

DATE ~~OCT 20 1993~~

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT W. TRUDE a/k/a ROBERT)
 WAYNE TRUDE; OPAL R. TRUDE)
 a/k/a OPAL TRUDE a/k/a OPAL)
 ROSE TRUDE; HERITAGE FINANCIAL)
 SERVICES, INC. f/k/a First)
 Southern Financial Corporation;)
 COUNTY TREASURER, Rogers County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Rogers County,)
 Oklahoma; SUNBELT FEDERAL)
 SAVINGS, FSB a/k/a SUNBELT)
 SAVINGS, FSB; FINANCIAL TRUST)
 GROUP, INC., a Texas corporation;)
 AmSAV GROUP, INC., a Florida)
 corporation,)
)
 Defendants.)

FILED

OCT 19 1993

CIVIL ACTION NO. 92-C-55-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day
of Oct, 1993. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Wyn Dee Baker, Assistant United States
Attorney; the Defendants, County Treasurer, Rogers County,
Oklahoma, and Board of County Commissioners, Rogers County,
Oklahoma, appear by Bill M. Shaw, Assistant District Attorney,
Rogers County, Oklahoma; the Defendant, Sunbelt Federal Savings,
FSB a/k/a Sunbelt Savings, FSB, appears not, having previously
filed its Disclaimer; and the Defendants, Robert W. Trude a/k/a
Robert Wayne Trude; Opal R. Trude a/k/a Opal Trude a/k/a Opal
Rose Trude; Heritage Financial Services, Inc. f/k/a First

Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Robert W. Trude a/k/a Robert Wayne Trude, acknowledged receipt of Summons and Complaint on February 9, 1992; that the Defendant, Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude, acknowledged receipt of Summons and Complaint on February 9, 1992; that Defendant, County Treasurer, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on January 28, 1992; and that Defendant, Board of County Commissioners, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on January 23, 1992.

The Court further finds that the Defendants, Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation, were served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning July 13, 1993, and continuing through August 17, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust

Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on January 27, 1992; that the Defendant, Sunbelt Federal Savings, FSB a/k/a Sunbelt Savings, FSB, filed its Disclaimer on November 24, 1992; and that the Defendants, Robert W. Trude a/k/a Robert Wayne Trude; Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude; Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 15, 1989, Robert Wayne Trude and Opal Rose Trude filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-03843-W. On April 3, 1990, a Discharge of Debtor was entered discharging the debtors from all dischargeable debts. On May 4, 1990, this bankruptcy case was closed.

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

Lot 5 in Block 1 of Walnut Park "Second" Addition, an Addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on February 4, 1981, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$37,640.00, payable in monthly installments, with interest thereon at the rate of 12 percent per annum.

The Court further finds that as security for the payment of the above-described note, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated February 4, 1981, covering the above-described property, situated in the State of Oklahoma, Rogers County. This mortgage was recorded on February 4, 1981, in Book 594, Page 85, in the records of Rogers County, Oklahoma.

The Court further finds that on June 19, 1983, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on March 19, 1984, Robert W. Trude and Opal Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that on March 19, 1984, Robert W. Trude and Opal Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on February 12, 1985, Robert W. Trude and Opal Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on January 8, 1986, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on January 23, 1987, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on September 19, 1988, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home

Administration, a Reamortization and/or Deferral Agreement pursuant to which the entire debt due on that date was made principal.

The Court further finds that on September 19, 1988, Robert W. Trude and Opal R. Trude executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Robert W. Trude a/k/a Robert Wayne Trude and Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude, made default under the terms of the aforesaid note, mortgage, reamortization and/or deferral agreements and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Robert W. Trude a/k/a Robert Wayne Trude and Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude, are indebted to the Plaintiff in the principal sum of \$38,641.03, plus accrued interest in the amount of \$7,652.94 as of February 6, 1991, plus interest accruing thereafter at the rate of 12 percent per annum or \$13.762 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$12,078.00, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Sunbelt Federal Savings, FSB a/k/a Sunbelt Savings, FSB, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; and AmSav Group, Inc., a Florida corporation, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment in rem against the Defendants, Robert W. Trude a/k/a Robert Wayne Trude and Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude, in the principal sum of \$38,641.03, plus accrued interest in the amount of \$7,652.94 as of February 6, 1991, plus interest accruing thereafter at the rate of 12 percent per annum or \$13.762 per day until judgment, plus interest thereafter at the current legal rate of 3.38 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$12,078.00, plus interest thereafter on that sum at the current legal rate of 3.38 percent per annum until paid, plus the costs of this action in the amount of \$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 Defendants, Sunbelt Federal Savings, FSB a/k/a Sunbelt Savings, FSB; Heritage Financial Services, Inc. f/k/a First Southern Financial Corporation; Financial Trust Group, Inc., a Texas corporation; AmSav Group, Inc., a Florida corporation; and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, 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, Robert W. Trude a/k/a Robert Wayne Trude and Opal R. Trude a/k/a Opal Trude a/k/a Opal Rose Trude, to satisfy the in rem 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 the judgment rendered herein in favor of the Plaintiff.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIP L. SMITH aka PHILLIP)
 SMITH aka PHIL SMITH; FIRST BANK)
 & TRUST CO., Yale, Oklahoma;)
 COUNTY TREASURER, Pawnee County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Pawnee County,)
 Oklahoma,)
)
 Defendants.)

FILED

OCT 19 1993

CIVIL ACTION NO. 93-C-408-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of Oct, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendant, First Bank & Trust Co., Yale, Oklahoma, appears not, having previously filed its Disclaimer of Interest through the Federal Deposit Insurance Corporation as its liquidating agent; and the Defendants, Phillip L. Smith aka Phillip Smith aka Phil Smith; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Phillip L. Smith aka Phillip Smith aka Phil Smith, acknowledged receipt of Summons and Complaint on June 3, 1992; that the Defendant, First Bank & Trust Co., Yale, Oklahoma, acknowledged receipt of Summons and Complaint on May 11, 1993; that Defendant, County Treasurer,

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Pawnee County, Oklahoma, acknowledged receipt of Summons and Complaint on May 5, 1993; and that Defendant, Board of County Commissioners, Pawnee County, Oklahoma, acknowledged receipt of Summons and Complaint on May 6, 1993.

It appears that the Defendant, First Bank & Trust Co., Yale, Oklahoma, filed its Disclaimer of Interest on June 7, 1993, through the Federal Deposit Insurance Corporation as its liquidating agent; and that the Defendants, Phillip L. Smith aka Phillip Smith aka Phil Smith; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

LOT SIXTEEN (16) IN BLOCK THREE (3) IN THE ORIGINAL TOWN (NOW CITY) OF PAWNEE, IN PAWNEE COUNTY, STATE OF OKLAHOMA ACCORDING TO THE RECORDED PLAT THEREOF.

SUBJECT, HOWEVER, TO ALL VALID OUTSTANDING EASEMENTS, RIGHTS-OF-WAY, MINERAL LEASES, MINERAL RESERVATIONS, AND MINERAL CONVEYANCES OF RECORD.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith and of judicially terminating joint tenancy of Phillip L. Smith aka Phillip Smith aka Phil Smith and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith.

The Court further finds that Phillip L. Smith aka Phillip Smith aka Phil Smith (hereinafter referred to by any of these names) and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith (hereinafter referred to by any of these names) became the record owners of the real property involved in this action by virtue of that certain Joint Tenancy Warranty Deed dated July 28, 1974, from Art Staneart and Della Staneart, husband and wife, to Phillip L. Smith and Lue Ellen Smith, husband and wife, as joint tenants, and not as tenants in common, with the right of survivorship, the whole estate to vest in the survivor, which Joint Tenancy Warranty Deed was filed of record on August 1, 1974, in Book 157, Page 352, in the records of the County Clerk of Pawnee County, Oklahoma.

The Court further finds that on July 28, 1974, Phillip L. Smith and Lue Ellen Smith executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$16,600.00, payable in monthly installments, with interest thereon at the rate of 8.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, Phillip L. Smith and Lue Ellen Smith executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated July 28, 1974, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on August 1, 1974, in Book 157, Page 356, in the records of Pawnee County, Oklahoma.

The Court further finds that on August 29, 1980, Phillip L. Smith and Lue Ellen Smith executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of \$2,150.00, payable in monthly installments, with interest thereon at the rate of 11.50 percent per annum.

The Court further finds that as security for the payment of the above-described note, Phillip L. Smith and Lue Ellen Smith executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated August 29, 1980, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on September 4, 1980, in Book 257, Page 205, in the records of Pawnee County, Oklahoma.

The Court further finds that Phillip L. Smith aka Phillip Smith aka Phil Smith and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith executed and delivered to the United States of America, acting through the Farmers Home Administration, the following interest credit agreements:

<u>Instrument</u>	<u>Dated</u>	<u>County</u>
Interest Credit Agreement	08/29/80	Pawnee
Interest Credit Agreement	06/15/82	Pawnee
Interest Credit Agreement	06/01/84	Pawnee
Interest Credit Agreement	05/21/85	Pawnee
Interest Credit Agreement	05/26/86	Pawnee
Interest Credit Agreement	06/02/87	Pawnee
Interest Credit Agreement	06/21/88	Pawnee
Interest Credit Agreement	05/15/89	Pawnee
Interest Credit Agreement	05/23/90	Pawnee
Interest Credit Agreement	05/22/91	Pawnee

The Court further finds that Lu Ellen Smith died on September 16, 1991. Upon the death of Lu Ellen Smith, the subject property vested in her surviving joint tenant, Phillip L. Smith, by operation of law. A copy of Certificate of Death No. 20753 issued by the Oklahoma State Department of Health certifies Lu Ellen Smith's death.

The Court further finds that Phillip L. Smith aka Phillip Smith aka Phil Smith and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith, now deceased, made default under the terms of the aforesaid notes, mortgages, and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Phillip L. Smith aka Phillip Smith aka Phil Smith, is indebted to the Plaintiff in the principal sum of \$10,880.06, plus accrued interest in the amount of \$633.99 as of October 8, 1992, plus interest accruing thereafter at the rate of \$2.6027 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of \$1,800.20, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Plaintiff is entitled to a judicial determination of death of Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith and to a judicial termination of the joint tenancy of Phillip L. Smith aka Phillip

Smith aka Phil Smith and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith.

The Court further finds that the Defendant, **First Bank & Trust Co., Yale, Oklahoma**, through the Federal Deposit Insurance Corporation as its liquidating agent, disclaims any right, title, or interest in the subject real property.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma**, are in default and therefore have no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith be and the same hereby is judicially determined to have occurred on September 16, 1991 in the City of Pawnee, Pawnee County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of Phillip L. Smith aka Phillip Smith aka Phil Smith and Lue Ellen Smith aka Lue Ellem Smith aka Lue E. Smith aka Lu Ellen Smith in the above-described real property be and the same hereby is judicially terminated as of the date of the death of Lu Ellen Smith on September 16, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendant, **Phillip L. Smith aka Phillip Smith aka Phil Smith**, in the principal sum of \$10,880.06, plus accrued interest in the amount of \$633.99 as of October 8, 1992, plus interest accruing

thereafter at the rate of \$2.6027 per day until judgment, plus interest thereafter at the current legal rate of 3.38 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of \$1,800.20, plus interest on that sum at the current legal rate of 3.38 percent per annum from judgment until paid, plus the costs of this action in the amount of \$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 Defendants, First Bank & Trust Co., Yale, Oklahoma; County Treasurer, Pawnee County, Oklahoma; and Board of County Commissioners, Pawnee County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Phillip L. Smith aka Phillip Smith aka Phil Smith, 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 the judgment rendered herein
in favor of the Plaintiff.

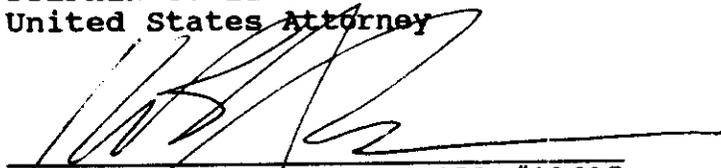
The surplus from said sale, if any, shall be deposited with the
Clerk of the Court to await further Order of the Court.

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.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-408-B

KBA/css

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

ENTERED ON DOCKET
DATE OCT 20 1993

ROBBER E. SMITH,)
)
 Petitioner,)
)
 vs.)
)
 BRENT CROUSE, ET AL.,)
)
 Respondent.)

No. 92-C-1055-B

FILED

OCT 19 1993

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

ORDER OF DISMISSAL

Before the Court is Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

In March 1990, Petitioner pleaded nolo contendere to three counts of robbery with a firearm, case no. CF-89-2498, and to one count of robbery with a firearm after three or more felony convictions, case no. CF-89-2457. The sentencing court sentenced Petitioner to twenty-one years on each count; the sentences to run concurrently. The sentencing court then advised Petitioner of his right to an appeal and of the proper procedure for procuring the same. Okla. Stat. tit. 21, § 801 was not mentioned until the end of the proceeding when the Court granted the State's request that "the J & S reflect . . . that [Petitioner's] conviction [was] under 21 [O.S.] 801, three or more convictions of Robbery with Firearm, that carries a flat time of ten years."¹ (Response, plea tr. at 8-10.)

Petitioner did not move to withdraw his nolo contendere plea,

¹The second paragraph of section 801 provides that any person who is guilty of three separate robberies with a firearm shall serve a mandatory minimum sentence of ten years and shall not be eligible for probation or parole or receive any deduction from his sentence for good conduct until he shall have served ten years.

