion, must accept as true the non-moving party's evidence and must draw **all legitimate** inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986).

Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party who bears the burden of proof at trial if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case. A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; **there must be evidence on which the jury could reasonably find for the plaintiff.**" *Id. at 2512.*

To state a claim under 42 U.S.C. §1983, the Plaintiff must first prove that the defendant deprived him of a right secured by the Constitution and/or laws of the United States. The plaintiff must then show that the defendant deprived him of this constitutional

right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *Meade v. Grubbs*, 841 F.2d 1512, 1526 (10th Cir.1988).

Dunford's two allegations are that Defendants unconstitutionally denied him access to the courts and that he received cruel and unusual punishment because he was not allowed outdoor exercise.

A. Access to the Courts

Prisoners also have a "fundamental constitutional right of access to the courts [that] requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 827, 97 S.Ct. 1491, 1497, 52 L.Ed.2d 72 (1977).

Dunford does not submit any evidence. He merely rests on his pleadings. Defendants, on the other hand, submit a Special Report discussing the actions leading up to Dunford's Complaint. Below is a summary:

On the morning of September 24, 1991, Sgt. Claudene Johnson, a co-defendant, advised her staff that a routine cell search was needed to search for contraband at the Adult Detention Center. According to Tulsa City-County Jail policy, a prisoner can only have two boxes of personal property in his cell at one time.

During the search of Dunford's cell, Sgt. Johnson found six boxes of personal property. Dunford said the boxes were needed for a pending federal court case. Johnson, however, told Dunford that he could pare down the six boxes of material into two boxes. The rest of the material was removed from the cell. The Special Report also stated:

Such searches for contraband are necessary to prevent contraband items being smuggled into the cells that could cause bodily harm to the inmate or endanger the lives of officers. In addition, the amount of legal materials must be limited to prevent increased fire hazards within the Tulsa County Jail.

Dunford does not have a constitutional right to keep an unlimited amount of boxes in his cell, especially given the limited space. Furthermore, since he has not submitted any evidence supporting his claim (i.e. evidence explaining what specific documents were taken from him and why the confiscation denied him his access to courts), Dunford has not met his burden as the non-moving party to Defendant's Rule 56 summary judgment motion. The pertinent part of Rule 56(e) states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Therefore, Dunford has failed to meet his burden on this issue.

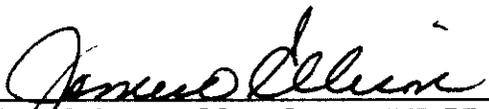
B. Outdoor Exercise

Total or near-total deprivation of exercise, without penological justification, violates the Eighth Amendment. Inmates require regular exercise to maintain reasonably good physical and psychological health. *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983).

According to Defendants' Special Report, Dunford was allowed to exercise one time inside the "county crosswalk" during a six-month period. According to the Report, he refused outside exercise on October 14, 1991. As a general rule, Tulsa City-County

prisoners are allowed outdoor exercise **one time** per week. However, the Special Report states that such outdoor exercise was **canceled** at various times during that six-month stretch due to inclement weather, **manpower** shortage and assorted other reasons.

The issue is whether Dunford's **Eighth** Amendment rights were violated because of the lack of outdoor exercise. The **undersigned** finds that it was not. Dunford submits no evidence that he could not exercise **inside his cell**.¹ In addition, he submits no evidence supporting his claim. The Special Report sets forth legitimate penological reasons why Dunford did not receive outdoor exercise. Therefore, Defendants' Motion For Summary Judgment (docket #16) is **GRANTED**. Judgment is entered for Defendants on the issues of access to the courts and failure to **provide** outdoor exercise.



JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

¹ *The undersigned also finds that Dunford's other allegations are without merit.*

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

FILED

APR 26 1993

RICHARD M. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

No. 92-C-911-C

KIMBERLY R. WELTY,)
)
Plaintiff,)
)
v.)
)
MOORE FUNERAL HOME, INC.,)
an Oklahoma corporation, and)
DARRELL PRICER,)
)
Defendants.)

ORDER

Before the Court are the motions of the defendants Moore Funeral Home, Inc. ("Moore") and Darrell Pricer ("Pricer") for summary judgment. Plaintiff brings this action under Title VII of the Civil Rights Act of 1964 and the pendent jurisdiction of this Court. Specifically, she alleges violations of Title VII and the state torts of assault, battery, intentional infliction of emotional distress, and prima facie tort.

The undisputed facts are that plaintiff began employment with defendant Moore in October 18, 1988. From that date until August of 1991, she worked at Moore's Peoria facility in Tulsa, Oklahoma. Defendant Pricer was her supervisor. Since August of 1991, plaintiff has worked at Moore's Southlawn Chapel and has a good relationship with her current supervisor, Joan Freeman. Plaintiff filed a complaint with the Oklahoma Human Rights Commission and the Equal Employment Opportunity Commission on November 6, 1991. She filed a state court lawsuit against these same defendants on November 12, 1991, and dismissed the action without prejudice on

45

October 5, 1992. She filed the present federal action on October 7, 1992.

Plaintiff alleges that, beginning in November, 1989, she was subjected to sexual advances and assaults and batteries by Pricer and other circumstances of sexual harassment by Moore, all of which created a hostile working environment. She alleges that she complained to the corporate defendant Moore, but that no action was taken. She further alleges that, prior to her employment with Moore, the company was aware of actions by Pricer and other employees which constituted sexual harassment. Also, she contends that because of plaintiff's rejection of Pricer's advances and her complaints to management, the defendants have retaliated against her with further harassment, sexual advances and hostility.

A review of plaintiff's deposition testimony reflects the following specific allegations: After one month of plaintiff's employment (i.e., approximately in November, 1988), Pricer asked her out for a drink, but plaintiff declined. In response to the deposition question "You regarded asking you out for a drink as sexual harrassment [sic]?", she answered "After I had said no, and he continued to ask, yes, I did" (Exhibit A to defendant Moore's brief at page 20, ll. 2-5). Pricer continued to ask plaintiff out for a drink several more times, but plaintiff cannot provide the specific dates of such occasions. Pricer continued to ask two or three times a week and plaintiff is unable to state when this activity ceased, other than it obviously stopped when she was transferred to the Southlawn location. About six months after her

employment began (i.e., approximately March, 1989), plaintiff testified, Pricer slapped her on the rear. A second such slap took place, but plaintiff could only provide an approximate date of 1989. Plaintiff testified that Pricer kissed her on the face twice, once in March of 1991 and the other at an unspecified time. Plaintiff testified that, possibly in 1990, Pricer pushed or backed her into a corner. Finally, plaintiff testified of Pricer's general hostility, in that he would make comments about her work habits to other employees and, on other occasions, ignore her questions to him and walk off.

Initially, defendants raise the defense of statute of limitation to various of plaintiff's causes of action. As regards assault and battery, defendants note that the applicable limitation is one year, citing 12 O.S. §95(4). Thus, they argue, plaintiff cannot recover for any alleged assault and battery which occurred after November 12, 1990 (i.e., one year before filing of the state court action).¹ Plaintiff concedes this point. Similarly, defendants assert a two-year statute of limitation for intentional infliction of emotional distress under 12 O.S. §95(3) and Williams v. Lee Way Motor Freight, 688 P.2d 1294 (Okla.1984), and contend that plaintiff cannot recover for any such alleged acts which took

¹ Although the instant case was filed on October 7, 1992, the saving clause of 12 O.S. §100 tolls the statute of limitation for one year after dismissal of a state court action.

place after November 12, 1989. Again, plaintiff agrees.² Finally, defendants point to 42 U.S.C. §2000e-5(e), which establishes (in this plaintiff's circumstances) a three hundred day limitation from date of unlawful act until the filing of a complaint with the EEOC. Plaintiff does not contest the conclusion that she may not recover for any alleged acts violating Title VII occurring after January 10, 1991 (three hundred days prior to November 12, 1991). As regards plaintiff's assault and battery claim, the only act which might be so characterized which occurred after November 12, 1990, is the alleged kiss of March, 1991. In response to a motion for summary judgment, plaintiff must set forth specific facts showing the presence of a genuine issue of material fact for trial. Lake Hefner Open Space Alliance v. Dole, 871 F.2d 943, 945 (10th Cir.1989). Inasmuch as plaintiff is unable to fix a specific date of occurrence within the limitation period for any other alleged assault and battery, defendants' motion is granted on this claim save and except for the alleged March, 1991 kiss.

Turning next to plaintiff's prima facie tort claim, defendants correctly point out that the United States Court of Appeals for the Tenth Circuit has held that Oklahoma would not extend the doctrine to private sex discrimination between co-workers. See Merrick v. Northern Natural Gas Co., 911 F.2d 426, 433 (10th Cir.1990). The Court declines plaintiff's suggestion to certify the question to the Supreme Court of Oklahoma.

² The reference in plaintiff's response brief is November 12, 1990, but the Court assumes this to be a typographical error.

Plaintiff also seeks recover for the independent tort of intentional infliction of emotional distress, also called the tort of outrage. See Eddy v. Brown, 715 P.2d 74, 76 (Okla.1986). Summary judgment is proper on such a claim when the record demonstrates that the actions of the defendant were not so extreme or outrageous as to subject the defendant to liability. See Smith v. Farmers Co-op of Butler, 825 P.2d 1323, 1327-28 (Okla.1992). The Court has carefully reviewed the record in this case, and concludes that the conduct of which plaintiff complains fails to rise to the required level. "Conduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." Eddy, 715 P.2d at 77. Therefore, judgment is granted in defendants' favor on this claim as well.

In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the United States Supreme Court affirmed the development of a cause of action for "sexual harrassment" under Title VII. In a claim of hostile work environment because of sexual harassment, the employee must prove the following for a prima facie case: (1) that the employee belongs to a protected group; (2) that the employee was subject to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the harassment complained of affected a "term, condition, or privilege" of employment. Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th

Cir.1987).³ As with the other causes of action, only the alleged March, 1991 kiss falls within the statute of limitation and may be considered as regards liability in damages.⁴ Even limiting the Court's consideration to the single kiss, the first three factors listed above are met. The fourth element has been further defined as possessing both a subjective component (the discrimination detrimentally affected the plaintiff) and an objective component (the discrimination would detrimentally affect a reasonable person of the same sex in that position). See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482-83 (3rd Cir. 1990). The Court cannot, from a review of the record, conclude that plaintiff has demonstrated that the single kiss which "survives" the statute of limitation demonstrates an environment severe enough to affect the "psychological stability" of an employee, whether considered objectively or subjectively. Cf. Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989). Indeed, even considering the alleged occurrences outside the statute of limitation, and the testimony of another Moore employee provided as an exhibit to plaintiff's response, the Court would not conclude that they constitute a description of a hostile work environment actionable under Vinson.

³ As regards defendant Moore, a fifth element must also be demonstrated: respondeat superior, that is, defendant knew or should have known of the harassment and failed to take prompt, effective remedial action. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1522 (M.D.Fla. 1991).

⁴ Plaintiff argues that alleged acts which took place outside of the statute of limitation may nevertheless be admissible under Rule 404(b) F.R.Evid. This issue is reserved until trial.

However, this is not the only Title VII claim made in this case. Plaintiff also asserts retaliation against her for rejecting Pricer's advances and for filing her complaints with the Oklahoma Human Rights Commission and with the EEOC. To establish a prima facie case, plaintiff must show: (1) that she engaged in protected opposition to Title VII discrimination; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; (3) a causal connection between the protected activity and the adverse employment action. See Burrus v. United Telephone Co., 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071 (1982). Plaintiff has failed to prove a prima facie case as to Pricer. No causal connection has been demonstrated between Pricer's "talking behind her back" and plaintiff's filed complaints. While such a connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, id., plaintiff has made no attempt to demonstrate that such comments constitute "adverse action" cognizable under Title VII or that Pricer's alleged comments are actions by the employer. The Court finds no retaliation claim as to Pricer. However, as to corporate defendant Moore, plaintiff has provided a statement which relates that she was told by Joe Moore (position unidentified) that she would be denied a raise because she had "already cost him too much in attorney fees". Plaintiff's statement says that it is given under the penalty of perjury; therefore, it falls with 28 U.S.C. §1746. No challenge to the statement has been made, and the Court will consider it for purposes of the pending motion. Such a

statement by an official of Moore Funeral Homes, Inc., does satisfy the prima facie requirements of a retaliation claim. Accordingly, that claim will be allowed to proceed as to that one alleged incident.

