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DATE 3-18-94

FILED

IN THE UNITED STATES DISTRICT COURT

MAR 17 1994

FOR THE NORTHERN DISTRICT OF OKLAHOMA

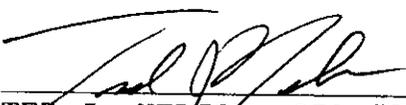
**Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT**

CAPITAL SECURITY LIFE)
 INSURANCE COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 CAROL G. VANSCHOYCK, et al)
)
 Defendants.)

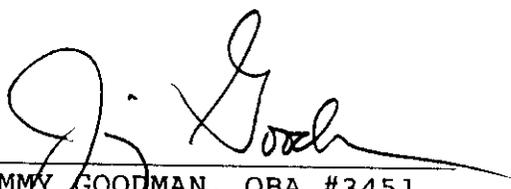
Case No. 93-C-639B

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

The plaintiff, Capital Security Life Insurance Company, by and through its attorney, Jimmy Goodman of Crowe & Dunlevy, and the defendants, Carol G. VanSchoyck, Michael J. VanSchoyck and Harold E. Goldman, by and through their attorney, Ted J. Nelson, being all parties who have appeared in this action, hereby stipulate to the dismissal without prejudice of the plaintiff's claims and action against the defendants pursuant to Fed. R. Civ. P. 41(a)(1)(ii).



 TED J. NELSON, OBA #10108



 JIMMY GOODMAN, OBA #3451

-Of the Firm-

-Of the Firm-

JOYCE AND POLLARD
 515 South Main St.
 Suite 300
 Tulsa, Oklahoma 74103
 (918) 585-2751

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 1800 Mid-America Tower
 20 North Broadway
 Oklahoma City, Oklahoma 73102
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ATTORNEYS FOR DEFENDANTS

ATTORNEYS FOR PLAINTIFF
 CAPITAL SECURITY LIFE
 INSURANCE COMPANY

DATE 3-18-94

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

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

ELLIE JORDAN,

Plaintiff-Intervenor,

vs.

WILTEL, INC., f/k/a WILLIAMS
COMMUNICATIONS GROUP, INC.,

Defendant.

FILED

MAR 18 1994

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

No. 92-C-142-E ✓

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Introduction

This is an employment discrimination case brought by the Equal Employment Opportunity Commission (EEOC) against WilTel, Inc., formerly known as Williams Telecommunications Group, and in which Ellie Jordan intervened, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Title VII).

The EEOC and Plaintiff-Intervenor Ellie Jordan claim that the Defendant WilTel, Inc., discriminated against Ellie Jordan, a former temporary employee of the Defendant in its customer service department by failing to hire her as a Customer Service Representative because of her religion, in violation of Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1).

FINDINGS OF FACT

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Title VII).

2. Venue properly lies within the jurisdiction of the United States District Court for the Northern District of Oklahoma.

3. Plaintiff, Equal Employment Opportunity Commission (the Commission, or EEOC), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is authorized to bring this action by Section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1).

4. Plaintiff-Intervenor, Ellie Jordan, is a citizen of Oklahoma and a resident of Tulsa, Oklahoma.

5. At all relevant times, Defendant, WilTel, Inc., has continuously been and is now doing business in the State of Oklahoma and the City of Tulsa, Oklahoma, and has continuously had at least fifteen employees.

6. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g), and (h) of Title VII, 42 U.S.C. §2000e-(b), (g), and (h).

7. Ellie Jordan filed a charge of religious discrimination against the Defendant with the Office of Federal Contract Compliance Programs (OFCCP) on or about November 7, 1988, which the

OFCCP referred to the Plaintiff on November 10, 1988, for investigation.

8. EEOC notified WilTel of Jordan's charge by notice dated November 30, 1988. On the notice the Defendant was informed that it must keep, pursuant to the EEOC's regulations, all records relevant to the charge until final disposition of the charge.

9. EEOC deferred Jordan's charge to the Oklahoma Human Rights Commission (OHRC) by charge transmittal dated November 30, 1988. OHRC waived investigation of the charge by transmittal dated December 1, 1988.

10. Ellie Jordan filed a perfected charge of religious discrimination against WilTel with EEOC on or about January 20, 1989.

11. EEOC notified WilTel of the perfected charge by letter dated January 27, 1989, and at that time provided WilTel a copy of the perfected charge.

12. EEOC's Oklahoma City Area Office investigated Jordan's charge and issued a determination dated April 11, 1989, finding no reasonable cause to believe that WilTel had denied Jordan a job because of her religion.

13. Jordan timely requested by letter dated April 18, 1989, that the EEOC Determinations Review Program review the determination of no reasonable cause.

14. EEOC issued to Ellie Jordan and to WilTel on or about May 9, 1989, its Notice of Acceptance of Request for Review, informing the parties to the charge that it had received and accepted for review and processing Ms. Jordan's request for review of the no

cause determination.

15. EEOC issued its Determination on Review with respect to Jordan's charge on April 5, 1991, finding reasonable cause to believe that WilTel had denied Jordan a job as a customer service representative because of her religion.

16. Ellie Jordan is a Christian, a member of the Southern Baptist denomination. She identifies herself as an "evangelical Christian."

17. Ellie Jordan was a temporary employee of WilTel from October 1987 through January 1989, and was hired through Hannah's Temporary Agency, Tulsa, Oklahoma.

18. Ellie Jordan was hired as a clerical employee in the Customer Service Department of WilTel's Tulsa facility. She also received training in, and performed job skills related to the position of Sales Representative.

19. In March 1988 six positions were "posted" for a WilTel Carrier Customer Service Representative in Tulsa. This number was later reduced to five following a re-examination of the support required in Tulsa.

20. The qualifications as stated in the job posting and a related newspaper advertisement required two to four years customer service/telephone experience, as well as organizational, communications, and interpersonal skills.

21. Three WilTel employees were involved in selection of applicants for the position: Gordon Martin, Supervisor Compensation and Benefits; Julie Hackett, Manager Customer

Services; and Clarissa Esquivel Bordelon, Supervisor Customer Services.

22. Ellie Jordan was interviewed in Tulsa on or about March 10, 1988, by Julie Hackett and separately on or about March 9, 1988, by Gordon Martin, the Defendant's Tulsa Supervisor of Human Resources.

23. At the time of Julie Hackett's March 1988 interview of Ms. Jordan, Ms. Hackett had reviewed Ms. Jordan's resume and one or more reference letters supplied for the job vacancies.

24. One of the reference letters was from Nurit ("Nickie") O. Glick, the Director of Education of a religious school, B'Nai Emunah, for whom she had worked for three months as Administrative and Personal Secretary in 1983. The letter stated, in part:

Over this time we have both been blessed with a very special communication, friendship, and working relationship that has brought us as close as any two friends can be.

Ellie portrays excellence in all areas as a human being, peer, co-worker, and subordinate; so it is unnecessary for me to go into specific details. It is apparent from this letter that we feel a deep sorrow in her leaving, and the only reason I don't recommend her highly is because I don't want to lose her. Our loss is your gain.

We wish Ellie much success and good fortune in her new position. She knows that if you aren't going to be good to her, she can come to us. She has captured the hearts of everyone with whom she has come in contact here at the Synagogue and the School, and that tells the whole story.

25. During Julie Hackett's interview of Ellie Jordan, Ms. Hackett asked Ellie Jordan questions pertaining to her purpose or

goal in life, and Ellie Jordan's answer could be paraphrased as follows: "To please the Lord; to use my talents, gifts and education to the best of my ability to serve others and represent my employer, whatever I do or wherever I am ...". To some of the other questions asked, Ms. Jordan also gave answers that included religiously oriented content.

26. At the time of Gordon Martin's interview with Ellie Jordan, Mr. Martin had not reviewed her resume and did not know what her qualifications were. The credible evidence indicates Gordon Martin played only a minor role in the decision-making process.

27. Nancy Smith, director of customer service, testified that Julie Hackett and Claire Esquivel had the hiring responsibility for the five vacancies, and that Human Resources reviewed the monies and the paperwork. Nancy Smith also testified that she relied on Julie Hackett to make the recommendations to her of who to hire and that she approved them after reviewing the hirees' application materials. She testified that she did not herself interview any of the candidates, and she did not review the paperwork of any of the candidates whom Julie Hackett did not recommend. Claire Esquivel testified she recommended hiring Ellie Jordan, but Julie Hackett would not agree. The preponderance of the evidence shows that Julie Hackett was the dominant person in the hiring of customer service representatives for the March 1988 vacancies.

28. Ellie Jordan was rejected by Julie Hackett for the position of Customer Service Representative.

29. After Ms. Esquivel continued to try to convince Ms. Hackett that Ellie Jordan should be hired as a Customer Service Representative, Ms. Hackett finally admitted to Ms. Esquivel:

I don't like Ellie because she's into all that
Jesus shit and she doesn't fit in.

30. Ms. Hackett's statement to Ms. Esquivel is direct evidence of discrimination.

31. Nancy Smith relied on Julie Hackett's recommendation of the candidates to hire, which did not include Ms. Jordan.

32. Ellie Jordan was never hired as a Customer Service Representative by the Defendant.

33. Instead the Defendant hired other persons, some of whom were less qualified than Ellie Jordan.

34. In the course of discovery in this lawsuit, WilTel learned that the reference letter submitted by Ellie Jordan, allegedly from Nurit ("Nickie") O. Glick at B'Nai Emunah was, in fact fraudulent. Testimony of Ms. Glick that she did not write the submitted letter was entirely credible. Had WilTel known that the reference letter was fraudulent, it would not have hired Jordan for a permanent position with the company.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and this controversy pursuant to 28 U.S.C. §1343(a).

2. Defendant WilTel is an "employer" within the meaning of Title VII.

3. Ellie Jordan is a member of a protected class as an

evangelical Christian who expressed her beliefs.

4. Title VII generally prohibits religious preferences in hiring. 42 U.S.C. §2000e-2(a). An applicant for employment, who is otherwise qualified, may not be denied employment on the grounds of the applicant's religious belief. 42 U.S.C. §2000e-2(a)(1).

5. EEOC and Ellie Jordan bear the burden of proving that WilTel's failure to hire Ellie Jordan was the result of intentional discrimination. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

6. Julie Hackett's statement that she did not want to hire Ellie Jordan "because she's into all that Jesus shit and she wouldn't fit in" is direct evidence of discriminatory motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

7. For direct evidence of discriminatory motive to be determinative, the Plaintiff must show that the individual who participated in the challenged employment practice or decision acted on his or her discriminatory motive. Ramsey, Id.

8. Generally, the direct evidence of discrimination must not only speak directly to the issue of discriminatory motive or intent, it must also relate to the specific employment decision in question. Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989). Remarks unrelated to the challenged employment decision do not constitute direct evidence of discrimination. Grant v. Hazelett Strip-Casting Corp., 880 F.2d

1564, 1567 (2d Cir. 1989).