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but filed an application for post-conviction relief in the state district court, raising nine grounds for relief. The state court denied relief. The Oklahoma Court of Criminal Appeals affirmed, concluding Petitioner had failed to articulate a sufficient reason explaining his failure to file a direct appeal.

In August 1992, Petitioner filed this request for a writ of habeas corpus. He asserted as a new ground for relief that the enhancement of his sentence under section 801 violated his due process rights because all of his robbery convictions were part of his nolo contendere plea; he had no other prior conviction for robbery with a firearm; and he was not eligible for earned good time credits and parole. Petitioner reasserted that he was denied a direct appeal "through no fault of his own" because as a layman he should not have been expected to know the consequences of a section 801 enhancement within ten days of his sentence.

Respondent argues Petitioner procedurally defaulted his claims; the Oklahoma Court of Criminal Appeals rested its decision on an adequate and independent state procedural bar; and Petitioner failed to show cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Petitioner replies "he was denied an appeal through no fault of his own" because he did not know he would be unable to earn good time credits and qualify for parole until he arrived at the Lexington Correctional Center. He restates the sentencing court, the State, and his counsel failed to inform him of the consequences of his plea.

The doctrine of procedural default prohibits a federal court

from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

Petitioner does not dispute that the decision of the Oklahoma Court of Criminal Appeals rested upon a state procedural default. He, however, has not offered any facts that would demonstrate cause and prejudice under the Coleman standard for his failure to move to withdraw his nolo contendere plea. The fact that Petitioner is a layman does not constitute sufficient cause. See Rodriguez v.

Maynard, 948 F.2d 684, 688 (10th Cir. 1991) (petitioner's pro se status and lack of awareness and training of legal issues do not constitute sufficient cause under the cause and prejudice standard). The U.S. Constitution does not require the State to inform a defendant about parole eligibility in order for a plea of guilty to be voluntary. Hill v. Lockhart, 477 U.S. 52, 56 (1985). Petitioner does not argue in this section 2254 petition that, had counsel correctly informed him about his parole eligibility date, he would not have pleaded guilty. See id. at 60. Nor does this case present one of those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey, 111 S. Ct. at 1470. Accordingly, this petition for a writ of habeas corpus should be dismissed as procedurally defaulted.

In any event, the Court concludes that Petitioner has failed to exhaust his first ground for relief. To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

In Rose v. Lundy, 455 U.S. 509 (1982), the United States

Supreme Court held that a federal district court must dismiss habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

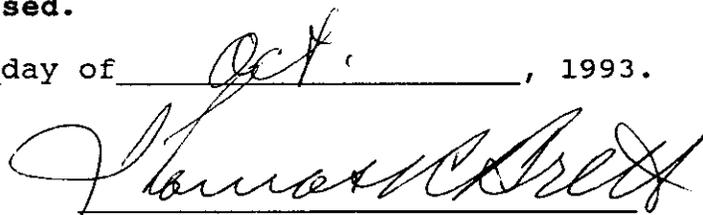
In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

It is clear from the record in this case that the Petitioner did not raise his first ground for relief in the state post-conviction proceedings. Accordingly, the petition for a writ of habeas corpus should also be dismissed as a "mixed petition."

ACCORDINGLY, IT IS HEREBY ORDERED that this petition for a writ of habeas corpus is dismissed.

IT IS SO ORDERED this 18 day of Oct., 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 10-20-93

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MELVIN L. MORRIS,)
)
 Plaintiff,)
 vs.)
)
 CREEK COUNTY RURAL WATER DISTRICT)
 NO. 1, a body politic created by the)
 Statues of the State of Oklahoma)
 (Water District), AND J.E. MARTELLE,)
 ELDON E. HELLARD, JOHN WELPTON,)
 SAM NELSON and JIM HIETT, individually)
 and as Members of the Board of)
 Directors of Water District, AND)
 J.E. MARTELLE also as President of the)
 Board of Directors of Water District,)
)
 Defendants.)

CASE NO. 92-C-429-B ✓

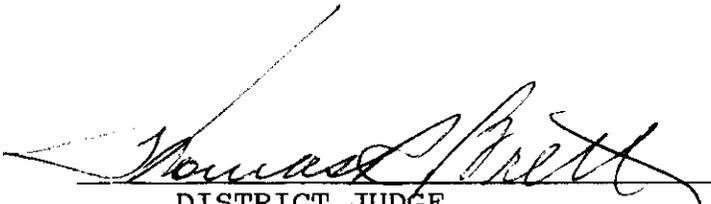
FILED

OCT 19 1993

Richard M. Lawrence, Clerk
S. D. OF J. U.S.
NORTH STATE OF OKLAHOMA

ORDER DISMISSING CASE WITH PREJUDICE

Now on this 19th day of October, 1993, pursuant to the Motion of Plaintiff to dismiss this case with prejudice in accordance with the settlement agreement entered into by the parties on October 6, 1993, IT IS HEREBY ordered that the above styled case be and it is hereby dismissed with prejudice.


 DISTRICT JUDGE

DATE OCT 20 1993

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

OCT 19 1993

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

TIFFANY PRUITT and ANTHONY PRUITT, Individually and as Parents and Next Friends of KEWON MAURICE PRUITT, Deceased,

Plaintiffs,

v.

Case No. 92-C-541-B

THE WELSH COMPANY and ARMSTRONG WORLD INDUSTRIES, INC.,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties hereby stipulate pursuant to Fed. R. Civ. P. 41(a)(1)(ii) to the dismissal of this action, with prejudice.

Respectfully submitted,

By: Brian Huddleston
Brian Huddleston, OBA # 13295
MORRIS & MORRIS
1616 S. Denver
Tulsa, OK 74119
(918) 587-5514
Attorney for Plaintiffs

By: Tony M. Graham
Tony Graham, OBA # 3524
FELDMAN, HALL, FRANDEN, WOODARD
& FARRIS
525 S. Main, Suite 1400
Tulsa, OK 74103
(918) 583-7129
Attorney for Defendants

ENTERED ON DOCKET

DATE 10-19-93 FILED

IN THE UNITED STATES DISTRICT COURT 1993
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

TROY THOMPSON and NANCY)
THOMPSON, husband and wife,)
)
Plaintiffs,)
)
vs.)
)
DOMINION INTERNATIONAL CORP.,)
d/b/a QUALITY INN OF TULSA,)
)
Defendant.)

Case No. 93-C-128E ✓

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 18th day of Oct., 1993, it appearing to
the Court that this matter has been compromised and settled, this
case is herewith dismissed with prejudice to the refiling of a
future action.


JUDGE OF THE DISTRICT COURT

156\90\dwp1.djs\mwm

DATE 10-19-93

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JACK L. DAVID, et al.,)
)
 Defendants.)

No. 89-C-594-E ✓
(consolidated with
91-C-974-E)

FILED

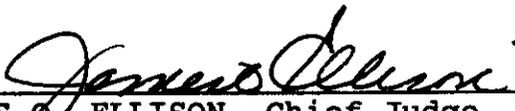
OCT 19 1993

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

ORDER OF DISMISSAL

On the 23rd day of March this Court affirmed the Order of the Bankruptcy Court finding Defendant's HEAL Loan non-dischargeable, disallowing post-petition interest, and establishing a structured schedule of repayment for Defendant. This decision effectively moots the pending motions herein. Wherefor the case is DISMISSED.

ORDERED this 18th day of October, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IT IS SO ORDERED, this 15 day of October, 1993.

A handwritten signature in cursive script, reading "Thomas R. Brett". The signature is written in black ink and is positioned above the printed name.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

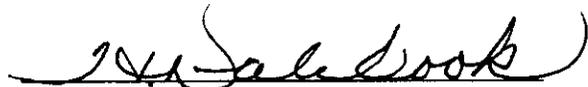
The magistrate summarily dismissed plaintiff's claims of sentencing error, ineffective assistance of counsel, double jeopardy and failure to prove prior felony convictions as procedurally barred in that plaintiff did not raise these claims on direct appeal. In plaintiff's post-conviction applications the Oklahoma Court of Criminal Appeals applied the procedural bar and declined to examine these claims. In his objection plaintiff asserts that because he is a lay person and unfamiliar with the law, he was unaware of his court appointed counsel's actions.

Plaintiff's stated justification for his default in state procedure is without merit. As in this case, a state prisoner who has defaulted in raising claims in a post-conviction appeal pursuant to an independent state procedural bar, is also barred from federal habeas review of the claims unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, 111 S.Ct. 2546 at 2565 (1991). Plaintiff was entitled to effective assistance of trial counsel. Ineffective assistance of counsel may constitute cause for state procedural default where counsel's performance falls below the minimum requirements of Strickland v. Washington, 466 U.S. 668 (1984). The Court has reviewed the record and finds no support for plaintiff's contentions that his trial counsel provided ineffective assistance or that the claims plaintiff is now asserting in his request for habeas relief (i.e. sentencing error, double jeopardy and proof of prior convictions) are supported by the trial record.

Accordingly the Court finds no prejudice to plaintiff in dismissing his habeas petition nor would dismissal result in a fundamental miscarriage of justice.

Based on a careful review of the record, the Court finds and concludes that plaintiff's petition for writ of habeas corpus is hereby DISMISSED.

IT IS SO ORDERED this 15th day of October, 1993.



H. DALE COOK
United States District Judge

ENTERED ON DOCKET

DATE 10/18/93

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

OCT 15 93

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

No. 93-C-129-B

RON McCOOL
an individual,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,
a Delaware corporation,

Defendant.

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, American Airlines, Inc., and against the Plaintiff, Ron McCool. Plaintiff shall take nothing of its claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 15th day of October, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

22

ENTERED ON DOCKET

DATE 10/18/93

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

COLUMBIA PICTURES)
INDUSTRIES, INC., TRISTAR)
PICTURES, INC.,)
METRO-GOLDWYN-MAYER, INC.,)
PARAMOUNT PICTURES, CORP.,)
UNIVERSAL CITY STUDIOS, INC.,)
THE WALT DISNEY COMPANY,)
WARNER BROS., TWENTIETH)
CENTURY-FOX FILM CORPORATION,)

Plaintiffs,)

v.)

Case No. 93-C-875-B

DONREY CABLEVISION,)
DONREY MEDIA GROUP, INC.;)
BIXBY CABLEVISION,)
MULTIMEDIA CABLEVISION INC.;)
POST-NEWSWEEK CABLE INC.)
(system name),)
POST-NEWSWEEK CABLE INC.)
(owner);)
ALERT CABLE TV OF)
OKLAHOMA INC.,)
CABLEVISION INDUSTRIES INC.;)
CABLECOM OF)
VINITA/NOWATA INC.,)
POST-NEWSWEEK CABLE INC.,)

Defendants.)

FILED

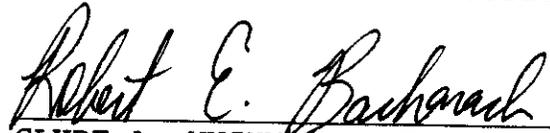
OCT 15 1993

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

**PLAINTIFFS' NOTICE OF DISMISSAL OF
CERTAIN DEFENDANTS**

Plaintiffs give notice pursuant to Rule 41(a)(1), Fed.R.Civ.P., that the case is hereby dismissed with prejudice as to those Defendants set out in Attachment A hereto ("Settling Defendants"), and each party shall bear its own costs and attorney's fees. Neither answers nor motions for summary judgment have been served upon the

Plaintiffs by any of the Settling Defendants in this action.



CLYDE A. MUCHMORE, OBA #6482
ROBERT E. BACHARACH, OBA #11211

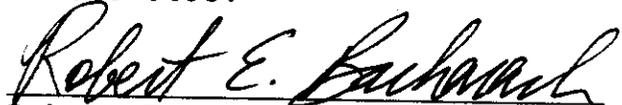
-Of the Firm-

CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served by regular mail, postage prepaid, on this 15th day of October, 1993, to James Horvitz, Esq., Cole, Raywid & Braverman, 1919 Pennsylvania Avenue, N.W., Washington, D.C. 20006-3458.


Robert E. Bacharach

499.93B.REB

ATTACHMENT A

List of Defendants Which Are Dismissed With Prejudice
(Northern District of Oklahoma)

Donrey Cablevision
Donrey Media Group, Inc.
Post-Newsweek Cable Inc. (system name)
Post-Newsweek Cable Inc. (owner)
Cablecom of Vinita/Nowata Inc.

495.93B.REB

DATE OCT 18 1993

1 GARY A. EATON
1717 E. 15TH STREET
2 TULSA, OKLAHOMA 74104
(981) 743-8781

3 JESS WOMACK
4 ATLANTIC RICHFIELD COMPANY
515 SOUTH FLOWER STREET
5 45TH FLOOR
6 LOS ANGELES, CALIFORNIA 90071

COPY

7 LARRY G. GUTTERRIDGE
8 LINDA S. PETERSON
ALAN AU
9 SIDLEY & AUSTIN
555 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90013
(213) 896-6000

FILED

OCT 18 1993

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

10 Attorneys for Plaintiff
11 ATLANTIC RICHFIELD COMPANY

12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF OKLAHOMA

16 ATLANTIC RICHFIELD COMPANY,	)	Consolidated Case Nos.
)	
17 Plaintiff,	)	89-C-868-B
	)	89-C-869-B
18 v.	)	90-C-859-B
)	
19 AMERICAN AIRLINES, INC., et al.,	)	NOTICE OF DISMISSAL WITHOUT
	)	PREJUDICE OR IN THE
20 Defendants.	)	ALTERNATIVE MOTION FOR
	)	DISMISSAL WITHOUT PREJUDICE
)	
)	

23
24 COMES NOW Plaintiff Atlantic Richfield Company ("ARCO"),
25 pursuant to Federal Rule of Civil Procedure 41(a)(1), and dismisses
26 Defendant A.C. Eason without prejudice, with costs borne by the
27 parties. In the alternative, ARCO respectfully moves the Court for
28 leave to dismiss without prejudice, and with costs borne by the

1 parties, ARCO's claims against Defendant A.C. Eason, pursuant to
2 Federal Rule of Civil Procedure 41(a)(2).

