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

LARRY BALL,	)	
Plaintiff,	)	
vs.	)	No. 93-C-735-B
STANLEY GLANZ, et al	)	
Defendants.	)	

ORDER

Before the Court is Defendant's motion to dismiss or for summary judgment filed on December 20, 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 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss or for summary judgment [docket #9] is **granted** and the above captioned case is **dismissed without prejudice.**

SO ORDERED THIS 9th day of Feb., 1994.

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

12

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

THOMAS GATES,	)	
Plaintiff,	)	
vs.	)	No. 93-C-887-B
DR. SMITH,	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss filed on December 28, 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 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #8] is **granted** and the above captioned case is **dismissed without prejudice.**

SO ORDERED THIS 9 day of Feb, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12

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

ROBERT EUGENE ALLEN Plaintiff, vs. CREEK COUNTY SHERIFF'S, et al Defendants.	)))))))))	No. 93-C-64-B

JUDGMENT

In accord with the Order granting Defendant's motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Robert Eugene Allen. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 9 day of Feb., 1994.

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

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

ROBERT EUGENE ALLEN Plaintiff, vs. CREEK COUNTY SHERIFF'S, et al Defendants.	)))))))))	No. 93-C-64-B

ORDER

Before the Court are Defendants' motions for summary judgment filed on September 29, 1993, and December 3, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motions for summary judgment [docket #5 and #7] are granted.

SO ORDERED THIS 9 day of Feb., 1994.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

RICKY O'BRIEN,	)	
Plaintiff,	)	
vs.	)	No. 92-C-761-B
GARY MAYNARD, et al	)	
Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment filed on September 20, 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 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss or for summary judgment [docket #9] is **granted** and the above captioned case is **dismissed without prejudice.**

SO ORDERED THIS 9 day of Feb., 1994.

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

13

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

WILLIE B. JOHNSON, JR.	)	
Plaintiff,	)	
vs.	)	No. 93-C-751-B
RUSSELL LEWIS, et al	)	
Defendants.	)	

ORDER

Before the Court are Defendants' motions to dismiss or for summary judgment filed on November 10, 1993, and November 15, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions and a confession of the matters raised by the motions. See Local Rule 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motions to dismiss or for summary judgment [docket #4 and #8] are **granted** and the above captioned case is **dismissed without prejudice.**

SO ORDERED THIS 9 day of Feb, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. **LARRY M. BURNS;** **JEANIE L. BURNS;** **MARY RUTH NACHTIGALL;** **CITY OF COLLINSVILLE**, Oklahoma; **COUNTY TREASURER**, Tulsa County, Oklahoma; **BOARD OF COUNTY COMMISSIONERS**, Tulsa County, Oklahoma, Defendants.	)	**FILED** FEB 0 9 1994 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA CIVIL ACTION NO. 93-C-514-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 9th day of Feb., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Larry M. Burns**, **Jeanie L. Burns**, **Mary Ruth Nachtigall**, and **City of Collinsville, Oklahoma**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Larry M. Burns**, acknowledged receipt of Summons and Complaint on July 26, 1993; that the Defendant, **Jeanie L. Burns**, acknowledged receipt of Summons and Complaint on July 26, 1993; that the Defendant, **Mary Ruth**

Nachtigall, acknowledged receipt of Summons and Complaint on June 7, 1993; that the Defendant, **City of Collinsville, Oklahoma**, acknowledged receipt of Summons and Complaint on June 7, 1993; that Defendant, **County Treasurer**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 8, 1993; and that Defendant, **Board of County Commissioners**, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 7, 1993.

It appears that the Defendants, **County Treasurer**, Tulsa County, Oklahoma, and **Board of County Commissioners**, Tulsa County, Oklahoma, filed their Answers on June 28, 1993; that the Defendants, **Larry M. Burns**, **Jeanie L. Burns**, **Mary Ruth Nachtigall**, and **City of Collinsville, 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 a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> LOT EIGHT (8), BLOCK ONE (1), RESUBDIVISION OF A PART OF THE HOME ADDITION, AN ADDITION TO COLLINSVILLE, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on August 19, 1986, the Defendants, Larry M. Burns and Jeanie L. Burns, executed and delivered to Commonwealth Mortgage Corporation of America, their mortgage note in the amount of $42,246.00, payable in monthly

installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Larry M. Burns and Jeanie L. Burns, executed and delivered to Commonwealth Mortgage Corporation of America, a mortgage dated August 19, 1986, covering the above-described property. Said mortgage was recorded on September 4, 1986, in Book 4967, Page 1973, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 10, 1986, Commonwealth Mortgage Corporation of America assigned the above-described mortgage note and mortgage to Citicorp Homeowners Services, Inc. This Assignment of Real Estate Mortgage was recorded on May 6, 1987, in Book 5021, Page 1193, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 11, 1988, Citicorp Mortgage, Inc., successor in interest to Citicorp Homeowners Services, Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment was recorded on July 21, 1988, in Book 5116, Page 138, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1988, the Defendants, Larry M. Burns and Jeanie L. Burns, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's

forbearance of its right to foreclose. Superseding agreements were reached between these same parties on March 1, 1989; December 1, 1989; January 1, 1991; September 1, 1991; and March 1, 1992.

The Court further finds that the Defendants, **Larry M. Burns and Jeanie L. Burns**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Larry M. Burns and Jeanie L. Burns, are indebted to the Plaintiff in the principal sum of $62,566.08, plus interest at the rate of 10.5 percent per annum from May 12, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $413.00 ($405.00 fees for abstracting; $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $13.00 which became liens on the property as of 1987 ($7.00) and 1991 ($6.00). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners**, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Mary Ruth Nachtigall** and **City of Collinsville, Oklahoma**, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment **in rem** against Defendants, **Larry M. Burns and Jeanie L. Burns**, in the principal sum of $62,566.08, plus interest at the rate of 10.5 percent per annum from May 12, 1993 until judgment, plus interest thereafter at the current legal rate of 3.74 percent per annum until paid, plus the costs of this action in the amount of $413.00 ($405.00 fees for abstracting; $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer**, Tulsa County, Oklahoma, have and recover judgment in the amount of $13.00 for personal property taxes for the years 1987 and 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Mary Ruth Nachtigall, City of Collinsville, Oklahoma,** and **Board of County Commissioners**, Tulsa 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, **Larry M. Burns and Jeanie L. Burns**, 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 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 Defendant, County Treasurer, Tulsanty, 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 pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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.

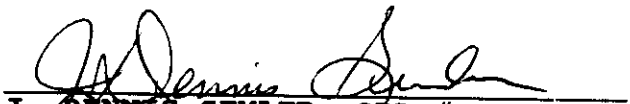
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-514-B

ENTERED ON DOCKET

DATE 2-10-94

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

FILED

FEB 1 1994

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

MARK EDWARD BROWN,	)	
Plaintiff,	)	
vs.	)	No. 91-C-548-E
DOYLE EDGE and CHRIS GREEN,	)	
Defendants.	)	

ORDER AND JUDGMENT

The Court has for consideration the Defendants' Motion for Summary Judgment (docket #25). On July 8, 1993 the Magistrate Judge granted Plaintiff additional time to respond to the motion pursuant to Joplin v. Southwestern Bell Telephone Co., 671 F.2d 1274 (10th Cir. 1982) and he cautioned that failure to respond would result to a Local Rule 15A dismissal. Plaintiff failed to file a response. The Court has reviewed the record in light of the applicable law and finds that under the undisputed facts that appear on this record the Defendants' defense of qualified immunity is sufficient to sustain a judgment of dismissal on the merits. Anderson v. Crayton, 483 U.S. 635 (1987); Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990). In addition, the court finds that dismissal pursuant to the local rules is an appropriate sanction for Plaintiff's second failure to respond.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is GRANTED. Judgment will be entered in favor of the Defendants. The case is DISMISSED.

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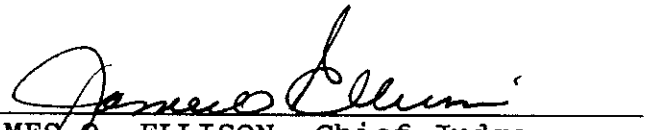
ORDERED this 9th day of February, 1994.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 2-9-94

FILED

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

FEB 9 1994

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

GARY WAYNE MIDGLEY,	)	
Plaintiff,	)	
v.	)	Case No. 93-C-654-E
TANK SUPPLY, INC.,	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Gary W. Midgley, pursuant to Federal Rule of Civil Procedure 41(a)(1), dismisses his suit against Defendant, Tank Supply Inc., with prejudice.

Respectfully submitted,

John L. Harlan
20 North Coo-Y-Yah
P.O. Box 1042
Pryor, Oklahoma 74362
Attorney for Plaintiff
(918) 227-2590

Larry D. Henry, OBA No. 4105
Patrick W. Cipolla, OBA No. 15203

100 West Fifth Street
1000 ONEOK Plaza
Tulsa, Oklahoma 74103-4219
(918) 585-8141

Attorneys for Tank Supply, Inc.

CERTIFICATE OF MAILING

I, Larry D. Henry, hereby certify that on the 9 day of February, 1993, I caused a true and correct copy of the above and foregoing instrument to be placed in the U.S. mails with proper postage thereon, addressed to: John L. Harlan, P.O. Box 1042, Pryor, Oklahoma 74362.

Larry D. Henry

ENTERED ON DOCKET

DATE 2-9-94

FILED

FEB 9 1994

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

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

LINDA K. McLEAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE No. 92-C-1155E
	)	
EAGLE-PICHER INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

ORDER ALLOWING DISMISSAL WITH PREJUDICE

This matter came on before the Court this 9th day of Feb., 1994, upon the parties' Stipulation of Dismissal with Prejudice, and for good cause shown, it is therefore ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against the Defendants is hereby dismissed with prejudice with each side to bear its own costs and attorney fees.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-9-94

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

THOMAS GATES, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 93-C-901-E
MS. KAREN STEED,	)	
Defendant.	)	

FILED

FEB 8 1994

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

ORDER

Before the Court are defendant's motion to dismiss filed on December 27, 1993, and plaintiffs' "motion for an order" filed on January 3, 1994.

Plaintiffs' 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 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss [docket #7] is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) Plaintiff's motion for an order [docket #8] is **denied.**

SO ORDERED THIS 8th day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Plaintiff, vs. HIGHWAY 66, LTD., an Oklahoma General Partnership, comprised of Toby L. Powell, Michael W. Henry, and Charles W. Powell; TOBY L. POWELL, individually; MICHAEL W. HENRY, individually; CHARLES W. POWELL, individually; STATE OF OKLAHOMA, ex rel. Oklahoma Tax Commission; COUNTY TREASURER OF ROGERS COUNTY, OKLAHOMA; THE BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA; HARVARD CLEANERS, INC., an Oklahoma corporation; JODY'S DAYLIGHT DONUTS; NITTIN NOOK; STEVE N. SWANN, AGENT, d/b/a STATE FARM INSURANCE COMPANY; and ARCHERY PRO SHOP & SPORTS CENTER, CYNTHIA L. HENRY, individually, NANCY S. POWELL, individually, and BETH POWELL, individually, Defendants.	Case No. 90-C-830-C FILED FEB 8 1994 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA

DEFICIENCY JUDGMENT

Now on this 8 day of February, 1994, this matter comes before the Court upon the Motion for Leave to Enter Deficiency Judgment filed by the Plaintiff herein. Plaintiff was represented by its attorneys of record Bradley K. Beasley and Sheila M. Powers of Boesche, McDermott & Eskridge. The Defendants did not appear.

The Court finds that Plaintiff filed its Motion for Leave to Enter Deficiency Judgment on December 29, 1993, and served a copy on all answering Defendants and that said motion is deemed confessed by the failure of any Defendant to file a response thereto within the time permitted by the rules of this Court.

The Court, being fully advised in the premises, and after reviewing all the evidence, finds that a Judgment was entered on May 29, 1991, granting judgment in favor of Plaintiff and against Defendants, Highway 66, Ltd., Toby L. Powell, Michael W. Henry, Charles W. Powell, Cynthia L. Henry, Nancy S. Powell and Beth Powell, in the principal sum of $819,081.81, with interest accrued through November 27, 1989, in the amount of $88,266.14 and interest accruing thereafter at the rate of 13.25% per annum, plus a reasonable attorney fee and all costs and expenses of this action, accrued and accruing, all to bear interest at the maximum rate allowed by law from the date of judgment until paid.

The Court further finds that pursuant to the Judgment and a Pluries Special Execution and Order of Sale issued out of the Office of the Court Clerk, the Sheriff of Rogers County, Oklahoma, sold the following real property situated in Rogers County, Oklahoma, to-wit:

> A tract of land in the S/2 of SW/4 of SE/4 of Section 30, Township 20 North, Range 15 East of the I.B. & M., Rogers County, State of Oklahoma, according to the U.S. Government survey thereof, more particularly described as follows, to-wit: Begin at the Southeast corner of the SW/4 of SW/4 of SE/4, thence North 16.5 feet to a point; thence East 43.7 feet to a point; thence Northeasterly on a curve to the right having a radius of 5829.6

> feet a distance of 300 feet to a point; thence Northwesterly to the point of intersection of the Easterly right-of-way line of U.S. Highway #66 as now located and the West line of SE/4 of SW/4 of SE/4; thence Southwesterly along the Easterly right-of-way of U.S. Highway #66, a distance of 474.5 feet to the South line of the SW/4 of SW/4 of SE/4; thence East on said South line 264.6 feet to the point of beginning (the "Property"),

to Federal Deposit Insurance Corporation, in its corporate capacity ("FDIC"), at a sale conducted on the 30th day of September, 1993, at the County Courthouse in Rogers County, Oklahoma, situated in Claremore, Oklahoma.

The Court further finds that the Property was sold to FDIC for the sum of $250,000.00, which was the highest and best bid for the Property, such bid being at least two-thirds of the Sheriff's appraised value of $375,000.00 and that the sale of the Property was confirmed by this Court on January 4, 1994.

The Court further finds that FDIC filed its Motion for Leave to Enter Deficiency Judgment on December 29, 1993, seeking a Deficiency Judgment of $1,027,684.08, plus interest on that amount at the rate of 13.25% per annum until paid.

The Court further finds that the Property's fair and reasonable market value as of the date of Sheriff's Sale on September 30, 1993, was $250,000.00 and that the total amount of Deficiency Judgment to which FDIC is entitled is the sum of $1,027,684.08, which amount represents the difference in the fair and reasonable market value of the Property on or about September 30, 1993, and the sum of FDIC's lien against the Property on September 30, 1993.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the fair and reasonable market value of the Property as of the date of Sheriff's sale, September 30, 1993, was $250,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff FDIC is granted a Deficiency Judgment in personam against the Defendants, Highway 66, Ltd., Toby L. Powell, Michael W. Henry, Charles W. Powell, Cynthia L. Henry, Nancy S. Powell and Beth Powell, and each of them, jointly and severally, in the amount of $1,027,684.08, plus interest at the rate of 13.25% per annum, until paid.

(Signed) H. Dale Cook

H. DALE COOK
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF OKLAHOMA

SMP/alt:#36/Hwy66.DJ

IN THE UNITED STATES DISTRICT COURT IN AND FOR

THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES FIDELITY & GUARANTY COMPANY	X	
Plaintiff	X	
VS.	X	CASE NO. 93-C-816-B
GREAT PLAINS PIPELINE CONSTRUCTION, INC.	X	
Defendant	X	

ORDER TRANSFERRING PROCEEDINGS

GREAT PLAINS PIPELINE CONSTRUCTION, INC.'S Motion for Transfer was considered by the Court on this date.

The Court, upon due deliberations, having found that venue herein is improper for the reasons stated in the Motions and having further found that this action should be transferred to the United States Bankruptcy Court for the Northern District of Texas Lubbock Division, and the interest of justice and the convenience of the parties require transfer.

Therefore, IT IS ORDERED that this action be transferred to the United States Bankruptcy Court for the Northern District of Texas Lubbock Division, and it is FURTHER ORDERED that the Clerk of this Court transmit to the Clerk of the United States Bankruptcy Court for the Northern District of Texas Lubbock Division a certified copy of this Order and all of the pleadings and paper on file in this office relating to this proceeding.

DATED: Feb. 7, 1994 Thomas R. Chetti
JUDGE PRESIDING

ENTERED ON DOCKET

DATE 2-8-94

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 8 1994

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

CLEVELAND INSPECTION SERVICES, INC., an Oklahoma corporation,	)	
Plaintiff	)	
v.	)	No. 93-C-949-E
MBF OPERATING COMPANY, a New Mexico corporation, MARK W. DANIELS, FRANK L. STURGES and RORY A. McMINN,	)	
Defendants.	)	

STIPULATION FOR DISMISSAL

COMES NOW the Plaintiff, Cleveland Inspection Services, Inc., by and through its attorney of record, Lee I. Levinson, and the Defendants, MBF Operating Company, Mark W. Daniels, Frank L. Sturges and Rory A. McMinn, by and through their attorney of record, Robert E. Bacharach, and hereby dismisses the above captioned cause with prejudice to the refiling of same.

Lee I. Levinson OBA #5395
5310 E. 31st Street, Ste. 900
Tulsa, OK 74135
(918) 664-0800

Robert E. Bacharach OBA #11211
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700

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

LORI McKENZIE,	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-398-B
RENBERG'S, INC., and ROBERT L. RENBERG,	)	
Defendants.	)	

O R D E R

Now before the Court is the Motion for Summary Judgment on Robert L. Renberg's Counterclaim (Docket #53) of Plaintiff Lori G. McKenzie (McKenzie).