9. Julie Hackett's statement clearly related to the issue of discriminatory intent, and it also related to the decision not to hire Ellie Jordan. Ms. Hackett in making the statement was explaining her reason for not hiring Ellie Jordan.

10. The Plaintiff and Plaintiff-Intervenor have proven by direct evidence, i.e., by Julie Hackett's statement that discrimination was a determining factor or substantial motivating factor in the rejection of Ellie Jordan for a Customer Service Representative position.

11. Once a plaintiff establishes by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that the adverse employment decision would have been taken even in the absence of the impermissible motivation. Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S.Ct. 1775, 1795, 104 L.Ed.2d 268 (1989) (plurality opinion); Id., 490 U.S. at 265, 109 S.Ct. at 1798-99 (O'Connor, J., concurring); Grant v. Hazelett Strip-Casting Corp., 880 F.2d at 1568; c.f., Long v. Laramie County Community College District, 840 F.2d at 748 - 749 (once discrimination is established by direct evidence, the burden shifts to the employer to prove by a preponderance of the evidence that the adverse employment action would have been taken even in the absence of the impermissible motivation.)

12. The Defendant has claimed that Ms. Jordan was not hired

because she was not qualified and thus she would not have been hired even in the absence of discrimination. The Court disagrees. The Defendant has not only failed to prove Ms. Jordan was not qualified; the evidence instead shows that she was qualified and that she was better qualified than some other persons who were hired. The Defendant has failed to prove by a preponderance of the evidence that it would have made the same decision to reject Ms. Jordan in the absence of discrimination, on the basis of her qualifications.

13. However, the discovery of the falsification of an employment application is a complete bar to any relief under a Title VII hiring claim. O'Driscoll v. Hercules, Inc., No. 92-4164, slip op., 1994 U.S. App. LEXIS 110 (10th Cir. Jan. 5, 1994); Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).

14. Under the rule announced in Summers, no relief under Title VII is available to an applicant whose fraud in connection with the application process, would have, if discovered, precluded employment.

15. In this case, Jordan submitted a fraudulent reference letter from B'Nai Emunah Schools in connection with her WilTel application for employment. WilTel did not discover the fraudulent letter until discovery in this lawsuit was underway. The evidence was undisputed that WilTel would not have hired Jordan for a permanent position had it known of the fraudulent reference letter. Accordingly, EEOC and Jordan are precluded from seeking any relief

under Title VII.

16. The Administrative Procedure Act (APA), and specifically 5 U.S.C. §§555(b) and 706, do not apply, because the EEOC's presuit activities do not fall within the parameters of the APA. Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979); Stewart v. EEOC, 611 F.2d 679 (7th Cir. 1979). Further, any failure to comply with administrative procedures is not a proper defense to this Title VII action. Courts have consistently held that the adequacy or sufficiency of the EEOC's investigation is not at issue in suits filed by the Commission. See EEOC v. Keco Industries, Inc., 748 F.2d 1097 (6th Cir. 1984).

17. The Court concludes that the doctrine of laches does not apply to the sovereign, and thus not to EEOC in this case. See, e.g., Costello v. United States, 365 U.S. 265, 281, 81 S.Ct. 534, 542, 5 L.Ed.2d 551 (1961).

18. The Court concludes that, if the doctrine of laches were available against the sovereign, the Defendant has not met its burden of showing inexcusable delay nor its burden of showing substantial prejudice. The Defendant has had available substantial evidence to defend itself. All of the application materials of those hired and of Ms. Jordan are available. All of the principal witnesses are available.

19. For the foregoing reasons the Court concludes that judgment should be entered in favor of Defendant WilTel, Inc. and against Plaintiff EEOC and Plaintiff-Intervenor Jordan on their claims for relief.

DATED this 17th day of March, 1994.

A handwritten signature in cursive script, appearing to read "James C. Ellison", written over a horizontal line.

JAMES C. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET:

DATE: 3-18-94

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 17 1994

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MELVIN MCCOY,)
)
Defendant.)

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

Civil Action No. 93-C-1073-E

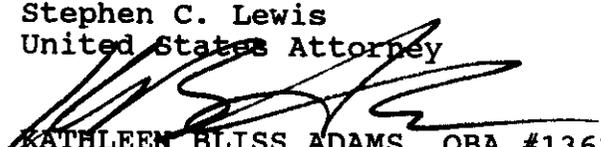
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Kathleen Bliss Adams, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 17th day of March, 1994.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 United States Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of March, 1994, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to:

Melvin McCoy
15020 S. Waco
Glenpool, OK 74033


Assistant United States Attorney

RECORDED ON BOOKLET
MAR 17 1994

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

FILED

MOUNTAIN STATES FINANCIAL)
RESOURCES, CORP.,)
)
Plaintiff,)
)
vs.)
)
BARTLESVILLE MARINELAND, an)
Oklahoma corporation,)
)
Defendants.)

MAR 15 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-928-C ✓

ORDER OF DISMISSAL WITH PREJUDICE

Now on the 14 day of March, 1994 pursuant to the Stipulated Dismissal with Prejudice filed herein by the Plaintiff and Defendants, IT IS ORDERED, ADJUDGED AND DECREED that the cause of action filed herein be dismissed with prejudice to refileing. The parties shall each bear their own attorney's fees and costs.

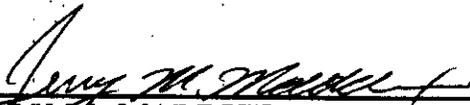

U.S. DISTRICT JUDGE

APPROVED AS TO FORM:



BRUCE F. KLEIN, OBA #11389
MARK J. PEREGRIN, OBA #12438
Attorneys for Plaintiff
205 N.W. 63rd, Suite 160
Oklahoma City, Oklahoma 73116
(405) 848-8842

THIS IS AN ORIGINAL SIGNATURE PAGE FOR THE FOREGOING ORDER OF DISMISSAL WITH PREJUDICE IN THE CASE STYLED MOUNTAIN STATES FINANCIAL RESOURCES, CORP. V. BARTLESVILLE MARINE LAND, AN OKLAHOMA CORPORATION, ET AL., CASE NO. 92-C-928-C, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



JERRY M. MADDUX
SELBY, CONNOR, MADDUX & JANER
Attorney for Defendants
416 E. 5th St., P.O. Drawer Z
Bartlesville, OK 74005-5025

Washburnhill.org

ENTERED ON DOCKET

DATE 3/17/94

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAR 15 1994
MAR 15 1994
MAR 15 1994

ORIGINAL

CREDIT SERVICE, INC.,)

Plaintiff,)

vs.)

DANNY ALLEMBGAUGH, and)
MILTON DALE ALLEMBGAUGH,)

Defendants, and)

Third-Party Plaintiffs,)

vs.)

JIM WARNER FORD CO. and)
HEARTLAND FEDERAL SAVINGS)
AND LOAN ASSOCIATION,)

Third Party Defendants.)

Pawnee County District
Court Case No. CS-92-188

No. 93-C-996-B

NOTICE OF
DISMISSAL WITHOUT PREJUDICE
AS TO DEFENDANT, JIM WARNER FORD CO.

COMES NOW the Third Party Plaintiffs, DANNY ALLEMBGAUGH and MILTON DALE ALLEMBGAUGH, and dismisses without prejudice its cause of action against JIM WARNER FORD CO., with costs to Plaintiffs.

DANNY ALLEMBGAUGH and
MILTON DALE ALLEMBGAUGH

By Charles D. Arney
Charles D. Arney, OBA #332
Attorney for Third Party
Plaintiffs
P. O. Box 570
707 North Broadway
Cleveland, OK 74020
(918) 358-3210

CHARLES D. ARNEY
ARNEY AT LAW
707 NORTH BROADWAY
DRAWER 570
CLEVELAND, OK 74020
(918) 358-3210

5

CERTIFICATE OF MAILING

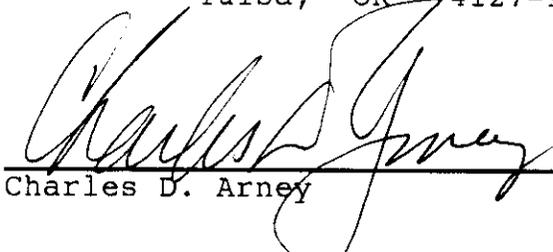
I, Charles D. Arney, hereby certify that on the 11 day of March, 1994, I mailed a true and correct copy of the above and foregoing instrument by regular mail, with postage prepaid thereon, to:

Dawn Zellner
Gingras & Zellner, P.C.
Attorney For Credit
Service, Inc.
308 NW 13th, Suite 200
Oklahoma City, OK 73103

Commercial Federal Bank
4501 Dodge Street
Omaha, NB 68132

Michele L. Schultz
Attorney For The Federal
Deposit Insurance
Corporation
3800 First National Tower
15 East Fifth Street
Tulsa, OK 74103-4309

Robert E. Martin
Attorney For Jim Warner
Ford Co.
717 S. Houston, Suite 401
Tulsa, OK 74127-9007



Charles D. Arney

\\wp51\civ\palembau.dwo

DATE 3/17/94

FILED

MAR 15 1994

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

PAWNEE COUNTY DISTRICT COURT

CREDIT SERVICE, INC.,)
)
Plaintiff,)
)
vs.)
)
DANNY ALLE MBAUGH, and)
MILTON DALE ALLE MBAUGH,)
)
Defendants, and)
)
Third-Party Plaintiffs,)
)
vs.)
)
JIM WARNER FORD CO. and)
HEARTLAND FEDERAL SAVINGS)
AND LOAN ASSOCIATION,)
)
Third Party Defendants.)

Pawnee County District
Court Case No. CS-92-188

No. 93-C-996-B

ORIGINAL

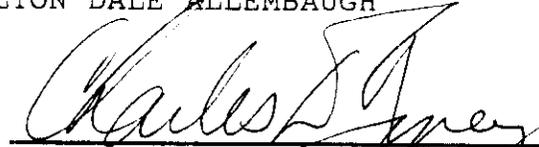
Notice of

DISMISSAL WITH PREJUDICE

COMES NOW DANNY ALLE MBAUGH and MILTON DALE ALLE MBAUGH, as Defendants and Third Party Plaintiffs, as to the following parties, CREDIT SERVICE, INC., Plaintiff, and HEARTLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, Third Party Defendant, and hereby in consideration for the General Release, Accord and Satisfaction granted in behalf of CREDIT SERVICE, INC., as a Releasor, HEARTLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, as Releasor, and COMMERCIAL FEDERAL BANK of Omaha, Nebraska, as Releasor, does hereby dismiss with prejudice its cause of action against the above described entities. This Release does not extend to the Third Party Defendant, JIM WARNER FORD CO., who is not affected by this Dismissal With Prejudice.