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 Atlantic Richfield Company ("ARCO") has filed the three
6 above-captioned actions seeking recovery of past costs incurred, as
7 well as costs that may be incurred in the future, to investigate
8 and clean up the Sand Springs Petrochemical Complex Superfund Site
9 ("Site"). ARCO initially filed two actions in 1989, designated as
10 Case Number 89-C-868-C ("ARCO v. American Airlines, Inc., et al.")
11 and Case Number 89-C-869-C ("ARCO v. Solvents Recovery Corp., et
12 at."). In 1990, ARCO filed a third suit in this action, designated
13 as Case Number 90-C-859-C ("ARCO v. Unit Rig Equipment Co., et
14 al."). These three cases have been consolidated for all purposes.

15 In March, 1992, ARCO filed a Consolidated Amended
16 Complaint and in June, 1992, ARCO filed a Second Consolidated
17 Amended Complaint. A Third Consolidated Amended Complaint was
18 filed in December, 1992. Defendant A.C. Eason was added as a party
19 to these actions in the Third Consolidated Amended Complaint.

20 A.C. Eason has neither answered ARCO's Complaints nor
21 formally joined a Defendant Group as required by the Second Amended
22 Case Management Order (docket no. 356).¹

23 On July 16, 1993, Plaintiff ARCO mailed to Lead Counsel
24 for Group IV, John H. Tucker, an offer of a Stipulation for
25 Dismissal Without Prejudice of Defendant A.C. Eason. ARCO was
26

27 ¹ Although Defendant A.C. Eason has not formally joined
28 Defendant Group IV, Group IV does list A.C. Eason as one of its
members in its assessment statements.

1 subsequently informed by the offices of Lead Counsel for Group IV,
2 Rhodes, Hieronymus, Jones, Tucker & Gable, that ARCO's offer had
3 been forwarded to Defendant A.C. Eason but that Rhodes, Hieronymus
4 had not received a reply.

5 With the permission of Rhodes, Hieronymus and the offices
6 of Liaison Counsel, Doerner, Stuart, Saunders, Daniel & Anderson,
7 ARCO mailed its offer of a Stipulation for Dismissal Without
8 Prejudice directly to Defendant A.C. Eason on September 28, 1993.
9 Defendant A.C. Eason's response is attached hereto as Exhibit A.

10 Insofar as Defendant A.C. Eason never answered ARCO's
11 complaint, ARCO is entitled to dismiss him pursuant to Federal Rule
12 of Civil Procedure 41(d)(1) by filing of a notice of dismissal.
13 Because Defendant A.C. Eason has not answered ARCO's complaint,
14 A.C. Eason's response to ARCO's offer of a Stipulation for
15 Dismissal Without Prejudice should be disregarded and A.C. Eason
16 should be dismissed without prejudice, with costs borne by the
17 parties.

18 In the alternative, ARCO respectfully requests that the
19 Court issue an Order pursuant to Federal Rule of Civil Procedure
20 41(a)(2) dismissing ARCO's claims against A.C. Eason without
21 prejudice, with each party to bear its own costs. ARCO has
22 reviewed its claims against Defendant A.C. Eason and in
23 consideration of A.C. Eason's financial condition and fragile
24 health, ARCO does not desire to pursue its case against A.C. Eason
25 at this time.

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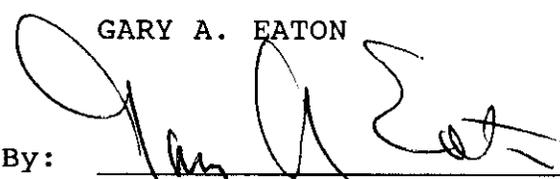
In either event, ARCO's claims against Defendant A.C. Eason should be dismissed without prejudice, with costs borne by the parties.

Date: October 18, 1993

ATLANTIC RICHFIELD CO.
JESS WOMACK

SIDLEY & AUSTIN
LARRY G. GUTTERRIDGE
LINDA S. PETERSON
ALAN AU

GARY A. EATON

By: 

Gary A. Eaton
Attorneys for Plaintiff
Atlantic Richfield Company

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

ATLANTIC RICHFIELD COMPANY,	)	Consolidated Case Nos.
)	
Plaintiff,	)	89-C-868-B
	)	89-C-869-B
v.	)	90-C-859-B
)	
AMERICAN AIRLINES, INC., ET AL.)	
)	
Defendants.)	

STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

The Plaintiff Atlantic Richfield Company and Defendant A.C. Eason, jointly agree, state, and stipulate as follows:

1. Atlantic Richfield Company and A.C. Eason jointly waive hearing and notice of hearing of this Stipulation of Dismissal without Prejudice.

2. Atlantic Richfield Company and A.C. Eason stipulate and move the Court to allow Atlantic Richfield Company to dismiss all claims set forth herein against A.C. Eason without prejudice to any future action upon such claims.

3. Atlantic Richfield Company and A.C. Eason stipulate *I shall not be responsible to pay any thing (A.C.E.)* that each shall bear and be responsible for its own costs and *I don't do anything & I was never in this you're* expenses incurred herein. *+ I don't ask to be sued*
besides I don't have any money and I drew a \$5. Check. to live on

Dated: _____

Gary A. Eaton, Attorney for
Atlantic Richfield Company

Dated: 10-2-93

A.C. Eason
A.C. Eason

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

ATLANTIC RICHFIELD COMPANY,	)	Consolidated Case Nos.
)	
Plaintiff,	)	89-C-868-B
	)	89-C-869-B
v.	)	90-C-859-B
)	
AMERICAN AIRLINES, INC., ET AL.)	
)	
Defendants.)	

ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this ____ day of July, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant A.C. Eason, the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against A.C. Eason should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for ~~its own costs~~ and expenses incurred herein.

I didn't ask to be sued & I shall not be held responsible for any charges be sided & I don't have any money

Judge

Approved as to form and content:

Gary A. Eaton, Attorney for
Atlantic Richfield Company

A. C. Eason

A.C. Eason

DATE 10/18/93

FILED

OCT 15 93

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

CHARLES LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

[Handwritten initials]

RON MCCOOL, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC.,)
 a Delaware corporation,)
)
 Defendant.)

Case No. 93-C-129-B ✓

O R D E R

Now before the Court is Defendant American Airlines' (American) motion for summary judgment (docket #8) filed on August 10, 1993).

Undisputed Facts

Plaintiff Ronald McCool (McCool) was employed with American Airlines in January, 1986. The employment application signed by McCool contained the following provisions:

1. My employment shall be in accordance with the terms of (A) this application, (B) company rules and regulations and any amendments thereto and (C) any applicable labor agreement. The company shall have the right to amend, modify, or revoke its rules and regulations at any time. I will familiarize myself promptly with such rules and regulations and will abide and be bound by the rules and regulations now or hereafter in effect.
2. My employment may be terminated by the company at any time without advance notice, its only obligation being to pay wages or salary earned by me to date of termination. Without limitation, failure to abide by company rules and regulations, failure to pass any company physical examination and the falsification of any information given by me in this application will entitle the company to terminate my employment.

In December, 1987, McCool received an Employee Handbook and signed

[Handwritten mark]

a Handbook Receipt and Acknowledgement with the following provisions:

The Company may add to, change, or delete the contents of this Handbook at any time. Changes will be included in periodic revisions.

Neither the Employee Handbook nor any provision of the Handbook constitutes a contract of employment in whole or in part.

McCool admits that his employment could be terminated at any time by American, but maintains that American was bound to adhere to its regulations in determining whether he could and should be laid off.

In approximately January 1991, McCool developed a friendship with Selby Cook, an employee in his department. During the period of the friendship, up until the time Ms. Cook left American's employ, McCool was counseled about taking lunches with Ms. Cook that exceeded the time allotted for lunches, and talking on the phone with Ms. Cook for reasons not related to business.

In 1992, American instituted a Reduction in Force Policy (RIF Policy) which affected the group within which McCool worked. The RIF Policy provided for layoffs to be made on the basis of a comprehensive review of performance, qualifications, experience, and length of service. The RIF Policy was distributed to American's officers, directors, and certain managers. McCool was not provided the RIF Policies by any of his managers.

McCool was laid off on November 30, 1992, in conjunction with American's 1992 RIF. He brings this suit for breach of a contract of employment by selecting him for layoff not in accordance with

the criteria in the RIF Policy¹, and for termination in violation of public policy.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Breach of Contract

McCool bases his breach of contract action on American's

¹ McCool denies in his response to American's undisputed facts that he is basing his breach of contract solely on the criterion in the RIF Policy. He states in his affidavit that he "relied on all of the regulations of American Airlines as a part of [his] agreement with the company." However, he does not provide the Court with any other regulations other than the RIF Policy to consider in opposition to American's motion.

failure to follow its own regulations in concluding that he should be laid off. McCool contends that he should have been rated higher than some of the other employees in his department in the required assessment of performance, qualifications, experience, and length of service. He claims that the RIF Policy guidelines required American to lay off the employee or employees with the lowest ranking in a consideration of these factors. Thus, he concludes the decision to terminate his employment was in violation of the RIF Policy guidelines, and was a breach of the contract of employment based on his employment application and, by implication, the RIF guidelines themselves.

American claims that the application for employment does not provide the basis for a contract because it is not sufficiently concrete in nature, that the RIF guidelines do not provide the basis for a contract because there was no reliance on those guidelines by McCool. American also contends that Plaintiff's layoff was consistent with the guidelines in the RIF policy because it had ranked Plaintiff lowest in his department.

The Oklahoma Supreme Court, in Hinson v. Cameron, 742 P. 2d 549 (Okla. 1987), acknowledged that it had not addressed the question of whether a personnel manual could constitute a contract of employment. In light of the holding in Hinson, the court, in Williams v. Maremont Corporation, 875 F.2d 1476, 1481 (10th Cir. 1989), stated that it would "assume that the Oklahoma Supreme Court would treat employers' personnel manuals, handbooks, or other statements of policy as unilateral contracts binding on the

employer, under proper circumstances." Operating under the same assumption, the question before the Court in this case is whether the application of employment and RIF Policy² combined constitute a unilateral contract which required American to follow certain procedures in determining whether Plaintiff could and should have been laid off on November 30, 1992. If there was a unilateral contract, this court must determine whether the decision to terminate Plaintiff's employment on November 30, 1992 could be a breach of that contract.

When faced with the argument that an employee manual constituted an implied contract that an employee would be terminated for stipulated causes, the court, in Hinson, resorted to a contract analysis to determine whether the plaintiff had been induced to accept or continue her employment as a result to the employee manual. Id. at 556, n. 28. The court found that the only evidence presented to support inducement was the manual itself, and this was insufficient to defeat summary judgment. Id. The Williams court, construing Hinson, Miller v Independent School District No. 56 of Garfield County, 609 P.2d 756 (Okla. 1980) (holding that a policy statement adopted by the board of education was incorporated by implication in the teacher's contract), and

² McCool argues, in his "Statement of Material Facts As To Which A Genuine Issue Exists" that the "criteria for layoff for plaintiff's job grade is published in Defendant's Rules and Regulations..." However, Plaintiff does not provide a copy of the rules and regulations with his response brief, nor do they appear anywhere in the record. The mere reference to the regulations does not constitute a specific fact as is required by Fed.R.Civ.P. 56, and thus will not be considered.

Langdon v. Saga corp., 569 P.2d 524 (Okla. App. 1976), held that there must be proof of consent, communication, inducement, and reliance as necessary prerequisites to the formation of a contract binding on an employer. Williams, 875 F.2d at 1481. Plaintiff asserts that the evidence would support a finding that consent, communication, inducement, and reliance are present in this case. The Court, however, does not find that, reviewing the record before it, there is any question of fact which would prevent summary judgment. There is no evidence that American communicated the RIF Policies to Plaintiff, and no evidence that Plaintiff relied on those procedures or was induced to continue employment as a result of them.³

In his response to American's motion, McCool also relies on Breshears v. Moore, 792 P.2d 91 (Okla. App. 1990). In Breshears, the plaintiff admitted that there was no employment contract, but argued that it was her understanding that the policies and procedures of the employer constituted a contract which reasonable men could interpret as being incorporated into her employment-at-will relationship. The Court of Appeals held that a question of fact existed whether the employer breached the duty that it had imposed on itself. Id. at p. 93-94. Breshears is distinguishable from the present case. That court held that there were facts which

³ In his brief, Plaintiff asserts that he relied on the policies and that because of the policies, which he received approximately one month prior to his layoff, he was induced to stay. This mere assertion, which is not supported by any evidence other than the language of the RIF Policy itself, is no different from the assertion of the plaintiff in Hinson, and is insufficient to defeat summary judgment. Hinson, 742 at 556, n. 28.

would give rise to an inference that, under those circumstances, the procedures manual could have become part of the employer-employee relationship. In the present case, applying the analysis in Hinson, and Williams, the evidence does not give rise to a question of fact whether the RIF Policies were part of the employment agreement. American's motion for summary judgment on Plaintiff's breach of contract claim is granted.