Undisputed Facts

McKenzie was the personnel director for Renberg's from 1985 to the time she was terminated on September 20, 1991. McKenzie brings this suit against Robert Renberg (Renberg) and Renberg's, alleging that her termination was based in part on sexual discrimination and in part due to her "whistleblowing". Renberg counterclaimed, asserting that McKenzie was part of a conspiracy against him at Renberg's that resulted in tortious interference with business relations, breach of fiduciary duty, and intentional infliction of emotional distress. He alleges that he asserted these counterclaims against Donald B. Renberg in George J. Renberg, Donald B. Renberg and Renberg's, Inc. v. Robert Renberg and Sherrie Renberg Kaplan, filed in the District Court of Tulsa County, State of Oklahoma, Case No. CJ-91-2063.

The following additional facts are not in dispute:

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1) On May 27, 1992, in the case of Renberg v. Renberg, CJ-91-2063, the District Court of Tulsa County entered a judgment for Robert Renberg on his claims against Donald Renberg for breach of fiduciary duty, intentional infliction of emotional distress, and tortious interference with business relations.

2) The claims upon which the judgment was rendered were the result of actions taken by Donald Renberg, brother of Robert Renberg, in taking over the presidency of Renberg's and subsequently terminating Robert's employment by Renberg's.

3) The Judgment against Donald Renberg was appealed to the Oklahoma Supreme Court on June 15, 1992.

4) On or about June 30, 1992, Donald Renberg and Robert Renberg executed a Memorandum of Agreement to "settle and resolve all disputes and claims between them existing as of this date, including, but not limited to claims relating to the lawsuit." Donald Renberg agreed to transfer his family's stock in Renberg's Inc. to Robert Renberg and agreed to dismiss his appeal. He also agreed to relinquish his salary from Renberg's. In return, Robert Renberg agreed to "release, disclaim, and relinquish all claims, including personal injury claims, against Donald Renberg for actual and punitive damages, prejudgment and postjudgment interest, costs and attorneys' fees, arising out of, relating to, or resulting from, the Judgment. Upon execution of this Agreement and delivery of the stock under paragraph 3.1 of this Agreement, Robert Renberg will execute and deliver a release and satisfaction of the Judgment." The agreement also provided that any consideration paid

by Donald Renberg was "in settlement of the personal injury tort claims embodied in the judgment."

5) The Memorandum of Agreement also contained the following provision:

> Robert Renberg and Donald Renberg each for himself and his heirs, representatives, successors, and executors, releases, acquits, discharges, and disclaims the other and his heirs, successors, representatives, and attorneys, from all legal or equitable relief, claims liabilities or causes of action of any kind, known or unknown, accrued or accruing, which exist or could have existed, through and as of the date of this Agreement.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 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).

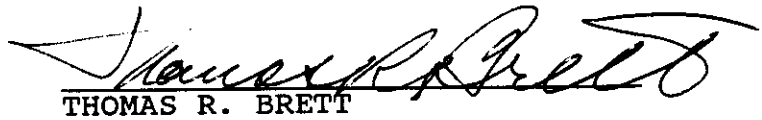
The Court finds that the counterclaim of Renberg against McKenzie is barred by the Memorandum of Agreement and attendant Release and Satisfaction of Judgment. It is undisputed that Renberg's claim against McKenzie is the same claim he brought against Donald Renberg. Judgment and satisfaction thereof against some defendants operates as a bar to any further claim of damages against other defendants. Cartwright v. MFA Mutual Insurance company of Columbia, Mo., 499 P.2d 1380 (Okla. 1972). "There may be but one recovery for any one wrong; and an attempt to pursue a claim against remaining tort-feasors, after judgment and satisfaction as to one tort-feasor is improper by reason of the attempt to split the cause of action." Powell v. Powell, 370 P.2d 909, 911 (Okla. 1962).

> [A] payment by such a party in satisfaction of a judgment against him even for less than the total damage for which he and another are legally responsible releases the other from any further liability. Cain v. Quannah Light & Inc Co., 131 Okl. 25, 267 P. 641 (1928). The reasoning is that the satisfaction of the judgment even though for less that the full damage extinguishes any cause of action against the remaining defendant. Powell v. Powell, 370 P.2d 909 (Okla. 1962).

Biles v. Harris, 521 P.2d 884, 887 (Okla. App. 1974).

In the present case, the judgment was satisfied pursuant to an Agreement between Renberg and Donald Renberg. The Agreement even required Robert Renberg to execute a Release and Satisfaction of Judgment. Thus Renberg's claim against McKenzie was extinguished by the Memorandum of Agreement (which satisfied the judgment) between Renberg and Donald Renberg. McKenzie's Motion For Summary Judgment on Renberg's counterclaim should be and hereby is GRANTED.

IT IS SO ORDERED THIS 7th DAY OF FEBRUARY, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

LORI McKENZIE, Plaintiff,	)	
vs.	)	Case No. 92-C-398-B
RENBERG'S, INC., and ROBERT L. RENBERG, Defendants.	)	

O R D E R

Now before the Court is the Motion for Summary Judgment (Docket #52) of Defendants Renberg's Inc. and Robert L. Renberg (Renberg).

Undisputed Facts

Plaintiff Lori McKenzie (McKenzie) was the personnel director for Renberg's from 1985 until the time she was terminated on September 20, 1991. McKenzie brings this suit against Renberg and Renberg's, alleging that her termination was based in part on sexual discrimination[1] and in part due to her "whistleblowing"[2].

---

[1] McKenzie was pregnant at the time she was terminated. She states in her affidavit that, since she lost a baby in 1990, she was questioned about her high-risk pregnancy, whether it would interfere with the hours she was expected to give her employer, and whether she suspected her job played any part in the loss of her baby.

[2] McKenzie learned of a wage and hour problem with the way store department managers and sales associates were being compensated after Marsha McElroy, the controller, attended a wage and hour seminar in August, 1991. As a result, McKenzie and the controller met with Renberg's outside counsel, Steve Andrew, on September 3, 1991. Andrew testified in his deposition that he did not hear anything at the meeting that caused him concern; however,

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Plaintiff asserts that discrimination based on her pregnancy is in violation of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and 25 O.S. §1302. She also asserts that termination of her employment due to "whistleblowing" is in violation of the public policy of Oklahoma and actionable under Burk v. K-Mart, 770 P.2d 24 (Okla. 1989).

McKenzie was told by Renberg that she was being fired for "lack of confidence." Defendants argue that the "lack of confidence" is the result of McKenzie's failure to keep certain matters confidential, a letter[3] that was notarized by McKenzie on September 26, 1989, and that certain managers "all acknowledged that they had no confidence in McKenzie's ability to do the job or in the way she was doing the job."

Defendants argue, relying on McKenzie's deposition testimony, that the only basis McKenzie has for believing that she was terminated for "whistleblowing" or because of her pregnancy is that Renberg said nothing to her after she brought the wage and hour problems to his attention and that she was not told prior to her termination that she was performing below Renberg's expectations.

---

the controller testified in her deposition that Andrew asked for more details to be provided after the meeting but that he never contacted McKenzie nor did he return her phone calls. On that same day McKenzie told Renberg she felt that, in the case of a large number of employees, Renberg's was not complying with the Fair Labor Standards Act.

[3] The letter was from David Childers, manager of a Renberg's store to Brenda Jagels, a part-time Renberg's employee, and is characterized by Plaintiff as a private, non-company related document, a "big joke" and a "courtship ritual" between Childers and Jagels.

Defendants point out that Plaintiff admitted that an employee terminated "for cause" at Renberg's does not have to go through a progressive discipline procedure, and that Marsha McElroy, Renberg's controller who went with Plaintiff to the attorney's office to discuss the wage and hour problems, was not terminated. The controller testified, however, that employees were normally given warnings or write-ups before termination.

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 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).

Defendants' Motion for Summary Judgment

The central question, then, is whether there is any evidence to support Plaintiff's claim that she was terminated either as a result of her pregnancy, her pursuit of the time and wage problems at Renberg's, or both. McKenzie's pregnancy discrimination claim is brought under 42 U.S.C. §2000e(k). Claims under the Pregnancy Discrimination Act (PDA) are analyzed under the disparate treatment analysis applied in Title VII cases. Equal Employment Opportunity Commission v. Ackerman, Hood & McQueen, 956 F.2d 944, 947 (10th Cir. 1992). Under this analysis, plaintiff must make a prima facie case of discrimination, defendant must then rebut the presumption of illegal termination and finally, plaintiff must prove that defendant's alleged justification is merely a pretext for discrimination. Id. To prove a prima facie case, Plaintiff must show that 1) she was a member of a protected class; 2) that she was qualified for the job; and 3) that she was fired despite her qualifications for the job. Equal Employment Opportunity Commission v. Ackerman, Hood & McQueen, 758 F.Supp. 1440, 1450 (W.D. Okla. 1991) (Aff'd. 956 F.2d 944). She can then either show that the position remained open or that the job was filled. Id. at 1451. The Court concludes that McKenzie has made a prima facie case. She was pregnant and therefore protected under Title VII, she was qualified for the job,[4] and was fired. Moreover, the controller testified that after McKenzie was terminated, Renberg's

[4] The Court makes this conclusion based on the fact that McKenzie held the job for approximately six years without any previous problems or discipline.

did not have a personnel director or human resource director, and Steve Andrews, attorney for Renberg's, Inc. acted in that capacity.

Renberg's has articulated "lack of confidence," failure to keep information confidential, and notarization of a letter in 1989 as the reasons for termination. It is therefore incumbent on Plaintiff to "[persuade] the court that a discriminatory reason more likely motivated the employer or [show] that the employer's proffered explanation is unworthy of credence." Ackerman, Hood & McQueen, 956 F.2d at 948 (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256). The Court finds that a question of fact exists as to whether the "employer's proffered explanation is unworthy of credence." Employees of Renberg's admitted that it was not the practice of Renberg's to fire employees for "lack of confidence," the evidence is controverted as to whether McKenzie related confidential information to persons not privy to confidential information and whether the managers lacked confidence in McKenzie. The Court also notes that the complained of letter was notarized approximately two years prior to McKenzie's termination, and that Renberg's did not contest McKenzie's unemployment benefits claim.

While the Court recognizes that Plaintiff's claim regarding termination for bringing possible violations of the wage and hour requirements to the attention of Renberg's attorney must be analyzed under state law, the court reaches the same conclusion as to that claim. Under Burk, McKenzie must prove that she was 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." Burk, 770 P.2d at 29. As noted above, a question of fact exists as to whether Defendant's stated reasons for termination are "worthy of credence." Thus McKenzie's evidence gives rise to an inference that her termination was due to her pursuit of the wage and hour problems.

Defendant's Motion for Summary Judgment should be and is hereby DENIED.

IT IS SO ORDERED THIS 7th DAY OF FEBRUARY, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ELLA KNAPPER, Plaintiff,	)	
vs.	)	Case No. 92-C-797-B
DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	)	

O R D E R

This action is an appeal of a ruling by the Secretary of Health and Human Services ("the Secretary") that Plaintiff, Ella Knapper ("Knapper"), was not under a disability as defined in the Social Security Act. Now before the Court is Plaintiff's Objection to the Report and Recommendation of Magistrate Judge Wolfe (Docket #10) which recommended that the Secretary's decision be affirmed.

Knapper raises the following issues in her objection to the Magistrate Judge's R&R:

(1) Was the Secretary's decision supported by substantial evidence; and

(2) Did the Administrative Law Judge ("ALJ") properly evaluate Plaintiff's subjective complaints of pain.

The Social Security Act entitles every individual who "is under a disability" to a disability insurance benefit. 42 U.S.C.A. § 423(a)(1)(D) (1983). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." Id.

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§423(d)(1)(A). An individual

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work."

Id. § 423(d)(2)(A).

The Secretary has established a five-step process for evaluating a disability claim. *See,* Bowen v. Yuckert, 482 U.S. 137, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987). The five steps, as set forth in Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988), proceed as follows:

(1) A person who is working is not disabled. 20 C.F.R. § 416.920(b).

(2) A person who does not have an impairment or combination of impairments severe enough to limit his ability to do basic work activities is not disabled. 20 C.F.R. § 416.920(c).

(3) A person whose impairment meets or equals one of the impairments listed in the "Listing of Impairments," 20 C.F.R. § 404, subpt. P, app. 1, is conclusively presumed to be disabled. 20 C.F.R. § 416.920(d).

(4) A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. § 416.920(e).

(5) A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work available in the national economy. Factors to be considered are age, education, past work experience, and residual

functional capacity. 20 C.F.R. § 416.920(f).

If at any point in the process the Secretary find that a person is disabled or not disabled, the review ends. Reyes, 845 F.2d at 243; Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); 20 C.F.R. § 416.920.

The ALJ followed the five-step approach set forth in Reyes and concluded:

> 1) The Plaintiff has not engaged in substantial gainful activity since November 1987. (Record at 19, 32).
>
> 2) Plaintiff has a vocationally severe impairment. (Record at 20, 32).
>
> 3) Plaintiff does not have a listed impairment. (Record at 20-30, 32).
>
> 4) Plaintiff is capable of performing past relevant work and is therefore not disabled. (Record at 32).

The ALJ found that Plaintiff "has the residual functional capacity to perform work-related activities except for work involving that work over and above that set forth for the full range of medium exertional activity and that work requiring over low stress" and that Plaintiff's "past relevant work as a housekeeper did not require the performance of the work-related activities precluded by the above limitation." (Record at 33).

The Secretary's findings stand if such findings are supported by substantial evidence, considering the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). "Substantial evidence" requires "more than a scintilla, but less than a preponderance," and is satisfied by such relevant "evidence that a reasonable mind

might accept to support the conclusion." Campbell v. Bowen, 822 F.2d at 1521; Brown, 801 F.2d at 362.

The Plaintiff has the burden to show that he is unable to return to the prior work he performed. Bernal, 851 F.2d at 299. Plaintiff contends that there was not substantial evidence to support the ALJ's findings, and that the ALJ improperly evaluated the Plaintiff's subjective complaints of pain.

The ALJ considered all of the evidence presented and concluded that Plaintiff could perform past relevant work. The findings of the Secretary as to any fact are conclusive if supported by substantial evidence. 42 U.S.C. §405(g). It is not the duty of this Court to reweigh the evidence or substitute its discretion for that of the ALJ. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991); Casias v. Secretary of Health & Human Services, 933 F.2d 799, 800 (10th Cir. 1991). After a thorough review of the medical records and testimony, the Court does find substantial evidence in the record to support the ALJ's findings that Plaintiff's impairment does not prevent her from performing her past relevant work.[1]

Further, the Court concludes the ALJ sufficiently considered the Plaintiff's subjective complaints of pain. After considering all of the subjective[2] and objective evidence, the ALJ concluded

---

[1] A summary of the evidence presented to the ALJ is included in the Magistrate Judge's R&R and is adopted as though set out herein.

[2] The ALJ concluded that Plaintiff's testimony as to pain was credible only to the extent that it is reconciled with her ability to perform the full range of medium exertional activity.

the Plaintiff was not suffering from a totally disabling pain syndrome according to the criteria established in 20 CFR 416.929 as interpreted by Social Security Ruling 88-13 and Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

The Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988).

The ALJ considered all the evidence and the factors for evaluating subjective pain set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), and concluded Plaintiff's pain was not disabling. The ALJ stated that neither the objective medical evidence nor the testimony of the claimant established that the ability to function had been so severely impaired as to preclude all types of work activity. (Record at 30). Upon review of the record, the Court finds substantial evidence supports the ALJ's conclusion that Plaintiff's pain was not disabling.

The Magistrate Judge found no reversible error in the ALJ's evaluation and findings. Likewise, this Court finds that there is sufficient relevant evidence in the record to support the ALJ's ruling that the Plaintiff is able to perform her prior work. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 8th DAY OF FEBRUARY, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 8 1994

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

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 91-C-861-C
THIRTEEN COLT, M-203, 40 MM GRENADE LAUNCHERS, THREE MACHINEGUNS, AND THREE FIREARMS SILENCERS Defendants.	)	

JUDGMENT OF FORFEITURE
OF DEFENDANT M-14 RIFLE

This cause having come before this Court upon Plaintiff's Motion filed herein, and being otherwise fully apprised in the premises, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 4th day of November 1991; the Complaint alleges that the defendant properties described on Exhibit "A" are subject to forfeiture pursuant to 18 U.S.C. §§ 1, 371, 922(a)(6) and 924(a), and 26 U.S.C. §§ 5861(d), 5861(1), 7201, and 7206(2).

The hereinafter-described defendant M-14 Rifle is among the property described on Exhibit "A" attached hereto and made a part hereof, and as such was included in the Warrant of Arrest and Notice In Rem issued on November 7, 1991, by the Clerk of this Court.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the hereinafter-described defendant property on December 6, 1991.

United States Marshals Service 285s reflecting service on the hereinafter-described defendant property is on file herein.

United States Marshals Service 285s reflecting service on William H. Fleming, a/k/a William Hugh Fleming, on Stephen W. Scribner, a/k/a Stephen Wade Scribner, on Clayton Lee Badger, and on Don Ipo Nelson are all on file herein.

All persons, if any, interested in the hereinafter-described defendant property were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claims.

The hereinafter-described defendant property, upon which personal service was effectuated more than twenty (20) days ago, has failed to file a claim or answer, as directed in the Warrant of Arrest and Notice In Rem on file herein.

No persons or entities have filed a Claim or Answer reflecting an interest in the hereinafter-described defendant property.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News on March 18 and 25 and April 1, 1993, and that Proof of Publication was filed of record on the 15th day of April 1993.

No other claims, papers, pleadings, or other defenses have been filed by the hereinafter-described defendant property, or any persons or entities having an interest therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against, and only against, the following-described defendant property:

> **One U. S. Rifle, M-14, H&R Arms Co., Serial No. 491846, 7.62 mm caliber, blue steel, woodstock, 22" barrel, 44 1/2" overall length, with bipod and strap,**

and against all persons and/or entities, if any, having an interest in such property, and that the defendant property be, and the same is, hereby forfeited to the United States of America for disposition by the United States Marshal according to law, and that no right, title, or interest shall exist in any other party.