DANNY ALLEMBAUGH and
MILTON DALE ALLEMBAUGH

By



Charles D. Arney, OBA #332
Attorney for Defendants
P. O. Box 570
707 North Broadway
Cleveland, OK 74020
(918) 358-3210

CERTIFICATE OF MAILING

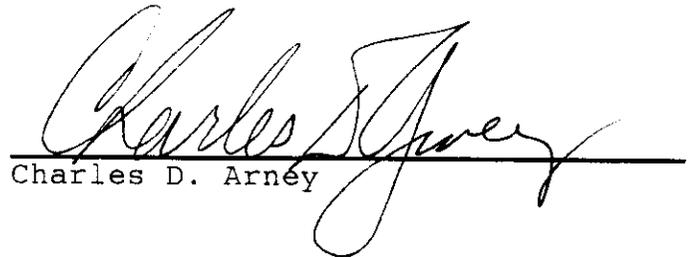
I, Charles D. Arney, hereby certify that on the 11 day of
March, 1994, I mailed a true and correct copy of the above
and foregoing instrument by regular mail, with postage prepaid
thereon, to:

Dawn Zellner
Gingras & Zellner, P.C.
Attorney For Credit
Service, Inc.
308 NW 13th, Suite 200
Oklahoma City, OK 73103

Commercial Federal Bank
4501 Dodge Street
Omaha, NB 68132

Michele L. Schultz
Attorney For The Federal
Deposit Insurance
Corporation
3800 First National Tower
15 East Fifth Street
Tulsa, OK 74103-4309

Robert E. Martin
Attorney For Jim Warner
Ford Co.
717 S. Houston, Suite 401
Tulsa, OK 74127-9007



Charles D. Arney

ENTERED CLERK'S OFFICE

DATE MAR 17 1994

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

FILED

RESOLUTION TRUST CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 LOUIS W. GRANT, JR.; et al.,)
)
 Defendants.)

MAR 15 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
No. 92-C-1043-W

ORDER

This matter comes before the Court upon the Joint Stipulation for Dismissal filed by Resolution Trust Corporation and Defendant David Moffett. The Court, having fully considered the matter in all premises, finds that such stipulation is valid, and should be granted.

IT IS THEREFORE ORDERED, that the claims of the Plaintiff Resolution Trust Corporation against the Defendant David Moffett are hereby dismissed with prejudice.

ENTERED this _____ day of March, 1994.



LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAR 17 1994

FILED
MAR 15 1994

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

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

RONDA FLYNN,)
)
 Plaintiff,)
)
 vs.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF OTTAWA COUNTY, OKLAHOMA;)
 STATE OF OKLAHOMA; AND CITY)
 OF MIAMI, OKLAHOMA,)
)
 Defendants.)

Case No. 93-C-1139-B ✓

ORDER

Now before the Court for its consideration is Defendant Board of County Commissioners of Ottawa County, Oklahoma's Motion to Dismiss Plaintiff's State Pendent Law Tort Claim and Punitive Damages Claim (Docket entry #12) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff brings a Title VII¹ case alleging that during 1992, she was employed by Defendant in the Ottawa County multi-jurisdictional task force; and while working with the task force, Plaintiff alleges that she was sexually harassed by her immediate supervisor, as well as various other employees also employed by the State. Plaintiff further alleges that "[t]he termination of Plaintiff's employment with the Defendant[] was a result of the sexual harassment." Plaintiff's Complaint, filed Dec. 23, 1993, para. VI, p.2.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that

¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

82

Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to Dismiss under Fed.R.Civ.P. 12(b) admit all well pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969).

Defendant claims that Plaintiff's State Tort Claim action should be dismissed for failure to comply with the provisions of the Oklahoma Governmental Tort Claims Act.² Section 156 (A) of the Act provides that a person having a claim against the state or political subdivision within the scope of the act must first present a claim to the state or political subdivision for appropriate relief including the award of money damages. Furthermore, a person may not initiate a suit against the state or a political subdivision unless and until the claim has been denied either in whole or in part. Okla.Stat. tit. 51, § 157 (A) (1988). Plaintiff never filed a tort claim with the County Clerk as required by the act, and thus, the failure to comply with the act requires dismissal of Plaintiff's pendant state tort claim. See Willborn v. City of Tulsa, 721 P.2d 803 (Okla. 1986).

Defendant also contends that Plaintiff's claim for punitive damages is barred by the terms of the Civil Rights Act of 1991. Title 42 U.S.C. § 1981a(b)(1) specifically states:

"A Complaining party may recover punitive damages

² Okla.Stat. tit. 51, § 151 et seq. (1988 & Supp.).

under this section against a respondent (other than a government, government agency or political subdivision) ... " (emphasis added).

The terms of the statute could not be more clear. Accordingly, Plaintiff's claims for punitive damages are dismissed.

For the reasons set forth above, Defendant Board of County Commissioners of Ottawa County, Oklahoma's Motion to Dismiss Plaintiff's state law tort cause of action and claim for punitive damages is GRANTED.

IT IS SO ORDERED this 15th day of March, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
MAR 17 1994
DATE

FILED
MAR 16 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

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

FRED MARVEL and ANGELA MARVEL)
)
 Plaintiffs,)
)
 vs.)
)
 FINANCIAL RATES, INC., AMERICAN)
 GENERAL FINANCIAL CENTER THRIFT)
 COMPANY, and AMERICAN GENERAL)
 FINANCE COMPANY,)
)
 Defendants.)

Case No. 92-C-206-B

O R D E R

This matter comes on for consideration of Plaintiffs' Motion To Reconsider (docket entry #156) wherein Plaintiffs allege they timely filed an objection to the Magistrate Judge's Report and Recommendation. The Report, recommending that Plaintiffs' Motion To Proceed as a Class as to Second Cause of Action be denied, was affirmed by this Court, on February 24, 1994, for failure of the Plaintiffs to timely filing an exception or objection thereto.

Plaintiffs correctly allege the Report stated:

"Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order."

The Magistrate Judge's caveat, read in light of Rule 6, F.R.Civ.P. (a) which provides, in part: "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." and (e) which provides "Whenever a party has the right or is required to do some act or take some proceedings within a

58

prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.", creates an uncertainty. Since the Magistrate Judge's Report was mailed to Plaintiffs' attorney (see docket sheet) paragraph (e) automatically adds 3 days, for a total of 13 days. Arguably this addition takes the matter beyond the reach of paragraph (a), i.e. time periods of 11 days or less wherein Saturdays, Sundays and holidays are excluded.

Contrawise, if paragraph (a) is applied initially, thereby eliminating weekends and holidays, a party may have 10 working days plus three "mail added" working days to file a response.

In this matter, by at least one computation, Plaintiffs' objection was timely.¹ The Court will therefore consider the objection to the Magistrate Judge's Report and Recommendation on the merits.

Plaintiffs' original Complaint alleged eight claims among which was their Second Cause of Action wherein they sought damages for breach of contract. The Plaintiffs alleged in their second claim that they and approximately 30 more Oklahoma individuals

¹ The Report was filed February 2, 1994, (a Wednesday) requiring Plaintiffs to object within ten days from receipt thereof. By applying Rule 6 (a) (because the response time is less than 11 days) there is eliminated all Saturdays, Sundays and Holidays. Because the Report was mailed to Plaintiffs (see docket sheet) three days are added to Plaintiffs' allowable time. Since Plaintiffs need only count non-holiday weekdays they have 13 "working days" to file their objection. Under the rules the first day is not counted but the last day is. Plaintiffs had the following 13 working days within which to file any objection: February 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18 and 22 (February 21st was a legal holiday, President's Day). Plaintiffs timely filed their objection on February 22, 1994.

purchased Certificates of Deposit (CD) from Defendants which turned out to be Thrift Investment Certificates (TIC) which were subject to cancellation by Defendants upon thirty days notice.²

Approximately one year after the suit was initiated Plaintiffs sought class certification for their First, Second, Third, Sixth and Seventh claims. Plaintiffs' motions to proceed as a class on the Third, Sixth and Seventh claims were denied due to the Court's rulings on dispositive motions.³

The Magistrate Judge, applying Rule 23(a), F.R.Civ.P., determined, after examining the prerequisites to a class action (numerosity, commonality and typicality), that Plaintiffs had not met the burden of showing "under a strict burden of proof, that all of the requirements of 23(a) are clearly met"., citing MacArthur Syvester Rex, et al, v. Charles Owens et al, 585 F.2d 432 (10th Cir. 1978). The Magistrate Judge, in recommending that Plaintiffs Motion to Proceed as a Class as to Second Cause of Action be denied, concluded that serious questions of commonality and typicality exist.

The Court agrees with the Magistrate Judge's conclusions as to commonality and typicality. Moreover, the Court is not convinced

² Certificates of Deposit typically are for a contractually fixed interest period, i.e. one year, two years, etc..

³ The Court entered orders dismissing Plaintiffs' Third, Fourth, Sixth and Seventh claims against Defendant American General Finance, Inc. (AGFI) and granted partial summary judgment in favor of Defendant American General Financial Center Thrift Company (AGFCTC) on Plaintiffs' Fourth, Sixth and Seventh causes of action.

the prerequisite of numerosity has been adequately met. The Court concludes that the putative class (32) is not so numerous that joinder of all members is impracticable. Courts in the Tenth Circuit have refused to certify classes larger than the class proposed by Plaintiffs. Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir.1975) (numerosity requirement failed with 37 members of subclass); Zinser v. Continental Grain Co., 660 F.2d 754 (10th Cir.1981) (certification denied where three classes had 366 members); Independent School Dist. No. 89 v. Bolain Equipment, Inc., 90 F.R.D. 245 (W.D.1980) (certification denied with only 41 apparent class members).⁴

The Court concludes the Magistrate Judge's Report and Recommendation should be and the same is hereby ADOPTED and AFFIRMED. Plaintiffs' Objection thereto is, accordingly, DENIED.

IT IS SO ORDERED this 16th day of March, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ The Magistrate Judge noted in his Report that certification has been granted with as few as 17 to 20 proposed class members but that such class actions have been typically allowed in those instances wherein the plaintiffs sought primarily injunctive and not monetary relief. MacArthur Syvester Rex, supra, citing Arkansas Educational Ass'n v. Board of Education, 446 F.2d 763 (8th Cir.1971). Plaintiffs herein seek primarily monetary relief.

ENTERED ON DOCKET

DATE 3/17/94

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

FILED

MAR 15 1994

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

Case No. 91-C-447-B

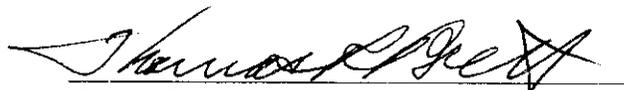
LOUISE LESTRO, SURVIVING)
SPOUSE OF JOSE LESTRO,)
DECEASED,)
)
Plaintiff,)
)
)
SAFEWAY STORES, INC.,)
)
)
Defendant.)