It is the Order of the Court that the motions of the defendants for summary judgment are hereby granted in full as to plaintiff's claims for hostile work environment under Title VII and the state law claims of intentional infliction of emotional distress and prima facie tort. Said motions are granted in part as to plaintiff's claim for assault and battery, judgment being granted in defendants' favor with the exception of the alleged kiss of March, 1991. Defendant Pricer's motion is granted in full as to the claim for retaliation under Title VII, and defendant Moore's motion as to that claim is granted in part, with judgment in Moore's favor except as to the alleged incident of "[s]hortly before April 6, 1992" when plaintiff was denied a raise.

IT IS SO ORDERED this 26th day of April, 1993.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTIRE CASE DOCKET

DATE APR 27 1993

FILED

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

JUDY ANN TRUSTER,
Plaintiff,

-vs-

LEWIS ELSWORTH ASHER,
Defendant.

No. 92-C-653-B

O R D E R

NOW on this 26th day of April, 1993,
plaintiff's Application to Dismiss with Prejudice came on for
hearing. The Court being fully advised in the premises finds
that said Application should be sustained and the defendant,
should be dismissed from the above entitled action with
prejudice.

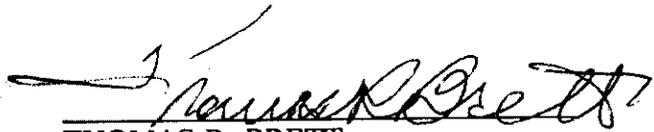
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that
plaintiff's Application to Dismiss With Prejudice be sustained
and the above captioned action be dismissed with prejudice as to
defendants.

S/ THOMAS R. BRETT

~~HONORABLE JEFFREY S. WOLFE, JUDGE
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT~~
U.S. District Judge Thomas R. Brett

Given the fact that no Brief in Chief was filed, and that no further extension was requested, the court finds that Appellants have abandoned their appeal and that the appeal should be and hereby is dismissed.

SO ORDERED THIS 26 day of Apr., 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE APR 27 1993

FILED

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

ANTHONY HARRIS, et al.,
Plaintiffs,

v.

RON CHAMPION, et al.,
Defendants.

Nos. 90-C-448-B
~~90-C-475-B~~ etc.
as consolidated

ORDER

This matter comes before the Court upon the Application of Plaintiffs for an injunction against Defendant Oklahoma Court of Criminal Appeals, to enjoin such Court from granting extensions of time to the Oklahoma Indigent Defense System attorneys in state criminal appeals. The Court concludes, upon statement of Plaintiffs' counsel that such Application is now withdrawn as moot, that such Application should be and the same is hereby DENIED as moot.

IT IS SO ORDERED this 26th day of Apr, 1993.

Thomas R. Brett

THOMAS R. BRETT
United States District Judge
Northern District of Oklahoma

Wayne E. Alley

WAYNE E. ALLEY
United States District Judge
Western District of Oklahoma

Frank H. Seay

FRANK H. SEAY
United States District Court
Eastern District of Oklahoma

ENTERED ON DOCKET

DATE 4-26-93

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

FILED

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BERNARDINE G. THEIS,)
Administrator of the Estate of)
Patrick A. Theis, Deceased,)

Plaintiff,)

vs.)

GARRETT ENGINE DIVISION OF)
ALLIED-SIGNAL, INC.,)

Defendant.)

93
No. ~~92~~-C-145-E

ORDER

It appearing from the record that this Court lacks in personam jurisdiction over Defendant Woodward Governor Company, ^{the} ~~that~~ Defendant's Motion to Dismiss (docket #3) will be granted; Plaintiff's Motion for Extension of Time (docket #7) will be denied.

ORDERED this 23^d day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-26-93

FILED

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

APR 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NOEL AND MAXINE KAISER,
d/b/a SAPPHIRE CATTLE
COMPANY, INC.,

Plaintiffs,

vs.

No. 92-C-817-E

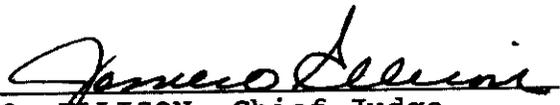
UNITED PARCEL SERVICE, INC.,

Defendant.

ORDER OF DISMISSAL

The Plaintiffs have filed a Statement of Dismissal herein. The Defendant has filed no objection to the Statement within the required time. The Court has reviewed the record and finds this matter should be dismissed with prejudice.

ORDERED this 23rd day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-26-93

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

MARY ELIZABETH BABCOCK DUNN,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

No. 91-C-38-E

LED

APR 23 1993

Lawrence, Clerk
DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 23 1993

ORDER AND JUDGMENT

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Plaintiff, Mary Elizabeth Babcock Dunn ("Mrs. Dunn"), filed this action to contest penalties and interest assessed against her by the Internal Revenue Service ("IRS") in relation to her 1982 tax return. This matter concerns a loss deduction in the amount of \$20,442.00 which was claimed by Mrs. Dunn on her 1982 individual income tax return and which arises out of an investment made by her during March of 1982 in Esplanade Associates, Limited Partnership ("Esplanade"), a New York limited partnership. After trial of this cause on the 2nd day of March, 1993, the Court finds as follows from the evidence.

Mrs. Dunn was born, raised, and educated in Oklahoma. She graduated from High school in 1932, went on to obtain a bachelors degree in social services, and then was married for twenty-five years. Throughout the marriage, Mrs. Dunn's husband managed an oil company and related investments, while she remained responsible for raising their three children and for managing their home. Although Mrs. Dunn always wrote personal checks for her own expenditures and

paid her personal bills, she was never responsible for the bookkeeping matters with respect to either home or business expenses.

After her husband passed away, Mrs. Dunn was charged with "running" Iron Drilling Company, which at that point merely involved maintaining the payroll for two "pumpers" who gauged the amount of oil produced. No new drilling was pursued during this period of time, and Mrs. Dunn's personal accountant, Harley Goodwin, prepared all of the necessary checks relating to the business.

Sometime in 1982, Mrs. Dunn was contacted by Tom Hermann, a local certified public accountant who had previously assisted her with personal investments. Mr. Hermann went to Mrs. Dunn's home to discuss the Esplanade Prospectus and "Private Offering Memorandum" and to solicit Mrs. Dunn as an investor.

Esplanade was promoted in early 1982 as providing its investors with a limited partnership interest in recycling machines that were designed to process polystyrene products for recycling. Prior to his visit with Mrs. Dunn, Mr. Hermann had been introduced to Esplanade by one of his colleagues, Mr. Bill Stewart, who in turn had been introduced to Esplanade in early 1982 by Mr. Bill Story.

The Esplanade prospectus projected as the worst case scenario that a given investor would recover his/her initial investment. The prospectus projected as the best case scenario that the same investor could recover two or three times beyond his/her initial investment. In reviewing the prospectus, two initial concerns were

raised in the minds of Mr. Stewart and Mr. Hermann: (1) whether the lease safe-harbor provisions would be applicable to a given investment so as to warrant application of the pertinent deduction provisions, and (2) whether the valuation of the machines was appropriate. Both of these concerns were expressed to Mrs. Dunn by Mr. Hermann, however they were not explained in detail.

Mr. Stewart and Mr. Story, along with other potential offerees and "offeree representatives", traveled to New York to investigate the legitimacy of the promotion by touring the packaging factory and witnessing the recycling machine function first-hand. After returning from this trip, Mr. Stewart and Mr. Hermann, though aware that a certain degree of risk is inherent in any new venture, concluded that Esplanade was legitimate and could potentially result in a high return. It was at this point in time that Mr. Hermann contacted Mrs. Dunn.

In discussing the Esplanade prospectus with Mrs. Dunn, Mr. Hermann addressed the tremendous tax benefits, the likelihood of profits and the associated risk of audit. Impressed with the potential returns, Mrs. Dunn retained the offering memorandum for further review by herself and by her personal accountant, and trusted friend, Harley Goodwin. With a mind "to make some money", Mrs. Dunn invested \$25,000.00 in Esplanade during March of 1982. Mr. Hermann and Mr. Stewart, as offeree-representatives, received a 9.9% commission for each investor they solicited.¹

¹ It was unclear from the testimony at trial at what point in time Stewart and Hermann were actually aware of the commission they would receive as "offeree-representatives". However, in light of

In preparing Mrs. Dunn's 1982 income tax return, Harley Goodwin contacted the New York law firm which had supplemented the Esplanade prospectus with a seventy-page memorandum concerning the appropriate tax treatment by investors. Based on the information supplied to him, Mr. Goodwin claimed, on behalf of Mrs. Dunn, a deductible loss for the calendar year 1982 in the amount of \$20,442.00, representing the losses suffered by Esplanade during that year; and claimed an investment tax credit totalling \$40,600.00.

On or about December 15, 1988, the IRS issued a Notice of Deficiency to Mrs. Dunn relating to her 1982 tax return. The IRS informed her that the above-stated loss deduction and investment credit were totally disallowed on the grounds that Esplanade was a sham so lacking in economic substance that it was to be disregarded for federal income tax purposes:

I.A. Schedule E - Esplanade Associates

It is determined all partnership items of income, loss, deductions, and credits reported by the partnership, with respect to their equipment leasing activities for the taxable year ended December 31, 1982 are disallowed. For the purposes of federal income taxation, the partnership cannot be considered the owner or lessee of the equipment with respect to which said items of income, loss, deductions, and credits are reported because, after examination of all of the facts and circumstances, the partnership is found not to have incurred the benefits and burdens of ownership or lease of the equipment or to have made, in substance, a true economic investment in the equipment. The transactions entered into with respect to the partnership's nominal equipment leasing

the express provisions in the offering memorandum, it is clear they should have become aware of the commissions during their detailed review of that document, and therefore should have known prior to their contact with Mrs. Dunn.

activities were devoid of the substance necessary for recognition for federal income tax purposes. Since the liabilities to which the equipment is subject are non-recourse, contingent and lacking in true economic substance, they cannot be considered a component of the value of the equipment for purposes of computing tax credits, depreciation, interest expense, or value of the equipment for any other reason....

See Joint Exhibit 1, Schedule 1-A "Explanation of Adjustments".

The Notice of Deficiency further informed Mrs. Dunn that she owed \$47,914.83 in principal tax. Further, the IRS assessed interest in the amount of \$50,695.74; a negligence penalty, pursuant to 26 U.S.C. §6653, in the amount of \$27,139.98; an overvaluation penalty, pursuant to 26 U.S.C. §6659, in the amount of \$14,374.45; and an interest penalty, pursuant to 26 U.S.C. §6621(c) in the amount of \$10,139.15. Mrs. Dunn consented to the deficiency, paid all of the above assessed amounts, and filed a claim for refund.

On September 25, 1990, the IRS issued to Mrs. Dunn a Notice of Disallowance and denial of her claim for refund. Mrs. Dunn now contests only the penalties assessed.

This case presents two substantial legal issues for determination: (1) Whether Mrs. Dunn reasonably relied on her experts for tax advice, and thereby cannot be held liable for a negligence penalty under 26 U.S.C. §6653(a), and (2) Whether the IRS can assess penalties for an overvaluation, pursuant to 26 U.S.C. §6659, when the deduction at issue was totally disallowed?