IT IS FURTHER ORDERED by the Court that the above-described defendant property shall be disposed of according to law.

Entered this 2 day of Feb, 1994.

(Signed) H. Dale Cook

H. DALE COOK
United States District Judge

APPROVED:

CATHERINE DEPEW HART,
Assistant United States Attorney

N:\UDD\CHOOK\FC\FLEMING\03504

EXHIBIT "A"

1. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175967.

2. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175556.

3. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175519.

4. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175856.

5. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175957.

6. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175518.

7. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175873.

8. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175917.

9. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175458.

10. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175921.

11. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175845.

12. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175539.

13. One Colt, M-203, 40mm grenade launcher, 12" barrel, 15" over all length, with sights and cleaning kit, serial number 0175492.

14. One U.S. rifle, M-14, H&R Arms Co., serial number 491846, 7.62mm caliber, blue steel, woodstock, 22" barrel, 44 1/2" over all length, with bipod and strap.

15. One HK, MP5SD, 9mm machinegun, 6" barrel, 18" over all length, with collapsible stock, seral number 7993.

16. One HK, MP5SD, 9mm machinegun, 6" barrel, 18" over all length, with collapsible stock, serial number 3777.

17. One SD suppressor, 9mm, blue steel, 12" over all length, serial number 7993S.

18. One SD suppressor, 9mm, blue steel, 12" over all length, serial number 3777S.

19. One HE suppressor, 9mm, blue steel, 11 1/2" over all length, serial number Captain I.

FILED

FEB 8 1994

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

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

BROTHERHOOD MUTUAL INSURANCE COMPANY, Plaintiff,	)	
vs.	)	Case No. 93-C-218-B
JACK MOOBERRY d/b/a M & M EQUIPMENT and JAMES L. McDOUGAL, Defendants.	)	

ENTERED ON DOCKET
DATE FEB 8 1994

STIPULATION OF DISMISSAL

COME NOW the parties to this action and stipulate to the Court that upon the Settlement Conference held herein on the 31st day of January, 1994, an agreement for settlement and compromise of all issues herein was reached and that, therefore, the Court may dismiss this action with prejudice to the re-filing of the same.

Respectfully submitted,

WILLIAMS, BAKER AND HOWARD, P.A.

L. Richard Howard, OBA #4402
Roger R. Williams, OBA #9681
Attorneys for Plaintiff
1605 South Denver
Tulsa, OK 74119-4249
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Darrell E. Williams
Attorney for Defendant Jack Mooberry
d/b/a M & M Equipment

Monte L. Pratt
Attorney for Defendant
James L. McDougal

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MARVIN G. ABERNATHY aka MARVIN GEORGE ABERNATHY; CAROL A. ABERNATHY aka CAROL ABERNATHY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission, Defendants.	)	CIVIL ACTION NO. 93-C-678-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7th day of Feb., 1994. 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, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, appears by its attorney Kim D. Ashley; and the Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Carol A. Abernathy aka Carol Abernathy**, acknowledged receipt of Summons and Complaint on

August 6, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, acknowledged receipt of Summons and Amended Complaint on September 14, 1993; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 29, 1993; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on July 30, 1993.

The Court further finds that the Defendant, **Marvin G. Abernathy aka Marvin George Abernathy**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 22, 1993, and continuing through November 26, 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 Defendant, **Marvin G. Abernathy aka Marvin George Abernathy**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant 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 address of the Defendant, **Marvin G. Abernathy aka**

Marvin George Abernathy. 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 Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. 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 Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on August 13, 1993; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer on or about October 4, 1993; and that the Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 13, 1992, Marvin George Abernathy and Carol Abernathy their filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-03531-C. On February 3, 1993, a Discharge of Debtor was entered discharging debtors from all dischargeable debts. Subsequently, on March 19, 1993, Case No. 92-03531-C, United States Bankruptcy Court, Northern District of Oklahoma, 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 Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot 23, Block 6, Scottsdale Addition, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on November 8, 1983, Marvin G. Abernathy and Carol A. Abernathy executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $32,500.00, payable in monthly installments, with interest thereon at the rate of 13 percent per annum.

The Court further fints that as security for the payment of the above-described note, Marvin G. Abernathy and Carol A. Abernathy executed and delivered to the United States of America, acting through the Farmers Home Administration, a real

estate mortgage dated November 8, 1983, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on November 8, 1983, in Book 4742, Page 1572, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, are indebted to the Plaintiff in the principal sum of $32,637.48, plus accrued interest in the amount of $11,542.09 as of June 25, 1993, plus interest accruing thereafter at the rate of 13 percent per annum or $11.6243 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $243.70 (publication fees).

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 amount of $161.92 plus interest and penalty, by virtue of a tax warrant recorded on January 29, 1992, in Book 5376, Page 2492 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $1.00 which became a lien on the property as of 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims 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 **in rem** judgment against the Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, in the principal sum of $32,637.48, plus accrued interest in the amount of $11,542.09 as of June 25, 1993, plus interest accruing thereafter at the rate of 13 percent per annum or $11.6243 per day until judgment, plus interest thereafter at the current legal rate of 3.74 percent per annum until fully paid, plus the costs of this action in the amount of $243.70 (publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, have and recover judgment in the amount of $161.92 plus interest and penalty, by virtue of a tax warrant recorded on January 29, 1992, in Book 5376, Page 2492 in the records of Tulsa County, Oklahoma, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $1.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Marvin G. Abernathy aka Marvin George Abernathy and Carol A. Abernathy aka Carol Abernathy**, 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 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 Defendant, County Treasurer, Tulsa 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
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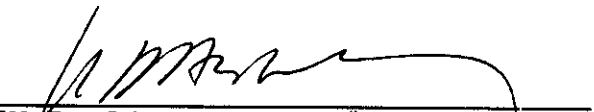

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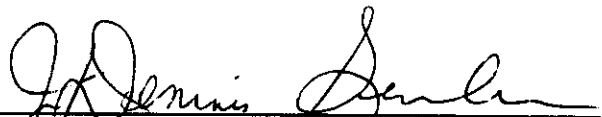

J. DENNIS SEMLER, OBA #8076
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-678-B

PP:css

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
V.	)	CASE NO. 93-CR-66-B
WAYNE EDWARD CARNES	)	
Defendant.	)	

O R D E R

The Court has before it the Defendant Wayne Edward Carnes' Motion To Correct Sentence (docket # 65).

Defendant argues that, under 18 U.S.C. §3553, a Federal Court is required to avoid sentencing disparities between or among defendants of like nature. Defendant contends the Court "has committed error in sentencing him to a 3 year probated sentence, a $1,000.00 fine, and de facto responsibility for paying all of the restitution incurred relating to the victim in the amount of $2,416.79 while the Court authorized the dismissal of charges in this case against his co-defendants, Eric Sanders and Robert Logan."

The rather brief answer to Defendant's argument is that the Court did not sentence Sanders nor Logan; ergo, there is no sentence disparity. Further, the Government points out that it moved to dismiss the felony charges against Eric Sanders in an effort to achieve some measure of parity between Sanders and

Carnes.[1]

The Court concludes Defendant's Motion To Correct Sentence should be and the same is hereby DENIED.

IT IS SO ORDERED, this 4th day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] The Court presumes that any further charges against Sanders will be in tribal court in the nature of a misdemeanor.

ENTERED ON DOCKET
DATE FEB 07 1994

FILED

FEB 4 1994

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

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

CYNTHIA JANE BOONE, Plaintiff, vs. DONNA SHALALA, in her capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)	Case No. 93-C-568-B

J U D G M E N T

In accord with an Order entered this date, granting summary judgment in favor of Defendant Donna Shalala, in her capacity as Secretary of the Department of Health and Human Services, judgment is herewith entered in favor of Defendant Donna Shalala, in her capacity as Secretary of the Department of Health and Human Services, and against the Plaintiff Cynthia Jane Boone on all claims. Costs are assessed against the Plaintiff if timely applied for pursuant to Local Rule 54.1. Each party is to bear their own attorneys fees.

DATED THIS 4th DAY OF February, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

CYNTHIA JANE BOONE, Plaintiff, vs. DONNA SHALALA, in her capacity as SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	)	Case No. 93-C-568-B

O R D E R

Now before the Court for its consideration is Defendant Donna Shalala's Motion for Summary Judgment (Docket entry #2), in response to Plaintiff Cynthia Boone's Title VII reprisal discrimination claim. The undisputed facts are as follows:

1. Cynthia Jane Boone has worked as a Contract Health Specialist for the Indian Health Service (IHS)[1] since 1979. In 1986, she was working at the Pawnee Service Unit at the GS-6 level.

2. On January 22, 1987, Plaintiff filed an Equal Employment Opportunity (EEO) claim which was subsequently settled on February 19, 1987.

3. On September 8, 1988, Plaintiff filed a subsequent EEO claim alleging that certain actions occurred in reprisal for having filed her original EEO claim of January 22, 1987. In response to this, a letter of acceptance of the formal complaint of discrimination identifying five issues/allegations of Plaintiff was

[1] Indian Health Service is a subdivision of the Department of Health and Human Services.

sent to Plaintiff on November 14, 1988.

4. The five allegations listed in the letter sent to Plaintiff were as follows:

(1) In reprisal, Plaintiff's request to attend the Area CHS meetings in September, 1987, was denied.

(2) In reprisal, the new Service Director was immediately informed by memoranda dated September 10, 1987, and again on September 16, 1987, of a patient's complaint against Plaintiff.

(3) In reprisal, in November 1987, someone else was promoted into a combination position containing Plaintiff's duties.

(4) In reprisal, Plaintiff's duty station and supervisor changed in November, 1987, yet her Performance Improvement Program (PIP) remained in effect.

(5) In reprisal, management's assessment of her performance rating, dated December 31, 1987, prevented Plaintiff from receiving an "outstanding" level of performance rating.

5. The Department of Health and Human Services (HHS) issued a Proposed Disposition dated July 30, 1991, finding no discrimination.

6. On September 18, 1992, Administrative Law Judge Cora Patricia Williams issued an order remanding the complaint to IHS.

7. HHS issued a final decision on March 16, 1993, finding that Plaintiff was not discriminated against on the basis of reprisal.

8. On September 2, 1993, Pawnee Service Unit Budget Analyst Josephine Carter certified that funds were available to send Plaintiff for training in Oklahoma City.

9. Pawnee Service Budget Analyst, Josephine Carter, was never informed of any budget restrictions as reflected in Ms. Georgia Tiger's affidavit.

10. Budget Analyst Josephine Carter found the affidavit of Ms. Tiger to be inconsistent with the September 3, 1993, rejection of Ms. Boone's training request.

11. Ms. Georgia Tiger signed a letter on March 19, 1993, informing Ms. Boone of her reassignment pursuant to the EEO Agreement, but in her Affidavit of August 1993, denies knowing anything about an EEO Agreement.

12. Mr. James Norris, the immediate supervisor of Plaintiff, in September, 1987, stated, "If a budget analyst says there are funds available, then there are funds available."

13. Oklahoma City Area EEO Officer, Joe Long, stated that it was a routine practice to brief new administrators as to EEO problems and agreements under their supervision, and that he remembers meeting with Ms. Tiger prior to her detail to Pawnee.

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. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); **Anderson v. Liberty Lobby, Inc.**, 477

U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); **Windon Third Oil and Gas v. Federal Deposit Insurance Corporation**, 805 F.2d 342, 345 (10th Cir. 1986). certien.480 U.S. 947 (1987). In **Celotex**, 477 U.S. at 322 (1986), it is stated:

> "[T]he 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, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. **Anderson v. Liberty Lobby, Inc.**, supra,wherein the Court stated that:

> " ... The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff ... " Id.at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by **Celotex** and **Anderson**. **Setliff v. Memorial Hospital of Sheridan County**, 850 F.2d 1384, 1393 (10th Cir. 1988).

Defendant has moved for summary judgment alleging Plaintiff

cannot establish a prima facie case of discrimination. Plaintiff specifically alleged five incidents of retaliation on the part of Defendant. Defendant, in her initial brief, introduced evidence to support her assertions that Plaintiff could not establish a prima facie case with respect to any of the five allegations. Plaintiff's response brief however, presented circumstantial evidence concerning only the first allegation: that her request to attend the CHS meetings was denied.

Concerning allegations two through five, Plaintiff merely claimed that she "has been unable to pursue the other issues of retaliation ... because of the limits of the Rule 56(f) Order." However, Plaintiff was afforded a full and fair opportunity to conduct discovery in order to present a prima facie showing of discrimination, and informed the Court that she would only need to take three depositions. Plaintiff may not now maintain that she was limited by the Order, since it was Plaintiff, herself, that determined the confines of her Rule 56(f) discovery. Plaintiff must affirmatively show specific facts demonstrating that there is a genuine issue of material fact with regard to her last four allegations. **Anderson**, at 247. Plaintiff has failed to present any evidence whatsoever, indicating there is a genuine issue of material fact concerning prima facie reprisal discrimination as stated in allegations two through five. Moreover, in the absence of any disputed material facts, there is no evidence upon which a jury could reasonably find for Plaintiff on these issues. Therefore, the only issue left for the Court's consideration is

whether there exists a genuine issue of material fact concerning denial of Plaintiff's request to attend area CHS meetings, and if not, whether Defendant is entitled to judgment as a matter of law.

For Plaintiff to prevail in establishing a prima facie case of reprisal discrimination, she must show: (1) that she has initiated a Title VII discrimination claim; (2) that adverse action by the employer subsequent to or contemporaneous with such Title VII claim has occurred; and (3) that a causal connection exists between such discrimination and the employer's adverse action. **Kendall v. Watkins**, 998 F.2d 848, 850 (10th Cir. 1993).

To withstand a motion for summary judgment, the Plaintiff must establish that there is a genuine issue of material fact as to whether a causal connection exists between Plaintiff's prior EEO action and the denial of Plaintiff's request to attend an area CHS meeting. Thus, Plaintiff has the burden of coming forward with evidence tending to establish that Ms. Georgia Tiger, knowing of Plaintiff's prior EEO Complaint and Agreement, denied Plaintiff's request to attend an area CHS meeting in retaliation for filing that complaint.

Plaintiff has introduced evidence that Ms. Tiger, prior to denying Plaintiff's travel request, acquired knowledge of Plaintiff's prior EEO action. In particular, Plaintiff relies on the fact that six months earlier, Ms. Tiger signed correspondence on behalf of the Executive Officer of the Oklahoma City Area Indian Health Service, relating to Plaintiff's EEO Agreement. In

addition, Plaintiff offers a sworn statement of former Oklahoma City Area EEO Officer, Joe Long, who stated that it is routine to inform new administrators of EEO problems and agreements they would have under their supervision. Furthermore, he states that he remembers meeting with Ms. Tiger prior to her assignment to Pawnee. Plaintiff also offers testimony of James Norris, Plaintiff's immediate supervisor, to the effect that common sense would dictate that a new administrator would be briefed as to EEO problems and agreements under their supervision.

Nevertheless, this evidence raises no more than a "metaphysical doubt" as to the facts. **Matsushita**, 475 U.S. at 585-86. Clearly, Ms. Tiger signed the correspondence relating to Plaintiff's EEO agreement. However, the evidence demonstrates that Ms. Tiger signed the document on behalf of the Executive Officer, and that she signed numerous documents in that capacity. Moreover, the document was signed six months prior to the rejection of Plaintiff's travel request, and Ms. Tiger claims to have had no recollection of the letter at that time. Furthermore, Mr. Long's statement of the practice of Indian Health Service as well as that of Mr. Norris offers no specific material facts by which Plaintiff may avoid summary judgment. Mr. Long does state that he briefed Tiger on personnel problems of the Pawnee Service Unit. However, he nowhere states that he informed Ms. Tiger specifically of Plaintiff's EEO Agreement. Thus, the best Plaintiff can do is merely speculate as to whether Ms. Tiger had knowledge of Plaintiff's EEO Agreement. However, even if plaintiff's evidence

could justify an inference of knowledge on the part of Ms. Tiger, Plaintiff's cause would nevertheless fail.

Plaintiff submits evidence that Ms. Tiger denied Plaintiff's travel request not for budgetary restrictions, but in retaliation for Plaintiff's prior EEO Complaint. The facts indicate that Josephine Carter, the sole Budget Analyst for the Pawnee Service Unit, certified that funds were available for Plaintiff's travel request, and that Ms. Carter was unaware of any budgetary restrictions. In addition, Plaintiff offers testimony of James Norris that if the Budget Analyst (Ms. Carter) says that funds are available, then funds are available. Nonetheless, Ms. Tiger denied Plaintiff's request stating they would only send one employee, mainly due to budgetary restrictions. However, Ms. Tiger did not inform Plaintiff of these restrictions in her denied travel request. There is also evidence that Ms. Tiger never conferred with Ms. Carter concerning the budget or any restrictions thereon. Furthermore, Ms. Carter claims she does not understand why Ms. Tiger would not communicate the budget restrictions to Plaintiff in Plaintiff's denied travel request.

Plaintiff presents no specific facts showing there is a genuine issue of material fact for trial. The fact that funds were available for Plaintiff's travel request does not automatically mandate that management grant Plaintiff's request. In fact, the testimony of James Norris indicates that, although funds may be available, it "is an administrative decision on whether or not to use those funds." Plaintiff's Exhibit I-2. Just because an

organization has available funds does not necessarily mean that it should spend them. Moreover, Ms. Carter was not aware of the budget restrictions because, as the evidence illustrates, there was a discrepancy between the financial records of the Pawnee Service Unit and those of Oklahoma City area finance office. Ms. Tiger knew of these restrictions because, as Service Unit Director, she received her directives straight from area management, and was the person in charge of enforcing the budget.