ORDER OF DISMISSAL

This matter having come before the Court on the joint motion of plaintiff Louise Lestro, Surviving Spouse of Jose Lestro, Deceased, and defendant Safeway Stores, Inc., to dismiss this action with prejudice, and the Court being fully advised FINDS a good cause exists for granting the motion and that all questions and controversies have been compromised and settled.

Therefore, the Court ORDERS AND DIRECTS that this action and all claims asserted therein be and they hereby are dismissed with prejudice, with each party to bear his, her, or its costs and attorneys fees previously incurred, with plaintiff to bear any remaining court costs.

DATED: 3-15, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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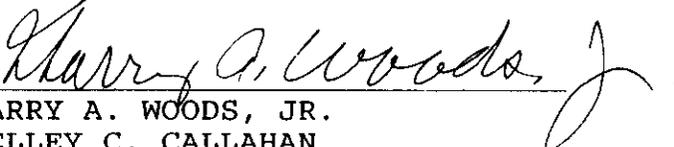
APPROVED:

TONY LAIZURE

Of the Firm

STIPE, GOSSETT, STIPE, HARPER,
MCCUNE and PARKS
2417 East Skelly Dr.
Oliver Building
Tulsa, OK 74105
(918) 749-0749

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KELLEY C. CALLAHAN

Of the Firm
CROWE & DUNLEVY
1800 Mid-America Tower
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Oklahoma City, Oklahoma 73102
(405) 235-7700

COUNSEL FOR DEFENDANT
SAFEWAY STORES, INC.,

DATE 3/17/94

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

FRED MARVEL, ET AL)
Plaintiffs,)
vs.)
AMERICAN GENERAL FINANCIAL)
CENTER THRIFT CO., ET AL)
Defendants)

92-C-0206-B

FILED

MAR 16 1994

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

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE REGARDING PLAINTIFF'S MOTION TO PROCEED AS CLASS AS TO FIRST CAUSE OF ACTION

This report and recommendation addresses Plaintiff's Motion to Proceed as a Class as to First Cause of Action (docket #97), filed February 16, 1993.

The First "Cause of Action" claims "that the Defendants practiced a deceit and fraud on the public or the particular persons constituting the Oklahoma class, ie, the residents of Oklahoma similarly situated with the named Plaintiffs, to alter their positions to their injury or risk, in violation of 76 OS Sections 1-4." Plaintiffs' Motion to Proceed as a Class as to First Cause of Action, at p.2. The Motion is discussed below.

Plaintiff's Motion to Proceed As A Class As To First Cause of Action

Plaintiff's "First Cause of Action" seeks damages for "deceit and fraud under 76 OS Sections 1-4" alleging that Defendant "...intended to and did deceive and work a fraud upon the named Plaintiffs and the other members of the proposed Oklahoma class, each

59

of whom was misled thereby... (Motion to Proceed as a Class as to First Cause of Action, at p. 6).

Plaintiff cites the following cogent facts giving rise to their claim:

4. On December 18, 1990, based upon the information contained in 100 Highest Yields, Fred Marvel called 1-800-621-797 in California. Fred Marvel talked to Brenda Guy, and told her that he had read in 100 Highest Yields that American General Financial Center Thrift Company was paying the above rate of interest on 5-year CD's of \$25,000.00 or more, and that he wanted to verify the rate and lock it in. Brenda Guy told Fred Marvel that the rate on that date was 8.57% and 8.84 annual yield. Fred Marvel stated that he would send, on the same day, a check for a \$50,000.00 5-year CD at the quoted rate and Brenda Guy agreed to lock in the rate she had quoted. Fred Marvel sent Brenda Guy the December 18, 1990 letter and \$50,000.00 check as above referred to, by overnight delivery from Tulsa, Oklahoma to San Francisco, California. The check was cashed by American General Financial Center Thrift Company on or about December 20, 1990 and paid by the Brookside State Bank in Tulsa, Oklahoma in regular course. *Plaintiffs' Response to Motion to Dismiss* (docket #78), at pp. 7-8).

Any class action analysis must, of course, begin first with Rule 23, *Federal Rules of Civil Procedure*. Rule 23(a) requires the following prerequisites to a class action:

One or more members of a class may sue...as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.¹

Rule 23(b) sets forth criteria by which to evaluate whether a class action is "maintainable":

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

¹ These "prerequisites" have been referred to as "numerosity", "commonality", "typicality" and "adequacy". See e.g., *Truckway, Inc. et al v. General Electric et al*, 1992 U.S. Dist. LEXIS 4054 (E.D. Pa. 1992); *O'Neill et al v. City of Philadelphia, et al*, 1992 U.S. Dist. LEXIS 16594 (E.D. Pa. 1992).

- (1) the prosecution of separate actions...would create risk of
 - (A) inconsistent or varying adjudications...which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impede or impair their ability to protect their interests;...

- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient resolution of the controversy...(Emphasis added.)

In applying these standards, courts have held that the requirements of Rule 23(a) are to be liberally construed. *Williams et al v. City of Chicago*, 1992 U.S. Dist. LEXIS 7650 (N.D. Ill. 1992), citing *Harris v. General Development Corp.*, 127 F.R.D. 655, 658 (N.D. Ill. 1989). Whether the named plaintiffs adequately define a class must nevertheless be carefully evaluated, as once the class is certified and the controversy is litigated, the outcome is *res judicata* as to all unnamed class members. *Harris v. General Development Corp.*, 127 F.R.D. 655, 658 (N.D. Ill. 1989). Plaintiffs bear the burden of establishing that all of the requirements of Rule 23(a) are met. *General Telephone Patterson v. General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). Furthermore, "[a] party seeking class certification must demonstrate, under a strict burden of proof, that all of the requirements of 23(a) are clearly met. *MacArthur Syvester Rex, et al. v. Charles Owens et al.*, 585 F.2d 432 (10th Cir. 1978).

Applying the requirements of Rule 23 to the case at bar yields the following.

a. Numerosity

Here, the proposed class is composed of thirty-two (32) Oklahoma residents (see Motion, at p.2). Specifically, Plaintiff contends that Defendant "...intended to and did

deceive and work a fraud upon the named Plaintiffs and the other members of the proposed Oklahoma class, each of whom was misled thereby. This major question of law is common to each of the Oklahoma residents comprising the proposed...Class." (*Id.*)

"Class actions have been deemed viable in instances where as few as 17 to 20 persons are identified as the class." *MacArthur Syvester Rex, et al. v. Charles Owens et al.*, 585 F.2d 432 (10th Cir. 1978), citing, *Arkansas Educational Ass'n v. Board of Education*, 446 F.2d 763 (8th Cir. 1971). However, such actions have been allowed principally in the face of actions seeking primarily injunctive and not monetary relief.

The ultimate question is whether the impracticability of the numbers of potential *other* legal actions mandates formation of a class in the *instant* case. As the court in *Rex, supra*, noted "...impracticability is dependent not on any arbitrary limit but upon the circumstances surrounding the case." *MacArthur Syvester Rex, et al. v. Charles Owens et al.*, 585 F.2d 432 (10th Cir. 1978), citing, *Forbush v. Wallace*, 341 F.Supp. 217 220 (M.D.Ala. 1971).

In this case, Plaintiff identifies 32 proposed members of the class -- Oklahoma residents who purchased Thrift Investment Certificates from Defendant. The depositions of *Melanie West, Arthur McMellon, Thomas Claydon, Rodney Delano and Greg Raymer* are attached by Plaintiffs as exemplary of persons within the class who, like Plaintiffs, purchased Thrift Investment Certificates thinking they had purchased Certificates of Deposit. Review of each of the depositions reveals a different, though admittedly similar, set of facts from that of Plaintiffs. One person watched and got information from a television program (Greg Raymer); another tracked interest rates across the country using

the Wall Street Journal (Rodney Delano); another got information from both the Wall Street Journal and Baron's Weekly (Thomas Claydon); while yet another worked for a company and used a "rate service" to obtain information (Melanie West).

Each of these persons relate similar scenarios in that they each thought they were buying a Certificate of Deposit; and yet each relate different facts comprising the manner in which they learned of Defendant's rate.

Injunctive relief is not sought in this case and the numbers of affected persons is not numerically great. Accordingly, the undersigned finds that as regards numerosity, Plaintiffs have not demonstrated that thirty-two (32) people is so numerous as to make joinder impracticable. *See also, Monarch Asphalt Sales Co., v. Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975); and *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981), both courts denying certification to larger classes, where as here, the primary sought-after recovery is monetary.

b. Commonality and Typicality

Rule 23(a) requires "questions of law or fact common to the class." Not every question of fact and law need be common to every member of the class, yet it is clear that common questions must predominate. *O'Neill et al. v. City of Philadelphia, et al.*, 1992 U.S. Dist. LEXIS 16594 (E.D.Pa. 1992). Here, "commonality" merges with "typicality".

"Typicality" requires "a finding that the claims or defenses of the representative parties are *typical* of the claims or defenses of the class." (Emphasis added.) *Id.* Plaintiffs' claims are "typical" of the class they seek to represent if their claims arise from "the same event or course of conduct that gives rise to the claims of other class members and is based

on the same legal theory." *O'Neill et al. v. City of Philadelphia, et al.*, 1992 U.S. Dist. LEXIS 16594 (E.D.Pa. 1992), citing *Strain v. Nutri/System, Inc.*, 1990 U.S. Dist. LEXIS 12031 at 11 (E.D.Pa. 1990).

The essence of the claim brought by Plaintiff one for fraud and deceit, straightforward in its expression:

"There is a duty to disclose, when equity and good conscience would require disclosure. There is no doubt that under the above described circumstances, the Defendant American General Financial Center Thrift Company was under a duty, before they took the money...for the CD, to fully inform Oklahoma residents who ordered a CD...that American General...could not offer for sale or advertise for sale, permit others to advertise for sale or sell a certificate of deposit or CD, but that they were authorized by law to sell thrift investment certificates or TIC but that it had a call provision which could cut off interest owing to the depositor before the maturity date...Instead they suppressed the truth and covered the call provision by hiding it in the fine print of the copy of the TIC furnished to the customer, and by putting out a cleverly planned 3" by 6" bright yellow "Disclosure for Full Paid Certificate" form which stated that interest would accrue daily until maturity. The above...was a deceit and a fraud... (*Plaintiffs' Motion to Proceed as a Class as to First Cause of Action*, at pp. 5-6).

Plaintiffs' depositions show, each person purchased their TIC from Defendants by following a different pathway to the purchase, hence the *facts* of the individual transactions vary. Thus, while a common question of law *may* arise, that question is entirely fact-dependent - - i.e., at what point was a "misrepresentation" made, and was there, in fact, a failure to disclose -- two questions which are necessarily particular to each prospective claimant.