(1) Negligence Penalties under §6653(a)

Section 6653(a) of Title 26 of the United States Code authorizes the IRS to assess a negligence penalty equal to 5% of

the underpayment and 50% of the interest due on the underpayment. That section adopts the tort definition of negligence, providing that a taxpayer can be penalized for "any failure to make a reasonable attempt to comply" with the tax code, or for "any careless, reckless or intentional" "disregard of rules or regulations." The United States Supreme Court has interpreted this standard of negligence, with respect to a penalty for late filing, as requiring the taxpayer to exercise "ordinary care and prudence". United States v. Boyle, 105 S.Ct. 687, 469 U.S. 241 (1985). Addressing the negligence of a taxpayer whose attorney had failed to timely file a return, the United States Supreme Court stated as follows:

When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place. "Ordinary business care and prudence" do not demand such actions.

Id. at 692-93 (emphasis theirs)(citations omitted). Clearly, the United States Supreme Court would not place a burden on an unsophisticated taxpayer such as Mrs. Dunn to obtain second opinions.

Based on the foregoing evidence presented at trial, the Court finds that Mrs. Dunn is an unsophisticated investor without a great degree of experience in evaluating investments or their tax treatment. The Court further finds that Mrs. Dunn reasonably and substantially relied on the expert advice and/or investigations of

Tom Hermann, Bill Stewart, and Harley Goodwin, all of whom were certified public accountants licensed by the State of Oklahoma, in claiming a loss deduction and investment credit in relation to her Esplanade investment. The fact that Mrs. Dunn obtained no second opinions does not negate the reasonableness and prudence of her actions. Accordingly, the Court finds that the assessment of the negligence penalty under 26 U.S.C. §6653(a) is inappropriate.

(2) **Overvaluation Penalties under §6659**

United States Code title 26, §6659(a) authorizes the IRS to impose a valuation overstatement penalty for any underpayment of tax "attributable to a valuation overstatement." Plaintiff asserts, however, that as a matter of law, the IRS cannot assess overvaluation penalties when the related deduction is totally disallowed. In particular, Plaintiff asks this Court to follow the decisions of the Fifth Circuit in Todd v. C.I.R., 862 F.2d 540 (5th Cir. 1988) and Heasley v. C.I.R., 902 F.2d 380 (5th Cir. 1990) wherein the IRS was not allowed to assess penalties for valuation overstatements when the deduction or credit, with respect to which the valuation was made, was totally disallowed. The Fifth Circuit explained their decision in these cases as follows:

Whenever the IRS totally disallows a deduction or credit the I.R.S. may not penalize the taxpayer for a valuation overstatement included in that deduction or credit. In such a case, the underpayment is not attributable to a valuation overstatement. Instead, it is attributable to claiming an improper deduction or credit.

Heasley at 383. In both Todd and Heasley, the Fifth Circuit determined whether the underpayment was "attributable to" a valuation overstatement or to an improperly claimed deduction or

credit by comparing the taxpayer's actual tax liability minus the valuation overstatement, to the tax liability plus the valuation overstatement included. In Todd and Heasley, the Fifth Circuit found that these two amounts were the same, and therefore concluded that the underpayment was not attributable to the valuation overstatement and accordingly that the § 6659 penalty assessment was inappropriate. Todd at 542-43, Heasley at 383.

The IRS, in support of its assessment of the valuation overstatement penalty, asks this Court to follow the decision of the Second Circuit in Gilman v. C.I.R., 933 F.2d 143 (2nd Cir. 1991).² The Gilman case, like the case at bar, originated with a sale-leaseback transaction which was treated by the IRS as a transaction lacking in economic substance. After affirming that the transaction was a sham, the Second Circuit identified the basic purpose of the overvaluation penalty assessment as follows:

The application of section 6659(b) to a transaction determined to be without economic substance is not self-evident. The statute is most appropriately applied to instances where a taxpayer claims for an asset a value that the Commissioner determines is unduly high. The paradigmatic case is the inflated value claimed for a work of art in order to obtain a large deduction for a charitable donation. That is the example provided in the legislative history when the specific penalty for overvaluation was first adopted in 1981. See Joint Committee on Taxation, General Explanation of the Economic Recovery Act of 1981, 97th Cong. 1st Sess. 334, reprinted in Internal Revenue Acts 1980-1981, 1704 (1981).

Gilman at 150. The Second Circuit then went on to address the

² The IRS also points the Court to the holding of the Tax Court in Provizer v. C.I.R., 63 T.C. 2531 (March 25, 1992), which addresses the disallowance and overvaluation concerning the exact deductions and investment credits at issue here. That matter is currently on appeal to the Second Circuit.

cases in which 6659(b) has been applied in the context of tax shelter transactions. See Grodt & McKay Realty Inc. v. C.I.R., 77 T.C. 1221 (1981), Zirker v. C.I.R., 87 T.C. (1986), Massengill v. C.I.R., 876 F.2d 616 (8th Cir. 1989). Each of those cases involved a claimed purchase of breeding cattle which was found to be so lacking in economic substance that no sale could have occurred and therefore each taxpayer's basis in the cattle was treated as zero. Each of the deductions were disallowed on the grounds that the basis in the cattle was overvalued and therefore the overvaluation penalty was imposed. The Second Circuit, in analyzing this history behind the overvaluation penalty in the context of tax shelter transactions, stated as follows:

It is fairly questionable whether what occurred in these cases was a "valuation overstatement." What indisputably happened is that the Tax Court ruled that no sale had occurred. In one sense, the taxpayers had "overvalued" by claiming a high value for an asset that the Tax Court ruled they had not bought at all. Yet, in another sense, these were not cases of taxpayers selecting an unduly high value; rather, the taxpayers were rebuffed in their claims that any purchase at all had occurred. To say that a taxpayer has a zero basis in an asset he is found to have not acquired seems strained. Yet the appropriateness of the penalty seems more justified if one considers the alternative arguments of the Commissioner in Grodt & McKay Realty, arguments typically made in tax shelter disputes. Had the Commissioner been confined to his fallback position that the taxpayer's basis for depreciation was fair market value, a value far below his claimed purchase price, it would have been entirely sound to say that the asset had been "overvalued" and to impose the section 6659 penalty. If the Commissioner is more successful and persuades the Court to disregard not only the non-recourse notes but the entirety of the purchase price, thereby lowering the "price" down not only to fair market value but all the way to zero, should the Commissioner's success have the perverse effect of sparing the taxpayer the overvaluation penalty?

We are inclined to accept the view of the Tax Court in this and the prior cases and of the Eighth Circuit in Massengill and deem the penalty applicable. Indeed, ours is a stronger

case for the penalty than the cattle cases, because, while the Commissioner disputes that the [sale-leaseback] transaction has sufficient economic substance to warrant deductions for depreciation and interest, he does not contend that Gilman did not make a purchase.

Gilman at 150-51 (emphasis added). In next addressing whether the tax deficiency was "attributable to" the valuation overstatement, the Second Circuit again opted to follow the reasoning of the 8th Circuit in Massengill, stating:

While the Tax Court did not explicitly discuss the question of whether the purchase price paid by Gilman was fair, a premise of the Court's conclusion is that at the time Gilman entered the transaction, he could not reasonably expect a profit independent of taxes and that the purchase price of \$3 million was more than the computers were worth. In that way, the overvaluation of the computer equipment contributed to the Court's conclusion that the transaction lacked economic substance and was a sham.

Gilman at 151. Although recognizing it to be a "less common application", the Second Circuit held that section 6659 does authorize imposition of an overvaluation penalty to a transaction which lacks economic substance because the basis of the property transferred was incorrectly valued. Id. at 152.

This split in the case law was recently addressed by the Sixth Circuit in Illes v. C.I.R., 982 F.2d 1631 (6th Cir. 1992). Like the Esplanade transaction, Illes involved a tax shelter investment in children's audio cassettes for which the investors attempted to claim deductions and investment credits. The Commissioner in Illes determined, and the taxpayer admitted, that the value ascribed to each investor's interest exceeded their actual value by more than 250% and that the transaction therefore amounted to an economic sham. The Commissioner therefore assessed the overvaluation

penalty against Illes pursuant to §6659. The taxpayer argued that the underpayment could not be "attributable to" the valuation overstatement, but rather was "attributable to" the improper deductions and credits he had claimed. The Sixth Circuit, adopting the rationale of the Eighth Circuit in Massengill, supra, 876 F.2d at 619-20, ruled as follows on the distinction Illes tried to draw:

This is a false distinction. The tax benefit generated by the [tax] shelter was directly dependent upon the valuation overstatement, and the amount of the tax benefit was actually determined by the amount of the overvaluation. The entire artifice of the [tax] shelter was constructed on the foundation of the overvaluation of its assets. Plainly, then, Illes' underpayment was attributable to his valuation overstatement.

The Sixth Circuit, distinguishing Todd, supra., explained that the claimed deductions and credits therein were disallowed without regard to the investor's valuations of their interests. According to the Sixth Circuit, the deductions and credits were disallowed in Todd by the Fifth Circuit because the property at issue was not put into service in the tax year for which the deductions and credits were claimed. Illes at 167.

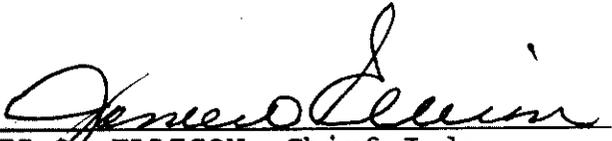
The Sixth Circuit has correctly drawn the legal distinction that is dispositive in this case. If the claimed deductions and investment credits relating to Esplanade were disallowed without regard to the valuation ascribed by the investors, then the underpayment is deemed not "attributable to" a valuation overstatement under §6659. If, on the other hand, the deductions and investment credits claimed were disallowed because the transaction for which the deductions/credits were claimed was

totally lacking in economic substance, then the underpayment is deemed "attributable to" a valuation overstatement under §6659. The latter is the case here. Accordingly, assessment of the valuation overstatement penalty in this case was appropriate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the assessment of the negligence penalty under 26 U.S.C. §6653(a) is hereby denied and judgment is entered in favor of the Plaintiff Mary Elizabeth Babcock Dunn.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the assessment of the overvaluation penalty under 26 U.S.C. §6659(a) is hereby affirmed and judgment is entered in favor of the Defendant United States of America.

ORDERED this 23^d day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE APR 26 1993

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

FILED

APR 28 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
Case No. 92-C-791-B ✓

WILLIAM KIRKLAND,)
)
 Plaintiff,)
)
 vs.)
)
 JOHNNIE BUTLER, Individually)
 and as Postmaster of Mc Alester)
 Post Office, Mc Alester,)
 Oklahoma, and the UNITED STATES)
 POSTAL SERVICE,)
)
 Defendants.)

ORDER

Before the Court for consideration are Defendant's Motion to Substitute the United States as Defendant (Docket #3), and Defendant's Motion to Dismiss or Alternatively for Summary Judgment (Docket #8). Plaintiff, William Kirkland, objects to the Motion to Substitute, arguing that the claim is for violations of his Constitutional rights and the named Defendants are the correct defendants. Plaintiff failed to file a response to the Defendant's Motion to Dismiss.¹

Plaintiff filed the instant action on September 3, 1992, pursuant to 42 U.S.C. § 1983. In his Complaint, Plaintiff seeks declaratory relief with respect to alleged civil rights violations and damages pursuant to the common law tort of intentional infliction of emotional distress. Plaintiff named two Defendants:

¹ According to Local Rule 15(a), failure to file an objection to a motion within fifteen days, constitutes a waiver of objection.

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Johnnie Butler individually and in his official capacity as the Postmaster of the Mc Alester Post Office, and The United States Postal Service.