In addition, Plaintiff produced no evidence to indicate that Ms. Tiger should have conferred with Ms. Carter before making the decision to send only one person to the CHS meeting. As noted above, Ms. Tiger received her directives straight from area management. Area management projected a deficit, and since Ms. Tiger was the person actually in charge of enforcing the budget, it was her responsibility to limit spending so as not to sustain a loss. Moreover, Ms. Carter's bewilderment at Ms. Tiger's failure to mention the budget restrictions in Plaintiff's returned travel request is immaterial as to the reason Plaintiff's request was denied. Plaintiff's assertions are nothing more than pure speculation. Speculation as to why Ms. Tiger failed to mention budgetary restrictions in Plaintiff's returned travel request is insufficient to take this case beyond the threshold of **Celotex**.

Plaintiff has failed to produce evidence tending to establish a causal connection between her prior EEO action and the subsequent rejection of her travel request. However, assuming arguendo, that Plaintiff established the causal connection and

thus, her prima facie case, Plaintiff still could not prevail under **McDonnell Douglas**, infra, or **Kendall v. Watkins**, infra.

Under the **McDonnell Douglas** theory, Plaintiff must first establish her prima facie case. If successful, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." **McDonnell Douglas Corp. v. Green**, 411 U.S. 792, 802 (1972). If Defendant meets her burden of production, Plaintiff must then carry the ultimate burden of proving Defendant's reasons are pretextual and her true intent was to discriminate. **St. Mary's Honor Center v. Hicks**, 61 U.S.L.W. 4782, 4787, (U.S. June 25, 1993) (No. 92-602).

> "... [S]ome evidence that the articulated business reason for the decision was pretextual does not compel the conclusion that the employer intentionally discriminated. If a plaintiff successfully proves that the defendant's reasons are not worthy of credence, the plaintiff must still prove that the true motive for the employment decision violates Title VII."

Kendall v. Watkins, 998 F.2d at 851-52. A mere showing that an employer's articulated reasons are wrong will not suffice. **Id**. at 852.

As indicated above, Plaintiff submitted evidence that rejection of her travel was not based on budgetary restrictions. Assuming that she had established her prima facie case, the presumption would then be on Defendant to produce evidence of a legitimate business reason. Defendant articulated several reasons

for denying Plaintiff's request, which a reasonable jury could find to be legitimate. For Plaintiff to overcome a motion for summary judgment, she would have to show that a genuine issue of material fact exists which tends to establish that Ms. Tiger rejected her travel request not for budgetary reasons, but with an intent to discriminate against Plaintiff. The Court concludes Plaintiff cannot prove any specific facts by which a reasonable jury could find intentional discrimination.

In sum, Plaintiff has not presented the Court with any evidence of a genuine issue of material fact. The Court concludes the moving party is entitled to a judgment as a matter of law. Plaintiff has proven no specific facts tending to establish a prima facia case or a discriminatory intent on the part of Defendant. Having failed to establish the existence of an element essential to Plaintiff's case on which she will bear the burden of proof at trial, the motion for summary judgement must be sustained.

It is therefore ORDERED that the Defendant's Motion for Summary Judgment be sustained and the case dismissed. A judgment in conformance herewith will be simultaneously entered herein.

IT IS SO ORDERED THIS 2 DAY OF February, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

LIBERTY MUTUAL INSURANCE GROUP,	)	
Plaintiff,	)	
vs.	)	Case No. 93-C-1007 B
EAST CENTRAL OKLAHOMA ELECTRIC COOPERATIVE, and STONEWALL SURPLUS LINES INSURANCE COMPANY,	)	
Defendants.	)	

FILED
FEB 07 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

COMES NOW the Court on this 7th day of Feb., 1994, having considered the Joint Application for Dismissal with Prejudice of Defendant Stonewall Surplus Lines Insurance Company, and does find that said application should be granted.

IT IS ORDERED that Defendant, Stonewall Surplus Lines Insurance Company, be, and is hereby, dismissed with prejudice from this action and that all other rights and claims in this action between Plaintiff, Liberty Mutual Insurance Group, and Defendant, East Central Oklahoma Electric Cooperative, are reserved.

UNITED STATES DISTRICT JUDGE

RDG:TBR:dh
1/25/94
Z100-3

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

IN THE MATTER OF THE TAX
INDEBTEDNESS OF DAVID G.
AND MAUREEN M. BYNUM

CASE NO. 93-M-48-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on for hearing on a request for preliminary injunction filed by David G. and Maureen M. Bynum (hereinafter "taxpayers") on January 6, 1994. Following a review of the evidence in the record, statements of counsel and *pro se* litigants, and the applicable legal authorities, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On December 27, 1993, the taxpayers filed their request for a temporary restraining order and a preliminary injunction pursuant to Fed.R.Civ.P. 65. The taxpayers essentially requested that the court restrain and enjoin the Internal Revenue Service (IRS) from placing any further liens upon their property, releasing any liens heretofore placed on their property, and ordering the IRS to return to the taxpayers their property seized pursuant to a levy effected by the IRS.

2. In their request for a temporary restraining order and preliminary injunction, the taxpayers refer several times to the assets seized as their own property. The taxpayers have failed to prove that the ownership of the seized assets is vested in any other person or entity.

3. The IRS levy was effected on December 14, 1993, pursuant

7

to an Amended Warrant to Enter Premises issued by this court on December 9, 1993. Pursuant to the Amended Warrant the IRS was authorized to enter the premises located at 16110 N. 137th East Avenue, Collinsville, Oklahoma 74021, in order to seize property in satisfaction of unpaid federal taxes. The Amended Warrant was issued based upon a declaration signed by Revenue Officer Steven Schrader which stated that there was probable cause to believe that property or rights to property that were subject to levy by the United States pursuant to § 6331 of the Internal Revenue Code was located on or within the subject premises. (Government Exhibit A).

4. Steven Schrader is a Revenue Officer employed in the Collection Division of the Office of the District Director, Internal Revenue Service, in Tulsa, Oklahoma.

5. An assessment of individual income tax, penalty and interest for calendar year ending December 31, 1989, was made against the taxpayers in the total amount of $7,442.73. Notice and demand for the payment of such tax, penalty and interest was made on August 20, 1990. (Government Exhibits A and B).

6. Subsequent to August 20, 1990, the taxpayers entered into an installment payment agreement with the IRS. A number of installment payments on the subject tax indebtedness were made by the taxpayers.

7. As of November 12, 1993, there remained an unpaid balance of $2,339.62 as calculated by the IRS on the subject indebtedness. (Government Exhibit A).

8. The taxpayers have refused and continue to refuse to pay

the full amount of the tax, penalties and interest accrued to date by the IRS on the subject indebtedness.

9. A Notice of Intention to Levy was provided to the taxpayers by certified mail on or about January 1, 1991, as required by 26 U.S.C. § 6331(d). On November 12, 1993, the taxpayer, David Bynum, refused consent to Revenue Officer Schrader to enter the premises for the purposes of effecting a levy. The assets seized on December 14, 1993, included furniture, furnishings, jewelry, paintings, art objects and other valuables which exceed the exemption the taxpayers are allowed by law. These assets were located in the taxpayers' place of abode at 16110 North 137th East Avenue, Collinsville, Oklahoma 74021. Information regarding the assets that were seized was provided on a financial statement previously submitted by the taxpayers. There were no prior encumbrances against the seized assets on record at the Tulsa County Courthouse. (Government Exhibit A).

10. Any Conclusion of Law which is more appropriately characterized as a Finding of Fact is hereby incorporated as a Finding of Fact.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter.

2. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law is hereby incorporated as a Conclusion of Law.

3. A proper assessment of tax, penalty and interest for

calendar year 1989 was made against the taxpayers for which a proper Notice and Demand was made on August 20, 1990.

4. By reason of the assessment, a lien arose on all property and rights to property of the taxpayers. 26 U.S.C. §§ 6321 and 6322.

5. By reason of the taxpayers' failure to fully pay the taxes, penalty and interest accrued by the IRS, a levy can be made on all property and rights to property belonging to the taxpayers or to which the federal tax lien attaches. 26 U.S.C. § 6331.

6. The case at bar is distinguishable from the facts in the case of United States v. James Daniel Good Real Property, et al., a copy of which was submitted by the taxpayers at the hearing.

(a) The Good case involved the issue of whether the due process clause of the Fifth Amendment prohibited the government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. The facts in the case at bar are distinguishable because this is not a civil forfeiture case and no real property was seized.

(b) As specifically stated in the Good case, the Internal Revenue Code contains ample provision for due process and protecting taxpayers against improper administrative action. The taxpayers were afforded ample notice of the IRS' intention to levy and failed to provide any proof of any improper IRS administrative action.

7. Accordingly, taxpayers' request for preliminary injunctive relief is denied.

8. This Court lacks subject matter jurisdiction to issue a temporary restraining order or preliminary or permanent injunction against the IRS pursuant to 26 U.S.C. § 7421.

(a) The doctrine of sovereign immunity prohibits suits against the United States except in those instances in which it has specifically consented to be sued. United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767 (1941). Any waiver by the United States of sovereign immunity "cannot be implied but must be unequivocally expressed" and such waivers must be "construed strictly in favor of the sovereign." United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948 (1976); Library of Congress v. Shaw, 478 U.S. 310, 318, 106 S.Ct. 2957 (1986).

(b) The Anti-Injunction Act, Internal Revenue Code § 7421(a), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This statute is intended to protect the government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund. Bob Jones University v. Simon, 416 U.S. 725, 736-737, 94 S.Ct. 1107 (1974).

(c) No statutory or common-law exceptions to the Anti-Injunction Act have been shown to be applicable. The averment that a taxing statute is unconstitutional does not take this case out of the operation of 26 U.S.C. § 7421(a). *See*, Alexander v. Americans

United, Inc., 416 U.S. 752, 94 S.Ct. 2053 (1974).

9. Accordingly, the taxpayers' request for preliminary and permanent injunction is hereby denied. A separate Judgment denying the requested preliminary and permanent injunction and granting judgment to the Internal Revenue Service shall be filed contemporaneously herewith.

DATED this 4th day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

IN THE MATTER OF THE TAX
INDEBTEDNESS OF DAVID G.
AND MAUREEN M. BYNUM

CASE NO. 93-M-48-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, IT IS HEREBY ADJUDGED that the taxpayers, David G. Bynum and Maureen M. Bynum, are denied their requested preliminary and permanent injunction against the Internal Revenue Service of the United States Government and/or Steven Schrader. The request for temporary restraining order, preliminary injunction and permanent injunction pursuant to Fed.R.Civ.P. 65 of David G. Bynum and Maureen M. Bynum is hereby dismissed with prejudice. Costs and attorneys fees are hereby assessed against David G. Bynum and Maureen M. Bynum if timely applied for pursuant to Local Rule 54.1 and 54.2. The basis for the award of attorneys fees is that the requested relief and pleadings filed herein of David G. Bynum and Maureen M. Bynum are clearly spurious and frivolous.

DATED this 4th day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-7-94

FILED

FEB 04 1994

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

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

CURTIS N. SALYER, Plaintiff,	)	
vs.	)	No. 93-C-543-B
LARRY FIELDS, et al., Defendants.	)	

ORDER

Before the Court is Defendants' motion to dismiss or for summary judgment filed on December 8, 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 7.1.C.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion to dismiss or for summary judgment [docket #7 & #9] is **granted** and the above captioned case is **dismissed without prejudice.**

(2) The order staying all "applications, motions, or discovery" [docket #6] entered on October 6, 1993, is **lifted.**

SO ORDERED THIS 4th day of Feb., 1994.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DANA RUTH FARLEY, Plaintiff,	)	
vs.	)	No. 92-C-1179-B
GROUP HEALTH SERVICE OF OKLAHOMA, INC., an Oklahoma corporation, RONALD R. EMMONS, PAUL HARTOG, and GEORGE L. SARTAIN, individually and as co-partners, d/b/a EMMONS, HARTOG and SARTAIN, an Oklahoma partnership, Defendants.	)	

ORDER AUTHORIZING FILING OF SECOND AMENDED COMPLAINT AND REMAND TO STATE COURT

This action was originally filed in the District Court in and for Tulsa County, Oklahoma, Case No. CJ 92-05511. The action was removed to this court on the basis of federal jurisdiction sounding under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. The Court concluded it had jurisdiction under ERISA and the removal was proper. (See Court's Orders of August 26, 1993, Docket # 20, and October 20, 1993, Docket #27).

The Court has this date, pursuant to the Plaintiff's motion, entered an order dismissing Plaintiff's claim against Group Health Service of Oklahoma, Inc., with prejudice. The Court hereby authorizes the filing of Plaintiff's Second Amended Complaint (attached to Plaintiff's Response to Defendant's Motion to Dismiss, Docket # 35) which in essence alleges an Oklahoma state based nonfederal claim for breach of employment contract to furnish

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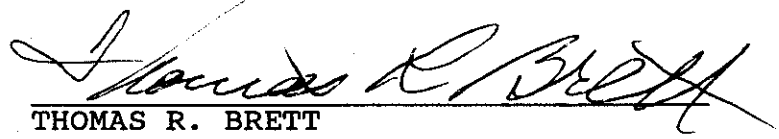
medical insurance. McName v. Bethlehem Steel Corp., 692 F.Supp. 1477 (E.D.N.Y. 1988), and Greenblatt v. Budd Co., 666 F.Supp. 735 (E.D.Pa. 1987). The ERISA claim is no longer integral to Plaintiff's theory of recovery.

Only a pendent state claim remains which is more appropriately considered by the Oklahoma state court. United Mine Workers of America v. Gibbs, 383 U.S. 715 at 726-727; and 28 U.S.C. § 1367(c). IT IS HEREBY ORDERED that this action in its present posture is remanded to the District Court in and for Tulsa County, Oklahoma. Thus, Defendants' motion to dismiss the Plaintiff's amended complaint (Docket # 31) herein is moot.

DATED this 3rd day of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE FEB 0 4 1994

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

DANA RUTH FARLEY, Plaintiff,	)	
vs.	)	No. 92-C-1179-B
GROUP HEALTH SERVICE OF OKLAHOMA, INC., an Oklahoma corporation, RONALD R. EMMONS, PAUL HARTOG, and GEORGE L. SARTAIN, individually and as co-partners, d/b/a EMMONS, HARTOG and SARTAIN, an Oklahoma partnership, Defendants.	)	

FILED

FEB 3 1994

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

O R D E R

Pursuant to Plaintiff's motion to dismiss Group Health Service of Oklahoma, Inc., an Oklahoma corporation (Docket # 28), the same is hereby granted and Plaintiff's action is dismissed with prejudice against Group Health Service of Oklahoma, Inc., an Oklahoma corporation.

Group Health Service of Oklahoma, Inc.'s request to file an application to impose sanctions and attorneys fees (Docket # 34) is hereby denied. The Court does not conclude that Plaintiff's action commenced in the first instance against Group Health Service of Oklahoma evidenced bad faith or should be considered as frivolous.

DATED this 3rd day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

BONNIE L. COLLINS, Plaintiff v. SEARS, ROEBUCK AND CO., a New York corporation authorized to do business in Oklahoma, Defendant.	)	Case No. 93-C-1071-B

O R D E R

This matter comes on for consideration of Plaintiff's Notice Of Dismissal Without Prejudice (docket # 5) filed herein on December 17, 1993. Defendant has objected to same alleging it filed its answer also on December 17, 1993 and therefore any dismissal must be by court order or by joint stipulation.

Rule 41(a)(1)(i) provides that a Plaintiff may dismiss an action without order of the court " . . by filing a notice of dismissal at any time before service by the adverse party of an answer . . .".

Defendant, in its objection to the dismissal, accuses Plaintiff of forum shopping, arguing that it believes from statements allegedly made by Plaintiff's counsel, that the matter will be refiled in Creek County, Oklahoma, under an allegation of less than $50,000 damages due, thereby preventing removal (again) to this court.

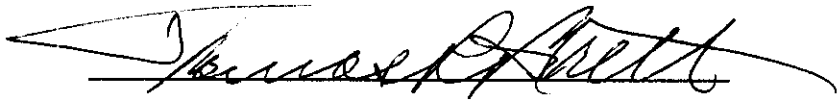
Defendant states that its answer was filed and docketed prior

to Plaintiff's Notice of Dismissal. Defendant fails to state that such belief is based upon a time-filed stamp system in the United States District Court Clerk's office. In fact, no such time-filed system exists in the Court Clerk's routine filing procedure, a matter of which this Court takes judicial notice. Further, the Court judicially notes that a lower docketing number of two pleadings filed the same day does not indicate prior filing.[1]

The Court is of the view that the critical inquiry is: when was Defendant's answer served. Plaintiff acknowledges that service by mail is complete when the pleading is placed in the U.S. mails. Defendant, however, has failed to aver or substantiate by affidavit that service by mail was made prior to Plaintiff's filing of the Notice of Dismissal Without Prejudice.[2]

The Court concludes Defendant's Objection to Plaintiff's Notice of Dismissal Without Prejudice should be and the same is hereby OVERRULED. This case stands dismissed.

IT IS SO ORDERED, this 3rd day of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[1] Defendant's answer is docket entry # 4 while Plaintiff's Notice of Dismissal Without Prejudice is docket entry # 5.

[2] Plaintiff alleges the Notice of Dismissal Without Prejudice was filed during the lunch hour on December 17, 1993.

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

RICHARD A. JOPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-914-C
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is Plaintiff Richard Jopson's appeal of the Secretary's denial of Social Security benefits. Three issues are raised: (1) Whether the Administrative Law Judge ("ALJ") erred in his hypothetical questioning of the vocational expert; (2) Whether the ALJ properly evaluated Plaintiff's complaints of pain; and (3) Whether substantial evidence supports the ALJ decision. For the reasons discussed below, the ALJ's decision is affirmed.

I. Standard of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. §405(g).[1] The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute

[1] *Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).[2]

Claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in Appendix 1 of the relevant regulation;[3] (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. *20 C.F.R. § 404.1520(b)-(f) (1991).* Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the Secretary found the Plaintiff not disabled at step 5.