Plaintiff's Tort Claim

McCool alleged in his petition that Defendant's invasion or intrusion into Plaintiff's privacy affected its employment decision. American contends that this allegation is not sufficient to constitute a public policy exception to the terminable-at-will doctrine as it is set forth in Burk v. K-Mart Corporation, 770 P.2d 26 (Okla. 1989).

The determination of public policy is a question of law for the Court. Pearson v. Hope Lumber & Supply Company, Inc., 820 P.2d 443, 444 (Okla. 1991). Once the determination of public policy is made, it is up to the jury to decide if public policy was violated. Id. McCool contends that Okla.Stat. Ann. tit. 76, §§1 and 6⁴ constitute public policy which protects a person from injury or

⁴ 76 O.S. §1 provides: "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

76 O.S. §6 provides: "Besides the personal rights mentioned or recognized in the political code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."

infringement on his rights, and protects a person from "injury to his personal relations." The question before the Court is whether Okla.Stat. Ann. tit. 76, §§1 and 6 constitute "public policy" as contemplated by Burk.

In holding that the public policy exception must be "tightly circumscribed," the Burk court stated:

Accordingly, we believe the circumstances which present an actionable tort claim under Oklahoma law is where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.

Id. at 29. The exception is also limited to cases "in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law." Id. at 28.

Vannerson v. Board of Regents of University of Oklahoma, 784 P.2d 1053 (Okla. 1989), and Pearson give further guidance as to what is "a clear mandate of public policy." In Vannerson, the court examined two different factual situations. In one, plaintiff witnessed an unlawful transfer of state property, reported it to his supervisor, and was told that the materials were trash. Plaintiff was dissatisfied with the response, and let his supervisor know. Ultimately, the matter was turned over to the police. The court held that, if plaintiff was "discharged for going over his supervisor's head in complaint of an illegal disposition of state property," public policy would be invoked. Id. In contrast, in the second situation, plaintiff found inventory discrepancies, was dissatisfied with his supervisor's

response, became belligerent and left. Plaintiff did not believe any property had been stolen, resulting in the discrepancies, but believed most likely the discrepancies were a record keeping error. Id. at 1054. The court held that the only public policy being violated was that records be accurate, and that this violation did not come within the parameters of Burk.

In Pearson, the plaintiff refused to sign a waiver and release of liability before taking a polygraph test. He was then terminated for not taking the polygraph test as was required of all employees. He brought suit, alleging that his termination was in violation of public policy found in the Polygraph Examiner's Act, Okla.Stat. Ann. tit. 59, §§ 1451-1476. That act allowed for suspension or revocation of a license:

For failing to inform a subject to be examined that his participation in the examination is voluntary, unless the subject is an employee of a governmental body that has a policy or rules and regulations requiring mandatory polygraph examination as a part of internal investigations.

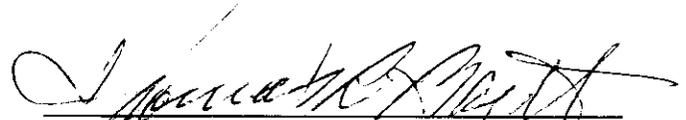
Okla.Stat. Ann. tit. 59, §1468(2). The court held that the act did not constitute a "clear mandate of public policy" because it did not purport to limit the actions of an employer. Id. at 445.

The reasoning in both Vannerson and Pearson support a finding that no "clear mandate of public policy" exists as a result of Okla.Stat. Ann. tit. 76, §§ 1 and 6. McCool was not terminated for refusing to perform an act in violation of public policy, or for performing an act consistent with public policy. Moreover, nothing in the language of § 1 or § 6 purports to limit the actions of an employer. The language of §§ 1 and 6 is so broad that basing a

public policy on these sections would defeat the intent of the Burk court to state a "narrow public policy exception" to the terminable-at-will rule. Any termination could arguably be "injury to" the employee. Therefore, American's motion for summary judgment on Plaintiff's tort claim is granted.

In summary, American's motion for summary judgment (docket #8) is granted as to McCool's breach of contract claim as well as his tort claim.

IT IS SO ORDERED THIS 13th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 10-15-93

FILED

OCT 15 1993

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

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

JACOB TARABOLOUS, Individually)
and as father and next friend of)
ERIC J. TARABOLOUS, a minor.)

Plaintiffs,)

vs.)

Case No. 93-C-458-E

NORTH AMERICAN LIFE ASSURANCE)
COMPANY,)

Defendant.)

DISMISSAL WITHOUT PREJUDICE BY STIPULATION

It is hereby stipulated pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure by and between the parties to the above-entitled action, by their respective attorneys of record, that the action is dismissed without prejudice to either party or cost to either party.

Dated this 13th day of October, 1993.

[Handwritten Signature]
MICHAEL JAMES KING, OBA #5036
M. JEAN HOLMES, OBA #13507
7130 South Lewis, Suite 720
Tulsa, OK 74136
(918) 494-6868

[Handwritten Signature]
PATRICIA LEDVINA HIMES
Attorney at Law
2000 Bank IV Center
15 West Sixth Street
Tulsa, OK 74119-5447
(918) 582-9201

1993

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CYNTHIA JANE BOONE,)
)
 Plaintiff,)
)
 v.)
)
 DONNA SHALALA, in her)
 capacity as SECRETARY OF THE)
 DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES,)
)
 Defendant.)

Case No. 93-C-568-B

FILED

OCT 13 1993

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

ORDER GRANTING MOTION DISMISS ON
DEFENDANT'S PURSUANT TO F.R.C.P. 12(b)(1) and (6)

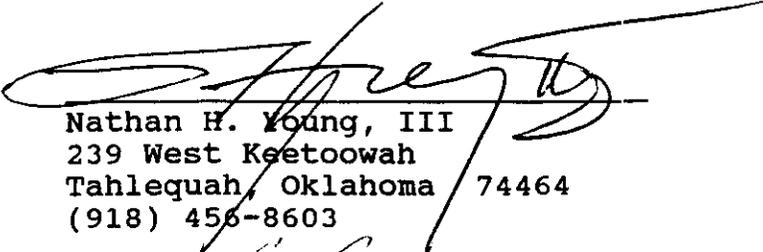
This cause came on for hearing on this 16th day of September, 1993, as to the Defendant's Motion to Dismiss duly served and filed in this action. After hearing arguments of counsel for the respective parties, and on due consideration, the motion to dismiss is allowed with the stipulation that any allegations not previously raised in the administrative process are dismissed.

IT IS HEREBY ORDERED that Plaintiff's allegations other than reprisal are dismissed if not previously raised in the administrative process.

S/ THOMAS R. BRETT

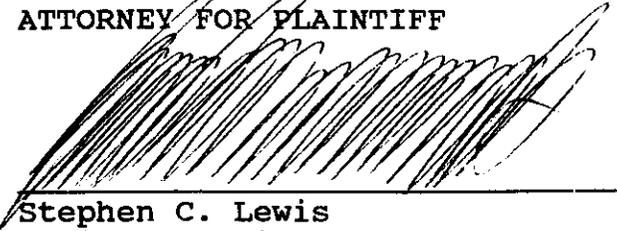
JUDGE OF THE DISTRICT COURT

APPROVED:



Nathan H. Young, III
239 West Keetoowah
Tahlequah, Oklahoma 74464
(918) 456-8603

ATTORNEY FOR PLAINTIFF



Stephen C. Lewis
Assistant United States Attorney
3900 United States Courthouse
Tulsa, Oklahoma 74103

ATTORNEY FOR DEFENDANT

(Not\boone.dismiss)

ENTERED ON DOCKET
OCT 15 1993
DATE

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

F I L E D

OCT 13 1993

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

THOMAS K. HALEY,)
Plaintiff,)
vs.)
DONNA E. SHALALA, M.D.,)
Secretary of Health & Human Services,)
Defendant.)

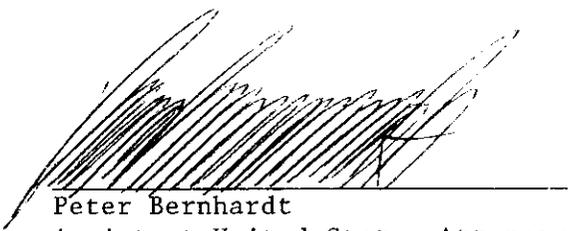
Case No. 93-C-232-B

DISMISSAL WITHOUT PREJUDICE

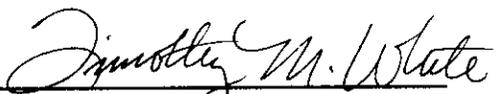
COMES NOW the Plaintiff, THOMAS K. HALEY, and hereby dismisses
the above entitled action without prejudice.

The Defendant has no objection.

Respectfully submitted,
THOMAS K. HALEY, Plaintiff



Peter Bernhardt
Assistant United States Attorney
OBA #741
3900 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

By: 

Timothy M. White
Attorney for Plaintiff
O.B.A. #9552
Center 2700, Suite 700
2761 E. Skelly Drive
Tulsa, Oklahoma 74105-6258
(918) 748-8115

CERTIFICATE OF MAILING

This is to certify that on the 12th day of October, 1993, I mailed, with
postage prepaid, a copy of the foregoing *Motion to Enlarge Time* to: Mr. Peter
Bernhardt, Assistant U.S. Attorney, 3900 Federal Courthouse Building, 333
West Fourth Street, Tulsa, Oklahoma 74103.


Timothy M. White

OCT 14 1993

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

KEYSTONE SERVICES, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Defendant,)
)
and)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Third-Party Plaintiff,)
)
vs.)
)
ERGON, INC.,)
a Mississippi corporation,)
)
Third-Party Defendant.)

Case No. 93-C-0089-B

FILED

OCT 14 1993

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 14 day of October, 1993, this matter coming on before me the undersigned United States District Judge and having received the Stipulation for Dismissal, finds as follows:

That each of the parties to this matter have entered into a settlement agreement which has been fully satisfied and is binding upon each of the parties to this action. It is therefore ordered that the above-styled action, in its entirety, is **DISMISSED WITH PREJUDICE.**

S/ THOMAS R. BRETT

United States District Judge
Thomas R. Brett

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1993

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PRATT F. LEADING FOX; MICHELLE)
 LEADING FOX; STATE OF OKLAHOMA)
 ex rel. OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Pawnee County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Pawnee County,)
 Oklahoma,)
)
 Defendants.)

CIVIL ACTION NO. 93-C-394-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day
of Oct, 1993. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, County Treasurer, Pawnee County, Oklahoma, and
Board of County Commissioners, Pawnee County, Oklahoma, appear by
Alan B. Foster, Assistant District Attorney, Pawnee County,
Oklahoma; the Defendant, State of Oklahoma ex rel. Oklahoma Tax
Commission, appears by its attorney Kim D. Ashley; and the
Defendants, Pratt F. Leading Fox and Michelle Leading Fox, appear
not, but make default.

The Court being fully advised and having examined the
court file finds that the Defendants, Pratt F. Leading Fox and
Michelle Leading Fox, were served with Summons and Complaint on
June 2, 1993; that the Defendant, State of Oklahoma ex rel.

Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on May 3, 1993; that Defendant, County Treasurer, Pawnee County, Oklahoma, acknowledged receipt of Summons and Complaint on May 3, 1993; and that Defendant, Board of County Commissioners, Pawnee County, Oklahoma, acknowledged receipt of Summons and Complaint on May 3, 1993.

It appears that the Defendants, County Treasurer, Pawnee County, Oklahoma, and Board of County Commissioners, Pawnee County, Oklahoma, filed their Answer on May 13, 1993; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer, Counterclaim and Cross-Claim on May 25, 1993; and that the Defendants, Pratt F. Leading Fox and Michelle Leading Fox, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Six (6), Block Two (2), in REEVES RIDGE ADDITION to the City of Pawnee, according to the recorded plat thereof.

SUBJECT, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.

The Court further finds that on August 14, 1979, Sharon K. Beaver executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of \$36,500.00, payable in monthly installments, with interest thereon at the rate of 9 percent per annum.

The Court further finds that as security for the payment of the above-described note, Sharon K. Beaver executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated August 14, 1979, and recorded on August 14, 1979, in Book 230, Page 340, in the records of Pawnee County, Oklahoma. Subsequently, to correct the legal description in the above-described mortgage, Sharon K. Beaver executed and delivered to the United States of America, acting through the Farmers Home Administration, a correction real estate mortgage dated May 6, 1981, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on May 7, 1981, in Book 277, Page 223, in the records of Pawnee County, Oklahoma.

The Court further finds that on November 20, 1989, the United States of America, acting through the Farmers Home Administration, released Sharon K. Beaver from personal liability to the Government for the indebtedness and obligation of said note and mortgage.

The Court further finds that on November 20, 1989, Pratt F. Leading Fox and Michelle Leading Fox executed and delivered to the United States of America, acting through the Farmers Home Administration, an Assumption Agreement assuming liability for the unpaid amount on the above-described note and mortgage in the amount of \$25,000.00, payable in monthly installments, with interest thereon at the rate of 9.25 percent per annum.