On November 30, 1992, Defendant Butler filed a Motion To Substitute The United States As Defendant, stating that the controlling statute is the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2679(b)(1) which provides that a suit against the United States is the exclusive remedy for a Plaintiff alleging claims against a federal employee acting within the scope of his employment. Section 2679(d)(1) provides that "upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose...the proceeding [shall be] deemed a tort action brought against the United States" pursuant to the Federal Tort Claims Act. The Defendants attached the certification of Tony M. Graham, the United States Attorney for the Northern District of Oklahoma,² that the Defendant, Johnnie Butler, was acting within the scope of his employment at the time of the incidents giving rise to Plaintiff's claims.

On December 18, 1992, Plaintiff filed a response to Defendant's Motion to Substitute, objecting to the substitution of the United States as Defendant and asserting that his claims were for civil rights violations. In an effort to remove his claims from the realm of the FTCA, Plaintiff relies on 28 U.S.C. §

² The United States Attorney is authorized to so act on behalf of the Attorney General by 28 C.F.R. §15.3.

.2679(b)(2) which provides that subsection (b)(1) (the exclusive remedy provision) does not apply to a civil action against a government employee if the claim is for a Constitutional violation under 42 U.S.C. § 1983. (emphasis added). The matter then turns on whether the alleged violations fall within the purview of § 1983.

Plaintiff was employed as Supervisor of Mails and Delivery for the United States Postal Service from 1983 to 1990, under the authority of Postmaster Johnnie Butler. Plaintiff alleges that the Defendants deprived him of Constitutional rights under the First and Fourteenth Amendments. Specifically, Plaintiff alleges that: 1) Defendant Butler told Plaintiff not to talk to certain co-workers and vice versa; 2) Defendant Butler told Plaintiff the other workers did not like him; 3) Defendant Butler told Plaintiff that he would be food for an eagle statue in Defendant Butler's office; and 4) Defendant Butler told Plaintiff he was going to make life hard for Plaintiff. Plaintiff claims that this alleged tortious harassment by Defendant Butler caused Plaintiff to suffer two emotional breakdowns and forced Plaintiff to resort to disability retirement from the Postal Service.³

The threshold issue is whether Plaintiff's Constitutional rights have been violated under § 1983. Section 1983 provides: "Every person who, *under color of any statute, ordinance, regulation,*

³ Defendants assert in their answer that "plaintiff applied for disability retirement from his position of employment with the Postal Service, and that the same was approved. However, plaintiff elected to draw injury compensation benefits instead of taking disability retirement."

custom, or usage, of any State, Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States...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 proceeding for redress...." (emphasis added).

There are two essential elements for maintaining a claim under § 1983: (1) the conduct complained of must be by a person acting under color of state law; and (2) the conduct must have deprived the plaintiff of rights secured by the Constitution or laws of the United States. *Palacios v. Foltz*, 441 F.2d 1196, 1197 (10th Cir. 1971); *Daniels v. Murphy*, 528 F. Supp. 2,6 (E.D. Okla. 1978).

While it is true that a Constitutional claim may be brought against an individual defendant pursuant to § 1983, both of the above stated elements must be satisfied in order to pursue a claim under this statute. Section 1983 "is of only limited scope. The statute deals only with deprivations of rights that are accomplished under the color of law of 'any State or Territory'. It does not reach purely private conduct and ...actions of the federal government and its officers..." *District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973). No claim lies under § 1983 for actions arising under color of federal law. *Campbell v. Amax Coal Co.*, 610 F.2d 701, 702 (10th Cir. 1979); *Porter v. Windham*, 550 F. Supp. 687, 688 (W.D. Okla. 1981).

Plaintiff's § 1983 civil rights claims fail for lack of the

first element. The alleged wrongdoings were not committed under color of state law. Plaintiff's claim did not allege facts justifying the slightest inference that the Defendants acted pursuant to state law, and it does not appear that any such allegation could be made under the circumstances. See *Porter* 550 F. Supp. at 688. The Court concludes Plaintiff has failed to state a claim under § 1983 and therefore 28 U.S.C. § 2679(b)(2) is not applicable. For this reason Defendant's Motion to Substitute the United States as Defendant should be granted.

Plaintiff's remaining claim is for intentional infliction of emotional distress. Defendants have moved to dismiss⁴ this claim based on Plaintiff's failure to exhaust his administrative remedies. The FTCA requires that a complainant present his claim to the Federal agency before filing suit in district court. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989). 28 U.S.C. § 2675(a) (West 1961 & Supp. 1992). The requirement that the claim first be presented to, and finally be denied by the agency, is "jurisdictional and cannot be waived." *Lurch v. United States*, 719 F.2d 333, 335 n.3 (10th Cir. 1983); *Three-M Enterprises v. United States*, 548 F. 2d 293, 294 (10th Cir. 1977). Plaintiff's failure to first file a claim with the Postal Service mandates the conclusion that

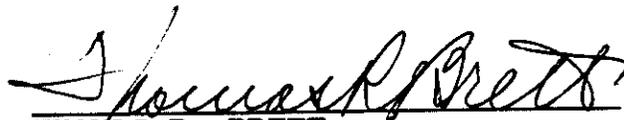
⁴ Plaintiff asked for an extension of time to respond to Defendant's Motion to Dismiss, and was granted an extension to March 8, 1993. Plaintiff did not file a response however, and the Court is therefore addressing Defendant's motion without Plaintiff's response.

Plaintiff has failed to exhaust his administrative remedies.⁵
Therefore this claim must be dismissed.

In sum, having established that the United States is the proper defendant, the FTCA is the exclusive remedy against the United States in this case. Plaintiff has failed to exhaust his administrative remedies which is a jurisdictional prerequisite for redress under the FTCA. Therefore Plaintiff's claims must be dismissed pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction.

For the above states reasons, Defendant's Motion to Substitute the United States as Defendant and Defendant's Motion to dismiss are hereby GRANTED.

IT IS SO ORDERED THIS 23rd DAY OF APRIL, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁵ Before Plaintiff can maintain a judicial action under the FTCA, he must first file an administrative claim in accordance with the applicable regulations found at 39 C.F.R. §§ 912.2 - 912.14.

ENTERED ON DOCKET

DATE 4-23-93

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

FILED

APR 22 1993

ROBERT M. LAURENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

HAROLD W. TAYLOR,
Plaintiff,

vs.

No. 92-C-498-E ✓

FORD MOTOR COMPANY, and
UNITED AUTO AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
LOCAL #1895,
Defendants.

ORDER AND JUDGMENT

COMES NOW before the Court the Motions for Summary Judgment of Defendant Ford Motor Company (hereinafter "Ford") (docket #10, #11) and of Defendant United Auto, Aerospace and Agricultural Implement Workers of America, Local #1895 (hereinafter "UAW") (docket #15). Plaintiff has wholly failed to respond to either motion. For the reasons stated herein, both motions are hereby granted.

Although the relief contemplated by Federal Rule of Civil Procedure 56 is drastic and should be applied with caution so that litigants will have an opportunity for trial on bona fide factual disputes¹, summary judgment shall be rendered if the pleadings and other documents on file with the Court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In a case such as this,

¹ Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 234 (10th Cir. 1975); Jones v. Nelson, 484 F.2d 1165, 1168 (10th Cir. 1973); Machinery Center, Inc. v. Anchor National Life Insurance Co., 434 F.2d 1, 6 (10th Cir. 1970).

where Plaintiff has utterly failed to submit any evidence to the Court to contradict the allegations of the Defendants, the last two sentences of subsection (e) of Fed.R.Civ.Proc. 56 must be considered:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Advisory Committee Notes concerning that subsection, and following that rule, provide the following reasons for the addition of the above two sentences:

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some, but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation, Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded" and not suppositious, conclusory, or ultimate. [Citations to Third Circuit Cases omitted].

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice and Procedure 1235.1 (Wright ed. 1958).

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The record in the case establishes the following. Taylor sues his former employer, Ford, and former local union, UAW, alleging four claims: (1) violation of the Collective Bargaining Agreement (CBA) between Ford and UAW by Ford in terminating Taylor's employment, (2) breach of the duty of fair representation by UAW in handling a grievance relating to Taylor's termination, (3) intentional infliction of emotional distress by Ford, and (4) wrongful discharge by Ford.

The undisputed facts establish that Taylor was terminated by Ford based upon charges that Taylor had stolen property belonging to Ford.

Specifically, two Ford employees witnessed Taylor remove a brown paper sack containing property belonging to Ford, place the sack on a cart, conceal the sack with a hose, drive the cart out to his white Ford pickup truck, place the sack inside of his truck, and return to the plant without the sack on the cart. Taylor has admitted he initially lied to the two employees about owning the truck and about having placed the sack within his truck. Emery suspended Taylor from employment pending disciplinary action. Five days later a disciplinary hearing was held, at which Union Representatives were present. Taylor was terminated by Ford for theft of Ford property. The Union filed a grievance appealing the discharge. Ford denied the grievance. The Union appealed again, but settled the grievance by withdrawing it without prejudice. The Union issued a letter to Taylor informing him that the grievance had been withdrawn, informing him that he had a constitutional

right to appeal, and informing him about the appeal process. Taylor admits that he never appealed.

Ford now seeks summary judgment on the claims of breach of the CBA, intentional infliction of emotional distress, and wrongful (retaliatory) discharge. The undisputed facts establish that Taylor failed to exhaust his administrative remedies. Although Taylor raises the defense of futility, the record is void of evidence to suggest (1) that the Union officials were so hostile that Taylor could not hope to obtain a fair hearing, (2) the internal Union appeals procedures were inadequate to either reactivate Taylor's grievance or to award him with the full relief he seeks under §301 of the Labor Management Relations Act, or (3) exhaustion of the internal union procedures would unreasonably delay Taylor's opportunity to obtain a judicial hearing on the merits of the claim. Clayton v. International Union, UAW, 101 S.Ct. 2088, 2095 (1981). Accordingly, the Court finds that Taylor's failure to exhaust his administrative remedies precludes him from now seeking relief against Defendant Ford for breach of the collective bargaining agreement in violation of §301 of the Labor Management Relations Act.

With respect to Plaintiff's state law tort claim against Defendant Ford for intentional infliction of emotional distress, this Court is bound by the decision of the Tenth Circuit Court of Appeals in Mock v. TG&Y Stores, 971 F.2d 522, 529, holding that a claim of intentional infliction of emotional distress is preempted by §301 of the Labor Management Relations Act because the

allegations supporting the tort claim "directly relate to either explicit or implied rights derived from the Collective Bargaining Agreement." See also, Davies v. American Airlines, Inc., 971 F.2d 463, 466 n.4 (10th Cir. 1992); Johnson v. Beatrice Foods Co., 921 F.2d 1015, 1020 (10th Cir. 1990). Accordingly, the Court finds that Taylor's claim of intentional infliction of emotional distress is preempted by §301 of the Labor Management Relations Act.

Finally, with respect to Plaintiff's wrongful (retaliatory) discharge claim, Plaintiff testified in deposition that he lacked any proof of retaliation on the part of Ford, and that his claim was simply based on a "feeling" he had about his discharge. Accordingly, the Court finds that Plaintiff has wholly failed to submit any evidence beyond the pleadings to overcome the evidence submitted in Defendant Ford's motion for summary judgment with respect to the claim for wrongful discharge.

Defendant Local Union #1895 seeks summary judgment in its favor on the only claim asserted against it--breach of the duty of fair representation in violation of §301 of the Labor Management Relations Act. The UAW submits (1) that it was the International Union, not the local union, that represented Plaintiff in his grievance and therefore the local union cannot be held liable, and (2) alternatively, that the evidence is insufficient as a matter of law to establish breach of the duty of fair representation by anyone. The Court finds that the International Union is the only party that can be involved in deciding to withdraw a grievance, and therefore the International Union is the party that should be named

as a defendant in this action. Therefore dismissal of this claim against the Local Union is warranted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment should be entered as a matter of law in favor of the Defendant Ford on all of Plaintiff's claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's claim against the Local Union for breach of the duty of fair representation shall be dismissed on the merits.