Furthermore, following the same analysis (hence, the merger of "commonality" and "typicality") it cannot be said that Plaintiffs' claims arise from "the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." Rather, Defendant maintained a telephone line and mailing address,

disseminating information to a variety of sources about its investment product. The path taken by each of the investors necessarily produces a different set of circumstances than those of Plaintiff and, therefore, cannot be said to arise of the "same event" or "course of conduct". Indeed, it is entirely possible that some prospective class members bargained for just what they got -- that is, a Thrift Investment Certificate.

Thus, while discovery shows that thirty-two Oklahomans purchased investment products, i.e., Thrift Investment Certificates, during the stated period, the court cannot *assume* that such purchases were necessarily as a result of a fraud or deceit. In this regard, the production of nine depositions, while persuasive, does little more than highlight the fact that each investor's circumstances are different from those of his or her fellow investors.

c. Conclusion

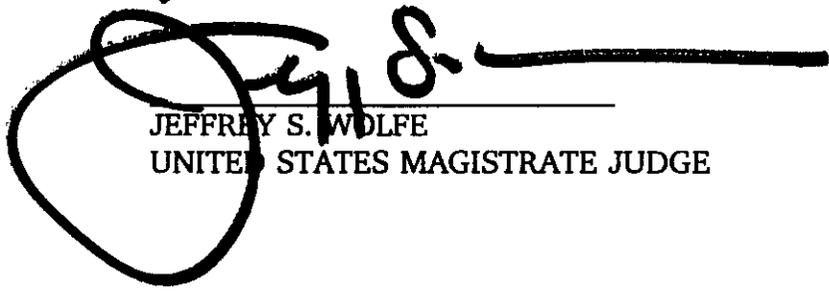
Plaintiff bears the burden of showing "under a strict burden of proof, that all of the requirements of 23(a) are clearly met." *MacArthur Syvester Rex, et al. v. Charles Owens et al.*, 585 F.2d 432 (10th Cir. 1978). Here, while Plaintiffs have been permitted discovery to unearth the facts necessary to proceed with this Motion, the undersigned finds that they have not met the required burden. While questions of numerosity exist and there is real question whether thirty-two (32) claims are sufficiently numerous so as to render joinder impracticable, serious additional questions of "commonality" and "typicality" exist -- essentially so, by reason of the differences in the way individual transactions were consummated.

This being the case, the undersigned recommends that Plaintiffs' Motion to Proceed

as a Class as to First Cause of Action (docket #97), filed February 16, 1993, be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of service of this Report and Recommendation. Failure to file objections within the specified time waives the right to appeal the District Court's order.²

Dated this 16th day of March, 1994.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

² See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

ENTERED ON BOOKET

DATE 3/17/94

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 15 1994

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

TIFFANY P. HOUSE,

Plaintiff,

vs.

BARTLETT-COLLINS COMPANY,
a Division of Indiana Glass
Corporation,

Defendant.

Case No. 94-C-49B

AGREED ORDER OF REMAND

The Plaintiff, Tiffany House, and the Defendant, Bartlett-Collins Company, hereby agree and stipulate that this case be remanded to the Oklahoma District Court for Creek County, Drumright Division. Plaintiff and Defendant agree to bear their own costs and fees associated with the removal and remand.

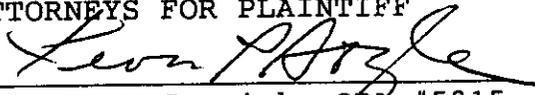
DATED this 15th day of March, 1994.

THOMAS R. BRETT

Judge of the United States
District Court for the Northern
District of Oklahoma



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John L. Harlan, OBA #3861
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ATTORNEYS FOR PLAINTIFF



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(918) 581-5500
ATTORNEYS FOR DEFENDANT

DATE 3-16-94

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

EL-O-MATIC USA, INC.,)
 a Delaware corporation,)
)
 Plaintiff,)
)
 vs.)
)
 INTEGRAL SOLUTIONS, INC.,)
 an Oklahoma corporation, and)
 WALTER A. JOHNSON, THE INTERNAL)
 REVENUE SERVICE OF THE UNITED)
 STATES OF AMERICA, and BROOKSIDE)
 STATE BANK, a National Banking Association,)
)
 Defendants.)

Case No. 93-C-0126-E

F I L E D
 MAR 16 1994
 Richard H. Lawrence, Clerk
 U. S. DISTRICT COURT
 NORTHERN DISTRICT OF OKLAHOMA

**ORDER GRANTING MOTION OF ALL REMAINING
PARTIES FOR DISMISSAL OF ACTION WITHOUT PREJUDICE**

UPON the motion of all remaining parties to this action to dismiss the action without prejudice, and good cause having been shown, the motion is hereby granted. This action is dismissed without prejudice. All parties are to bear their own costs and attorneys' fees.

IT IS SO ORDERED this 15 day of March, 1994.

S/ JAMES O. ELISON

 United States Magistrate Judge

ENTERED ON DOCKET

DATE 3-16-94

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

FILED

MAR 15 1994

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

THRIFTY RENT-A-CAR SYSTEMS, INC.,)
 an Oklahoma corporation,)
)
 Plaintiff,)
)
 vs.)
)
 E.B.F., INC., a foreign)
 corporation; BERNARD J. EBBERS,)
 an individual; and PATRICK I.)
 FLINN, an individual,)
)
 Defendants.)

CASE NO. 93-C-1033E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Thrifty Rent-A-Car System, Inc., and the Defendants, E.B.F., Inc. and Bernard J. Ebbers, and stipulate, pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, to the dismissal with prejudice of the Complaint, insofar as it seeks relief against these Defendants, and of the Counterclaim filed by these Defendants.

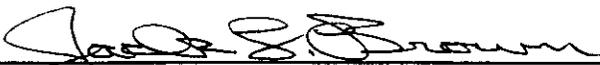
Respectfully submitted,

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

By: Richard A. Paschal
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 Constance L. Young, OBA #14537
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 (918) 599-9400

ATTORNEYS FOR PLAINTIFF,
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PATTON, BROWN

By: 

Jack L. Brown, OBA #10742
Frank R. Patton, Jr., OBA #6961
Tracy W. Robinett, OBA #13114
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Co-Counsel

Charles P. Adams, Jr.
Brunini, Grantham, Grower & Hews
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(601) 948-3101

ATTORNEYS FOR DEFENDANTS E.B.F., INC.
AND BERNARD J. EBBERS

ENTERED ON DOCKET

DATE 3-16-94

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

PREFERRED RISK MUTUAL INSURANCE)
COMPANY,)

Plaintiff,)

vs.)

LESTER G. ROPP, RALPH A. MYERS,)
WINSLOW & ASSOCIATES, INC.,)
TRAVELER'S INSURANCE COMPANIES,)
and FIRST PRESBYTERIAN CHURCH)
OF BARTLESVILLE, OKLAHOMA,)

Defendants.)

No. 94-C-40-E

FILED

MAR 15 1994

Richard H. Howard, Clerk
U.S. District Court
Northern District of Oklahoma

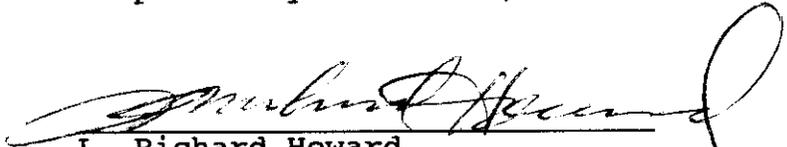
STIPULATION OF DISMISSAL

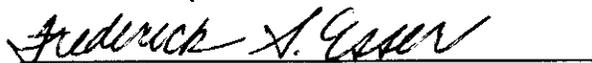
COMES NOW Preferred Risk Mutual Insurance Company, by and through its attorney of record, L. Richard Howard of Williams, Baker & Howard, P.A., Lester G. Ropp, by and through his attorney of record, Frederick S. Esser, and Ralph A. Myers and Winslow & Associates, Inc., by and through their attorney of record, Scott D. Cannon, and show to the Court that Lester G. Ropp, Ralph A. Myers, and Winslow & Associates, Inc. are the Defendants over which service of process has been obtained herein and that together with the Plaintiff, Preferred Risk Mutual Insurance Company, are all of the parties subject to jurisdiction of the Court at this time.

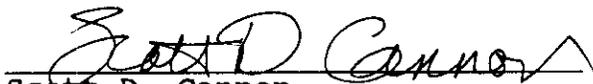
That all issues existing between the Plaintiff and the Defendants have been compromised and settled by private agreement.

The parties hereto stipulate that this cause may be dismissed by the Court.

Respectfully submitted,


L. Richard Howard
Attorney for Plaintiff


Frederick S. Esser
Attorney for Defendant Ropp


Scott D. Cannon
Attorney for Defendants
Ralph A. Myers and Winslow & Assoc.

ENTERED ON DOCKET

DATE 3-16-94

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

LOUIS E. CROSSLEY and)
ALYCE I. CROSSLEY,)

Plaintiffs,)

vs.)

SEARS, ROEBUCK AND CO. and)
WHIRLPOOL CORPORATION,)

Defendant.)

Case No. 93-C-323E

FILED

MAR 15 1994

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

The Plaintiffs and Defendants hereby stipulate to the
dismissal of this cause of action with prejudice to refileing.

Respectfully submitted,

SELMAN & STAUFFER, INC.

By: Paul B. Harmon
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918/592-7000

ATTORNEYS FOR PLAINTIFFS

and

FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS

By: J. David Mustain
J. David Mustain, OBA #13132
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Tulsa, Oklahoma 74103-4409
(918) 583-7129

ATTORNEYS FOR DEFENDANTS

MAR 10 1994

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

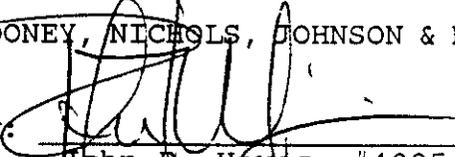
MAX TRUE PLASTERING COMPANY,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES FIDELITY AND)
GUARANTY COMPANY,)
)
Defendant/)
Third-Party Plaintiff,)
)
vs.)
)
NORTH AMERICAN INSURANCE)
AGENCY, INC.,)
)
Third-Party Defendant.)

No. 93-C-781-B

FILED
MAR 15 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

DISMISSAL WITHOUT PREJUDICE

Defendant/Third-Party Plaintiff, United States Fidelity & Guaranty Company (USF&G), hereby dismisses its third-party petition against North American Insurance Agency, Inc., without prejudice to refiling the same.