The Court further finds that as security for the payment of the above-described assumption agreement, Pratt F. Leading Fox and Michelle Leading Fox, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated November 20, 1989, covering the above-described property, situated in the State of Oklahoma, Pawnee County. This mortgage was recorded on November 20, 1989, in Book 420, Page 507, in the records of Pawnee County, Oklahoma.

The Court further finds that the Defendants, Pratt F. Leading Fox and Michelle Leading Fox, made default under the terms of the aforesaid assumption agreement and mortgages by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Pratt F. Leading Fox and Michelle Leading Fox, are indebted to the Plaintiff in the principal sum of \$24,819.06, plus accrued interest in the amount of \$2,154.70 as of September 17, 1992, plus interest accruing thereafter at the rate of 9.25 percent per annum or

\$6.2898 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$27.92 (\$19.92 fees for service of Summons and Complaint, \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$35.64, plus interest and penalties, which became a lien on the property as of 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the total amount of \$2,172.45, together with interest and penalty according to law, by virtue of Income Tax Warrant No. ITI90003016-00, recorded on April 9, 1990, in Book 424, Page 11 in the records of Pawnee County, Oklahoma; by virtue of Income Tax Warrant No. ITI90002755-00, recorded on April 13, 1990, in Book 424, Page 120 in the records of Pawnee County, Oklahoma; and by virtue of Income Tax Warrant No. ITI92020710-00, recorded on December 17, 1992, in Book 451, Page 04 in the records of Pawnee County, Oklahoma.

The Court further finds that the records of the Pawnee County Clerk show various right-of-way grants to Payne County Pipe Line Company, a domestic corporation, covering various tracts in

the SE/4 of Section 6-21N-5EIM, which are not specifically described. Reeves Ridge Addition is within the SW/4 SE/4 of Section 6-21N-5EIM. Purported releases of said right-of-way grants executed by Oklahoma Natural Gas Company, a corporation, as successor in interest to Payne County Pipe Line Company are shown of record. The Court further finds that the Plaintiff ascertains that the presence of this right-of-way does not affect its security in said above-described property.

The Court further finds that the records of the Pawnee County Clerk show an easement to Rural Water District #3, an easement to the City of Pawnee, and the Dedication and Covenants applicable to Reeves Ridge Addition providing for utility easements across the West 7.5 feet of captioned property and across the North, South and East 5 feet of captioned property. The Court further finds that the Plaintiff ascertains that the presence of these easements does not affect its security in said above-described property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment against the Defendants, **Pratt F. Leading Fox and Michelle Leading Fox**, in the principal sum of \$24,819.06, plus accrued interest in the amount of \$2,154.70 as of September 17, 1992, plus interest accruing thereafter at the rate of 9.25 percent per annum or \$6.2898 per day until judgment, plus interest thereafter at the current legal rate

of 3.40 percent per annum until paid, plus the costs of this action in the amount of \$27.92 (\$19.92 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 Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, have and recover judgment in the amount of \$35.64, plus interest and penalties, for personal property taxes for the year 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, Oklahoma, have and recover judgment in the total amount of \$2,172.45, together with interest and penalty according to law, by virtue of Income Tax Warrant No. ITI90003016-00, recorded on April 9, 1990, in Book 424, Page 11 in the records of Pawnee County, Oklahoma; by virtue of Income Tax Warrant No. ITI90002755-00, recorded on April 13, 1990, in Book 424, Page 120 in the records of Pawnee County, Oklahoma; and by virtue of Income Tax Warrant No. ITI92020710-00, recorded on December 17, 1992, in Book 451, Page 04 in the records of Pawnee County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Pratt F. Leading Fox and Michelle Leading Fox, 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 appraisement 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 the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission;

Fourth:

In payment of the judgment rendered herein in favor of the Defendants, County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, for 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. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

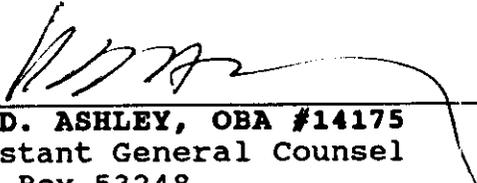
STEPHEN C. LEWIS
United States Attorney



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



ALAN B. FOSTER, OBA #3046
Assistant District Attorney
Pawnee County Courthouse - Room 301
Pawnee, Oklahoma 74058
(918) 762-2555
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Pawnee County, Oklahoma



KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, Oklahoma 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 93-C-394-B

DATE 10-14-93

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

FILED

OCT 13 1993

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

UNIT DRILLING AND EXPLORATION)
 COMPANY, a Delaware)
 Corporation, and UNIT)
 PETROLEUM COMPANY, an)
 Oklahoma corporation,)
)
 Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

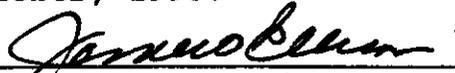
No. 92-C-794-E ✓

ORDER OF DISMISSAL

The Court has for consideration the Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) Fed.R.Civ.P. (docket #9). Because the court finds this motion dispositive, the remaining pending issue raised by Plaintiffs' Appeal of the Magistrate's Order (docket #31) is rendered moot and thereby denied. The basis for the Court's dismissal of the above-captioned case is that it states a claim in contract, not cognizable under the Federal Tort Claims Act. 28 U.S.C. §1346(b). This Court, therefore, lacks subject-matter jurisdiction over the case and accordingly, must dismiss the action. See, e.g. Davis v. U.S., 961 F.2d 53 (5th Cir. 1991); City National Bank v. U.S., 907 F.2d 536 (5th Cir. 1990); Woodbury v. U.S., 313 F.2d 291 (9th Cir. 1963).

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is GRANTED. The case is dismissed without prejudice.

ORDERED this 13th day of October, 1993.



 JAMES O. ELLISON, Chief Judge
 UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-14-93

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

TERRY MAJOR,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY FIELDS, ET AL.,)
)
 Defendants.)

No. 93-C-95-E ✓

FILED
OCT 13 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is Defendants' motion to dismiss filed on April 9, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss is GRANTED and that the above captioned case is DISMISSED.

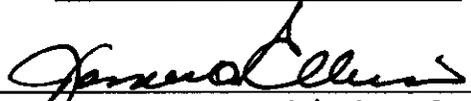
SO ORDERED THIS 13th day of October, 1993.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

alleged. In addition, the Court notes that the Petitioner has not responded to Respondent's motion to dismiss. This constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 15(A).

Accordingly, Respondents' motion to dismiss (docket # 5) is **granted**. The petition for a writ of habeas corpus is hereby **dismissed**.

IT IS SO ORDERED this 13th day of October, 1993.



JAMES E. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-14-93

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

DOLPHUS E. SCHIRMER,)
)
 Plaintiff,)
)
 V.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

No. 91-C-658-E

FILED

OCT 13 1993

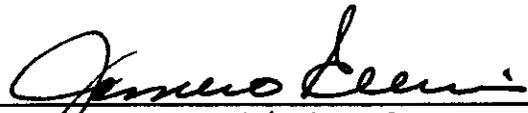
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This action came on for consideration before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendant and that the action be dismissed on the merits.

ORDERED this 13th day of October, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE 10-14-93

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

TABITHA SMITH,)
Petitioner,)
vs.)
NEVILLE MASSIE, ET AL.,)
Respondents.)

No. 93-C-001-E ✓

FILED

OCT 13 1993

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

ORDER

Before the Court is Respondents' motion to dismiss for failure to exhaust state remedies. Respondents assert that Petitioner failed to timely appeal the denial of her petition for post-conviction relief. Petitioner objects. She argues she unsuccessfully attempted to obtain a transcript from Delaware County and file an appeal out of time.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of [her] federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner

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has not exhausted her state remedies. She failed to timely appeal the denial of her petition for post-conviction relief and did not follow the necessary steps to secure an appeal out of time. Accordingly, Respondents' motion to dismiss (docket # 4) is granted. The petition for a writ of habeas corpus is hereby dismissed.

IT IS SO ORDERED this 13th day of October, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

GREGORY DALE HARDING,)
) Petitioner,)
))
 vs.))
))
 DAN REYNOLDS,)
) Respondent.)

No. 93-C-591-B

FILED

OCT 13 1993

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

ORDER

Before the Court are Petitioner's motion to amend his petition for writ of habeas corpus, Respondent's motion to dismiss, and Petitioner's motion for leave to return to state court.

In June 1993, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising two grounds for relief. On August 12, 1993, Petitioner moved to amend his petition to add a third ground. On August 13, 1993, Respondent moved to dismiss, arguing ground one was unexhausted. On August 24, 1993, Petitioner moved for leave to return to state court to exhaust his state remedies as to grounds one and three. He requested, however, that the court address ground two on the merits.

In Rose v. Lundy, 455 U.S. 509 (1982), the United States Supreme Court held that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief. The Court stated:

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of

15

amending or resubmitting the habeas petition to present only exhausted claims to the district court.

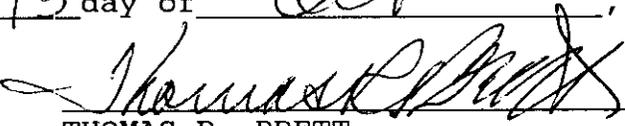
Id. at 510 (emphasis added).

Accordingly, this petition is dismissed at this time without prejudice as a "mixed petition." The Court will reinstate this action if the Petitioner wishes to amend his petition to present only his exhausted claim. In exercising his choice, Petitioner is reminded that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Id. at 521.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion for leave to amend his petition is denied;
2. Respondent's motion to dismiss is granted; and
3. This petition for a writ of habeas corpus is dismissed.

IT IS SO ORDERED this 13th day of Oct, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

ENTERED IN DOCKET

DATE ~~06-14-1993~~

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

UNITED DOMINION INDUSTRIES,)
(formerly AMCA INTERNATIONAL)
CORPORATION,)

Plaintiff,)

vs.)

ECONO-THERM ENERGY SYSTEMS)
CORP., and MORGAN PUMP CO.,)

Defendants.)

NO. 91-C-424-B

FILED
Richard L. Brett
U.S. District Judge
Northern District of Oklahoma

JUDGMENT

UPON granting of Summary Judgment in favor of United Dominion Industries and against Econo-Therm Energy Systems Corporation, Judgment is hereby entered in favor of United Dominion Industries and against Econo-Therm Energy Systems Corporation in the sum of Two Hundred Twenty-six Thousand Five Hundred Thirty-four and 22/100 (\$226,534.22) plus attorney's fees and costs, if timely applied for pursuant to Local Rule 6.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

nd

nd

ENTERED ON DOCKET
DATE OCT 14 1993

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

UNITED DOMINION INDUSTRIES,)
 (formerly AMCA INTERNATIONAL)
 CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 ECONO-THERM ENERGY SYSTEMS)
 CORP., and MORGAN PUMP CO.,)
)
 Defendants.)

NO. 91-C-424-B

FILED
 OCT 14 1993
 Richard [unclear]
 U.S. District Court
 Northern District of Oklahoma

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UPON MOTION by United Dominion Industries ("United Dominion") for Summary Judgment, and no response by Defendant Econo-Therm Energy Systems Corp. ("Econo-Therm"), this Court finds that pursuant to Local Rule 15 the Statement of Facts identified by United Dominion in its Motions for Summary Judgment are uncontroverted. The Findings of Fact include:

1. On October 7, 1985, an Asset Purchase Agreement ("Contract") for the Braden Manufacturing Facility was executed between United Dominion and Econo-Therm. (Motion for S. J. Brief Fact 1; Ex. 1; Ex. 2, No. 1, 2, and 3).
2. The parties to the Contract agreed that any liability relating to liabilities or obligations arising from any state, federal or local enforcement action with respect to an unsafe or unhealthy job environment at the Braden plant relating to the existence of a condition prior to

clm

the closing date would be satisfied by the Defendant. (Motion for S.J. Brief, Fact 1; Ex. 1, Section 3.1(f), page 9).

3. Defendant warranted that it was in complete compliance with all laws, regulations and orders relating to the Braden facility, including all laws relating to the same conduct of business. (Motion for S.J. Brief, Fact 1; Ex. 1, Section 6.10(d), page 22).
4. Defendant warranted that the representations and warranties made by Defendant contained no untrue or incomplete material facts that would make the representations or warranties misleading. (Motion for S.J. Brief, Fact 1; Ex. 1, Section 6.14, page 24).
5. The representations and warranties of Defendant in the Contract were continuing representations and they survived the Contract's closing date. (Motion for S.J. Brief, Fact 1; Ex. 1, Section 6.15, page 24; Section 14.8, page 37).
6. Defendant also agreed to protect, defend, hold harmless and indemnify Plaintiff for any claims against Plaintiff due to liabilities not assumed by Plaintiff, breaches of or inaccuracies in the covenants, representations and warranties made by Defendant in the Contract. (Motion for S.J. Brief, Fact 1; Ex. 1, Section 3.3, page 11).