SO ORDERED, ADJUDGED AND DECREED this 22nd day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-23-93

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

FILED

APR 22 1993

**Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

BERNICE R. OGANS, et al,)
)
 Plaintiffs,)
)
 v.)
)
 TED SANDERS,)
)
 Defendant.)

92-C-0187-E

ORDER AND JUDGMENT

On December 21, 1992 the undersigned entered an Order memorializing the ruling made in this action, following oral argument on September 22, 1992. At the time of oral argument the undersigned found that judgment should be entered for Plaintiff and as against the Secretary, particularly given the time elapsed. Upon reconsideration, the undersigned found that, notwithstanding the passage of time, and, notwithstanding the seeming inequity of the situation, the law demanded judgment be rendered in favor of the Secretary and as against Plaintiff. An Order to that effect was entered on December 21, 1992, but, past the time the parties had filed their appeal. Accordingly, the matter was remanded so that a new order and judgment might be entered. The Order entered on December 21, 1992 is set forth in its entirety below, and re-entered upon dismissal of the appeal.

The December 21, 1992 Order

Now before this Court are cross-motions for summary judgment. The facts are undisputed. The issue, however, is whether 20 U.S.C. §1091a(a) allows the Defendant to

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collect Plaintiff Bernice R. Ogans' \$2,693.56 student loan debt.¹ Ogans claims that the statute of limitations on collecting the debt has expired; the Secretary for the Department of Education disagrees.

Following oral argument, the undersigned ruled that the Government's collection efforts were time-barred by reason of the fact that it had not proceeded with judicial collection proceedings prior to expiration of the limitations period in effect before the passage of the Higher Educational Technical Amendments Act of 1991. After careful reconsideration, the undersigned finds that the earlier ruling was error, and that the Higher Education Technical Amendments Act of 1991 does operate to revive otherwise time-barred claims for repayment of student loans.

I. The Facts

On November 20, 1972, Ogans executed a promissory note ("Note") to McKenzie College in Chattanooga, Tennessee in exchange for \$2,362.25 in student loans.² The Note was guaranteed by the Defendant ("Secretary") under the National Defense Student Loan Program.³

On July 3, 1975, Ogans defaulted on the Note while still owing McKenzie College \$1,930.99. Four years later, McKenzie College assigned the Note to the Secretary. The Secretary apparently made little, if any, effort to collect the Note until 1991.

On September 14, 1991, Ogans received written notice about the Secretary's plan

¹ This amount does not include accrued interest.

² On November 20, 1972, Ogans borrowed \$1,144. On January 2, 1973, she borrowed \$30.25 and an additional \$1,188 on June 12, 1974.

³ Section 464, Title IV, Part E, of the Higher Education Act of 1965, as amended, 20 U.S.C. §1087dd.

to offset the unpaid Note balance of \$2,569.46 against any income tax refunds that might be owed to Ogans by the United States Treasury Department or Internal Revenue Service.

Two weeks after receiving the notice, Ogans protested in writing to the Secretary. On November 11, 1991, the Secretary denied the protest. That denial led to Ogans filing the instant Complaint.

II. Legal Analysis

At the time the Note was assigned to the Secretary, claims to collect delinquent student loans guaranteed by the Defendant were subject to 6- and 10-year statute of limitations. *See, 20 U.S.C. §1901a(a)(4)(c) and Treasury Regulation, 26 C.F.R. §301.6402-6(T)(b)(2), 31 U.S.C. §3720(a)(d), 26 U.S.C. §6402(d)*. Under those statute of limitations, Defendant would have been barred from collecting the debt after May 8, 1985 -- which was six years after the Note was assigned to the Secretary.

However, in 1991, the Higher Education Technical Amendments Act of 1991 ("HETA") was passed by Congress. The Act became effective April 7, 1986 by order of Congress. The pertinent part of that amendment ("HETA") reads:

(1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayment are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.

(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by -

(D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this title, or for the repayment of the amount due from a borrower on a loan made under this title that has been

assigned to the Secretary under this title. 20 U.S.C. §1091a(a)(D).

Plaintiff Ogans contends that HETA does not revive claims on delinquent student loans prior to April 7, 1986 -- the date Congress chose for HETA to become effective. Since Ogans' debt would have expired under the old statute of limitations on May 8, 1985, Ogans argues that Defendant is now time-barred from collecting the debt. Defendant, however, asserts that HETA allows it to collect any student loans that were previously barred by any statute of limitations.

The issue, therefore, is whether HETA allows Defendant to collect its previously time-barred debt against Ogans. No mandatory authority exists on this question as neither the United States Supreme Court or the Tenth Circuit has examined the issue. This Court, however, is guided by a series of federal district court decisions.

The case most similar to the one at bar is *United States v. Davis*, a case decided by the Middle District of Alabama.⁴ In that case, Davis executed a promissory note to a California bank to secure a student loan in December of 1972. That note, which also was guaranteed by the High Education Act of 1965, became due in 1973. In 1978, the bank assigned the loan to the Department of Education. Collection efforts were apparently unsuccessful, prompting the Department to file a lawsuit in 1992.

The court in *Davis* interpreted the HETA language as preventing Davis from using a statute of limitations defense. The court rejected an argument by Davis, also raised by Plaintiff in the instant case, that HETA revives only those claims for which the statute of limitations had run after April 7, 1986. After discussion of that issue, the court wrote:

⁴ 801 F.Supp. 581 (M.D. Ala. 1992) Also, see attachment to Reply To Plaintiff's Response And Memorandum In Support (docket #14).

The court concludes, first, that the 1991 Amendments [HETA] eliminating statutes of limitations for collection of defaulted student loans apply retroactively to revive claims time-barred under previous statutes of limitations and; second and more specifically, that, because of the 1991 Amendments, the government's efforts to collect Davis's defaulted loan through judicial means are not time-barred. *Id. at page 8.*

Another case examining the issue is *United States v. Waszak*, a case from the Western District of Missouri.⁵ In this case, Waszak executed promissory notes in 1969, 1970, 1971 and 1972 to an Illinois bank. The loans also were guaranteed by the Department of Education. The facts are different from those in the instant case in that the delinquent loan was not assigned to the Department of Education until May 14, 1990, but the courts stated:

The court also finds that regardless of the 1985 limitations period, [HETA applies] retroactively to eliminate any statute of limitations on the collection of student loans. By its terms the amendments [HETA] apply "notwithstanding any other provision of statute, regulation, or administrative limitation..." The amendments also expressly state that the purpose is to enforce student loan obligations "without regard to Federal or State statutory, regulatory, or administrative limitation..." It is therefore clear that the amendments were enacted in order to abrogate any limitations period on collecting delinquent student loans. *Id. at 5-6.*

A third case is from a federal district court in Oregon. In *United States v. Wall*, a bank made four federally insured loans to Wall from 1977 to 1979.⁶ In 1981, after Wall had made no payments on the loans, the loans were assigned to the United States. After some unsuccessful collection efforts, the United States filed suit in 1991. After examining the HETA language and the legislative history, the court wrote:

⁵ *Order, No. 91-0422-CV-W-6 (July 16, 1992).*

⁶ *794 F.Supp. 350 (D. Ore. 1992).*

I find that Congress intended to retroactively abolish all limitations on the collection of student loans, so that all possible funds could be collected from student loan defaulters. *Id.* at 8.

A fourth persuasive case comes from this Court. In *United States v. Walker, Walker*, 795 F.Supp. 1073 (N.D. Okla. 1992), executed promissory notes for student loans from 1965 to 1974. In 1984, Oklahoma State University assigned the loan to the Department of Education. After seven years, the United States sued to collect the debt. This Court found that the United States could collect the debt: "The new law, the Higher Education Technical Amendments of 1991, abrogated all limitation periods affecting collection of defaulted student loans." *Id.* at 2.⁷

In this case, Ogans makes the same argument advanced in the above cases. She argues that her debt was no longer legally or administratively enforceable after May 8, 1985 because Congress selected April 7, 1986 as the starting date for HETA.

This Court finds Ogans' arguments without merit for the same reasons discussed above: (1) the language of HETA clearly states that the student loan debts can be collected "notwithstanding any other provision of statute, regulation, or administrative limitation...; (2) The intent of Congress was clearly to eliminate all statute of limitations in collection of student loan debts;⁸ and (3) Courts have held that statute of limitations are procedural

⁷ Several other courts have made similar rulings: *United States v. Coggins*, CV-F-91-601-OWW (E.D. Cal. May 11, 1992) ("Congressional intent to revive otherwise expired causes of action to collect federally guaranteed student loans is clear in the 1991 technical amendments to the Higher Education Act."); *United States v. Smith*, 91-1152-CV-W-6 (W.D. Mo. July 16, 1992) ("Court finds that the HETA [is] applicable to the defendant's debt thereby defeating her statute of limitations defense."); *United States v. Friedenberg*, 1991 WL 352884 (E.D.N.Y. Sept. 20, 1991) (No bar under federal statute to the plaintiff United States maintaining its action against defendant); and *United States v. Davis*, 142 B.R. 293, 296 (S.D.Ind. 1992) ("the Court concludes that §1091a applies retroactively to actions pending on or after April 9, 1991 that have been or will be brought before November 15, 1992, regardless of whether the previous six-year statute of limitations had run prior to April 7, 1986.")

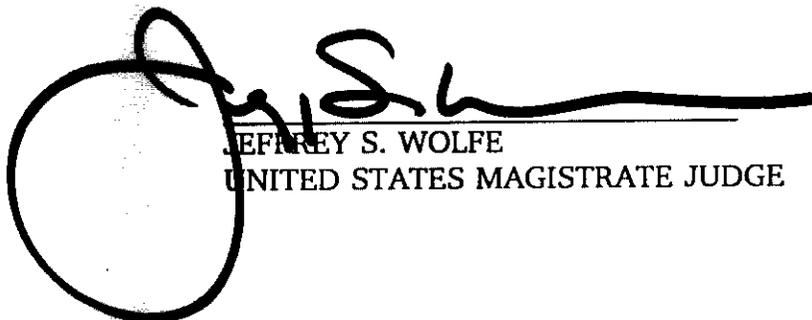
⁸ During the debate on HETA in the House of Representatives, Congressman William F. Goodling stated: "Some questions have arisen regarding the running of the statute of limitations. The amendment would lift the statute of limitations for all time, would apply it retroactively, and would sunset this provision on November 15, 1992, in line with the reauthorization of the Higher Education Act." 131 *Cong. Rec.* H1810

rules that can be established, modified or enlarged by the jurisdiction under which a debt can be enforced. *See United States v. Hunter*, 700 F.Supp. 26, 27 (M.D. Fla. 1988).

III. Conclusion

Had HETA not been passed, Ogans would have a successful statute of limitations defense against Defendant. However, upon careful reconsideration of the cases, this Court finds that, notwithstanding the circumstances of this case, that Plaintiff's statute of limitation defense is invalid. Therefore, Defendant's Motion For Summary Judgment is GRANTED and Plaintiff's Motion For Summary Judgment is DENIED. Judgment is entered for Defendant in the amount requested.

SO ORDERED THIS 20TH day of April, 1993.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

(daily ed. March 19, 1991). See, also, Response and Cross Motion for Summary Judgment at pages 8-9 (docket #8).

DATE 4/23/93

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

THE NANJI CORPORATION INTERNATIONAL,
an Oklahoma Corporation,

Plaintiff,

vs.

INTERNATIONAL PRODUCT RESOURCES,
a Foreign Company, and LIQUINET,
INC., a Foreign Corporation,

Defendants.