LOONEY, NICHOLS, JOHNSON & HAYES
By: 
John B. Hayes, #4005
Robert L. Magrini, #12385
528 N.W. 12th, P.O. Box 468
Oklahoma City, OK 73101
(405) 235-7641

Attorneys for Defendant,
United States Fidelity &
Guaranty Company

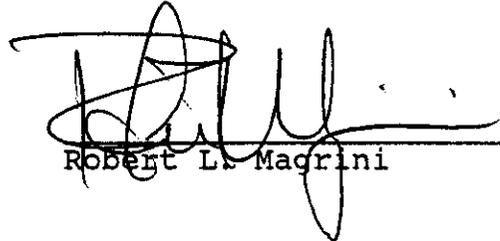
CERTIFICATE OF SERVICE

On the 10th day of March, 1994, a copy of the foregoing was mailed, postage prepaid to:

Jerry Reed
616 South Main, Suite 214
Tulsa, OK 74119

Joseph R. Farris
Jody R. Nathan
Feldman, Hall, Franden,
Woodard & Farris
525 South Main, Suite 1400
Tulsa, OK 74103-4409

Attorneys for Plaintiff,
Max True Plastering Company


Robert L. Magrini

lag

prejudice, the Plaintiffs reserving the right to proceed against the other Defendants.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

**Gary L. Richardson, OBA #7547
Fred E. Stoops, OBA #8666
RICHARDSON, STOOPS & KEATING
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674**

Attorneys for Plaintiffs

csg F:\USR\CSG\WP\FRED\PETERSON\DISMISS.ORD

DATE MAR 16 1994

MAR 14 1994

IN THE DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROL M. HENDRIX,)
)
 Plaintiff,)
)
 vs.)
)
 TOWN OF OOLOGAH, OKLAHOMA,)
 a municipal corporation,)
)
 Defendant.)

Case No. 93-C-1060-B

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Town of Oologah are hereby dismissed with prejudice.



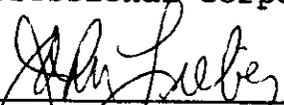
CAROL M. HENDRIX



JOE L. WHITE, OBA #10521
1718 West Broadway
Collinsville, Oklahoma 74021
(918) 371-2531

ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH
A Professional Corporation

By: 

John H. Lieber, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR DEFENDANT

prejudice, the Plaintiffs reserving the right to proceed against the other Defendants.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Gary L. Richardson, OBA #7547
Fred E. Stoops, OBA #8666
RICHARDSON, STOOPS & KEATING
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136
(918) 492-7674

Attorneys for Plaintiffs

cs: F:\USR\CSG\WP\FRED\PETERSON\DISMISS.ORD

MAR 16 1994

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

FILED
MAR 14 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

The Nanci Corporation)
International, an Oklahoma)
Corporation,)
)
Plaintiff,)
)
v.)
)
B.G.C. Marketing, Inc.,)
d/b/a UniQuest, a foreign)
corporation,)
)
Defendant.)

Case No. 92-C-261-B ✓

ORDER AND JUDGMENT

This matter comes on for consideration of Plaintiff Nanci Corporation International's Application For Attorney's Fees (docket entry #33).

This action was filed on March 30, 1992. Service was had upon the Defendant B.G.C. Marketing, Inc. d/b/a UniQuest (Uniquest) on March 30, 1992 and December 14, 1992.

Uniquest motioned this Court to dismiss this action based upon an alleged lack of personal jurisdiction and alleged ineffective service. The Court's final Order on these issues was entered September 21, 1993, wherein the Court denied UniQuest's motion to dismiss. Therein, the Court directed and ordered UniQuest to answer Plaintiff's Complaint within twenty days from the date of the Order.

No answer or dispositive motion was filed by UniQuest. Plaintiff's counsel contacted UniQuest's local counsel regarding

34

the failure to file an answer with no positive results flowing therefrom. (See affidavit of Plaintiff's attorney Rosemary E. Burgher).

The Court entered default judgment in the amount of \$576,537.08 plus interest on January 21, 1994. Said judgment assessed costs and attorneys fees against Defendant.

Plaintiff's application seeks attorneys fees in the amount of \$8,762.50, supported by an affidavit executed by Plaintiff's attorney Rosemary E. Burgher. Defendant has failed to respond to Plaintiff's application.

The Court concludes Plaintiff's Application should be and the same is hereby GRANTED. Judgment is entered in favor of Plaintiff, the NANCI Corporation International, and against the Defendant, B.G.C. Marketing, Inc. d/b/a UniQuest, in the amount of \$8,762.50.

DATED this 14th day of March, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAR 16 1994

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

FILED

MAR 14 1994

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

FEDERAL DEPOSIT INSURANCE)
CORPORATION, in its corporate)
capacity, and as successor in)
interest to Continental Illinois)
National Bank,)

Plaintiff,)

vs.)

ANR PIPELINE COMPANY, a Delaware)
corporation, formerly known as)
Michigan Wisconsin Pipe Line)
Company,)

Defendant.)

Case No. 93-C-822-B /

ORDER

For good cause shown based upon the joint motion of the parties, this case is hereby administratively closed in accordance with Local Rule 41, for thirty days.

IT IS SO ORDERED THIS 14th DAY OF MARCH, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 3-15-94

MAR 15 1994

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

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

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
667 CASES, MORE OR LESS, OF)
AN ARTICLE OF DEVICE ...)
"***ATTENDS***,")
Defendants.)

Civil Action No. 92-C-1093E

CONSENT DECREE OF CONDEMNATION
AND DESTRUCTION

On November 30, 1992, a Complaint for Forfeiture was filed in this Court on behalf of the United States of America, alleging that the above-captioned article is a device that is adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 351(a)(1), in that it consists, in part of a filthy substance, and that the article of device is misbranded within the meaning of 21 U.S.C. § 352(b), in that it is in package form and its label fails to bear (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count.

Pursuant to a Warrant for Arrest issued by the Clerk of this Court, the United States Marshal for this District seized the article on January 21, 1993. Thereafter, Advantage Medical, Inc. (claimant) intervened and filed a claim to the seized article on January 29, 1993 stating that it is the owner of the seized article, and filed an answer on February 18, 1993. Publication occurred according to local rule on February 11, 18, and 25, 1993, and no other parties have intervened as claimant within the time specified in Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. Thus default was entered against all other parties.

Claimant, without admitting or denying the allegations in the in rem Complaint, and pursuant to a settlement agreement negotiated at a formal settlement conference on February 28, 1994 before Honorable John Leo Wagner, United States Magistrate Judge, now consents that a decree, as prayed for in the Complaint, be entered condemning the property under seizure. The Court being fully advised in the premises, it is on motion of the parties hereto ORDERED, ADJUDGED, AND DECREED, that

1. The seized article is a device that is adulterated within the meaning of 21 U.S.C. § 351(a)(1), and misbranded within the meaning of 21 U.S.C. § 352(b), as alleged in the Complaint, and therefore is hereby condemned and forfeited to the United States pursuant to 21 U.S.C. § 334.

2. Pursuant to 21 U.S.C. § 334(d), the United States Marshal for this District shall destroy the condemned article on March 16, 1994, or on the first date thereafter upon which the parties can agree.

3. Pursuant to 21 U.S.C. § 334(e), the United States of America shall recover from claimant costs, not to exceed \$250.00, by check made payable to the United States Marshal Service.

4. This Court expressly retains jurisdiction to issue such further decrees and orders as may be necessary.

3/15/94
DATE

We hereby consent to the entry of the foregoing decree.

Dwight L. Smith
DWIGHT L. SMITH
COUNSEL FOR CLAIMANT
ADVANTAGE MEDICAL

JAMES O. HUNTON
UNITED STATES DISTRICT JUDGE

STEPHEN C. LEWIS
UNITED STATES ATTORNEY
BY: Catherine Depew Hart
CATHERINE DEPEW HART
ASSISTANT UNITED STATES ATTORNEY

ENTERED ON DOCKET

DATE 3-15-94

FILED

MAR 14 1994

**IN THE DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

VICTORIA G. CHAPMAN, and)
LAWRENCE O. RICHMOND,)

Plaintiffs,)

vs.)

Case No. 93-C-767-E

TOWN OF OOLOGAH, OKLAHOMA,)
a municipal corporation,)

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Town of Oologah are hereby dismissed with prejudice.

Victoria G. Chapman

VICTORIA G. CHAPMAN

Lawrence O. Richmond

LAWRENCE O. RICHMOND

Joe L. White

JOE L. WHITE, OBA #10521
1718 West Broadway
Collinsville, Oklahoma 74021
(918) 371-2531

ATTORNEY FOR PLAINTIFF

ELLER AND DETRICH
A Professional Corporation

By: *John H. Lieber*

John H. Lieber, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR DEFENDANT

DATE 3-14-94

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

C. ARNOLD BROWN, TRUSTEE FOR THE)
KWB, INC. AND SUBSIDIARY PROFIT)
SHARING PLAN AND TRUST,)

Plaintiff,)

vs.)

Case No. 91-C-120-E

COMPENSATION PROGRAMS, INC.,)
THE MASTER FUND COMPANY, INTEGRATED)
FINANCIAL SERVICES, INC., R.H. JONES)
ABSTRACT & TITLE GUARANTY COMPANY,)
AMERICAN FIDUCIARY FINANCIAL SERVICES)
CORPORATION, JOHN J. BENNETT, MASTER)
MORTGAGE INVESTMENT FUND, INC. and)
FIRST TRUST OF MID AMERICA,)

Defendants,)

COMPENSATION PROGRAMS, INC.,)
THE MASTER FUND COMPANY, INTEGRATED)
FINANCIAL SERVICES, INC., R.H. JONES)
ABSTRACT & TITLE GUARANTY COMPANY,)
AMERICAN FIDUCIARY FINANCIAL SERVICES)
CORPORATION, JOHN J. BENNETT, MASTER)
MORTGAGE INVESTMENT FUND, INC. and)
FIRST TRUST OF MID AMERICA,)

Third-Party Plaintiffs,)

vs.)

C. ARNOLD BROWN, CHARLES A. ELLIS,)
MICHAEL H. VAUGHN, GAYLEN R. HOWE)
and ASHLEY M. HOUGHTON,)

Third-Party Defendants.)

FILED

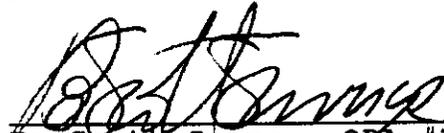
MAR 14 1994

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**PLAINTIFF'S AND DEFENDANT/THIRD-PARTY PLAINTIFF'S
STIPULATION OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS**

IT IS HEREBY STIPULATED AND AGREED by and between counsel for
all parties, that pursuant to Rule 41(a)(1) of the Federal Rules of
Civil Procedure, the parties stipulate that all claims, counter-

claims and third-party claims filed herein shall be dismissed with prejudice.