II. Summary of Procedural History

Richard Jopson ("Plaintiff") was born in 1954 and has a high school education. He worked as a contractor from 1976 until 1989. However, a back injury eventually led

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[2] *Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. Trimiar v. Sullivan, 966 F.2d 1326 (10th Cir. 1992).*

[3] *Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).*

Plaintiff to apply for Social Security disability benefits in May of 1989. Plaintiff claims he has been disabled since March 17, 1989. *Record at 133.*

Following his application, however, Plaintiff returned to work on March 5, 1990 -- the same job he held prior to filing for disability. On May 9, 1990, the ALJ denied benefits to Plaintiff because he had returned to full-time work. *Id. at 55.*[4] But, on March 6, 1991, the Appeals Council -- after learning that Plaintiff quit work again -- remanded the case to the ALJ. The ALJ then held a supplemental hearing where Plaintiff and a vocational expert testified. Following that hearing, the ALJ again denied benefits to Plaintiff. The ALJ concluded:

> **-- Claimant's complaints of debilitating pain are not consistent with the record as a whole, using the criteria set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) and Social Security Ruling 88-13.**
>
> **-- Claimant is unable to perform his past relevant work as a construction worker and working construction foreman.**
>
> **-- Although the claimant's additional nonexertional limitations do not allow him to perform the full range of light work, using the above-cited rule as a framework for decision making, there are a significant number of jobs in the national economy which he could perform. Examples of such jobs are: As a cashier and in entry level machine operating jobs.** *Record at 31-32.*

Plaintiff now appeals the ALJ's decision, raising three issues. First, does substantial evidence support the ALJ's decision? Second, did the ALJ err in evaluating Plaintiff's claims of pain? Last, did the ALJ properly question the vocational expert? Each issue is discussed below.

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[4] *The ALJ wrote: "Because claimant returned to work March 5, 1990, engaging in the same work he did at the time he alleges having become disabled; and because claimant has done this work in anticipation of pay or profit at a level that is considered substantial gainful activity...the ALJ must conclude that the claimant was not disabled as defined by the Social Security Act.* Id. *at 55.*

III. Legal Analysis

The overriding issue is whether substantial evidence supports the ALJ's decision to deny Plaintiff benefits. Intertwined in that issue is (1) whether the ALJ properly analyzed Plaintiff's non-exertional claims of pain and (2) whether the ALJ erred in his hypothetical questioning of the vocational expert.

The pertinent evidence is summarized below. Plaintiff had back surgery on April 12, 1989. At that time, Dr. Mark Hayes -- the treating physician -- stated that Plaintiff would be unable to be "competitively employed" for at least one year. *Id. at 218.* Dr. Hayes then released Plaintiff to work on February 27, 1990 with "no limitations." *Id. at 458.*[5] Plaintiff, however, continued to have back pain and Dr. Hayes recommended that Plaintiff seek a different job to ease the pain in his back.[6]

Plaintiff also underwent a resection of his left 12th rib on November 3, 1989, but was released a day later. *Id. at 226-227.* In addition, Dr. William Ford stated that Plaintiff had "major depression with [moderate] melancholia" following a January 1990 examination. Dr. Ford recommended that Plaintiff take medication for the problem. *Id. at 260.*

At the hearing before the ALJ, Plaintiff and a vocational expert testified. Plaintiff described his pain as "like being shot in the back with a shotgun." *Id. at 106.* He said he cannot work a 40-hour job because of fatigue, "leg pains" and because he has problems

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[5] *After returning to work, Plaintiff continued to have pain when attempting to do his prior work as a contractor. On June 5, 1990*

[6] *Hayes wrote: "I was very pleased with his progress until when he started doing hard outdoor labor and now that he has done this labor, it has shown that it is just too much for him and that he will have to find some other type of employment at a less heavy level of demand."* Record *at 435. On April 3, 1990, Hayes stated that Plaintiff had a "permanent partial impairment rating" of 22 percent.*

sleeping. However, Plaintiff did testify that he had been attending Vocational Technical school for about a year, taking six hours a day in Industrial Technology.[7]

Plaintiff also testified that he works out approximately once a week on Nautilus equipment. He said he could bench press up to 225 pounds, but works out at only 140 pounds. He also said he likes to do a lot of walking.[8]

The vocational expert states that Plaintiff could work at either an entry level machine operating job or as a cashier. The expert's response came after the ALJ asked the following hypothetical questions:

> **Assume a hypothetical person the same age, education, sex, background, training and experience as this claimant who first is capable of performing a full range of each sedentary and light work and first, I want to limit it to the following limitations only. No heavy labor such as prolonged walking and repeated or extreme bending or rapid, repeated movements...add the further limitation of needing to be free to sit or stand essentially as he needs to...add the further limitation of limited bending and limited stooping...**

After examining the foregoing, the court finds that substantial evidence does support the ALJ's decision to deny benefits.[9] The medical evidence plainly indicates that Plaintiff's impairments prevent him from working at his past jobs, but the reports submitted indicate that Plaintiff can work at other types of jobs. The vocational expert testified that Plaintiff can work as a cashier and entry level machine operator. In addition, the fact that Plaintiff

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[7] *Plaintiff said part of his schooling includes working at a bench "wiring up switches, using screw drivers and more or less drawing schematics, drafting, maybe hooking up real light air hoses to machinery...pushing buttons and programming." Id. at 114.*

[8] *Plaintiff also said he had depression. He said the depression makes him irritable. Id. at 124.*

[9] *The Defendant's Response To Plaintiff's Brief and the ALJ's decision also examines the evidence supporting the ALJ's decision.*

has been attending school on a regular basis is a factor that the ALJ properly considered.[10] Also, Plaintiff's activities -- including his ability to exercise and work out on weights -- supports the ALJ's decision.

There is little question that some evidence supports Plaintiff's disability claim. But, as noted earlier, a finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. That is not the case here.

Plaintiff also contends that the ALJ improperly evaluated his claims of pain. Evaluation of a claimant's allegations of disabling pain is in accord with *Luna v. Bowen*.[11] First, the ALJ must determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the ALJ must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164.* An excerpt from *Luna* explains how such evidence should be evaluated:

> **In previous cases, we have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problem. [Other] factors for consideration [are] the**

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[10] *An ability to attend classes, without more, is not per se evidence of an ability to perform substantial gainful activity. Cohen v. Secretary of Department of Health and Human Services, 964 F.2d 524, 530 (6th Cir. 1992). School attendance may be considered, however, as one factor in the spectrum of evidence used to determine whether the claimant is disabled. Markham v. Califano, 601 F.2d 533, 534 (10th Cir. 1979). The ALJ's opinion reflects that school attendance was only one of several factors which he considered.*

[11] *834 F.2d 161 (10th Cir. 1987).*

claimant's daily activities, and the dosage, effectiveness and side effects of medication. *Id. at 166.*[12]

In the instant case, the ALJ first concluded that Plaintiff established a pain-producing impairment by objective medical evidence (past surgery on his back). The ALJ next found that a loose nexus existed between the back impairment and Plaintiff's allegations of pain. *Record at 30.* The ALJ then determined that Plaintiff's pain was not disabling. A review of the record does not show that the ALJ erred in his analysis of Plaintiff's pain.[13] *Id. at 24.*

The final issue raised by Plaintiff is whether the ALJ erred in his hypothetical questioning of the expert. See, *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991)("Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision.") However, this issue is without merit. Upon review, the undersigned finds that the ALJ did not err in his hypothetical questioning.

III. Conclusion

Plaintiff Richard Jopson, 37 years old at the time of the supplemental hearing, challenges the Secretary/ALJ's decision to deny him Social Security benefits. However, a review of the record indicates that the ALJ did not err in the decision. Substantial evidence supports the finding that Jopson can return to work. Therefore, the court **AFFIRMS** the

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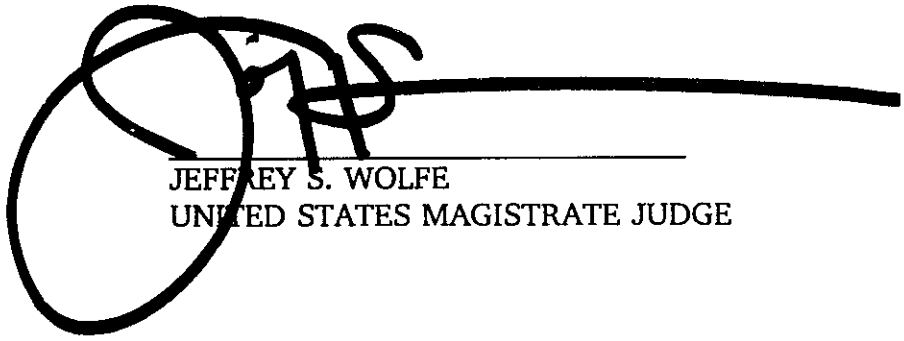
[12] *The Tenth Circuit noted that its list was not exhaustive. Luna, 834 F.2d at 166.*

[13] *The Plaintiff maintains that his pain is disabling for the following reasons: (1) he has persistently sought relief for his back pain; (2) he has gone through multiple operations and taken medication for his back; (3) he has had regular contact with a doctor; (4) Plaintiff claims evidence of depression exists; (5) that his daily activities are limited; and (6) that his medication has adverse side effects. Plaintiff's Brief, page 8. The ALJ's summary adequately discusses the evidence of record, including the above factors. See Record at 13-31.*

Secretary's decision.

SO ORDERED THIS 30 day of July, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

ROLLIE A. PETERSON, an individual, and SUSAN P. PETERSON, an individual, Plaintiffs, vs. NANCY WALENTINY; HUGH V. RINEER; C. MICHAEL ZACHARIAS; SHARON L. CORBITT; N. SCOTT JOHNSON; RINEER, ZACHARIAS & CORBITT, a partnership; JEAN A. HOWARD; MARIAN B. HOWARD; SHARON DOTY; and ROBERT W. BLOCK, Defendants.	Case No. 93-C-399-B

O R D E R

Now before the Court is the Appeal of Magistrate Judge's Order Not To Seal Documents From Public View (Docket #44) of Defendant Jean A. Howard (Howard).

Facts

Plaintiffs Rollie Peterson and Susan Peterson (Petersons) bring this action against Peterson's ex-wife (Howard), her mother (Marian B. Howard), his ex-wife's previous lawyer (Sharon Corbitt), and her partners (Hugh Rineer, Michael Zacharias, Scott Johnson) and law firm (Rineer, Zacharias & Corbitt) and various counselors and physicians and physicians (Nancy Walentiny, Sharon Doty, and Robert Block) for malicious prosecution, slander per se, libel, intentional, reckless, or negligent infliction of emotional distress, professional negligence, and abuse of process. These claims arise from allegations that Peterson sexually abused his then four year old daughter. The allegations of sexual abuse

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resulted in a criminal investigation and a civil suit in state court by Howard against Peterson for a petition to modify a foreign divorce decree and an emergency order for supervised visitation.

After prevailing in the state court action, the Petersons brought this action against Howard and the other Defendants for their deliberate and malicious actions in pursuing him as the person who allegedly sexually abused his minor daughter. The Petersons' Complaint and Amended Complaints contain specific and detailed accounts of the statements the minor daughter made which caused Howard to believe she was being sexually abused, the subsequent statements the minor daughter made during interviews by some Defendants, and the results of a physical examination.

Howard filed a motion to seal all filings in the case from public view, asserting that "[t]his lawsuit involves very sensitive and possibly stigmatizing allegations involving the minor child of the Defendant Jean Howard." The motion was unopposed by Howard's Co-defendants, but opposed by the Petersons. During a status conference the day before Peterson's objection would be due, Peterson voiced his objection and the grounds therefor, and the magistrate overruled the motion. Howard now appeals that ruling.

Legal Analysis

Peterson objected to sealing the documents from public view because the motion was unsupported by authority, because there was no justification for concluding that the documents would stigmatize

or irreparably harm the minor daughter[1], and because of the public right of access to the trial. Howard argued on appeal, relying on Webster Groves School District v. Pulitzer Publishing Company, 898 F.2d 1371, 1376 (8th Cir. 1990) that the right of access to judicial records is a qualified right that requires a weighing of competing interests, and, relying on Globe Newspaper Company v. Superior Court, 457 U.S. 596, 607 (1982), that the physical and psychological well being of a minor is a compelling state interest.

A Magistrate Judge's decision on a non-dispositive issue will be reversed only if it is clearly erroneous. 28 U.S.C. §636(b)(1), Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991). While the Court recognizes the need to consider the psychological well being of a minor child, under the facts of this case, it is not convinced that the ruling of the Magistrate Judge is clearly erroneous, or that the minor child's interests cannot be protected by less intrusive means. Howard's Appeal of the Magistrate Judge's Order Not to Seal Documents From Public View is DENIED.

IT IS SO ORDERED THIS 3rd DAY OF FEBRUARY, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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[1] Peterson attached his Reply to Plaintiff's Objection to Production of Documents and Things by Tulsa Police Department (Reply Brief) as an exhibit to his opposition to Howard's appeal of the Magistrate Judge's order. That exhibit contains a description of the relevant events that is strikingly similar to, and every bit as specific and detailed as the description in Peterson's Complaints. Peterson points out, however, that the Reply Brief and other documents remain on file (unsealed) in the state court action and that, in fact, Howard never attempted to have those documents sealed from public view.

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

PENNWELL PRINTING COMPANY, INC., Plaintiff,	)	
vs.	)	Case No. 92-C-1139-B
TULSA TYPOGRAPHICAL UNION NO. 403, Defendant.	)	

O R D E R

Now before the Court for its consideration are the motions for summary judgment pursuant to Rule 56, F.R.C.P., filed by Defendant and Cross-Plaintiff Tulsa Typographical Union No. 403 (Docket #26), and Plaintiff and Counter-Defendant, Pennwell Printing Company, Inc. (Docket #28).

UNDISPUTED FACTS

The undisputed facts are essentially these:

1. Pennwell Printing Company, Inc., (Pennwell) and Tulsa Typographical Union No. 403, (Union) entered into a single employer Collective Bargaining Agreement (Agreement) on October 2, 1990, which was to expire on October 1, 1993.

2. The Union is the exclusive bargaining representative for all employees employed by Pennwell who perform offset prep department work. These employees are covered by the Agreement.

3. This Agreement sets forth certain rights and obligations between the parties. The Agreement provides for arbitration of

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grievances filed by the parties pursuant to the grievance process.

4. According to Section 14.01 of the Agreement, a grievance is defined as "an allegation that one of the parties to this Agreement has violated a specific provision of this Agreement."

5. After a grievance is filed, a grievance meeting is held between the parties. If the grievance is not resolved, Section 14.01 states, "the grieving party will have the right to proceed to arbitration."

6. On August 9, 1992, the Union filed a grievance alleging a violation of the Agreement by Pennwell. This grievance alleged that Pennwell was transferring work, by subcontract, to individuals not covered by the Agreement, concurrent with the layoff of employees, and that these actions were in violation of the contract.

7. After a grievance meeting on the issue, Pennwell denied the grievance on the grounds that it had the right to subcontract work pursuant to Section 3.02 of the Agreement.

8. The Union then proceeded to demand arbitration of the grievance by filing a request for a list of arbitrators with the American Arbitration Association (AAA), as required by the Agreement.

9. In response to this action, Pennwell included in a letter to the American Arbitration Association the claim that the issue raised was not arbitrable.

THE PRESENT ACTION

Pennwell filed its complaint for Declaratory Judgment with

this Court seeking clarification of its obligation to arbitrate the grievance filed by the Union. The Union filed a Counterclaim to compel arbitration. On November 15, 1993, the parties filed cross motions 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. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); **Windon Third Oil and Gas v. Federal Deposit Insurance Corporation**, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In **Celotex**, 477 U.S. at 322 (1986), it is stated:

> "[T]he 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, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing

there is a genuine issue of material fact for trial. **Anderson v. Liberty Lobby, Inc.**, *supra*, wherein the Court stated that:

> ". . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by **Celotex** and **Anderson**. **Setliff v. Memorial Hospital of Sheridan County**, 850 F.2d 1384, 1393.

The issues of material fact in this case are not in dispute. The remaining disputed questions concern the interpretation of the contract language, particularly the arbitrability of the sub-contract grievance. These questions concern only issues of law.

At issue in this dispute is the arbitrability of the grievance filed by the Union alleging that Pennwell violated the Agreement when it subcontracted work outside the bargaining unit. The key issue in deciding the arbitrability of the grievance is discerning whether the Collective Bargaining Agreement created a right of arbitration. Arbitration is a matter of contract. A party cannot be compelled to arbitrate a dispute that the party has not agreed to submit to arbitration. AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

The Agreement between Pennwell and the Union contains a grievance procedure which gives the grieving party the right to arbitrate unresolved grievances. The relevant inquiry herein is

whether the parties intended for the dispute in question to be subject to the grievance and arbitration procedure.

The dispute in question arose out of the layoff of unit employees and the concurrent subcontracting of bargaining unit work. After the Union demanded arbitration of the grievance based on this dispute, Pennwell denied that the dispute was arbitrable.

When deciding the arbitrability of a dispute, there is a presumption of arbitrability that requires the Court to compel arbitration of a grievance "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute." AT&T, at 650. Doubts regarding the arbitrability of the dispute, "should be resolved in favor of arbitration." Id.

Pennwell seeks summary judgment on the grounds that it did not intend for disputes arising in the context of management decision making, pursuant to the rights reserved in the management rights clause of the Agreement, to be subject to arbitration. Therefore, Pennwell argues, it cannot be forced to arbitrate because it did not intend for this type of dispute be subject to the grievance and arbitration procedure. Pennwell's reliance on the fact that it reserved the right to subcontract work and layoff employees to its sole discretion, pursuant to the management rights clause, is not conclusive of the issue of whether these decisions are subject to arbitration. Although Pennwell reserved the right to subcontract to its exclusive discretion, without interference by the Union, it is not axiomatic that the Union can never dispute

Pennwell's actions in this area. A reservation of the right to subcontract cannot be read to allow Pennwell to use their reserved right to subcontract to the extent that such action would violate the basic protections of the Collective Bargaining Agreement. See Dreis & Krump Mfg. v. International Association of Machinist, 802 F.2d 247, 254 (7th Cir. 1986).