No. 92-C-587-B ✓

FILED
APR 22 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court previously found in favor of Plaintiff, The NANCI Corporation International ("NANCI"), on the issue of liability on February 25, 1993, by granting NANCI's Motion For Default Judgment in its entirety.

On April 14, 1993, NANCI presented at evidentiary hearing before the Court, its proof of damages.

The Court now enters this Findings of Fact and Conclusions of Law on the issue of Plaintiff's damages as follows:

FINDINGS OF FACT

1. The Defendants were made aware, by timely notice, of the Hearing on Damages set for April 14, 1993.
2. The defective merchandise is hose that was warranted to be non-run and sold to NANCI by the Defendant(s).
3. At the commencement of this lawsuit, in State District Court, on May 27, 1992, the Plaintiff's damages were alleged as follows: inventory of hose was \$306,757.29; returns/replacements were \$8,000; and, Plaintiff also alleged loss of goodwill in the amount of \$500,000.

4. At Hearing, the Court heard the testimony of Kristianne Kiegley, Coordinator, Customer Services for NANJI, that as of April 1993, returns (and the replacement and shipping costs of like item by the Company to the customer) had cost NANJI \$13,880.70.

5. At Hearing, the Court heard the testimony of Marc Chastain, Director of Accounting of NANJI, who stated that the present cost of inventory of the hose, less mandatory purchases and sales at cost or below, was \$262,348.54.

6. At Hearing, the Court heard the testimony of Nanci Masso, Chief Executive Officer of NANJI, and Marc Chastain, as to the loss of goodwill to the Company as a result of the defective product.

7. Mrs. Masso testified as to the general demise of the business in terms of decline of sales and distributor applications.

8. Mr. Chastain testified as to the loss of sales. That in the calendar year 1991 NANJI posted a net profit of \$300,000 and in calendar year 1992 NANJI posted a net loss of \$350,000. To his knowledge, this loss was directly attributed to the sale of the defective product and the resulting in loss of confidence by the distributors, hence the corresponding loss of sales.

CONCLUSIONS OF LAW

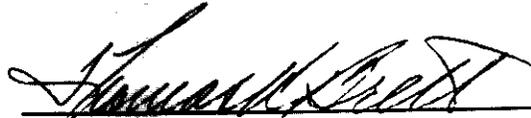
1. Based upon the evidence before it, the Court finds, as a matter of law, on the issue of damages for the Plaintiff as follows: Actual Damages in the amount of \$262,348.54 representing the Plaintiff's remaining inventory of hose; and, Consequential Damages in the amount of \$350,000.00, representing loss of goodwill to Plaintiff's business; for a total amount of damages to be assessed at \$612,348.54.

3. The Court awards costs to Plaintiff, to be assessed by the Court Clerk upon proper filing by Plaintiff pursuant to Rule 6(E) of the Local Court Rules for the Northern District.

4. The Court awards post-judgment interest allowable by law from the date of this Judgment.

5. The Court awards reasonable attorney's fees to Plaintiff pursuant to 12 O.S. Section 939, subject to proper application and submission by Plaintiff pursuant to Rule 6(G) of the Local Court Rules for the Northern District.

DATED this 22nd day of April, 1993.



THOMAS R. BRETT
JUDGE OF THE UNITED STATES DISTRICT COURT

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

KARIN D. OWEN,

Plaintiff,

vs.

LAUREATE PSYCHIATRIC CLINIC
AND HOSPITAL

Defendants.

Case No. 92-C-1130-B ✓

FILED

APR 22 1993 *mw*

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court for consideration is the Plaintiff's Dismissal With Prejudice (Docket #4)¹ and Motion to Remand (Docket #3) filed March 29, 1993. The Defendant has not filed a response.

Upon review of the file, the Court concludes it no longer has jurisdiction over this matter, and therefore, Plaintiff's Motion to Remand is hereby GRANTED.

IT IS SO ORDERED THIS 22nd DAY OF APRIL, 1993.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ Plaintiff dismissed her copyright claim, upon which this Court's jurisdiction was based.

5

APR 25 1993

DATE

FILE

APR 22 1993

Hard M. Lawrence, Court C
U.S. DISTRICT COURT

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

WILLIAM A. MEHOHAH and
FREDRICKA LOU MEHOJAH,
Plaintiffs,

v.

CHARLES R. DRUMMOND as
representative of the R.C.
DRUMMOND WEST RANCH TRUST,
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92-C-9-B

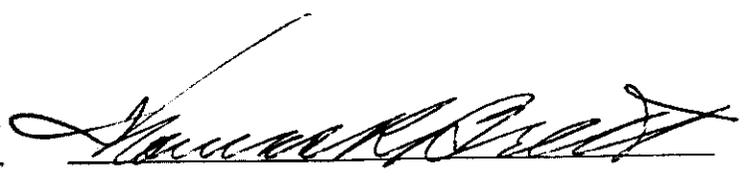
- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANT CHARLES R. DRUMMOND AS REPRESENTATIVE OF THE R.C. DRUMMOND WEST RANCH TRUST AND AGAINST THE PLAINTIFFS WILLIAM A. MEHOJAH AND FREDRICKA LOU MEHOJAH.

COSTS ARE ASSESSED AGAINST THE PLAINTIFFS AND THE PARTIES ARE TO PAY THEIR OWN RESPECTIVE ATTORNEYS FEES.

4-22-93

Date



THOMAS R. BRETT, JUDGE

(By) Deputy Clerk

47

ENTERED
DATE 4/22/93

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

A.V. AVINGTON, JR.

Plaintiff,

vs.

FREEDOM RANCH, INC.,
d/b/a FREEDOM HOUSE

Defendant.

Case Number 92-C-464-B

FILED

APR 21 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

On this day came on to be heard the Motion of A.V. Avington, Jr., Plaintiff in the above-captioned action, seeking dismissal of said action with prejudice. The Court is of the opinion, and finds, that all matters in dispute between Plaintiff and Defendant, Freedom Ranch, Inc. d/b/a Freedom House, have been fully and finally resolved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the above captioned action be, and the same is hereby, dismissed with prejudice to the rights of Plaintiff, A.V. Avington, Jr., and Defendant, Freedom Ranch, Inc. d/b/a Freedom House. All costs of Court are taxed against the party incurring same, for the collection of which execution may issue.

ENTERED this 21 day of April, 1993.

S/ THOMAS J. TIT

United States District Court Judge

DATE ~~APR 22 1993~~
FILED
 APR 21 1993
 Richard M. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

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

STEVE LENNOX,
)
)
 Plaintiff,
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendants.)

NO. 91-C-818-B ✓

ORDER

This matter comes on for further consideration of the Defendants' Motion to Dismiss converted to a Motion for Summary Judgment on the issue of qualified immunity.

Plaintiff, Steve Lennox (Lennox), is incarcerated in the Dick Conner Correctional Center. Policy at the prison allows a supervisor to remove an inmate from a prison job for misconduct or poor work performance.

Lennox was assigned, in June, 1991, to a clerical and janitorial job in the prison's plumbing unit. Lennox alleges supervisor Fred Williams, who "hired Lennox", was pleased with his work. Trouble began when a new supervisor, Jim Evans, found fault with Lennox's job performance and continual misconduct. A special report on Lennox stated that Lennox "continually failed to perform those duties assigned by maintenance supervisors and continually engaged in using the typewriter which he had been instructed to stop using" and that Lennox "was instructed not to use the typewriter for personal use; however, he continued using the typewriter."

Premised upon this misconduct Evans cited Lennox in an August 14, 1991 report. A hearing was held before prison

officials on August 26, 1991, and it was recommended that Lennox be terminated from his job, which he was. Lennox unsuccessfully appealed the decision to the prison warden and was later reassigned to another department.

After being terminated, Lennox filed a civil rights Complaint, alleging that prison officials fired him because he was black.

In Magistrate Judge Wolfe's Report and Recommendation, of April 24, 1992, he recommended that Defendants' Motion to Dismiss, converted to a Rule 56 motion, be denied on the issue of qualified immunity and further recommended that Plaintiff's First Amendment claim be dismissed. The Court, in its order of August 12, 1992, filed August 13, 1992, adopted the Magistrate Judge's report with respect to the latter claim, but denied his recommendation as to the former, taking under advisement Defendants' Motion to Dismiss on the issue of qualified immunity, converted to a Motion for Summary Judgment. Plaintiff was given thirty (30) days in which to respond to Defendants' motion, if so desired. Plaintiff, a pro se litigant, filed a Motion For Summary Judgment which the Court deems as a response to Defendants' motion.

The Magistrate Judge noted that Lennox had received three favorable evaluations as a worker in the plumbing unit for the periods June, July and August, 1991, leading up to his termination. The July evaluation was by Jim Evans, the others by Fred Williams.

In its earlier order this Court noted that Lennox did not deny that he used the typewriter, nor did he deny that he disobeyed his supervisor's orders (Lennox argued that he had the permission of his hiring supervisor, Williams, to use the typewriter). Notwithstanding, it is undisputed that Lennox did not have his new supervisor's permission to use the typewriter who, in fact, hid the electric cord from Lennox on one occasion in an apparent effort to discontinue the forbidden practice.

In its August 12th order the Court, because of its desire to allow Lennox opportunity to fully respond to the Motion to Dismiss converted to a Motion for Summary Judgment, concluded that Lennox faced a heavy burden on the issue of racial animus as a reason for Lennox being "fired" from his prison job, the essence of Lennox's § 1983 action. Further, on the issue of disparate impact, the Court stated:

Plaintiff also claims disparate impact discrimination at the prison, and asks this Court for relief under Section 1983 for discriminatory hiring and firing practices against all black prisoners. In order to prevail under a Section 1983 claim for disparate impact discrimination, the plaintiff must show that the defendant's discriminatory actions were purposeful and that he was injured by these challenged actions. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1976). In the present case, Plaintiff has not established sufficient facts to meet either burden, and thereby lacks standing at this time to pursue prison-wide discovery. Id. at page 6.

The Court concludes that Lennox, while a good employee, apparently would not refrain from using the typewriter and, further, confronted supervisor Evans with the statement that Evans "could fire him and he would file a discrimination suit".

In employment scenarios, a plaintiff must initially make a prima facie showing that his termination was a violation of a clearly established right. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The defendant is then given an opportunity to prove that nondiscriminatory factors resulted in the termination. Id. Finally, the plaintiff is given a chance to rebut the defendant's showing, if he can prove that these other factors were a mere pretext. Id. at 804.¹

The Court concludes that the record, when viewed in a light most favorable to Lennox, arguably supports satisfaction of Lennox's prima facie burden under McDonnell Douglas to show that his termination was a violation of a clearly established right. However, the Court concludes Lennox fails in the second level of inquiry under McDonnell Douglas, concerning the supervisor's justifications for Lennox's termination. An employer is not liable if there are nondiscriminatory reasons for the termination which, when viewed independently from the alleged discriminatory reasons, provide a legally justifiable cause for the firing. Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). This Court concludes, as it concluded in its order of August 12, 1992, that Defendants have provided sufficient justification for the firing of Lennox.

¹ While McDonnell Douglas refers to Title VII actions, when section 1983 "is used as a parallel remedy for transgression of section 1981 and section 706 of Title VII rights, the elements of the causes of action do not differ" from those required under Title VII. Guillory v. St. Landry Parish Police Jury, 802 F.2d 822, 824 (5th Cir. 1986), cert. denied 482 U.S. 916 (1987); see Poolaw v. City of Anadarko, 660 F.2d 459, 462 (10th Cir. 1981).