R. Scott Savage, OBA #7926
MOYERS, MARTIN, SANTEE,
IMEL & TETRICK
320 S. Boston, Suite 920
Tulsa, OK 74103-3722
(918) 582-5281

ATTORNEYS FOR PLAINTIFFS,
C. Arnold Brown, Trustee for
the KWB, Inc. and Subsidiary
Profit Sharing Plan and Trust,
and ATTORNEY FOR THIRD-PARTY
DEFENDANTS, C. Arnold Brown,
Charles A. Ellis, Michael H.
Vaugh, Gaylen R. Howe and
Ashley M. Houghton


Mike Barkley, OBA #571
BARKLEY, RODOLF & MCCARTHY
2700 Mid-Continent Tower
401 S. Boston Avenue
Tulsa, OK 74103
(918) 599-9991

ATTORNEYS FOR DEFENDANTS and
THIRD-PARTY PLAINTIFFS,
Compensation Programs, Inc.,
The Master Fund Company,
Integrated Financial Services,
Inc., R. H. Jones Abstract &
Title Guaranty Company,
American Fiduciary Financial
Services Corporation, John J.
Bennett and First Trust of
Mid-America


Christine L. Schlomann
KING, BURKE, HERSHEY,
FARCHMIN & SCHLOMANN, P.C.
4740 Grand Avenue
Kansas City, MO 64112
(816) 753-6666

ATTORNEYS FOR DEFENDANT and
THIRD-PARTY PLAINTIFF,
Master Mortgage Investment
Fund, Inc.

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

FILED

MAR 11 1994

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
A.P. GREEN INDUSTRIES, INC.,)
)
Defendant.)

Civil Action No. 93-C 804B

JOINT STIPULATION AND ORDER OF DISMISSAL

The Parties in this cause of action, Plaintiff, the United States of America, and Defendant, A.P. Green Industries, Inc., through their undersigned representatives stipulate and agree as follows:

1. This is a civil action under the Clean Water Act, 33 U.S.C. § 1251, et. seq., filed by Plaintiff on September 7, 1993, alleging violations of the Clean Water Act at a facility owned and operated by Defendant at the Mid-America Industrial Park in Pryor, Oklahoma, and requesting civil penalties.
2. Defendant agrees to pay a civil penalty in the amount of \$450,000.00 to the Treasurer of the United States by electronic funds transfer in satisfaction of the civil claims for violations of the Clean Water Act at its Pryor, Oklahoma facility, as alleged in the complaint, occurring prior to October 1, 1993.
3. Payment of this sum shall constitute full settlement and satisfaction of any and all civil claims asserted by the United States in this action against the Defendant.

4. Execution of this Stipulation and payment of the civil penalty do not constitute an admission of any fact or liability of Defendant.

5. Defendant shall pay the civil penalty within ten (10) days of the filing of this Joint Stipulation and Order of Dismissal. Payment shall be made in accordance with directions for an electronic funds transfer from a bank designated by Defendant to a bank designated by Plaintiff; such directions will be provided by the Office of the United States Attorney, Northern District of Oklahoma, U.S. Courthouse, Room 3900, 333 West Fourth Street, Tulsa, Oklahoma 74103. Notice of the transfer shall be sent to the Office of Regional Counsel, U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and to the Chief, Environmental Enforcement Section, Environment & Natural Resources Division, U.S. Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044.

6. If payment is not timely made, post-judgment interest at the statutory rate shall be assessed from the date payment is due and Plaintiff may elect to move to vacate this dismissal and reinstate this action.

7. The Court shall retain jurisdiction over the parties and this lawsuit until all required monies have been paid.

8. This Joint Stipulation and Order of Dismissal is limited to the civil claims under the Clean Water Act with respect to Defendant's Pryor, Oklahoma facility as alleged in the complaint

and does not apply to any other claim, civil or criminal, which Plaintiff may have against Defendant.

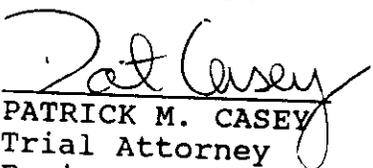
9. There are no separate agreements or understandings with respect to this matter which have not been set forth in this Joint Stipulation and Order of Dismissal.

For Plaintiff, UNITED STATES OF AMERICA:

Date: 2-6-94


LOIS J. SCHIEFER
Acting Assistant Attorney General
Environment and Natural Resources
Division

Date: 1-24-94


PATRICK M. CASEY
Trial Attorney
Environmental Enforcement
Section
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

For Defendant, A.P. GREEN INDUSTRIES, INC.:

Date: 11/22/93

Robert T Stewart

ROBERT T. STEWART
Jones, Day, Reavis & Pogue
301 Congress Avenue, Suite 1200
Austin, Texas 78701
Attorney for A.P. Green
Industries, Inc.

Date: 11/23/93

Michael B Cooney

MICHAEL B. COONEY
Senior Vice President
A.P. Green Industries, Inc.
Mexico, Missouri 65265

FOR THE UNITED STATES OF AMERICA:

STEPHEN C. LEWIS
United States Attorney for the
Northern District of Oklahoma

Date: 3-10-94

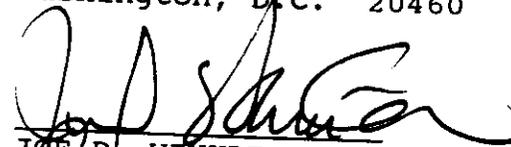

Assistant U.S. Attorney
Northern District of Oklahoma
U.S. Courthouse
Room 3900
333 West Fourth Street
Tulsa, Oklahoma 74103

FOR THE ENVIRONMENTAL PROTECTION AGENCY:

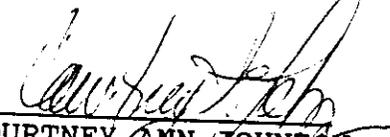
Date: January 4, 1994


STEVE HERMAN
Assistant Administrator for
Enforcement
U.S. Environmental Protection
Agency
Washington, D.C. 20460

Date: 12/3/93


JOE D. WINKLE
Acting Regional Administrator
U.S. Environmental Protection
Agency
Region VI
1445 Ross Avenue
Dallas, Texas 75202

Date: 11-29-93


COURTNEY ANN JOHNSON
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region VI
1445 Ross Avenue
Dallas, Texas 75202

As stipulated and agreed to by the parties, IT IS SO ORDERED this
10th day of March, 1994.

S/ THOMAS R. BRETT

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

SECRET
MAR 14 1994

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

FILED

MAR 11 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.)
)
OKLAHOMA FIXTURE COMPANY,)
an Oklahoma Corporation,)
)
Defendant.)

Case No. 93-C-1099

O R D E R

Now before the Court is Plaintiff's Motion for Attorney's Fees (Docket #10) filed February 15, 1994. Plaintiffs Michael Wayne Hall and the International Brotherhood of Carpenters and Joiners of America, Local Union 943 brought this action against Hall's former employer, Oklahoma Fixture Company, seeking an Order enforcing an Arbitrator's award. This Court entered a Judgment in favor of the Plaintiffs February 1, 1994, and ordered the Defendant to comply with the terms of the arbitrators award.

Plaintiffs now seek an award of attorney's fees of \$1,072.85. Although an award of attorney's fees is not specifically provided for by statute, such fees are awardable when a challenge to an arbitrator's decision is without justification. International Association of Machinists and Aerospace Workers v. Texas Steel Company, 538 F.2d 1116, 1121 (5th Cir. 1976). The Court concludes Defendant's objection to the arbitrator's award in the instant case lacked justification and was frivolous. For this reasons, Plaintiff

is entitled to an award of attorney's fees and the Court concludes \$1,072.85 is a reasonable award.

For this reason, Plaintiff's Motion for Attorney's Fees (Docket #10) is hereby GRANTED and judgment is entered in favor of the Plaintiffs and against the Defendant in the amount of \$1,072.

IT IS SO ORDERED, ADJUDGED AND DECREED, this 17th day of March, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

MAR 11 1994

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

AMY PENNINGTON, CHAD PENNINGTON,
and AMOS BERRY,

Plaintiffs,

vs.

Case No. 93-C-768-B

TOWN OF OOLOGAH, OKLAHOMA,
a Municipal Corporation;
RON GAMBLE, individually and in
his official capacity;
MARK LECHTENBERG, individually
and in his official capacity;
and CHRIS SWAFFORD, individually
and in his official capacity,

Defendants.

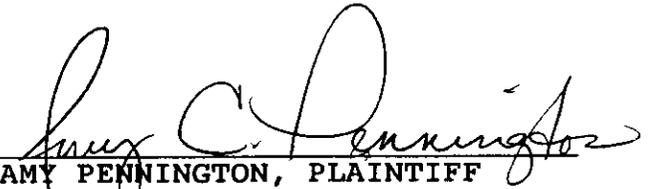
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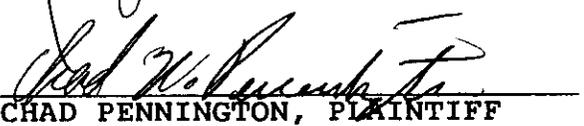
MAR 11 1994

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

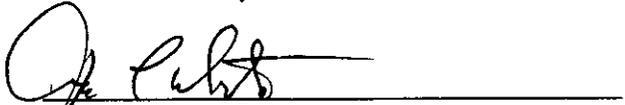
STIPULATION OF DISMISSAL WITH PREJUDICE

All parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, Town of Oologah, Ron Gamble, Mark Lechtenberg and Chris Swafford, are hereby dismissed with prejudice.


AMY PENNINGTON, PLAINTIFF

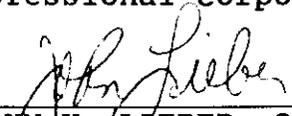

CHAD PENNINGTON, PLAINTIFF


AMOS BERRY, PLAINTIFF


JOE L. WHITE
1718 West Broadway
Collinsville, Oklahoma 74021

ATTORNEY FOR PLAINTIFFS

ELLER AND DETRICH
A Professional Corporation

By: 

JOHN H. LIEBER, OBA #5421
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

ATTORNEY FOR THE DEFENDANT

03\MAG\PENNINGT\STIPULAT.DIS

DATE MAR 14 1994

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

TIFFANY P. HOUSE,)
)
Plaintiff,)
)
vs.)
)
BARTLETT-COLLINS COMPANY,)
a Division of Indiana Glass)
Corporation,)
)
Defendant.)

Case No. 94-C-49-B

FILED

MAR 11 1994

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

O R D E R

Now before the Court is the Plaintiff's Motion to Remand (Docket #4) filed February 15, 1994.

Plaintiff, Tiffany House, initially filed this action in the District Court of Creek County and alleged that she was terminated by Defendant in retaliation for instituting proceedings under the Oklahoma Workers' Compensation Act. Defendant removed the case to this Court January 18, 1994, asserting this Court had original jurisdiction under the provisions of 28 U.S.C. §1332.

Plaintiff now moves to remand the action to Creek County District Court on the grounds that 28 U.S.C. §1445(c) prohibits the removal of cases arising under state workers' compensation laws. Defendant has failed to respond and the Court thus deems the matter confessed. See Local Rule 7.1(C). The Court concludes Plaintiff's retaliatory discharge claim arises under Oklahoma workers' compensation laws and is non-removable under 28 U.S.C. §1445(c). See e.g. Kemp v. Dayton Tire and Rubber Co., 435 F.Supp. 1062 (W.D.Okla. 1977). For these reasons, Plaintiff's Motion to Remand

6

(Docket #4) should be and is hereby GRANTED. Plaintiff's request for costs is DENIED.