In Dreis, the Company argued that sub-contracting was not an issue for arbitration because the management rights clause in the Collective Bargaining Agreement left the issue to management. The Court stated, "an employer cannot use subcontracting to nullify the collective agreement, merely because the management-rights clause is broad enough to allow this if read literally." Dreiss, at 254. Although the clause at issue would have allowed for most subcontracting, the clause could not be read to allow the company "to use subcontracting to unravel the basic protections that the collective bargaining agreement grants its employees." Id. Therefore, the fact that the right to subcontract is found in an agreement does not give management unfettered discretion to use the right to subcontract in violation of the spirit of the agreement.

Section 3.02 of the Agreement is a reservation of rights clause that lists examples of the rights retained by Pennwell. Included within Section 3.02 is the right of "contracting or subcontracting of any work into or out of the bargaining unit; and the creation, abolition or merger of positions, all at the sole discretion of the Employer." Pennwell claims the issues in dispute in the Union's grievance are within the rights reserved to

managerial decision making, centering the inquiry on whether the parties intended to bring disputes over the exercise of management prerogatives into the areas subject to the grievance and arbitration procedures.

Pennwell argues that the Union's complaint did not amount to a grievance under the Agreement because the Union did not allege a violation of a specific provision of the Agreement. Pennwell claims that at the base of the grievance is the subcontracting of work and the layoffs, and the right to make decisions in these areas has been left solely to the discretion of Pennwell in Section 3.02 of the Agreement. Therefore, Pennwell proclaims, it could not be charged with a violation of Section 3.02 because decisions made pursuant to the areas of this section are in the sole discretion of management, and as such cannot be violated. Pennwell urges that the only specific violation that the Union has asserted is a violation of the Article 1 Recognition Clause, and that grievances based on violations of the recognition clause are not arbitrable. However, Pennwell concedes that the real issue in the grievance centers around Section 3.02 and the intent of the parties to arbitrate decisions made pursuant to the exercise of management prerogatives.

Furthermore, Pennwell's assertion that it did not intend to arbitrate grievances involving the exercise of management prerogatives under Section 3.02 is contradicted by the fact that the very next section indicates that Pennwell recognized that such issues would be before an arbitrator. Section 3.03 declares that

when interpreting the Agreement, an arbitrator is bound by the "Reservation of Rights Doctrine." This is an indication that Pennwell foresaw the arbitration of issues involving disputes over the exercise of managerial rights, and provided boundaries for the arbitrator when dealing with such issues.

In AT&T Technologies v. Communication Workers of America, 475 U.S. 643, 650 (1986), the Supreme Court ruled that in order for an issue to be excluded from arbitration, it must be expressly excluded, or " the most forceful evidence to exclude the claim from arbitration" must be shown.

Pennwell did not expressly exclude grievances based on reserved management rights from arbitration. If it had done so, there would have been little or no issue as to whether it intended for grievances made pursuant to Section 3.02 to be subject to arbitration. However, since it did not request an express exclusion, its argument that it intended to exclude them is less compelling. Compounding the detrimental effect of the absence of an express exclusion of such disputes from arbitration is the fact that the Agreement did expressly exclude other disputes from the grievance and arbitration procedure. Section 17 of the Agreement expressly excludes from the grievance process the termination of employees during their probationary period. If the parties had wanted to expressly exclude reserved managerial rights decisions from the grievance process, the contract could have expressly so provided. This action "indicates that the parties knew how to remove issues from arbitration when they wanted to." Eichleay

Corp. v. International Association of Iron Workers, 944 F.2d 1047, 1058 (3rd Cir. 1991).

Pennwell has failed to bring forth forceful evidence that reserved management rights were to be excluded from the grievance process. On the contrary, there is no evidence tending to show that disputes over the exercise of these rights were to be excluded from arbitration. Pennwell's basis for arguing that these disputes were not subject to arbitration is that Pennwell has sole discretion in these areas, and this discretion can not be questioned by the Union. Whether Pennwell had an unlimited right to subcontract work cannot be resolved by this Court because the Court is precluded from reaching the merits of the grievance..

When deciding the arbitrability of a grievance, a Court cannot rule on the potential merits of the claim. AT&T Technologies, 475 U.S. at 649. In seeking the Declaratory Judgment, Pennwell asked this Court to rule that it reserved the right to subcontract work pursuant to the management rights clause, and any grievance based upon these rights, is not substantively arbitrable. Pennwell's argument that it has the right to move work in and out of the bargaining unit is an argument based on the merits of the grievance. This Court cannot rule on this issue because it is restricted from ruling on the particular merits of a grievance. Id. Whether or not Pennwell has the right of unlimited subcontracting is an issue for the arbitrator.

The Agreement did not expressly exclude from arbitration grievances involving the exercise of a reserved management right,

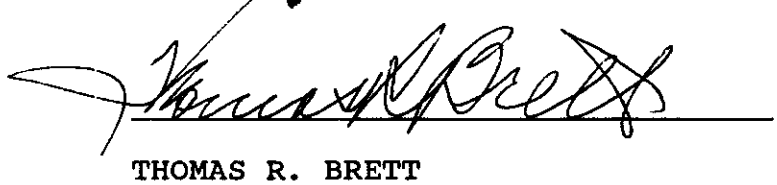
and Pennwell did not offer "the most forceful evidence of exclusion" of its intent to exclude such claims required to remove an issue from arbitration. Also, Pennwell has not shown that it had a clear intent to exclude disputes over management decisions, pursuant to Section 3.02, from the grievance and arbitration process. On the contrary, there is evidence that the parties intended for such disputes to be before an arbitrator. Pennwell has failed to sustain the burden of showing that the dispute is not susceptible to arbitration of grievances based on reserved management rights.

CONCLUSION

Having found that there is a presumption for arbitrability of the grievance submitted by the Union against Pennwell, and that Pennwell has failed to overcome this presumption, the Court concludes as a matter of law that the grievance submitted by the Union is arbitrable, and the Court must compel Pennwell to submit to arbitration.

Therefore, the Court concludes Pennwell's Motion For Summary Judgment, as to the Declaratory Judgment Action (92-C-1139B) against Tulsa Typographical Union No. 403, should be and the same is hereby DENIED, and the Motion For Summary Judgment of the Union, should be and the same is hereby GRANTED.

IT IS SO ORDERED, this 2nd day of February, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

PW/GEODYNE PRODUCTION PARTNERSHIP II-A; PW/GEODYNE PRODUCTION PARTNERSHIP II-B; and PW/GEODYNE PRODUCTION PARTNERSHIP II-C, General Partnerships,	)	
Plaintiffs,	)	
vs.	)	Case No. 93-C-166-B
WOLVERINE EXPLORATION COMPANY, a Corporation,	)	
Defendant.	)	

O R D E R

Now before the Court is the Motion to Transfer Venue (Docket #10) of Defendant Wolverine Exploration Company (Wolverine).

Facts

PW/Geodyne Production Partnership II-A, PW/Geodyne Production Partnership II-B, and PW/Geodyne Production Partnership II-C (collectively, Geodyne) bring this action against Wolverine for breach of contract, constructive trust, breach of fiduciary duty, equitable accounting and unjust enrichment. The claims arise from calculations of gas imbalance on certain oil and gas properties in Oklahoma and Texas that Geodyne purchased from Wolverine pursuant to a purchase and sale agreement dated February 26, 1988.

Wolverine moves for transfer of venue pursuant to 28 U.S.C. §1404(a), relying on the following facts set forth in the Affidavit of Phil Rykhoek, Vice President and Chief Accounting Officer of Wolverine:

1. Wolverine no longer actively conducts business in

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Oklahoma. Wolverine is a Delaware corporation with its principal place of business in Fort Worth, Texas. Wolverine's business operations are in Texas and Colorado.

2. The Purchase and Sale Agreement between Wolverine and Geodyne effective February 29, 1988 was negotiated by Texas law firms and was executed in Fort Worth, Texas. The Agreement provides that it will be interpreted in accordance with Texas law. Documents relating to the negotiation and execution of the Agreement are located in Fort Worth.

3. The following persons have personal knowledge of gas imbalancing accounting performed by Wolverine at issue in the lawsuit: Phil Rykhoek, Susie Morris, Glenn Adams, Lela Lenning, Jeff Stevens, and Chuck Chesser. All of these individuals except Chuck Chesser reside in Fort Worth. Chesser resides in the state of Washington.

4. All documents relating to Wolverine's accounting of gas balances are warehoused in Fort Worth.

5. No one with personal knowledge of Wolverine's accounting of gas balances resides in Oklahoma.

6. Pursuant to the agreement, Geodyne acquired a substantial number of oil and gas properties in Texas and routinely conducts business in that state.

7. Wolverine's trial counsel are located in Fort Worth.

In opposing the motion to transfer venue, Geodyne sets forth

the following facts supported by the affidavit of Craig D. Loseke, Supervisor of Special Projects and Owner Relations for Samson Production Services Company (Samson)[1]:

1. The lawsuit relates to certain acts and conduct of Defendant whereby it sold gas production from certain properties covered by the agreement in excess of its entitled share, increasing the overproduced status imposed on Geodyne after the effective date of the agreement. The imbalance currently relates to seven wells located in Washita county, Oklahoma. The current claims do not relate to any properties in Texas or any state other than Oklahoma.

2. Helmerich and Payne, Inc., a Delaware corporation with its principal place of business located in Tulsa, Oklahoma, was at all relevant times the operator of the subject wells and possesses relevant information which will have a direct bearing on the claims at issue in this lawsuit. All documents of Helmerich and Payne relating to the gas balancing accounting at issue, as well as its knowledgeable employees, are located in Tulsa. Helmerich and Payne is not a party to this lawsuit and the attendance of any of its employees must be compelled.

3. All of Geodyne's documents relating to the subject of this lawsuit are located in Tulsa, Oklahoma. All persons

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[1] Samson provides certain accounting and administrative functions for Geodyne.

with knowledge of Geodyne's accounting of gas imbalances as it relates to this lawsuit reside in Tulsa.

4. It would be inconvenient and inexpensive for those persons associated with both Helmerich and Payne and Geodyne to travel to Texas if venue in this lawsuit is transferred.

5. No person with current knowledge of Geodyne's accounting of gas balancing resides in Texas.

6. Pursuant to the agreement, Defendant offered and sold to Geodyne a substantial number of oil and gas properties located in Oklahoma. At all relevant times, including the time the Agreement was executed, Defendant was actively conducting business in Oklahoma.

7. At the time the lawsuit was filed, Defendant was registered to do business in Oklahoma. Defendant withdrew its registration from Oklahoma on June 29, 1993, after this lawsuit was filed.

8. Geodyne is currently pursuing this action through its in-house counsel, all of whom are located in Tulsa, Oklahoma.

Legal Analysis

Wolverine is requesting transfer of venue, pursuant to 28 U.S.C. §1404, which provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Despite Wolverine's claim that it no longer does business in

Oklahoma, Wolverine does not claim that venue is improper in Oklahoma. Wolverine's only claim is that the Northern District of Texas, another district where this action might have been brought, is more convenient than the Northern District of Oklahoma. The facts provided by both parties do not support this assertion.

In a motion to transfer, the burden of demonstrating the inconvenience of the forum falls on the moving party. Texas Eastern Transmission v. Marine Office-Appleton & Cox Corporation, 579 F.2d 561, 567 (10th Cir. 1978). Moreover, Plaintiff's choice of forum is given considerable weight. Id. In considering a motion to transfer, the Court must consider the plaintiff's choice of forum; the accessibility of witnesses (including the availability of compulsory process); the cost of obtaining attendance of willing witnesses; and other practical problems which make the trial easy, expeditious and inexpensive. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508 (1947); Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

In considering these factors, the Court concludes that while Oklahoma may be an inconvenient forum for Wolverine, Texas would be an inconvenient forum for Geodyne. There are witnesses that reside in Oklahoma who are not employees of a party to this action, and thus, the availability of compulsory process is an issue. Lastly the wells at issue are located in Oklahoma, as are many of the witnesses. Wolverine has not shown that its witnesses would be unwilling to come to Tulsa or that their deposition testimony would not suffice. Moreover, the fact that Texas law would govern is not

dispositive. See Scheidt v. Klein, 956 F.2d 963, 966 (10th Cir. 1992).

Wolverine's Motion to Transfer should be and hereby is DENIED.

IT IS SO ORDERED THIS 3rd DAY OF FEBRUARY, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 2/3/94

FILED
FEB 2 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a Kansas corporation,	)	
Plaintiff,	)	
vs.	)	No. 93-C-931-B
ADELIA SMITH, DONALD SMITH and DON TUNNELL,	)	
Defendants.	)	

ORDER OF DISMISSAL

Upon application of the parties, for good cause shown, IT IS ORDERED that this matter be dismissed with prejudice.

THOMAS R. BRETT
JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT

Tunnell/Order.ds

ENTERED ON DOCKET

DATE 2-2-94

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

SHARON (HOUTS) BRINLEE, Plaintiff,	)	
v.	)	Case No. 93-C-309-E
UNITED STATES OF AMERICA, Defendant.	)	

FILED

FEB 2 1994

Richard M. Law Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This case having been tried on Wednesday, January 12, 1994, and the issues having been determined and a decision having been rendered, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED THAT judgment is entered in favor of the United States, and the plaintiff shall take nothing on her Complaint. The United States is awarded its costs.

DATED: 1/31, 1994.

S/ JAMES O. ELLISON
JAMES O. ELLISON
Chief Judge

ENTERED ON DOCKET

DATE 2-2-94

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

SHARON (HOUTS) BRINLEE, Plaintiff,	)	
v.	)	Case No. 93-C-309-E
UNITED STATES OF AMERICA, Defendant.	)	

FILED

FEB 2 1994

Richard M. L[illegible], Clerk
U. S. DIST[illegible] COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This case having been tried on Wednesday, January 12, 1994, and the issues having been determined and a decision having been rendered, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED THAT judgment is entered in favor of the United States, and the plaintiff shall take nothing on her Complaint. The United States is awarded its costs.

DATED: 1/31, 1994.

S/ JAMES O. ELLISON

JAMES O. ELLISON
Chief Judge

ENTERED ON DOCKET

DATE 2-2-94

FILED

FEB 2 1994

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

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 93-C-441-E**
ONE 1985 CHEVROLET CORVETTE, VIN 1G1YY0783F5108740,	)	
Defendant.	)	

JUDGMENT OF FORFEITURE
BY DEFAULT AND BY STIPULATION

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default and by Stipulation against the defendant vehicle, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of May 1993, alleging that the defendant vehicle was subject to forfeiture pursuant to 21 U.S.C. § 881, because it was furnished, or was intended to be furnished, in exchange for a controlled substance, in violation of 21 U.S.C. § 881 of the drug laws of the United States.

Warrant of Arrest and Notice In Rem was issued on the 11th day of May 1993, by Clerk of the United States District Court for the Northern District of Oklahoma to the United States Marshal for the Northern District of Oklahoma.

On the 15th day of June, 1993, the United States Marshals Service served a copy of the Complaint for Forfeiture In

Rem and the Warrant of Arrest and Notice In Rem on the defendant vehicle, to-wit:

ONE 1985 CHEVROLET CORVETTE,
VIN 1G1YY0783F5108740.

The following individuals were determined to be potential claimants in this action with possible standing to file a claim herein, and the United States Marshal for the Northern District of Oklahoma personally served the following persons and entities having a potential interest in this action, to-wit:

MARVIN D. SMITH	**Served July 1, 1993, by serving J. Patrick Thompson, his attorney.**
ROYCE TERRELL WILLIAMS	**Served July 1, 1993, by serving J. Patrick Thompson, his attorney.**

United States Marshals 285s reflecting the services set forth above are on file herein.

All persons interested in the defendant vehicle were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

The only Claims filed in this matter were those of Marvin D. Smith and Royce Terrell Williams, both of whom subsequently failed to file an Answer herein.

No other persons or entities upon whom personal service was effectuated more than thirty (30) days ago have filed a Claim, Answer, or other response or defense.

Claimant Royce Terrell Williams is now deceased, and a Withdrawal of Claim of Royce Terrell Williams executed by J. Patrick Thompson, his attorney of record, was filed on January 26, 1994.

No other claims in respect to the defendant vehicle have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant vehicle, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant vehicle and all persons and/or entities interested therein, except Marvin D. Smith, who has stipulated to forfeiture of the defendant vehicle. The Stipulation for Forfeiture provides that the tires and wheels which were on the defendant vehicle at the time of seizure and the cost and claim bond in the amount of $800.00 posted by Claimant Smith in the administrative action be returned to Claimant Smith by delivery to his attorney, J. Patrick Thompson.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending, on July 29, August 5 and 12, 1993, and Proof of Publication was filed herein on September 10, 1993.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Judgment be entered against the following-described defendant vehicle:

ONE 1985 CHEVROLET CORVETTE,
VIN 1G1YY0783F5108740,

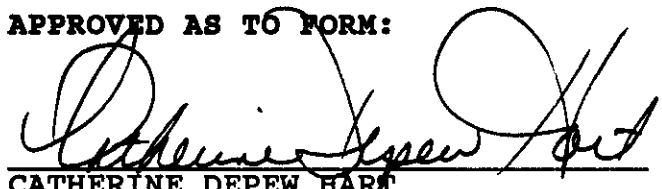
and that such vehicle, less the tires and wheels which were on the vehicle at the time of seizure, be, and it is, forfeited to the United States of America for disposition by the United States Marshals Service according to law.