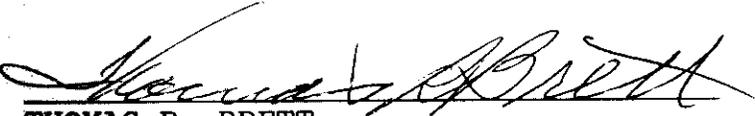
As this Court stated in its earlier order, a government official is only liable for improper actions under Section 1983 where a reasonable person in his position would realize that his actions violate a clearly established constitutional or statutory right; if this showing is not made the official is immune from suit. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). This Court further observed that if the defendant shows that no triable dispute of fact exists on the issue of qualified immunity, he is immune from suit, relieved from further discovery, and is entitled to judgment as a matter of law. Jones v. City and County of Denver, Colo., 854 F.2d 1206, 1211 (10th Cir. 1988). This is, of course, the basis of Defendants' motion for summary judgment on the issue of qualified immunity.

When the Court, on August 12, 1992, took the Motion to Dismiss converted to a Rule 56 motion under advisement it was allowing Plaintiff reasonable opportunity to rebut Defendants' showing that a nondiscriminatory reason existed for Plaintiff's termination. Lennox has failed to make such showing. By the Court's previous order, Lennox was granted opportunity to conduct discovery, if desired, concerning "the facts surrounding the termination of Plaintiff, Steve Lennox, from his position as janitor/clerk in the Plumbing Department at Dick Conner Correctional Center from June 1, 1991 through August 15, 1991, and any facts concerning Plaintiff's employment during that time."

The issue is were the supervisor's actions violative of Lennox's rights. The Court concludes they were not. Lennox was ordered by his duly authorized supervisor not to use the typewriter, and when he continually disobeyed that request, he was issued a misconduct report and subsequently terminated. (Offense Report, Attachment "A", Affidavit of Jim Evans). The Court again concludes that this is adequate justification for Lennox's termination, independent of any potential racial animus.

The Court concludes Defendants' Motion to Dismiss, converted to a Rule 56 Summary Judgment Motion, on the issue of qualified immunity, should be and the same is hereby GRANTED. Plaintiff's action is therefore DISMISSED as to all claims. A Judgment in accord with this Order and the Court's Order of August 12, 1992, will be entered simultaneously herewith.

IT IS SO ORDERED, this 21st day of April, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

4/22/93

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

THOMAS J. THOMA,
Plaintiff,
v.
THE UNITED STATES,
Defendant and Counterclaim
Plaintiff,
v.
ALLEN E. KROBLIN, THOMAS E. KROBLIN,
ROBERT A. KROBLIN, AND LOYAL FRISCH,
Counterclaim Defendants.

Civil No. 90-C-616-B

FILED
APR 21 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PARTIAL DISMISSAL WITH PREJUDICE

This case is before the Court on the joint Stipulation for Partial Dismissal filed herein by Plaintiff, Thomas J. Thoma, and Counterclaim Defendants, Thomas J. Thoma, Robert A. Kroblin and Loyal Frisch, and the United States. The Court having reviewed the Stipulation and being fully advised in the premises finds that the Partial Dismissal should be granted.

IT IS THEREFORE ORDERED that the Complaint filed by Thomas Thoma against the United States and the counterclaims filed against Thomas Thoma, Robert Kroblin and Loyal Frisch are dismissed with prejudice, the parties to bear their respective costs, including any attorney's fees or other expenses of litigation.

S/ TTT

DISTRICT COURT JUDGE

ENTERED ON DOCKET

DATE 4-22-93

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

BRIAN DALE DUBUC,)
)
Plaintiff,)
)
v.)
)
CLIFFORD E. HOPPER,)
et al.,)
)
Defendants.)

92-C-193-E

FILED

APR 22 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This order pertains to Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Docket #2),¹ the Motion to Dismiss of Defendant Judith Harmon (#5), the Motion to Dismiss of the Honorable Clifford Hopper and David Moss (#7), Plaintiff's Response to Defendant Harmon's 12(B)(6) Motion to Dismiss (#17), and Plaintiff's Responsive Pleading to Defendant Hopper's 12(B)(6) Motion to Dismiss (#19).

Plaintiff alleges that defendants violated his rights under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution by conspiring to continue his preliminary hearing in Case No. CF-91-3581 on several occasions, coercing him to waive his right to a preliminary hearing, restricting his use of the law library, and denying him a speedy trial. He claims that Defendant Harmon also violated his rights by presenting no evidence of his innocence, providing no defense, conversing with state officials and judges concerning his case, and refusing to allow his presence at confidential hearings concerning his liberty

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

during the course of her legal representation of him. Plaintiff seeks an injunction to stop all action in the state court arising from Case No. CF-91-3581 and two and one-half million dollars from each defendant.

Plaintiff was arrested and charged with five felony counts for theft of a vehicle and property in Case No. CF-91-3581 and appeared with his counsel, Judith Harmon, on August 30, 1991, for his initial appearance. His preliminary hearing was initially set for September 17, 1991 and was continued seven times until January 23, 1992, when he waived his right to a preliminary hearing, based upon a plea negotiation for eight years in custody. At this District Court Arraignment on January 23, 1991, his motion to remand for preliminary hearing was overruled, and Judith Harmon's request to withdraw as his attorney was denied. The case was set for jury trial on February 10, 1992. On that date, Judge Clifford Hopper allowed Judith Harmon to withdraw as attorney of record, prior to any hearings or trial, and with no objection by the plaintiff.

The case was passed to February 11, 1992, when the Office of the Public Defender was appointed to represent him for jury trial on March 2, 1992. The case was called for Jury Trial on March 2, 1991, and continued on a daily basis to March 4, 1992, when the trial began. A verdict of guilty on the first four counts was returned on March 9, 1992, and he was formally sentenced on March 12, 1992, to one hundred and eighty-seven years. Count five of the information was severed to be reset for jury trial at a later date.

Defendant Judith Harmon seeks dismissal on the ground that she was not acting under color of state law while serving as plaintiff's counsel. Defendants Clifford Hopper and David Moss seek dismissal on the grounds that plaintiff has failed to allege any facts in support of his allegations of conspiracy, that he has not shown that they personally

acted to deprive him of any rights, and **that** they are absolutely immune from suit. In Plaintiff's Responsive Pleading to Defendant Hopper's 12(B)(6) Motion to Dismiss (#19) and his brief in support (#20), plaintiff **has admitted** that defendant David Moss is not a proper party to this action.

The rule for reviewing the **sufficiency of any** complaint is that the "complaint should not be dismissed for failure to state a **claim** unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court may dismiss an **action** for failure to state a cause of action "only if it is clear that no relief could be **granted under** any set of facts which could be proved". Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

In order to establish a claim **under** 42 U.S.C. § 1983, plaintiff must allege that defendants, while acting under color of **state** law, deprived him of a constitutional or federally protected right. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

Before liability may be imposed **under** 42 U.S.C. §§ 1985 and 1986 for conspiring to deprive an individual of his **constitutional** rights, the complaint must allege (1) a conspiracy, (2) for the purpose of **depriving** plaintiff of equal privileges and protections of the law, (3) an overt act in furtherance **of the** object of the conspiracy, (4) that there was some racial or other class-based **invidiously discriminatory** animus behind the conspirators' actions and (5) injury or deprivation. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971); Taylor v. Gilmartin, 686 F.2d 1346, 1356-57 (10th Cir. 1982), cert. denied, 459 U.S. 1147 (1983).

"[W]here a plaintiff in a § 1983 action attempts to assert the necessary state action by implicating a state official in a conspiracy with private defendants, the pleadings must specifically present facts showing agreement and concerted action. Conclusory allegations without supporting facts are insufficient." Hammond v. Bales, 843 F.2d 1320, 1323 (10th Cir. 1988) (citing Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983)). The court in Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989), dismissed a prisoner's pro se complaint alleging conspiracy where it failed to allege specific facts showing an agreement and concerted action.

Defendant Judith Harmon is a private attorney licensed to practice law in Oklahoma and was retained by the plaintiff for legal representation in state court on the five felony charges. A private party does not "act under color of state law" as an officer of the state during the time she is acting as counsel for a criminal defendant. However, private persons, jointly engaged with state officials in an action challenged under the Act, have been found to be acting "under color" of law for purposes of the § 1983 action. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980).

Plaintiff has alleged that Defendant Judith Harmon conspired with the other defendants to deprive him of a fair trial. However, the complaint fails to present specific facts showing an agreement between defendants. It contains only broad, conclusory allegations. It wholly fails to allege, other than asserting bare conclusions, how or to what extent Defendant Harmon actually conspired with any of the public official defendants.

The Motion to Dismiss of Defendant Judith Harmon (#5) is granted. Plaintiff can prove no set of facts in support of his claim against Judith Harmon which would entitle

him to relief.

As a state district judge, Defendant Clifford Hopper is absolutely immune for his judicial acts, so long as he acted within his jurisdiction. Stump v. Sparkman, 435 U.S. 349, 355-57 (1978). Defendant Clifford Hopper clearly had jurisdiction to preside over plaintiff's criminal trial. While a judicial official is not immune from a claim for declaratory or injunctive relief under Pulliam v. Allen, 466 U.S. 522 (1984), as already discussed plaintiff has made no factual allegations to support his conclusory statements of a conspiracy.

The Motion to Dismiss of the Honorable Clifford Hopper (#7) is granted.

Dated this 7/27 day of April, 1993.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-22-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OKLAHOMA

GEODYNE ENERGY INCOME)
PRODUCTION PARTNERSHIP I-E, ET)
AL.,)

Plaintiffs,)

vs.)

EDP OPERATING, LTD., ET AL.,)

Defendants.)

Case No. 93-C-278E

FILED

APR 21 1993

DISMISSAL WITHOUT PREJUDICE

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

COMES NOW the Plaintiffs herein and, based upon the Tolling Agreement executed between the Plaintiffs and Defendants dated April 20, 1993, hereby dismiss the above-referenced action without prejudice to refiling the same.

Respectfully submitted,



Jack A. Canon (OBA #1464)
Rand Phipps (OBA #12050)
Michael G. Daniel (OBA #13265)
Samson Plaza
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-1791

ATTORNEYS FOR THE PLAINTIFFS
GEODYNE ENERGY INCOME PRODUCTION
PARTNERSHIPS I-E and I-F; and
GEODYNE PRODUCTION PARTNERSHIPS
II-A, II-B, II-C, II-D, and II-E

Certificate of Service

I hereby certify that on the 21 day of April, 1993, a true and correct copy of the above and foregoing Dismissal Without Prejudice was mailed, postage fully prepaid, to each of the following Defendants:

EDP Operating, Ltd.,
a Limited Partnership
c/o The Corporation Company
735 First National Bank Bldg
Oklahoma City, OK 73105

Hallwood G.P., Inc.
c/o The Prentice Hall
Corporation System
115 Southwest 89th Street
Oklahoma City, OK 73139-8511

EM Nominee Partnership Company
c/o EDP Operating, Ltd.
@ The Corporation Company
735 First National Bank Bldg
Oklahoma City, OK 73105

Hallwood Consolidated
Partners, L.P., a Limited
Partnership
c/o The Corporation Company
735 First National Bank Bldg
Oklahoma City, OK 73102

May Energy Partners Operating
Partnership, Ltd., a Limited
Partnership
c/o The Corporation Company
735 First National Bank Bldg
Oklahoma City, OK 73105

Hallwood Petroleum, Inc.
c/o Prentice-Hall Corporation
System OK, Inc.
115 Southwest 89th Street
Oklahoma City, OK 73139-8511

QRI Resources, Inc.
c/o The Corporation Trust
Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801

Hallwood Energy Partners, L.P.
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801


Michael G. Daniel

SECRET
4/22/93

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

ANGELA K. DENTIS,)
)
Plaintiff,)
)
vs.)
)
JANICE DARLENE HORN, et al.,)
)
Defendants,)
)
vs.)
)
JOHN DOE, et al.,)
)
Third Party Defendants.)