7. Valid audiometric studies of the hearing levels of Defendant's employees as required by OSHA were not performed by Econo-Therm at any time prior to execution of the Contract. (Motion for S.J. Brief, Fact 2; Ex. 2, No. 4).
8. Requests for Admissions were served upon Defendant. Pursuant to agreement of counsel, an Order was entered into on August 21, 1991, allowing Defendant until October 7, 1991, to respond to the discovery requests. No response has been filed and the requests are therefore deemed admitted under Fed.R.Civ.P. 36. (Motion for S.J. Brief, Fact 4; Ex. 4).
9. Defendant admits that Econo-Therm was required under OSHA rules and regulations to take audiometric studies of the employees of Braden during Econo-Therm's ownership. (Motion for S.J. Brief, Fact 3; Ex. 3, No. 4; Fact 4; Ex. 4, No. 4).
10. Defendant did not perform valid audiometric baseline or annual audiograms of the employees during Econo-Therm's ownership. (Motion for S.J. Brief, No. 5 and 6; Fact 4; Ex. 4, No. 5 and 6).
11. After purchasing Braden Steel from the Defendant, United Dominion hired several former Econo-Therm employees who had previously worked for Defendant at Braden Steel. (Motion for S.J. on Damages Brief, Fact A; Ex. "A").

12. Several of these employees later filed workers' compensation claims against United Dominion Industries in Oklahoma alleging noise exposure at the Braden Facility. Those claims were for many years of noise exposure which occurred primarily during Defendant's ownership. (Motion for S.J. on Damages Brief, Fact A; Ex. "A").
13. Plaintiff made demand upon Defendant to protect, defend, indemnify and hold harmless the Plaintiff from those workers' compensation claims. (Motion for S.J. Brief, Fact 5; Ex. 5). Defendant did not.
14. The amount of these claims and associated costs paid by United Dominion Industries totalled Two Hundred Twenty-six Thousand Five Hundred Thirty-four Dollars and 22/100 (\$226,534.22). These damages were incurred due to breaches of the Contract by Defendant. (Motion for S.J. on Damages Brief, Fact A; Ex. "A").

CONCLUSIONS OF LAW

This Court concludes:

1. On October 7, 1985, an Asset Purchase Agreement ("Contract") for the Braden Manufacturing Facility was executed between United Dominion and Econo-Therm.
2. The parties to the Contract agree that any liability relating to liabilities or obligations

arising from any state, federal or local enforcement action with respect to an unsafe or unhealthy job environment at the Braden plant relating to the existence of a condition prior to the closing date would be satisfied by the Defendant.

3. Defendant warranted that it was in complete compliance with all laws, regulations and orders relating to the Braden facility, including all laws relating to the same conduct of business.
4. Defendant warranted that the representations and warranties made by Defendant contained no untrue or incomplete material facts that would make the representations or warranties misleading.
5. The representations and warranties of Defendant in the Contract were continuing representations and they survived the Contract's closing date.
6. Defendant also agreed to protect, defend, hold harmless and indemnify Plaintiff for any claims against Plaintiff due to liabilities not assumed by Plaintiff, breaches of or inaccuracies in the covenants, representations and warranties made by Defendant in the Contract.
7. Valid audiometric studies of the hearing levels of Defendant's employees as required by OSHA were not performed by Econo-Therm at any time prior to execution of the Contract.

8. Requests for Admissions were served upon Defendant. Pursuant to agreement of counsel, an Order was entered into on August 21, 1991, allowing Defendant until October 7, 1991, to respond to the discovery requests. No response has been filed and the requests are therefore deemed admitted under Fed.R.Civ.P. 36.
9. Defendant admits that Econo-Therm was required under OSHA rules and regulations to take audiometric studies of the employees of Braden during Econo-Therm's ownership.
10. Defendant did not perform valid audiometric baseline or annual audiograms of the employees during Econo-Therm's ownership.
11. After purchasing Braden Steel from the Defendant, United Dominion hired several former Econo-Therm employees who had previously worked for Defendant at Braden Steel.
12. Several of these employees later filed workers' compensation claims against United Dominion Industries in Oklahoma alleging noise exposure at the Braden Facility. Those claims were for many years of noise exposure which occurred primarily during Defendant's ownership.
13. Plaintiff made demand upon Defendant to protect, defend, indemnify and hold harmless the Plaintiff

from those workers' compensation claims. Defendant did not.

14. The amount of these claims and associated costs paid by United Dominion Industries totalled Two Hundred Twenty-six Thousand Five Hundred Thirty-four Dollars and 22/100 (\$226,534.22). These damages were incurred due to breaches of the Contract by Defendant.
15. The Contract at issue was a valid contract between United Dominion and Econo-Therm.
16. That Econo-Therm breached the contract at issue.
17. United Dominion sustained Two Hundred Twenty-six Thousand Five Hundred Thirty-four Dollars and 22/100 (\$226,534.22) in damages as a result of the breaches by Econo-Therm of the Contract at issue.

This Court further finds as a matter of law that Summary Judgment should be granted to United Dominion and against Econo-Therm and that the damages incurred as a result of the breaches are Two Hundred Twenty-six Thousand Five Hundred Thirty-four Dollars and 22/100 (\$226,534.22) plus attorney's fees and costs.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE 10-12-93

ENTERED ON DOCKET

DATE 10-14-93

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

FILED

OCT 13 1993

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

RICHARD BELL and)
GEORGE BUBRICK,)
)
Plaintiffs and)
Counterclaim)
Defendants,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant and)
Counterclaim)
Plaintiff.)

Case No. 90-C0071-E

AGREED JOURNAL ENTRY OF JUDGMENT

The above-captioned matter came before this Court for jury trial on February 16 and 17, 1993, regarding the United States of America's assessment, pursuant to 26 U.S.C § 6672, against plaintiffs Richard Bell and George Bubrick. Plaintiffs were represented by Thomas J. McGeady. Defendant United States of America was represented by Carolyn D. Jones and Douglas H. Frazer. The jury was empaneled and sworn. It heard the evidence, the charges of the Court and the argument of counsel and returned its verdict in favor of Defendant United States on its Counterclaim, in the amount of TWO THOUSAND SEVEN HUNDRED FIFTY and 35/100 DOLLARS (\$2,750.35) against each plaintiff.

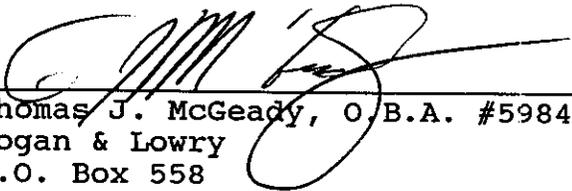
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant recover judgment from each of the Plaintiffs in the amount of TWO THOUSAND SEVEN HUNDRED FIFTY and 35/100 DOLLARS (\$2,750.35), with interest thereon accruing after the date of assessment, June 3, 1985, pursuant to Internal Revenue Code Section 6601.

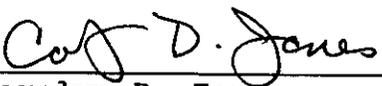
Dated this 13 day of October, 1993.

S/ JAMES O. ELLISON

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APPROVED:


Thomas J. McGeady, O.B.A. #5984
Logan & Lowry
P.O. Box 558
Vinita, Oklahoma 74301
Telephone: (918) 256-7511
(Attorney for Plaintiffs)


Carolyn D. Jones
Tax Division
U.S. Department of Justice
P.O. Box 7238, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-6637
(Attorney for Defendant)

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

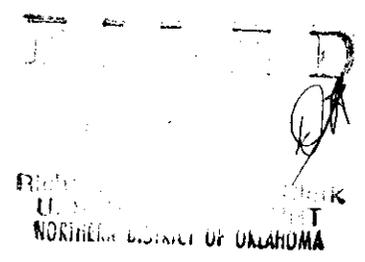
GLEN HEREDEN, an individual,
Plaintiff,

vs.

ROCKWELL INTERNATIONAL CORPORATION,
as Plan Sponsor and fiduciary; A.J.
SPIGARELLI, as Plan Administrator of
Rockwell International's Salaried and
Weekly Employees Retirement Plan; and
ROCKWELL INTERNATIONAL'S RETIREMENT
PLAN FOR ELIGIBLE EMPLOYEES ON THE
SALARIED AND WEEKLY PAYROLLS OF
ELECTRONICS OPERATIONS, NORTH AMERICAN
AIRCRAFT OPERATIONS AND NORTH AMERICAN
SPACE OPERATIONS,

Defendants.

Case No. 92-C-1137-B



ORDER

Pursuant to Fed.R.Civ.P. 60(a), the Court hereby amends the
last sentence of its Order of October 8, 1993, to read as follows:

Based on the Court's conclusions that there
was sufficient evidence to support the Plan's
determination and that the Defendants' use and
reliance on Dr. Framjee's opinion was
reasonable, Defendant is also entitled to
summary judgment on the remaining claims and
such is hereby GRANTED.

IT IS SO ORDERED, this 12th day of October, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

239

DATE OCT 13 1993

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

COPIES OF THIS DOCUMENT
OCT 12 1993
J. M. Lawrence, Clerk of
U.S. DISTRICT COURT

PHILLIP A. WRIGHT,)
Personal Representative of)
the Estate of Helen Wright,)
Plaintiff,)

vs.)

Case No. 91 C 442 B

SPALDING & EVENFLO COMPANIES,)
INC., d/b/a EVENFLO JUVENILE)
FURNITURE COMPANY, a/k/a)
QUESTOR JUVENILE FURNITURE)
COMPANY; EVENFLO JUVENILE)
FURNITURE COMPANY; and)
QUESTOR JUVENILE)
FURNITURE COMPANY,)
Defendants.)

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff, PHILLIP A. WRIGHT, personal representative of the Estate of Helen Wright, and the Defendant, SPALDING & EVENFLO COMPANIES, INC., and stipulate pursuant to Federal Rules of Civil Procedure, Rule 41, that this action be dismissed with prejudice.

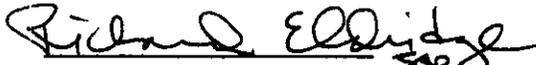
Dated this 11th day of October, 1993.

PLAINTIFF,
BY: Loyal J. Roach
LOYAL J. ROACH, OBA #7615
SUITE 660 - PARK CENTRE
TULSA, OK 74103
(918) 587-2544

and

JOE M. FEARS, OBA #2850
CURTIS SHACKLETT, OBA #8101
BARBER & BARTZ
110 W. 7th, #200
TULSA, OK 74119
(918) 599-7755

DEFENDANT,

BY: 
RICHARD M. ELDRIDGE, OBA #2665
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
BANK IV CENTER
15 W. 5TH STREET, SUITE 2800
Tulsa, Oklahoma 74119
(918) 582-1173

C:\WORD\WRIGHT\STIPDIS

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

CYNTHIA RUNYAN,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health
and Human Services,

Defendant.

91-C-533-B ✓

FILED

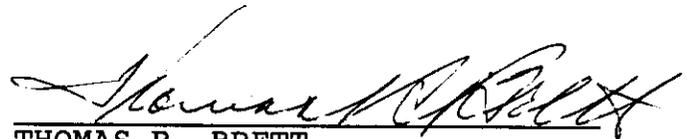
OCT 12 1993

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

J U D G M E N T

Pursuant to an Order entered simultaneously herein, granting Plaintiff's attorneys fee application in the amount of \$7,923.50 under 42 U.S.C. §406, judgment is herewith granted in favor of Plaintiff Cynthia Runyan and against Defendant Donna E. Shalala, Secretary of Health and Human Services, in the amount of \$7,923.50.

DATED this 12 day of October, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE OCT 13 1993

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

CYNTHIA RUNYAN,

Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of Health
and Human Services,

Defendant.

91-C-533-B ✓

FILED

OCT 12 1993 *mw*

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

ORDER

This matter comes on for consideration of Plaintiff's Motion for Attorney's Fees (docket #17) in the amount of 25% of the past due Social Security benefits recovered in this case by Plaintiff and for attorney fees in the amount of \$4,910.00 under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412.

The Court has jurisdiction to award attorney's fees under the Social Security Act for services rendered. Harris v Secretary of HHS, 836 F.2nd 496, (10th Cir. 1987). The Defendant states that she has no objection to the Court approving an attorney fee in the amount of \$7,923.50 which the Court presumes to be 25% of the back benefits recovered by Plaintiff herein. See 42 U.S.C. §406.

Defendant opposes Plaintiff's request for attorney fees under EAJA on the ground the application was untimely or, alternatively, that Plaintiff is not entitled to any EAJA fees because the Secretary's litigation position was substantially justified.

The parties agree that the final Order ("final judgment") herein was filed April 27, 1993. Parties have 60 days within which

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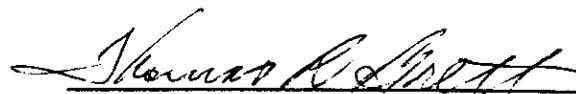
to appeal and if no appeal the Order (judgment) becomes final. Since no appeal was filed the Court's April 27, 1993 Order became a final judgment on June 26, 1993.

Under EAJA a plaintiff is required to file an EAJA attorneys fee application with 30 days of the final judgment. See 28 U.S.C. §2412(d)(1)(B). In the instant case that date was July 26, 1993. Plaintiff filed her EAJA attorneys fee application on July 27, 1993. July 26, 1993 was a non-holiday Monday. Timely filing within the 30 day filing period is jurisdictional. Olson v. Norma, 830 F.2d 811, 821 (8th Cir.1987); American Ass'n of Retired Persons v. EEOC, 873 F.2d 402, 407 n.7 (D.C. Cir.1989); Allen v. Secretary of HHS, 781 F.2d 92, 94 (6th Cir. 1986); Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990); Beta Systems, Inc. v. United States, 866 F.2d 1404, 1405 (Fed.Cir. 1989).