IT IS FURTHER ORDERED that the United States Marshals Service shall return the cost and claim bond in the amount of $800.00 to Claimant Marvin D. Smith, by delivery to his Attorney, J. Patrick Thompson.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Chief Judge of the
United States District Court

APPROVED AS TO FORM:



CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\CHOOK\FC\SMITH1\03340

ENTERED ON DOCKET

DATE 2-2-94

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

FILED

FEB 1 1994

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

VIDEO COMMUNICATIONS, INC., Plaintiff,	)	
vs.	)	Case No. 93-C-898-B
JOY HOUCK, SR., Defendant.	)	

ORDER

The Motion to Dismiss for lack of personal jurisdiction and venue or in the alternative to Transfer Venue (docket entry # 4), filed by Joy Houck, Sr. ("Houck"), is before the Court for decision. Following a review of the record, including the briefs of counsel, the Court concludes Houck's alternative motion to transfer venue should be sustained for the reasons stated hereafter.

This action is based on an alleged breach of a contract which granted Video Communications, Inc. ("VCI") the worldwide distribution rights of several films, which primarily feature old-time western star Lash LaRue. Defendant Houck entered into a licensing agreement with Jim McCullough ("McCullough") (not a party to the case) on February 17, 1993. On the same day, McCullough entered into a sub-licensing agreement with VCI. Both the licensing and sub-licensing agreements provided that Oklahoma law would apply to any dispute arising from the agreement. Houck and McCullough are both residents of Louisiana, while VCI is an Oklahoma corporation with its principal place of business in Tulsa,

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Oklahoma.

Houck has no contacts with the state of Oklahoma, except for the fact that McCullough assigned the licensing agreement to VCI. Houck's only direct contract with VCI came when he met Bill Blair, the CEO of VCI, at a film festival in California after both distribution agreements were completed. VCI also alleges that Houck's son subsequently traveled to Tulsa, Oklahoma, to deliver art materials and master tapes of the motion pictures, as well as to assist in the preparation for an upcoming film festival. VCI asserts that when the Tulsa trip is combined with the surrounding circumstances sufficient minimum contacts exist indicating personal jurisdiction is proper in the Northern District of Oklahoma. Houck is over 90 years old, and most of the witnesses and records relating to this case are in Louisiana.

As an alternative to dismissing an action with a procedural defect, a court may choose to transfer venue to a court in which the action could originally have been brought. 28 U.S.C. §1406(a). While the language of § 1406(a) refers only to improper venue, courts have interpreted the section to apply equally to cases involving a lack of personal jurisdiction. Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980). Transfer is generally considered to be more in the "interest of justice" than dismissal.

The defendant has raised considerable questions over the existence of either personal jurisdiction or venue in this matter. To be subject to the jurisdiction of this Court, a non-resident must have certain "minimum contacts" with the forum state. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The

"minimum contacts" test is satisfied, and personal jurisdiction exists, when a non-resident "purposefully directed his activities at residents of the forum." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985). However, the unilateral acts of a third party with the forum state do not constitute purposeful activity on the part of a non-resident defendant. Doe v. National Medical Services, 974 F.2d 143, 146 (10th Cir. 1992).

Houck's contacts with Oklahoma are indeed sparse. In fact, his contacts with Oklahoma were virtually nonexistent before McCullough sublicensed the distribution agreement to VCI. As exhibited in Doe v. National Medical Center, the unilateral acts of McCullough alone are not enough to subject Houck to the jurisdiction of this Court. Neither does his son's subsequent trip to Tulsa clearly establish the existence of sufficient minimum contacts in Oklahoma to justify a finding that personal jurisdiction exists. This alleged trip occurred after the completion of the distribution agreements, and such trip was not required by the terms of the agreement. The agreements required Houck to provide McCullough, and in turn VCI, with certain marketing materials and videotape copies of the films. However, the agreements did not require delivery. Thus, the Tulsa trip is a relatively insignificant event in the context of deciding whether personal jurisdiction exists.

Likewise, venue may not lay in the Northern District of Oklahoma, since these acts do not clearly comprise a "substantial part of the events . . . giving rise to the claim". 28 U.S.C. § 1391(a)(2). As discussed, the Tulsa trip appears to constitute a

very insignificant part of VCI's case. Therefore, it is not shown that a substantial part of the events giving rise to the claim occurred in the Northern District of Oklahoma.

Even if the Court were to find that these acts satisfied both the requirements of personal jurisdiction and venue, the Court would still consider transfer of the action to the Eastern District of Louisiana the preferred alternative.[1] When determining the propriety of a transfer under § 1404(a), the Court considers several criteria: 1) convenience of the parties; 2) convenience of the prospective witnesses; and 3) the interest of justice. National Sur. Corp. v. Robert M. Barton Corp., 484 F. Supp. 222, 224 (W.D. Okla. 1979). The purpose of this section is to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense. Id.

While venue in the Northern District of Oklahoma may be a great convenience to VCI, it is readily apparent that this will not be the case for Houck. Mr. Houck is over 90 years old, and all records relating to this case are located in Louisiana. While the plaintiff's choice of forum is to be given great weight, the inconvenience that would be imposed upon Houck substantially outweighs any convenience that would be derived by VCI. See Norwood v. Kirkpatrick, 349 U.S. 29 (1955). Furthermore, the

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[1]Because the Court would have transferred the case even if personal jurisdiction and venue existed, the Court declines to determine whether personal jurisdiction and venue do in fact exist in the present case. Sections 1406 and 1404 are not mutually exclusive and should be used in concert to effect the interests of justice. See In re Koratron, 302 F. Supp. 239 (Jud. Pan. Mult. Lit. 1969).

prospective witnesses would be inconvenienced should this matter proceed in the Northern District of Oklahoma. It appears from the record that almost all of the prospective witnesses reside in Louisiana--McCullough, Houck's son, Houck, and Houck's business manager. Only Blair, VCI's CEO, resides in the Northern District of Oklahoma.

Finally, transfer is in the interest of justice and judicial economy. The elderly Mr. Houck, the majority of the witnesses, and most of the records pertaining to the agreements are located in Louisiana. Additionally, this action could have been initially brought in the Eastern District of Louisiana pursuant to 28 U.S.C. § 1391(a)(1). It is a requirement that the proposed transferee forum be one in which venue would have been proper in the first instance. 28 U.S.C. §§ 1404(a), 1406(a).

The fact that Oklahoma law must be applied in this case does not prevent the transfer of this case to the Eastern District of Louisiana. For change of venue purposes it is irrelevant what the choice of law is, since the federal court here or in the transferee forum must apply the same law. While this Court may have more experience applying Oklahoma law, this experience is not a sufficient justification to prevent transfer. See Nemmers v. Truesdale, 612 F. Supp. 245 (N.D. Ohio 1985). This action does not involve a novel area of law. Instead, it is based on the basic principles of Oklahoma contract law, which may be as easily applied by the District Court for the Eastern District of Louisiana as by this Court.

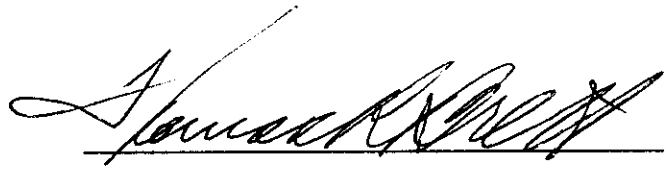
Finally, and of significant consequence, is the fact that VCI

did not challenge nor address transfer of venue in its briefs. Since VCI has posed no objections to such a transfer, neither does this Court.

The Court concludes a transfer of this case to the United States District Court for the Eastern District of Louisiana, because the Court finds a significant question to exist as to whether either personal jurisdiction or venue exists in the Northern District of Oklahoma, is the preferred action to take.

The Court concludes this matter should be and the same is hereby TRANSFERRED to the District Court for the Eastern District of Louisiana in the interests of justice and for the convenience of the parties.

IT IS SO ORDERED this 1st day of ~~January~~ Feb, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-2-94

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

FILED

FEB 1 1994

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

MICHAEL WAYNE HALL, and INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 943, an unincorporated labor organization,	)	
Plaintiff,	)	
vs.	)	Case No. 93-C-1099
OKLAHOMA FIXTURE COMPANY, an Oklahoma Corporation,	)	
Defendant.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Plaintiffs' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiffs, Michael Wayne Hall and International Brotherhood of Carpenters and Joiners of America, Local Union 943, and against the Defendant, Oklahoma Fixture Company, and orders the Defendant to comply with the terms of the arbitrators award of October 25, 1993. Costs are assessed against the Defendant. Any claim for costs and/or attorney's fees should be timely filed pursuant to Local Rule 54.1 and 54.2.

DATED this 1st day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE 2-1-94

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

FILED

FEB 1 1994

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

JACK R. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	91-C-702-E
	)	
LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
	)	
Defendant.	)	

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223, and for supplemental security income benefits under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

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[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding

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In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.[2] He found that plaintiff had the residual functional capacity to perform work-related activities, except for work involving lifting twenty pounds occasionally and ten pounds frequently. He found that plaintiff's past relevant work as a bail bondsman did not require performance of work-related activities precluded by these limitations. Having determined that plaintiff's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ erred in failing to recognize plaintiff's nonexertional impairments, including back pain, chronic obstructive pulmonary disease, hearing loss, and illiteracy.

(2) That the ALJ erred in failing to call a vocational witness to testify.

(3) That the ALJ erred in finding that plaintiff's past relevant work was as a bail bondsman.

(4) That the ALJ erred in mechanically applying the grid regulations.

(5) That the ALJ erred in failing to recognize the "treating physician's rule."

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whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

The medical evidence establishes that plaintiff has lumbar spine problems, hearing loss, and moderate chronic obstructive pulmonary disease. Plaintiff slipped on a can of oil and fell at his job at Liberty Glass Company on April 26, 1988. (TR 140). Subsequently he complained of back pain and the doctor prescribed Flexeril and Tylenol, hot baths, and reduced activity. (TR 140). X-rays were negative and he was told to return to work on April 29, 1988. (TR 141). Dr. James Keenan reported on May 17, 1988 that plaintiff still had pain in his neck, back, and right hip and thigh. (TR 158). He had full range of motion of the back, except for flexion limited to 60°, 70°, and 80° on separate attempts by pain. (TR 158). X-rays of the cervical and lumbar spine revealed degenerative disc disease at C2, C3, and C4, as well as L5-S1, with moderate disease throughout the upper lumbar spine and lumbar myofascial strain. (TR 158). Dr. Keenan recommended Feldene, Parafon Forte, and stretching exercises of the neck and low back. (TR 158).

On May 31, 1988, plaintiff complained to Dr. Donald Bobek, Dr. Keenan's associate, that he was no better. X-rays revealed first degree spondylolisthesis L5-S1 at the site of the degenerative disc disease. (TR 158). The doctor found a trigger point at L2-3 midline which was injected with no relief of the pain. (TR 158). Plaintiff was advised to continue his medication, have daily physical therapy, and continue working. (TR 158).

On June 23, 1988, Dr. Bobek reported that plaintiff's complaints had eased until he worked long hours on a forklift, so he was advised to continue his medications. (TR 157).

On August 15, 1988, Dr. Bobek stated that plaintiff had pain within three days of an injection and had taken nearly a whole prescription of Feldene, but stopped because it made him sick to his stomach. (TR 157). On August 19, 1988, Dr. Mark Hayes, another associate of Dr. Keenan, advised Liberty Glass that plaintiff was to stay off work until August 26, 1988, because heavy labor would be detrimental to his recovery. (TR 157). On August 19, 1988, a CAT scan was done, and this revealed as follows: "Broad based disc protrusion or annular bulge L3-L4 and L5-S1. Modest broad based herniation L4-L5. Abnormality below L4-L5 and above L5-S1 in the right L5 neural foramen with increased density and loss of fat of uncertain significance or etiology. This could represent a fragment of disc (although the attenuation coefficients certainly do not confirm this), conjoin nerve rootlet, or other process." (TR 144).

On August 26, 1988, Dr. Hayes reported plaintiff continued to have leg and back pain, and he had a positive straight-leg-raising test. (TR 157). Dr. Hayes concluded he had mild disc disease at L4-5 and possibly L3-4 and could not lift over fifty pounds on a repetitive basis. (TR 157). Dr. Hayes said "[i]t is my opinion that his symptoms would significantly improve if he was able to avoid heavy manual labor." (TR 157). Dr. Hayes recommended vigorous therapy to strengthen the back and stomach and vocational rehabilitation. (TR 156-157).

On September 23, 1988, Dr. Hayes found that plaintiff could lift no more than 12 pounds on a frequent basis and recommended a work hardening program, but plaintiff was found not to be a good candidate for the program. (TR 156). The evaluator stated:

> Mr. Smith completed the Functional Capacity Evaluation on 9-23-88. He scored to function at the sedentary physical demand level. Sedentary is

defined as lifting 10 pounds or less infrequently.

> Mr. Smith has admitted being non-compliant with his home exercise program. During his 1-2 hour exercise program in Re/Flex, Mr. Smith takes frequent 10-30 minute breaks between each 10 minute activity (i.e. mat exercises, treadmill, BTE) secondary to complaints of lower back and leg pain. (TR 150).

On November 18, 1988, the doctor limited his lifting to twenty-five pounds and told him to do no repetitive bending, stooping, lifting, or twisting. (TR 155). The doctor stated "I believe that he has reached his maximum medical benefit from regular orthopedic follow-up" and vocational rehabilitation was ordered. (TR 155). On February 20, 1989, Dr. Hayes reported plaintiff was suffering back and neck pain, as well as right ankle pain, and the disc bulging at three locations in his back had led to "permanent limitations of no repetitive lifting over 25 pounds" and a recommendation of vocational rehabilitation training, but no surgery. (TR 163). He was still on light duty status with limitations of no repetitive lifting over 25 pounds and no repetitive bending, stooping, or twisting. (TR 163).

Plaintiff was examined on March 29, 1989, to establish his disability for receipt of workmen's compensation benefits by Dr. Michael Farrar. (TR 173-177). The doctor noted that plaintiff was suffering back pain, preventing him from working, and several doctors had diagnosed degenerative disc disease. (TR 172-173). Dr. Farrar found plaintiff had a full range of motion in his shoulders, elbows, wrists, fingers, hips, knees, ankles, and feet. (TR 174). Plaintiff was able to heel and toe walk, but showed weakness in the muscles innervated by the left L5 nerve root and showed hypesthesia to pinwheel and pinprick in the left L5 distribution. (TR 174). His reflexes were normal and equal, and he ambulated

without an assistive device with a normal gait and station. (TR 174). Examination of his spine showed a negative foraminal closure test bilaterally. (TR 174). The range of motion of his spine was decreased by pain, and he had some muscle spasm and spine rigidity. (TR 172-174). X-rays showed the following:

> The cervical spine radiographs showed degenerative changes at C2, C3 and C4. There was facet arthrosis and osteophyte spondylosis. His thoracic spine radiographs showed numerous areas of osteophytic lipping throughout the thoracic spine. His lumbar spine radiographs showed narrowing between L5 and S1 and multiple degenerative changes. I also reviewed the computed tomography that had been taken of his lumbar spine showing the bulging L3-4 and L4-5 discs. (TR 174).

Dr. Farrar stated:

> After evaluating Mr. Smith on this date it is my opinion that he has achieved medical maximum improvement. I do not see any further therapy that would improve him to any respectable degree within any reasonable period of time. The difficulties that he has at this time are secondary to degeneration of the cervical and lumbar spine with subsequent range of motion loss and multiple functional limitations. Before he was operating in a medium to heavy capacity and now unfortunately by his work capacity evaluation is functioning only in a sedentary capacity. This is secondary to the anatomical abnormalities that he has into his neck and low back that have been exacerbated.... (TR 175).

Dr. Farrar concluded: "It is my opinion that the bulging discs into his lumbar spine as seen upon computed tomography are symptomatic for instability and continual pain." (TR 176). "In addition, it is my opinion he is in need of vocational rehabilitation. His education, training and experience are limited and without vocational rehabilitation and retraining he would not be able to be placed back to the work force in an acceptable functional capacity. Therefore, it is imperative that he receive vocational rehabilitation and retraining." (TR 177). He was found 23 percent permanently partially impaired secondary to the range of motion loss to his spine and 10 percent permanently partially impaired to

the body as a whole. (TR 176).

Dr. J.D. McKenzie conducted pulmonary studies on plaintiff on May 12, 1989, and concluded plaintiff had moderate chronic obstructive pulmonary disease. (TR 179-181).

On June 7, 1989, plaintiff was evaluated by Dr. Sami Framjee at the request of an insurance company defending a workers' compensation claim brought by plaintiff. The doctor's comments are revealing:

> On my present examination, it was very difficult to obtain a history of medical significance. The patient keeps on babbling about multiple symptoms of no particular pattern.
>
> Post accident, the patient was off work for about five days and thereafter returned to his occupational duties.
>
> The patient subsequently sought the services of Dr. Hayes, M.D., who advised him that he had a ruptured disc.
>
> . . .
>
> On my present examination, one observes a gentleman who has a very non-organic presentation. He complains of a burning sensation throughout his body. He complains of shooting pains that begin in his back and go all the way up into his neck and upper back. No radicular symptoms into the upper extremity or lower extremity elicited. There were no specific complaints in reference to the neck or the upper back. The patient complains of a feeling of pressure in his ribs and sometimes his legs and extremities swell up.
>
> Since I was unable to obtain a history of medical significance from the patient, I clinically examined the gentleman.
>
> . . .
>
> On my physical examination today, one observes a gentleman who was in no acute distress. He presents with universal symptomatologies.
>
> Examination of the cervical spine reveals normal cervical

> stance.
>
> Examination of the thoraco-lumbar spine reveals normal thoracic kyphosis and normal lumbar lordosis. There was no tenderness on palpating the axial skeleton. The patient was non-tender in the sciatic notches.
>
> . . .
>
> Medical records from the office of Dr. Mark Hayes and the Orthopedic Specialists of Tulsa were reviewed.
>
> These records reveal that the CT scan reveals the presence of bulging discs at the L4L5, L5S1 and the L3L4 levels.
>
> IMPRESSION: Based on my clinical examination today, I was unable to substantiate the patient's symptoms to my physical findings.
>
> The patient's clinical picture is highly indicative of secondary gain phenomenon.
>
> It is my impression that the above-mentioned patient can return to his normal occupational duties with no restrictions.
>
> At the present time, based on AMA Guidelines, 2nd & 3rd Editions, I am unable to find any evidence of permanent impairment of the lumbar spine secondary to any occupational episode.
>
> The patient's radiograms are indicative of some degenerative changes, however, clinical history indicates diffuse universal symptomatology.
>
> From an orthopedic standpoint, I do not see the medical necessity for any further medical management secondary to the episode of 04/23/88.