Case No. 93-C-0002-B

FILED

APR 21 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now on this 21st day of April, 1993, comes on before me, the undersigned Judge, the Motion to Remand filed by Plaintiff herein. The Court being fully advised in the premises and finding no objection, finds that same should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and same is hereby remanded to the District Court of Tulsa County, Oklahoma, whence it came.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 4-22-93

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

FILED

APR 21 1993

Richard M. Lawler, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

ELCO AUTO SYSTEMS, INC.,)
a foreign corporation; JOHN T.)
LASKEY, an individual; and)
MICHAEL STRAUSS, an individual,)

Defendants.)

Case No. 92-C-609 E

Notice of DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Thrifty Rent-A-Car System, Inc., and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, dismisses its claims against the Defendant, Elco Auto Systems, Inc., without prejudice.

Respectfully submitted,

LIPE, GREEN, PASCHAL,
TRUMP & GOURLEY, P.C.

By: Richard A Paschal
Richard A. Paschal, OBA #6927
Nancy G. Gourley, OBA #10317
401 South Boston Avenue, Suite 2100
Tulsa, Oklahoma 74103-4015
(918) 599-9400

ATTORNEYS FOR PLAINTIFF,
THRIFTY RENT-A-CAR SYSTEM, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of April, 1993, a true and correct copy of the within and foregoing document was mailed to the following with proper postage thereon fully prepaid:

Michael J. Carson
5310 East 31st Street, Suite 900
Tulsa, OK 74135-5014

John T. Laskey
18 Noe Drive
Madison, NJ 07940

Richard A. Paschol

were persuaded or bribed to lend credence to a pretextual reason for the terminations. Plaintiffs charge that the actions of the Defendants violated 42 U.S.C. §§2000(e), et seq.; 42 U.S.C. §1985, et seq.; and 18 U.S.C. §§1962(c).

Pending Motions

1. Defendant McCoy's Motion in Limine. Because the Court has concluded Plaintiffs' action must be dismissed, this motion will be denied as moot.
2. Defendant McCoy's Motion for Summary Judgment. This motion will be considered in conjunction with the substantive issues raised in Defendants' Motion for Summary Judgment as to Plaintiff Murray and Defendants' Motion for Summary Judgment as to Plaintiff Weaver.

Issues Raised

1. Civil RICO. In Plaintiffs' RICO CASE STATEMENT prepared and filed at the direction of the Court, Plaintiffs assert a claim under 18 U.S.C. §1962(c) which provides, in part, that

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...

Plaintiffs aver that the "racketeering activity" of which they complain is activity "which was indictable under 18 U.S.C. §§1503, 1510, and 1511." (Plaintiffs' RICO CASE

STATEMENT, docket #32, at 2). The specific misconduct they identify includes an alleged misstatement by Defendant Jack McCoy and other individuals of the circumstances surrounding the detention of Kevin Abraham. These alleged misstatements led to Murray's termination as well as that of Weaver for his support of Murray's position, the Plaintiffs assert. They also charge that the Defendants' conspiracy included bribing Defendant Kevin Abraham. In sum, the Plaintiffs assert that the effect of the Defendants' misconduct obstructed justice by impeding Plaintiff Murray's investigation of Kevin Abraham's criminal activity. (Plaintiffs' RICO CASE STATEMENT, docket #32 at 2-4.)

Section 1503 of Title 18, United States Code provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force,

or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Section 1503 affords protection to officers of the Court and impaneled jurors from interference with execution of their sworn duties by threats, influence, injury or intimidation. Thus, §1503 provides no statutory support for Plaintiffs' allegations of activity denominated by them as "racketeering."

Similarly, Plaintiffs' reliance on Section 1510 will not avail. That section provides at subsection (a) as follows:

Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigation shall be fined ... or imprisoned ...

Finally, Plaintiffs' attempt to invoke the provisions of Section 1511 must fail. That section provides, in part, that:

It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a state or political subdivision thereof, with the intent to facilitate an illegal gambling business ...

The Court finds that the predicate activities alleged by

Plaintiffs are not, in the context of the record submitted, "racketeering activity" for purposes of 18 U.S.C. §1962(c); therefore their Civil RICO claim must be dismissed.

2. Title VII The Title VII burdens of proof and of going forward with the evidence are firmly established; therefore a brief summary of the familiar litany will suffice. Plaintiff has the initial burden of establishing a prima facie case of racial discrimination and/or retaliation in the Defendants' decision to terminate his employment. Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981). If a prima facie case is shown, the burden shifts to the Defendant to "articulate some legitimate, non-discriminatory reason for the employee's rejection". McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973). If that burden of going forward is carried by the employer, then the burden shifts to Plaintiff to prove that the articulated reason is mere pretext. Id. at 1825. Thus, Plaintiff at all times shoulders the ultimate burden of establishing discriminatory motivation underlying the employment termination. Burdine at 1093.

For purposes of this analysis only, the Court will assume that Plaintiffs can make out a prima facie case. The focus then shifts to Defendants to identify a non-discriminatory, legitimate business reason. It should be

added, parenthetically, that the employer does not have a burden of persuasion on that issue:

It is sufficient if the Defendant's evidence raises a genuine issue of fact as to whether it discriminated against the Plaintiff. To accomplish this, the Defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the Plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the Defendant. If the Defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the Defendant thus serves simultaneously to meet the Plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the Plaintiff will have a full and fair opportunity to demonstrate pretext.

Burdine at 1094-1095 (footnotes omitted).

In the instant case Defendants have clearly articulated legitimate reasons for the discharges of Murray and Weaver, respectively. As to Murray, it is undisputed (1) that Murray destroyed what he believed to be crack cocaine which he discovered in the car when he detained Kevin Abraham on the night in question. (See, Exhibit "C" attached to docket #48); and (2) that the Sapulpa Police Department Rules and Regulations provide that destruction of evidence is grounds for dismissal. (See, docket #48, at 9).

Thus, Defendants have sustained their burden of "articulating a legitimate non-discriminatory" basis for the discharge. And Murray has not demonstrated that the articulated reason was pretextual. Accordingly, Murray's Title VII claims for racial discrimination and retaliatory discharge must be dismissed.

Similarly, even assuming Plaintiff Weaver has established a prima facie case of retaliatory discharge, he has not met his ultimate burden of proof by demonstrating that the employer's articulated reason for his discharge was pretextual. The employer has established by admissible evidence that on November 10, 1989 Weaver hit a handcuffed suspect in the head with a flashlight. See Exhibit "A" attached to docket #50 at pp. 21-22 (Deposition of Rick Weaver dated July 10, 1991). It is undisputed that the use of unnecessary force is grounds for dismissal pursuant to the Sapulpa Police Department Rules and Regulations. See, docket #50 at 11. Thus, Defendants have offered admissible evidence in support of the articulated justification for the dismissal. However, Weaver has not sustained his ultimate burden of demonstrating the proffered justification was pretextual and his Title VII claim should also be dismissed.

Plaintiffs have argued that they have submitted evidence of pretext. In support of their position,

Plaintiffs have submitted their respective affidavits and excerpts from the deposition of Tom Clark. This evidence does not contest the material facts which appear on the record in support of Defendants' position. Therefore, Plaintiffs' Title VII claims must be dismissed.

3. Plaintiffs' Conspiracy Claim Pursuant to 42 U.S.C. §1985. Plaintiffs have failed entirely to offer evidence of a conspiracy; therefore this claim must also be dismissed.
4. Plaintiff Weaver's Claim of Tortious Interference with His Employment Contract. What remains is, then, this state law tort claim. Under well-settled principles, the Court declines to exercise supplemental jurisdiction over this claim. Supplemental Jurisdiction Act, 28 U.S.C. §1367. It will also be dismissed.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss (dockets #47, 49) are granted; Defendant McCoy's motion at docket #45 is denied as moot; Judgment shall be entered in favor of Defendants; the case is dismissed.

ORDERED this 20th day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 4-21-93

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

FILED

APR 20 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE
CORPORATION IN ITS CORPORATE
CAPACITY,

Plaintiff,

vs.

No. 92-C-708-E ✓

CURTIS A. PARKS, et al.,

Defendants.

ORDER

The Court has for consideration the Cross Motions for Summary Judgment filed by the parties herein. The Court has reviewed the submissions in light of the relevant law and finds that Plaintiff's Motion for Summary Judgment (docket #16) should be granted; the Motion for Summary Judgment filed by Defendants Parks, Beard and Williamson (docket #20) should be denied.

The undisputed material facts may be stated as follows:

1. On July 1, 1982, Defendants Parks, Beard and Williamson (hereinafter "Individual Defendants") executed a note and mortgage to Pioneer Savings & Trust Company ("Pioneer") in the amount of \$40,012 (Note #1);
2. On September 27, 1983 Individuals executed a note and mortgage to Pioneer in the amount of \$47,708.34 (Note #2);
3. It is clear from the record that the balance due on Note #1 in the amount of \$37,497.34 was to be paid from the loan proceeds of Note #2 along with a \$10,000 cash

- payment and an \$11.00 filing fee for the release of Note #1;
4. Pioneer neither assigned nor released Note #1 of record;
 5. Note #2 was subsequently assigned by Pioneer to Property Ventures of Louisiana, Inc. ("Property Ventures"); Property Ventures assigned Note #2 to Town & Country Bank ("Town & Country");
 6. Federal Deposit Insurance Company ("FDIC") succeeded to all right, title and interest in and to Note #2 when Town & Country was placed in receivership on September 15, 1988;
 7. Individual Defendants have signed several extension agreements with respect to Note #2: first to Pioneer (on September 27, 1985 and March 27, 1986) and, then, to Town & Country (October 15, 1986, February 17, 1987, March 26, 1987, June 26, 1987, September 24, 1987, December 23, 1987, March 18, 1988 and July 15, 1988);
 8. FDIC has no authority to release Note #1;
 9. The record is clear that the indebtedness evidenced by Note #1 was discharged by the terms of Note #2;
 10. The Individual Defendants have paid a sum in excess of \$15,000 on the indebtedness represented by Note #2 since September 27, 1983.

Thus, the Court finds as a matter of law that Note #2 represents a valid lien against the subject property. Therefore, FDIC is entitled to foreclose the related mortgage pursuant to the express

terms of the mortgage. The Court further finds that Individual Defendants have raised no valid defenses to FDIC's claim; therefore their cross-claim and counterclaim are denied.

The Court now directs the parties to resolve the remaining accounting issues related to the indebtedness and to present an Agreed Form of Judgment to the Court on or before the 12th day of May, 1993. If, however, the parties should be unable to resolve the remaining issues then they should so advise the Court with specificity on or before May 12, 1993 and request that an evidentiary hearing or trial be set to address the disputed issues. In the interim, the pre-trial conference presently set for April 26, 1993 is stricken.

ORDERED this 20th day of April, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 4-21-93

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

FILED

APR 20 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

KENNETH L. HOLDMAN,
448-80-2102

Defendant,

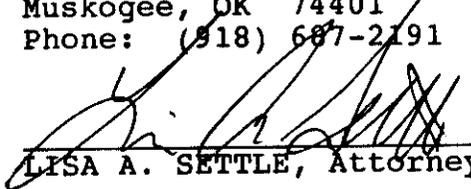
CIVIL NUMBER 93-C-0134 B

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United States of America, by and through its attorney, Clifton R. Byrd, District Counsel, Department of Veterans Affairs, Muskogee, Oklahoma, and voluntarily dismisses said action without prejudice under the provisions of Rule 41(a)(1), Federal Rules of Civil Procedure.

Respectfully submitted,
UNITED STATES OF AMERICA

Clifton R. Byrd
District Counsel
Department of Veterans Affairs
125 South Main Street
Muskogee, OK 74401
Phone: (518) 687-2191

By: 
LISA A. SETTLE, Attorney

CERTIFICATE OF MAILING

This is to certify that on the 20 day of April, 1993, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: KENNETH L. HOLDMAN, at 576 East 48th Place North, Tulsa, OK 74126.


GLORIA J. HIGHERS
Paralegal Specialist