Based upon the foregoing the Court concludes Plaintiff's EAJA attorneys fee application was untimely and the Court is therefore without jurisdiction to consider the application. Thompson v. Sullivan, 715 F.Supp. 1019, 1020 (D.Kan. 1989). Plaintiff's application for EAJA attorneys fees is therefore denied.

The Court concludes Plaintiff's application for attorneys fee under 42 U.S.C. §406 should be granted in the amount of \$7,923.50. A judgment in accord with this Order will be entered simultaneously herewith.

IT IS SO ORDERED this 12th day of October, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE OCT 13 1993

FILED

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

OCT 8 1993

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

GLEN HEREDEN, an individual,)

Plaintiff,)

vs.)

Case No. 92-C-1137-B

ROCKWELL INTERNATIONAL CORPORATION,)
as Plan Sponsor and fiduciary; A.J.)
SPIGARELLI, as Plan Administrator of)
Rockwell International's Salaried and)
Weekly Employees Retirement Plan; and)
ROCKWELL INTERNATIONAL'S RETIREMENT)
PLAN FOR ELIGIBLE EMPLOYEES ON THE)
SALARIED AND WEEKLY PAYROLLS OF)
ELECTRONICS OPERATIONS, NORTH AMERICAN)
AIRCRAFT OPERATIONS AND NORTH AMERICAN)
SPACE OPERATIONS,)

Defendants.)

ORDER

Now before the Court is Defendants' Motion to Dismiss and Motion for Summary Judgment (Docket #8) filed April 26, 1993.

This is an action arising under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq., in which Plaintiff, Glen Hereden (Hereden), alleges he was wrongfully denied disability pension benefits under the Pension Plan adopted by his employer, Defendant Rockwell International Corporation (Rockwell). Plaintiff contends Rockwell International's Retirement Plan ("the Plan") incorrectly concluded that he was not totally and permanently disabled under the terms of the Plan. Plaintiff asserts Defendants abused their discretion or acted recklessly in failing to ascertain the alleged reputation of Dr. Sami Framjee prior to selecting him to perform the independent medical exam of Plaintiff and in relying on Dr. Framjee's "biased or inadequate medical exam" to deny

Plaintiff benefits. Defendant seeks summary judgment on Plaintiff's ERISA claim and dismissal pursuant to Fed.R.Civ.P. 12(b)(6) or summary judgment on Plaintiff's related common law claims.

The following facts are not in dispute:

1) The Plaintiff started having lower back problems in the summer of 1989; had back surgery in December of 1989; and, after remaining off work for about one year, sought disability retirement under the Company Retirement Plan in the fall of 1990.

2) The Retirement Plan allows disability retirement only on a very restrictive basis, where the employee is deemed to be permanently and totally incapable of performing any type of work for wage or profit. The pertinent provisions of the Plan are:

10.020. Total and Permanent Disability. An Employee of the Company shall be deemed to be totally and permanently disabled when, on the basis of proof satisfactory to the Retirement Committee, the Retirement Committee finds that he is wholly and permanently prevented from engaging in any occupation or employment for wage or profit as a result of bodily injury or disease, either occupational or nonoccupational in origin, except such employment as is found by the Retirement Committee to be for the purposes of rehabilitation.

14.010. Participant Claims

c) Due to the factual nature of the determination of whether a Participant is totally and permanently disabled, the decision of the Retirement Committee shall be final and binding on the Participant if there was expert medical evidence to support its decision. Only the question of whether the Retirement Committee had before it any evidence to support its decision shall be subject to review.

15.010. Limitations on Liability

(a) Except as provided in [Section 405 of ERISA], no person shall be subject to any liability with respect to his duties under the Plan, unless he acts fraudulently or in bad faith;

(b) No person shall be liable for any breach of fiduciary responsibility resulting from the act or omission of any other fiduciary or any person to whom fiduciary responsibilities have been allocated or delegated....

15.020. Reliance Upon Documents and Opinions. The members of the...Retirement Committee, the Plan Administrator, the Board of Directors, and the Company shall be entitled to rely upon any ... reports furnished by ... consultant or firm or corporation which employs one or more consultants.... The members of the Benefits Committee and Retirement Committee, the Plan Administrator, the Board of Directors and the Company shall be fully protected and shall not be liable in any manner whatsoever for anything done or action taken or suffered in reliance upon any such consultant or firm or corporation.... Any and all such things done or such actions taken or suffered by the Benefits Committee and the Retirement Committee, the Plan Administrator, the Board of Directors and the Company shall be conclusive and binding on all Employees, Participants, beneficiaries and other persons whomsoever except as otherwise provided by law.

15.030. Company Records: The Benefits Committee, the Retirement Committee and Plan Administrator may, but are not required to, rely upon all records of the Company with respect to any matter or thing whatsoever. Such records shall be conclusive with respect to all Employees, Participants, Spouses and beneficiaries, except as otherwise provided by law.

3) In connection with his application for disability retirement benefits, in the fall of 1990 Plaintiff submitted a statement by his attending physician to the effect that his physician believed that Plaintiff was permanently disabled, but that Plaintiff did have the ability to perform certain sedentary work.

4) According to the first disability report from Plaintiff's physician (dated April 30, 1990) which was submitted to the Plan at the time of Plaintiff's disability retirement application, Plaintiff had some restrictions in walking, sitting and standing.

This physician (Dr. Randall Hendricks) recommended that Plaintiff entirely avoid climbing. Hence, his physician found that Plaintiff could not perform the duties of his old job. However, Dr. Hendricks did find that Plaintiff was physically capable of operating electrical equipment and small plant vehicles, and of performing job duties requiring concentrated visual attention. Dr. Hendricks gave no opinion in this first report regarding whether Plaintiff was totally disabled from any occupation. Nonetheless, Dr. Hendricks did provide a statement on the disability retirement application itself to the effect that Plaintiff at that time was totally disabled from performing all work; that it was uncertain when Plaintiff might be able to return to gainful employment; but that Plaintiff had a good prognosis.

5) In accordance with standard procedure, Plaintiff's application and supporting medical records were sent to the Hillcrest Occupational Medicine Clinic (the regular medical clinic used by Defendant Rockwell) to obtain another opinion regarding the disability status of the claimant. Dr. G. W. Kelly of this clinic reviewed all medical records submitted by the Plaintiff, and determined on the basis of the records submitted by Plaintiff that there was no need to conduct an in-person examination of Plaintiff. Under established procedures, an in-person examination is scheduled only where physicians of the Hillcrest Occupational Medicine Clinic determine that such is necessary. After review of the records which had been submitted by Plaintiff, Dr. G. W. Kelly of this clinic provided an opinion to Defendant Rockwell that Plaintiff was

not permanently and totally disabled within the terms of the Plan because the medical records of Dr. Hendricks regarding Plaintiff indicated that Plaintiff could perform sedentary work.

6) Based upon these opinions, Plaintiff was advised that a recommendation would be made by Plan Administration that his application be denied by the Retirement Committee, but that he could appeal to the Retirement Committee if he disagreed with the decision of Plan Administration. Plaintiff did appeal. In accordance with its usual practice, the Retirement Committee directed that Plaintiff be sent for an Independent Medical Exam (hereinafter referred to as "IME").

7) Springer Clinic physicians usually were used by the Plan to conduct IMEs for Tulsa-based employees. However, because Plaintiff was already using Springer physicians, the Plan decided to use a non-Springer doctor to conduct his IME.

8) Dr. Sami Framjee, a local orthopedic physician not affiliated with Springer Clinic, was selected to conduct the IME by the duly-authorized Benefit Administration employees of Defendant Rockwell, acting on behalf of the Plan. Dr. Framjee recently had been selected to conduct an IME in another case involving a union member (whom Dr. Framjee found to be disabled, and who then was approved for disability retirement benefits). Because Dr. Framjee had appeared to be a mutually agreeable choice with the Union in that case, the Plan decided to use Dr. Framjee to perform the IME for Plaintiff.

9) Dr. Framjee has been used to perform IMEs on a total of

four Company employees who have sought disability retirement benefits. Out of these four employees, Dr. Framjee has recommended that two be found to be disabled, and found that Mr. Hereden and one other employee were not disabled. The Retirement Committee followed the recommendations of Dr. Framjee in all four cases, and granted disability retirement to the two employees whom he found to be disabled.

10) Plaintiff made no objection to the use of Dr. Framjee to perform his IME, nor did Plaintiff advise the Plan after notification of the selection of Dr. Framjee that he believed that Dr. Framjee was not an unbiased or impartial medical examiner.

11) In March of 1991, Dr. Framjee conducted a physical exam of Plaintiff, and also reviewed all medical records which had been submitted by the Plaintiff to the Plan. After this exam, Dr. Framjee advised the Plan that he was uncertain regarding the ultimate prognosis of Plaintiff. Therefore, he found Plaintiff to be only temporarily disabled and recommended reevaluation of his disability status after six months to one year.

12) At approximately the same time as this initial exam by Dr. Framjee, Plaintiff also was reexamined by his own personal physician, Dr. Hendricks. The second disability report by Dr. Hendricks (completed in May of 1991) stated that Plaintiff had some limitation on sitting, and that Plaintiff could not perform duties requiring standing or climbing. Hence, the physician found that Plaintiff could not perform the duties of his old job, and was permanently and totally disabled. Dr. Hendricks further reported

that Plaintiff was physically capable of operating electrical equipment and engaging in tasks using concentrated visual attention, but nonetheless stated that Plaintiff was permanently and totally disabled from performing the duties of any occupation.

13) In December of 1991, Plaintiff was sent back to Dr. Framjee for follow-up evaluation, pursuant to a request by the Retirement Committee for an updated report. Plaintiff did not provide either the Plan or Dr. Framjee with the complete medical file of Springer Clinic. Rather, Plaintiff orally advised Dr. Framjee of the results of subsequent exams and tests which had been performed by Springer Clinic since his last exam by Dr. Framjee (to the best of Plaintiff's non-expert understanding of such findings). After conducting his examination of Plaintiff and obtaining information from Plaintiff about the further tests and exams by the Springer Clinic, Dr. Framjee provided the Plan with an opinion that Plaintiff was not permanently disabled under the terms of the Plan. Dr. Framjee did not obtain the complete Springer Clinic records or forward such records to the Plan.

14) Plaintiff did not advise the Plan, prior to the second decision by Dr. Framjee, that he believed that Dr. Framjee had not conducted a thorough or proper examination of him nor did Plaintiff object to the use of Dr. Framjee to conduct this second examination.

15) Based upon the medical evidence submitted, including the second report by Dr. Framjee, the Retirement Committee made the decision that Plaintiff had not provided data which was

satisfactory to the Retirement Committee which established that Plaintiff was permanently unable to perform any occupation for wage or profit because of bodily injury or disease. Plaintiff was advised of such decision by letter dated February 11, 1992.

16) Plaintiff timely appealed this decision to the Plan Administrator. In his appeal, Plaintiff complained for the first time about the extent of his exam by Dr. Framjee, and also complained about the failure of Dr. Framjee to obtain certain additional medical records from Springer Clinic which Plaintiff believed that Dr. Framjee should have reviewed before making his report. Plaintiff submitted additional Springer Clinic medical records to the Plan Administrator, including a new report by Dr. Calvin dated February 25, 1992, with respect to the results of his November, 1991, examination and testing on Plaintiff (which had taken place prior to the second exam by Dr. Framjee). The report by Dr. Calvin had not been written at the time that the Retirement Committee made its decision on Plaintiff's disability retirement application, and hence the Retirement Committee did not have a copy of the same when it made its decision. However, the Retirement Committee did have the report of Dr. Framjee, which described the results of Plaintiff's November, 1991, exam by Dr. Calvin.

17) The December, 1991, report of Dr. Framjee states that Plaintiff advised Dr. Framjee of the Calvin exam, and of what Plaintiff understood the findings to have been on tests conducted by Dr. Calvin.

18) Plaintiff did not receive a copy of the report of Dr.

Framjee until on or about February 25, 1992, after notice of decision by the Plan Committee. Plaintiff did not advise the Plan Administrator in his appeal that he believed that Dr. Framjee had any reputation in the community for conducting biased or inadequate medical exams, nor did Plaintiff accuse the Plan or any Plan fiduciary of having selected Dr. Framjee because of any belief that Dr. Framjee would automatically issue a finding of no disability.

19) The Plan Administrator reviewed all additional medical records submitted by Plaintiff in making his decision with respect to the appeal of Plaintiff. On April 23, 1992, the Plan Administrator denied the appeal of Plaintiff, and advised Plaintiff that he concurred with the decision of the Plan Committee that the evidence before the Plan Committee (including Dr. Framjee's reports) did not establish that Plaintiff was totally and permanently disabled within the terms of the Plan.

20) There is no evidence of any personal grudge or ill-will towards Plaintiff by any of the Defendants.

21) There is no evidence that any of the Defendants selected Dr. Framjee with the expectation that Dr. Framjee would automatically deny the claim of Plaintiff or would issue a biased or inaccurate medical report.

22) All of the members of the Retirement Committee of the Plan were employed by Defendant Rockwell during the time that they served on such Retirement Committee. The Plan Administrator also is an employee of Defendant Rockwell.