(TR 185-187) (emphasis added).

Dr. Framjee clearly made a very conservative evaluation of plaintiff's condition on behalf of the insurance company. While noting plaintiff had at least bulging, if not

ruptured, discs, he concluded plaintiff could return to his normal occupational duties as a furnace operator with no restrictions. For workers' compensation purposes, his conclusion that the plaintiff's fall in the Ford Glass Plant on April 23, 1988 had not resulted in back injury requiring further medical management was critical. For purposes of this evaluation for social security disability benefits, Dr. Framjee's examination supports plaintiff's complaints of back pain and his conclusions are highly suspect.

On July 26, 1989, Dr. A. Munson Fuller determined that plaintiff had a hearing loss of 18.8% in the left ear and 20.6% in the right ear, resulting in binaural impairment of 19.1%. (TR 190). His hearing discrimination scores were 72% in the left ear and 76% in the right ear.

The ALJ Erred in Failing to Recognize Plaintiff's Nonexertional Impairment of Back Pain

The ALJ relied on Dr. Framjee's report for his conclusion that claimant's testimony was not credible, since the doctor claimed he was "unable to substantiate the patient's symptoms" (TR 187), even though the claimant told Framjee Dr. Hayes had diagnosed a ruptured disc (TR 185) and Framjee saw the records of the CT scan revealing the presence of bulging discs in several areas of the back. (TR 187).

At the hearing plaintiff testified that he has constant back pain. (TR 35-36, 114, 128). He stated that the pain is in his neck and back and goes down into his leg. (TR 52). During the day he has to lay down at least twice because of the pain (TR 62). He stated that he seldom goes out to visit people or shop, that he helps "very little" around the house, and that he does "a little bit of mowing sometimes, and help carry the groceries in,

light stuff, sometimes." (TR 51-52).

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, No. 92-7090 (10th Cir. Mar. 3, 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

> [W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the

impairment and the pain alleged. Luna, 834 F.2d at 164. "'[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.'" Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423 (d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

There is not substantial evidence to support the ALJ's determination that plaintiff has the residual functional capacity to perform work-related activities, except for work involving lifting more than twenty pounds. The ALJ failed to recognize plaintiff's non-exertional impairment of pain, noting that plaintiff has never used strong pain medications (TR 53), he walks without assistive devices, he is able to do some lawn mowing and help carry groceries (TR 51-52), and he does not wear a back brace or TNS unit. (TR 53). However, there was sufficient objective evidence of a back impairment that would produce some pain interfering with an ability to work. This non-exertional impairment, along with the other impairments recognized by the ALJ, moderate obstructive pulmonary disease and

hearing loss, required that a vocational expert be called to testify.

The ALJ Erred in Failing to Call a Vocational Expert to Testify

Vocational expert testimony is preferred by the courts when the hearing record does not contain information on the plaintiff's ability to perform work activities other than those connected with his former work. Decker v. Harris, 647 F.2d 291, 298 (8th Cir. 1981); Warner v. Califano, 623 F.2d 531, 532 (8th Cir. 1980). There was no information in the hearing record regarding plaintiff's ability to perform any work activities other than those connected with heavy work that he had done in the past. A vocational expert should have been called.

The ALJ Erred in Finding that Plaintiff's Past Relevant Work Was As A Bail Bondsman

After finding that plaintiff could perform work-related activities, except for heavy lifting, the ALJ erred in finding that plaintiff could perform his past relevant work as a bail bondsman. Plaintiff testified he worked as a bail bondsman just part time off and on beginning in 1981 and continuing through 1988 and 1989. (TR 46-50). However, he testified that he made no money writing bonds because he didn't "get to write that much". (TR 49). The ALJ erred in finding that this activity constituted "past relevant work".

The ALJ Erred in Mechanically Applying the Grids

Use of the Medical-Vocational Guidelines ("the grids"), 20 C.F.R. § 404, Subpt. P, App. 2, is predicated on an impairment that limits the physical strength or exertional capacity of a claimant. Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987); Frey v. Bowen, 816 F.2d 508, 512 (10th Cir. 1987). The Social Security Regulations note,

however, that certain mental, sensory, or skill impairments, environmental restrictions, or

postural and manipulative restrictions may be independent from exertional limitations. Id. at 515-16. Where "nonexertional" limitations, such as pain, combine with exertional limitations which do not in and of themselves establish a disability, then the "grids" are to provide no more than a framework for determining disability. 814 F.2d at 1460. The ALJ is not to automatically or mechanically apply the grids, but instead must consider all the relevant facts in determining whether the nonexertional limitations diminish the claimant's ability to perform other work. Id. In this case, there was evidence of several nonexertional limitations which precluded the ALJ from applying the grids in the way that he did.

The ALJ Erred in Not Following the Treating Physician's Rule

The ALJ ignored the treating physician's rule when he did not agree with Dr. Hayes' conclusion that plaintiff should engage in vocational rehabilitation. An ALJ must give substantial weight to the statement of claimant's treating physician. Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985), unless the opinion is brief, conclusory, and unsupported by medical evidence. Allison v. Heckler, 711 F.2d 145, 148 (10th Cir. 1983). The ALJ discussed Dr. Hayes' opinion in his ruling in great detail. However, he relied mainly on Dr. Framjee's report when coming to the conclusion that plaintiff's complaints were not credible and he was not disabled.

The decision of the ALJ is not supported by substantial evidence and is reversed. This case is remanded to the Secretary for reconsideration after testimony by a vocational expert is obtained.

Dated this 28th day of January, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE FEB 1 1994

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 31 1994

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

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
JACK ESKRIDGE, JR., et al.,	)	
Defendants.	)	CIVIL ACTION NO. 92-C-895-C

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 31st day of Jan, 1994.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney

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

PP/esf

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

LEONARD RENAL ROBERTS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	92-C-497-B
	)	
STANLEY GLANZ,	)	
	)	
Defendant.	)	

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 13, 1993. The Magistrate Judge recommended that Defendant's Motion to Dismiss claims that plaintiff was physically threatened by a nurse, that he was denied newspapers, radios, magazines, tv, and thinking games, that the jail was overcrowded, and that he required care by a medical specialist be granted. The Magistrate Judge found that the remainder of plaintiff's complaint states viable claims, so that Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment as to the remainder of the claims should be denied. Although Defendant Stanley Glanz was granted an extension of time until October 9, 1993, to file objections to the Report and Recommendation, no exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that Defendant's Motion to Dismiss claims that plaintiff was physically threatened by a nurse, that he was denied newspapers, radios, magazines, tv, and thinking games, that the jail was overcrowded, and that he required care by a medical

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specialist is granted. The remainder of plaintiff's complaint states viable claims and Defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment as to these claims is denied.

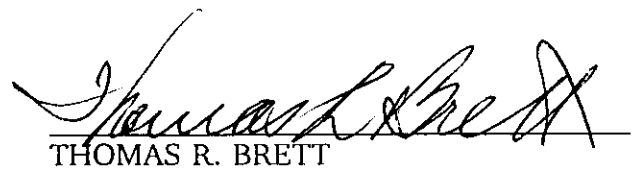
The claims which remain in this case include plaintiff's claim that he was denied access to the courts prior to his criminal trial in state court and also during his subsequent trial, that his legal mail was not given to him, that he was denied access to the law library and/or law clerk, that he was denied xeroxing and adequate mailing provisions, that he was denied exercise facilities, that the Tulsa County Jail kitchen facilities were unsanitary, and that he was denied proper medical care.

Discovery is to proceed in this case for sixty days and will be cut off on March 31, 1994. The parties are to exchange witness lists, including descriptions of each witness's testimony on or before February 28, 1994. The parties are to exchange all exhibits which will be used at trial on or before March 15, 1994.

On April 11, 1994, defendant is to submit a proposed pretrial order to the court and to plaintiff. Plaintiff will have ten days to make specific objections in writing to the court and to submit proposed modifications to the pretrial order.

A pretrial conference will be held on April 29, 1994 at 1:30 p.m. before the undersigned Judge.

Dated this 31 day of Jan, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

GREGORY DALE HARDING,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

Case No. 92-C-278-B

O R D E R

Now before the Court is Plaintiff Gregory Dale Harding's (Harding) Objection to the Report and Recommendation of the United States Magistrate Judge (Docket #51).

Facts

Harding brings this action for violation of his constitutional rights during the time he was incarcerated in the Tulsa City-County Jail from January 23, 1992 to April 10, 1992. Harding complains that he was denied access to the law library, denied access to a telephone, and denied access to medical services during his stay in the Tulsa City-County Jail.[1] Defendant submitted the library requisition forms showing that the requested materials were

[1] In his Complaint, Plaintiff also asserts that he was denied access to visitors for preparation of his defense, not protected from other prisoners, not given proper psychiatric screening, denied access to religious services, placed in quarters without fire protection, not given the opportunity to participate in a recreational program, and not provided the items to maintain personal hygiene. The Report and Recommendation of the United States Magistrate Judge recommended summary judgment on these claims and Plaintiff does not object to the Report and Recommendation as to these claims. Therefore, as to these claims, the Report and Recommendation of the United States Magistrate Judge is adopted and affirmed and these claims are not considered herein.

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provided to plaintiff, the phone log and progress notes from the jail in support of his motion for summary judgment. The United States Magistrate Judge recommended that Defendant's motion for summary judgment be granted, finding that Plaintiff "has not presented evidence on which a jury could reasonably rule for Plaintiff." In objecting to the Report and Recommendation of the United States Magistrate Judge, Harding submitted affidavits stating that he was never allowed to talk with the law clerk while he was incarcerated in the Tulsa County Jail, that he was not seen by a nurse or doctor while at the jail, and that he wasn't allowed to use a phone while he was held in restriction. Harding admitted in his objection that he placed a call on January 23, 1992 while in the jail.

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

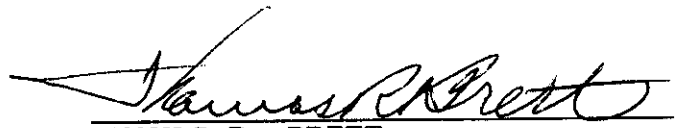
that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Summary judgment is appropriate in this case. The undisputed evidence reflects that Harding was provided the legal materials he requested even if he did not have the opportunity to speak to the law clark as he requested. The Court finds that provision of the requested legal materials is sufficient to satisfy plaintiff's constitutional right of access to courts. See Bounds v. Smith, 430 U.S. 817 (1977).

There is also no evidence that Harding's alleged constitutional violations are a result of the "execution of a government's policy or custom" as is required by Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1977).

Plaintiff's Objection to the Report and Recommendation of the United States Magistrate Judge (Docket #51) is DENIED and the Report and Recommendation of the United States Magistrate Judge (Docket #50) is adopted and AFFIRMED.[2]

IT IS SO ORDERED THIS 19th DAY OF FEBRUARY, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[2] The Court also notes that Plaintiff's Objection was filed January 4, 1994, more than ten days after the December 10, 1993 Report and Recommendation. Failure to timely file an objection constitutes waiver of any objection and provides an additional ground for denial of Plaintiff's motion.

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

GREGORY DALE HARDING,	)	
Plaintiff,	)	
vs.	)	Case No. 92-C-278-B
STANLEY GLANZ,	)	
Defendant.	)	

J U D G M E N T

In accord with the Order filed this date denying the plaintiff's objection to the Report and Recommendation of the United States Magistrate Judge recommending that Defendant's Motion for Summary Judgment be sustained, the Court hereby enters judgment in favor of the Defendant, Stanley Glanz, and against the Plaintiff, Gregory Dale Harding. Plaintiff shall take nothing of 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 1ST day of February, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE 2-1-94

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

FILED

JAN 31 1994

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

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 93-C-997-B
	)	
KATHRYN J. VANFLEET	)	
	)	
Respondent,	)	

ORDER STRIKING HEARING AND DISMISSAL

For good cause shown and upon application of the United States, it is hereby ordered that the Show Cause Hearing scheduled for February 4, 1994, at 9:00 a.m. is stricken. Based upon information provided by the United States, it is further ordered that this matter be dismissed.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

PHIL PINNELL, OBA #7169
Assistant United States Attorney
Northern District of Oklahoma
333 West 4th Street, Third Floor
Tulsa, Oklahoma 74103
(918) 581-7463

APPROVED AS TO CONTENT AND FORM

PP:cg

ENTERED ON DOCKET

DATE 2-1-94

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

FILED

JAN 31 1994

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

HERBERT LEWIS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 93-C-1130-E
	)	(base file)
JUDGE LA FORTUNE, et al.,	)	consolidated with
	)	No. 93-C-1131-E
Defendant.	)	No. 93-C-1132-E

ORDER

The court recently granted plaintiff leave to proceed in forma pauperis and consolidated the above numbered cases. The court will now consider whether plaintiff's complaints should be dismissed under 28 U.S.C. § 1915(d).

Plaintiff, an inmate at the Tulsa County Jail, has brought this action against the State of Oklahoma, the Tulsa County District Attorney, three county judges, the Tulsa County Sheriff's Department, and the Tulsa Police Department. Although plaintiff's allegations are rambling and incoherent, the court has tried its best to comprehend them. Plaintiff alleges that all defendants have "strayed away from civil procedure in violation of his due process, equal protection rights"; that the prosecutor will not let his wife drop the domestic charges pending against him by continuously lying to her; that Judge Perugino and Judge LaFortune "scantly reviewed his case"; and that defendants have defamed his character. Plaintiff seeks actual and punitive damages.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal

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courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the court concludes that plaintiff's allegations lack any arguable basis in either law or fact. The State of Oklahoma has eleventh amendment immunity, see Puerto Rico Aqueduct and Sewer Auth. v. Metcalf Eddy, Inc., 113 S. Ct. 684, 687-88 (1993), and the state district judges are absolutely immune from plaintiff's suit because they reviewed plaintiff's criminal case in their judicial capacity. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). Plaintiff has not alleged any involvement by the Tulsa County Sheriff's Department, the Tulsa Police Department, or any of their employees, and thus, they cannot

be liable under section 1983. See Meade v. Grubbs, 841 F.2d 1512, 1528 (10th Cir. 1990) (a defendant cannot be liable under section 1983 unless that defendant personally participated in the challenged action).

Plaintiff's general allegation that defendants "strayed away from civil procedure in violation of his due process, equal protection rights," is too vague and conclusory to be sufficient to state a claim arguably based in law or fact. See Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10th Cir. 1990). Nor does the alleged damage to plaintiff's reputation, see Paul v. Davis, 424 U.S. 693, 706-12 (1976); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1268 (10th Cir. 1989), or the prosecutor's refusal to allow plaintiff's wife to drop the charges rise to a constitutional deprivation. In any case, the state prosecutor would be entitled to absolute immunity from plaintiff's suit because his performance was "intimately associated with the judicial phase of the criminal process." Dicesare v. Stuart, No. 93-5019 (10th Cir. Dec. 20, 1993) (citing Imbler v. Pactman, 424 U.S. 409, 430 (1976)).

Accordingly, all of Plaintiff's consolidated actions [93-C-1130-E; 93-C-1131-E; and 93-C-1132-E] are hereby **dismissed** as frivolous under 28 U.S.C. § 1915(d).

SO ORDERED THIS 31st day of January, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 2-1-94

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

TOBIN DON LEMMONS,	)	
Plaintiff,	)	
vs.	)	No. 93-C-162-E
PAWNEE CO. JAIL, et al.,	)	
Defendants.	)	

FILED

JAN 31 1994

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

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Tobin Don Lemmons. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 31st day of January, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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ENTERED ON DOCKET

DATE 2-1-94

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

FILED

JAN 31 1994

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

DANIEL R. HOWELL,	)	
Plaintiff,	)	
v.	)	CASE NO. 93-C-258-B
MICHAEL SHAPIRO and KENSINGTON PRODUCTIONS	)	
Defendants.	)	

J U D G M E N T

In accordance with a jury verdict entered January 28, 1994, in favor of Plaintiff Daniel R. Howell and against Defendant Michael Shapiro, and pursuant to Plaintiff Daniel R. Howell's Motion For Default Judgment against Defendant Kensington Productions filed January 28, 1994, Judgment is entered in favor of Plaintiff Daniel R. Howell and against Defendants Michael Shapiro and Kensington Productions now Kensington Entertainment, a California corporation, jointly and severally, in the amount of $50,000.00 with interest thereon at the rate of six per cent (6%) per annum (15 O.S. §266) from September 21, 1992 until present date, and with interest on both sums from the date hereof at the rate of 3.67 % per annum until paid. Costs are assessed against the Defendants, jointly and severally, if timely applied for pursuant to Local Rule 54.1. Each party is to bear its own attorneys fees.

DATED this 31st day of January, 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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ENTERED ON DOCKET

DATE 2-1-94

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

SHIRLEY TREVATHAN NOWLIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	93-C-369-E
	)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES, DONNA SHALALA, SECRETARY,	)	
	)	
Defendant.	)	

FILED

JAN 31 1994

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

ORDER

Upon the motion of the defendant, Secretary of Health and Human Services, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Secretary for further administrative action.

Dated this 31st day of January, 1994.

JAMES O. ELLISON, CHIEF
UNITED STATES DISTRICT JUDGE

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