23) Plaintiff has been approved by the Social Security

Administration for disability benefits, subject to periodic review by that agency. However, the Pension Plan utilizes different standards for determining total and permanent disability than are used by the Social Security Administration.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

Legal Analysis and Authorities

Plaintiff's first claim alleges the Plan fiduciaries arbitrarily and capriciously denied Plaintiff of permanent disability status and the corresponding benefits. Plaintiff asserts the Defendants abused their discretion by selecting Dr. Framjee, whom Defendants knew or should have known was biased, to perform a medical exam of Plaintiff.

The parties agree and this Court finds that the actions of the Plan fiduciaries were "discretionary"¹ and that such decisions

¹ The Plan provides that applicants are only entitled to total and permanent disability benefits if they produce "evidence satisfactory to the Retirement Committee" of their permanent

should be reviewed under an "abuse of discretion" standard. Block v. Pitney Bowes, Inc., 952 F.2d 1450 (D.C.Cir. 1992). It is clear from the terms of the Plan that the fiduciaries were given the authority to weigh the evidence and resolve disputes over benefits eligibility. Therefore, the decision of the Plan fiduciaries should not be disturbed if there was evidence before them to support the decision. Id.

The case law establishes that the District Court should only set aside a discretionary decision of Plan fiduciaries upon a showing that there was no substantial evidence upon which the fiduciaries reasonably could have made the decision to deny benefits. Id.; McGee v. Equicor-Equitable HCA Corp., 952 F.2d 1192 (10th Cir. 1992); Exbom v. Central States Health & Welfare Plan, 900 F.2d 1138 (7th Cir. 1990); Eley v. Boeing Co., 945 F.2d 278 (9th Cir. 1991); and Jett v. Blue Cross of Alabama, 890 F.2d 1137 (11th Cir. 1989).

In the instant case, there was an abundance of evidence before the Retirement Committee and the Plan Administrator to support the conclusion that Plaintiff was not permanently and totally disabled pursuant to the terms of the Plan.² The Plan provides that an

inability to perform any occupation for wage or profit as a result of bodily injury or disease.

² Plaintiff has submitted two reports (1993 letters from Dr. Hendricks and Dr. Calvin) which were not presented to the Retirement Committee. Courts review ERISA-plan benefit decisions based on the evidence presented to the plan administrators. Jett v. Blue Cross of Alabama, 890 F.2d 1137 (11th Cir. 1989); Block v. Pitney Bowes, Inc., 952 F.2d 1450 (D.C.Cir. 1992). However, the existence of these two additional opinions does not negate the fact that there was sufficient evidence to support the decision of the

employee shall be deemed totally and permanently disabled when the Retirement Committee finds that he is "wholly and permanently prevented from engaging in any occupation or employment for wage or profit." The following evidence was before the Retirement Committee and supports the decision to deny Plaintiff total and permanent disability status:

1) Dr. Hendricks' April 30, 1990, report which concluded Plaintiff was capable of operating truck/dolly/small vehicles and electrical equipment and was capable of concentrated visual attention;

2) Dr. Kelly's letter of November 5, 1990, in which he

Plan. Furthermore, neither of these letters state that Plaintiff is "wholly and permanently prevented from engaging in any occupation" as the terms of the Plan require.

The July 22, 1993, letter from Dr. Calvin states:

I find the patient to be completely disabled and unable to perform in his previous employment. ...

I think ... he will not be able to perform in his previous employment, and will have limited capacity of performing any employment that requires the use of his hands or feet.

The July 19, 1993, letter of Dr. Hendricks states:

I have had difficulty in evaluating Mr. Hereden. He complains of significant pain in his back and discomfort in his legs. However, when I evaluate the patient I am hard pressed to find objective neurologic deficits that well [sic] explain his complaint. ... I believe that Mr. Hereden is essentially disabled and unable to return to work. I also feel that mentally Mr. Hereden does not want to return to gainful employment and is doing reasonably well in his current status both financially and clinically.

concluded Plaintiff was not totally and permanently disabled, that Plaintiff could do sedentary work and his prognosis was good for continued improvement;

3) Dr. Framjee's March 4, 1991, letter in which he concludes the Plaintiff is totally temporarily disabled and such condition will continue for a period of six months to a year;

4) Dr. Hendricks' May 20, 1991, report in which he states that Plaintiff is totally and permanently disabled for any occupation but also states that Plaintiff is improved and is capable of operating electronic equipment and tasks requiring concentrated visual attention;

5) Dr. Framjee's December 27, 1991, letter in which he states:

It is my impression the [Plaintiff] can now return to his normal occupational duties for Rockwell International as a machine shop supervisor with no restrictions.

Based on this evidence, the decision of the Retirement Committee was not arbitrary and capricious. Furthermore, the decision of the Plan Administrator to affirm the Retirement Committee's decision was likewise supported by the evidence.³ Of the four doctors that examined the Plaintiff, only Dr. Hendricks concluded Plaintiff was totally and permanently disabled. The Court concludes the Plan fiduciaries did not abuse their discretion by determining Plaintiff had failed to establish that he was totally

³ In addition to the evidence presented to the Retirement Committee, the Plaintiff submitted to the Plan Administrator a letter from Dr. Calvin dated February 25, 1992. In this letter, Dr. Calvin states that he feels the Plaintiff "continues to be totally disabled and unable to return to work" but makes no evaluation regarding the permanency of the disability.

and permanently disabled.

Plaintiff also argues that the Plan fiduciaries abused their discretion by selecting Dr. Framjee to conduct an examination of Plaintiff and by relying on Dr. Framjee's evaluation. Plaintiff contends the Plan should have known of Dr. Framjee's reputation in Tulsa as a defense medical expert witness. Plaintiff asserts that Defendants' lack of knowledge of Dr. Framjee's bias is the basis of all four claims in Plaintiff's complaint. (Plaintiff's Response to Defendant's Motion for Summary Judgment, p.5). Plaintiff also contends there were several glaring deficiencies in Dr. Framjee's report.

The Court finds no merit in Plaintiff's argument. It is not contested that Dr. Framjee has been used on four occasions by the Plan and he has concluded two of the individuals he examined were disabled and two of the individuals (including Plaintiff) were not disabled. In the instant case, Dr. Framjee's initial evaluation concluded the Plaintiff was presently totally disabled and would continue to be disabled for at least another six months to a year. Dr. Framjee's ultimate determination that the Plaintiff is not totally and permanently disabled is consistent with Dr. Kelly's original opinion, to which the Plaintiff does not claim bias.

Plaintiff asserts his abuse of discretion and reckless disregard arguments are based on Dr. Framjee's reputation in the Tulsa community. In support, Plaintiff submits an unsworn report which indicates Dr. Framjee testified in 38 cases over a twelve month period and in each case he was sponsored as an expert witness

by the Defendant. Plaintiff's counsel also makes the following unsupported self-serving statements in his response brief:

No one with PI experience in Tulsa can ever remember Dr. Framjee as anything but a defense medical expert witness. Moreover no one with PI experience in Tulsa can ever remember Dr. Framjee doing any medical work other than conducting cursory medical exams for hire.

Plaintiff also directs the Court to Dr. Hendricks' letter of July 19, 1993, in which Dr. Hendricks states:

[I]t is also my opinion that Dr. Framjee always comes to the same conclusion that there is never anything wrong with the patient. I believe that his repetitive conclusions of this nature probably render anything that Dr. Framjee says to be questionable in nature.

None of this evidence was presented to the Retirement Committee or the Plan Administrator. However, the Court finds that this evidence is insufficient to create a fact question as to the reasonableness of the Plan's decision to use Dr. Framjee in this case. The fact that Dr. Framjee has often testified as a medical expert for defendants or has a "reputation" among certain segments of the bar, is insufficient to create an inference that Defendants should have known of Dr. Framjee's "reputation" and were therefore negligent for considering his opinion in this case.

The Court concludes the Plan's decision to use Dr. Framjee was reasonable based on the Plan's prior experience with Dr. Framjee and relying on his opinion was not an abuse of its discretion. There is no evidence that any of the Defendants were aware of Dr. Framjee's alleged reputation or that they selected Dr. Framjee with the expectation that he would automatically deny the claim of

Plaintiff or would issue a biased or inaccurate report. Plaintiff does not allege Defendants had any ill-will towards Plaintiff or participated in a conspiracy with Dr. Framjee to defraud Plaintiff.

For all the above stated reasons, the Court concludes there is no genuine issue of material fact regarding Plaintiff's claim for wrongful denial of benefits and summary judgment thereon should be and is hereby GRANTED.

Likewise, Plaintiff's remaining three claims each allege Defendants intentionally or recklessly denied Plaintiff permanent disability benefits. Based on the Court's conclusions that there was sufficient evidence to support the Plan's determination and that the Defendants' use and reliance on Dr. Framjee's opinion was reasonable, Plaintiff is also entitled to summary judgment on the remaining claims and such is hereby GRANTED.⁴

IT IS SO ORDERED THIS 8th DAY OF OCTOBER, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ The Court need not address Defendant's argument that Plaintiff's final three claims are preempted by ERISA.

ENTERED ON BOOKS
OCT 13 1993

~~FILED~~

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

OCT 8 1993

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

GLEN HEREDEN, an individual,
Plaintiff,

vs.

Case No. 92-C-1137-B

ROCKWELL INTERNATIONAL CORPORATION,
as Plan Sponsor and fiduciary; A.J.
SPIGARELLI, as Plan Administrator of
Rockwell International's Salaried and
Weekly Employees Retirement Plan; and
ROCKWELL INTERNATIONAL'S RETIREMENT
PLAN FOR ELIGIBLE EMPLOYEES ON THE
SALARIED AND WEEKLY PAYROLLS OF
ELECTRONICS OPERATIONS, NORTH AMERICAN
AIRCRAFT OPERATIONS AND NORTH AMERICAN
SPACE OPERATIONS,

Defendants.

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Rockwell International Corporation, A.J. Spigarelli, and Rockwell International's Retirement Plan for Eligible Employees on the Salaried and Weekly Payrolls of Electronics Operations, North American Aircraft Operations and North American Space Operations, and against the Plaintiff, Glen Hereden. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 6, and each party is to pay its respective attorney's fees.

Dated, this 8th day of October, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

28

ENTERED IN COURT
DATE OCT 13 1993

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

FILED

OCT 13 93

RICHARD H. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KEYSTONE SERVICES, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Defendant,)
)
and)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Third-Party Plaintiff,)
)
vs.)
)
ERGON, INC.,)
a Mississippi corporation,)
)
Third-Party Defendant.)

Case No. 93-C-0089-B OK

DISMISSAL WITH PREJUDICE

The Defendant and Third-Party Plaintiff, Meridian
Aggregates Company, pursuant to Rule 41(a)(1) of the Federal
Rules of Civil Procedure, hereby dismisses with prejudice the
above-styled third-party cause of action.

Respectfully submitted,



Gary W. Farabough, OBA #2816
BICKFORD, PASLEY & FARABOUGH
P.O. Box 1027
Ardmore, Oklahoma 73402
(405) 223-5566

Attorneys for Defendant and Third-
Party Plaintiff, Meridian
Aggregates Company

CERTIFICATE OF MAILING

This is to certify that on this 6 day of October, 1993, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid and properly addressed, to:

John S. Zarbano
Zarbano, Leonard, Scott & Fehrle
5051 South Lewis, Suite 200
Tulsa, OK 74105-6061

Paul E. Swain, III
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103

J. Kevin Watson
J. Kevin Watson & Associates
Suite 1502, Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208



Gary W. Varabough

001 13 93

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

FILED
OCT 13 93

THOMAS M. LEWIS
CLERK OF COURT
NORTHERN DISTRICT OF OKLAHOMA

KEYSTONE SERVICES, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Defendant,)
)
and)
)
MERIDIAN AGGREGATES COMPANY,)
a Montana corporation,)
)
Third-Party Plaintiff,)
)
vs.)
)
ERGON, INC.,)
a Mississippi corporation,)
)
Third-Party Defendant.)

Case No. 93-C-0089-B

DISMISSAL WITH PREJUDICE

The Plaintiff, Keystone Services, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses with prejudice the above-styled cause.

Respectfully submitted,



John S. Zarbano, OBA #9989
ZARBANO, LEONARD, SCOTT & FEHRLE
5051 South Lewis, Suite 200
Tulsa, Oklahoma 74105-6061
(918) 742-2383

Attorneys for Plaintiff,
Keystone Services, Inc.

CERTIFICATE OF MAILING

This is to certify that on this _____ day of October, 1993, a true and correct copy of the above and foregoing instrument was mailed, postage pre-paid and properly addressed, to:

Gary W. Farabough
Bickford, Pasley & Farabough
P.O. Box 1027
Ardmore, OK 73402

Paul E. Swain, III
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103

J. Kevin Watson
J. Kevin Watson & Associates
Suite 1502, Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208



John S. Zarbaño

ENTERED ON DOCKET

DATE 10-12-93

FILED

OCT 12 1993

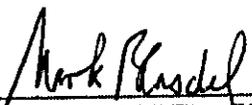
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

DELTA STRAPPING CORP.,)	
)	
Plaintiff,)	
vs	)	Case No. 93-C-314 E
)	
SOONER FREIGHT INC.,)	
)	
Defendant.)	

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, DELTA STRAPPING CORP by and through their attorney of record Mark Blasdel, and dismiss the above captioned cause with prejudice and to the bringing of any future action and states that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties.



 MARK BLASDEL OBA# 870
 1220 United Founders Tower
 5900 Mosteller Drive
 Oklahoma City, Oklahoma 73112-4605
 (405) 843-8700
 Attorney for Plaintiff