IT IS SO ORDERED THIS th DAY OF MARCH, 1994.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAR 11 1994

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE)
CORPORATION, IN ITS CORPORATE)
CAPACITY,)
)
PLAINTIFF,)
)
v.)
)
SERVICE STEEL CO., INC., a)
corporation, ROBERT B. MANTON,)
)
an individual and FIRST METALS,)
INC.,)
)
DEFENDANTS.)

Civil Action
NO. 90-C-558-B

FILED

MAR 10 1994

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

PARTIAL RELEASE OF JUDGMENT

COMES NOW, FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity regarding the Liquidation of Utica National Bank and Trust, Tulsa, Oklahoma, and partially releases that Judgment against Robert B. Manton obtained by Federal Deposit Insurance Corporation, on December 4, 1990, in the United States District Court, Northern District of Oklahoma, Civil Action No. 90-C-558-B and filed in the records of the County Clerk of Mayes County, Oklahoma, in favor of Plaintiff, Federal Deposit Insurance Corporation. This Partial Release will release the said Judgment only as it relates to the real estate described in Exhibit "A" attached hereto and made a part hereof. Said Judgment and liens related thereto are to remain in full force and effect for all other purposes.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity regarding the Liquidation of Utica National Bank and Trust, Tulsa, Oklahoma

By: Mark Warren
As Attorney-In-Fact, acting under and pursuant to the terms of that certain Power of Attorney, the Promulgation of which was published September 23, 1993 in the Federal Registry, Vol. 58, No. 183 at Page 49512.

ACKNOWLEDGMENT

STATE OF TEXAS)
) ss:
COUNTY OF DALLAS)

Before me, the undersigned, a Notary Public in and for said County and State, on this 7th day of March, 1994, personally appeared Mark Warren, to me known to be the identical person who subscribed his name to the foregoing instrument as Attorney-In-Fact for the Federal Deposit Insurance Corporation, who acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and seal of office, the day and year last above written.

Clay Blakey
Notary Public

My Commission Expires:

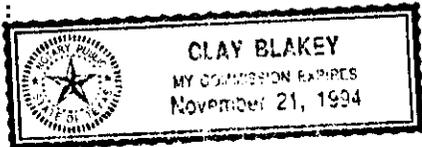


EXHIBIT "A"

The Southwest 10 acres of Lot 1 in Section 2, Township 20 North, Range 20 East of the I.B. & M., Mayes County, State of Oklahoma, LESS AND EXCEPT that part acquired by the Grand River Dam Authority described as beginning at the Southeast Corner of said Southwest 10 acres, thence West along the South boundary thereof for 81.9 feet, thence Northeasterly 181.5 feet to a point on the East boundary thereof, thence South along said East boundary 162 feet to the point of beginning, and LESS AND EXCEPT a tract described as beginning at a point on the West boundary of said Southwest 10 acres 175 feet South of the Northwest corner thereof, thence Northeasterly for 258.3 feet, thence North 110 feet to the North boundary thereof, thence West along the North boundary 250 feet to the Northwest corner thereof, thence South along the West boundary thereof for 175 feet to the point of beginning. Contains 9.03 acres more or less, and the North 3.25 acres of the Northeast 13.25 acres of Lot 2 of Section 2, Township 20 North, Range 20 East, of the I.B. & M., situated in Mayes County, State of Oklahoma, according to the United States Government Survey thereof, less and except that portion of subject land conveyed to the Grand River Dam Authority by Deed dated February 26, 1963 and recorded in Book 336 at Pages 520-521; and that portion of subject land conveyed to the Grand River Dam Authority by Deed dated October 15, 1963 and recorded in Book 343 at Pages 554-555; and, that portion of subject land described in Flowage Easement of the Grand River Dam Authority dated October 15, 1963 and recorded in Book 342 at Pages 552-553 and that part of the Southeast Ten (10) acres of the United States Government Lot #1, of Section Two (2), Township Twenty (20) North, Range Twenty (20) East of the Indian Base and Meridian, lying Northwest of Oklahoma State Highway #82 Right of Way, comprising two (2) acres, more or less.

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

LEE E. TIMMONS,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

FILED

MAR 10 1994

92-C-869-B

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

ORDER

Now before the Court is Plaintiff's appeal of the Secretary Louis W. Sullivan's denial of Social Security benefits. Plaintiff raises the following issues on appeal: (1) Does substantial evidence support the Secretary's finding that Plaintiff can return to her past work?; (2) Did the ALJ err in his hypothetical questions to the vocational expert and (3) Did the ALJ violate the "treating physician" rule? For the reasons discussed below, this Court **affirms** the Secretary's decision.

I. Standard of Review

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).¹ The Court'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). Substantial evidence is what "a reasonable mind might deem adequate

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."

to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).²

II. Procedural History/Summary of Medical Evidence

Plaintiff alleges he has been disabled since November 17, 1988 due to a back and arm injury.³ At the time of the hearing, the 46-year-old Plaintiff was 6-foot-2 and 263 pounds. He had completed the eighth grade and worked as a painter and truck driver. The other evidence submitted to the ALJ is as follows.⁴

In a September 23, 1991 hearing before the ALJ, Plaintiff testified that he can no longer work because of his back, hip, arm and left leg. He said his left leg sometimes buckles, making him fall down. He testified that his left arm gets numb and that he has difficulties bending over. *Record at 47*. Plaintiff testified that he drives, washes dishes and

² When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("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; (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 the instant case, the Secretary found Plaintiff could return to certain types of light work.

³ He applied for Supplemental Security Income benefits on June 13, 1990 and for Social Security Disability Insurance on July 12, 1990. Both applications were denied. Plaintiff was last insured for such benefits on September 30, 1989.

⁴ The Secretary's brief also gives an in-depth overview of the evidence.

watches television. *Id. at 42.* Plaintiff also said he has kidney problems.⁵

The vocational expert also testified at the hearing. In response to the ALJ's hypothetical question, the expert said that the Plaintiff could perform jobs in assembly, as a dispatcher, grinding machine operator, delivery driver and security guard. *Id. at 52.*⁶

The medical evidence indicates that in April of 1988 Plaintiff injured his left hand and arm while attempting to disconnect a trailer from his truck. He was subsequently treated for *ulnar neuropathy* in 1988 and 1989. Dr. Jeanne M. Edwards, M.D., examined Plaintiff on September 12, 1989 and found him to be doing "fairly well." *Id. at 140.*

On April 21, 1989, Dr. Richard W. Loy, M.D., stated that Plaintiff was "temporarily disabled" for a period of two months due to the 1988 injury. Dr. Loy also found that Plaintiff had a 30 percent "permanent partial impairment" in his left hand. *Id. at 152.*

On May 31, 1989, Dr. Frank Letcher, M.D., examined Plaintiff. He concluded that Plaintiff suffered an injury to his "left ulnar nerve in the mid portion of his forearm." *Id. at 158.* Dr. Letcher also wrote: "It appears that he is suffering no neurological deficit from this at this point." *Id.*

On August 28, 1989, Plaintiff was examined by Dr. Christopher Covington, an M.D. Dr. Covington recommended that Plaintiff continue with exercise and take anti-inflammatory medication. Dr. Covington also noted that Plaintiff's left arm had improved.

⁵ Plaintiff testified that he urinated 8 to 10 times a day and said he was "up all night" urinating. *Record at 49.*

⁶ Part of the ALJ's hypothetical question was as follows: "Would there be jobs that would permit -- if he had fairly complete use of the left hand...he does have some loss of sensation in it. He is right-handed. He has an eighth grade education. He is able to write. He's able to fill out forms and things of that nature. He has served in the -- apparently as a gunner in a helicopter -- would there be -- if a person could sit up to six hours a day, stand a couple hours, would there be jobs a person might be able to do if he couldn't do light work?" *Id. at 51.* The ALJ also added that Plaintiff would need a hourly break when doing light work.

Id. at 160-161.

On March 22, 1991, Dr. Richard Cooper, a consulting physician, examined Plaintiff. Dr. Cooper wrote: "There is a significant history that he did not give us of possible carpal tunnel syndrome on the left and ulnar neuropathy on the left. We have medical records from 1989 and he said nothing whatever about his left arm today. So, he does have some restricted range of motion of the thoracolumbar spine, positive Yeoman tests and would be impaired in any activity requiring prolonged standing, walking, bending, twisting, and lifting." *Id. at 191.*⁷

After examining the evidence, the ALJ found that Plaintiff was not disabled. The ALJ concluded that Plaintiff had "severe low back pain", "kidney problems" and a "partial loss of use of the left hand." He also found that Plaintiff could not return to his past relevant work as a truck driver. However, the ALJ stated that Plaintiff could perform light work provided he was able to have at least one break per hour. *Record at 21-23.*⁸

III. Legal Analysis

This appeal raises three issues. First, did the ALJ err in his hypothetical question? Second, did the ALJ properly follow the "treating physician" rule? Finally, does substantial evidence support the ALJ's decision that Plaintiff can return to work.

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

⁷ On February 27, 1991, Plaintiff underwent a kidney biopsy. The surgery produced no complications and Plaintiff was discharged. *Record at 195.* The biopsy did show nephrosclerosis. In addition, an April 18, 1991 note described Plaintiff as having chronic renal failure. However, on June 20, 1991, his renal status had improved.

⁸ The ALJ found that Plaintiff could work at jobs in assembly, dispatcher, grinding machine operator, delivery driver and security guard. *Record at 23.*

decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991).

In this case, Plaintiff contends that the ALJ improperly ignored the vocational expert's responses to his questions. The ALJ, however, is required to set forth only those physical and mental impairments in the hypothetical which he accepts as true.⁹ *Sumpter v. Bowen*, 703 F.Supp 1485 (D.Wyo. 1989). He does not have to accept answers to hypothetical questions that lists all of claimant's *alleged* impairments.¹⁰ Consequently, the ALJ did not err on this issue.

The second issue is whether the ALJ violated the "treating physician rule." That rule requires the Secretary to give substantial weight to the claimant's treating physician. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).¹¹

Plaintiff does not specify which treating physician's opinion was disregarded. Moreover, a review of the record indicates that the ALJ adequately examined the whole of the medical evidence, including the reports of the treating physicians. Nothing in the record suggests that he disregarded those reports. On pages 17 and 18, he discusses the examinations of Drs. Edwards, Letcher, Loy, Covington, Cooper and Graham. The ALJ also

⁹ Precision is not defined but this case indicates that uncontradicted expert conclusions that are corroborated by evidence must be included in the hypothetical. *Ekeland v. Bowen*, 899 F. 2d 719, 722 (8th Cir. 1990).

¹⁰ The ALJ did err when he found that Plaintiff could do work as a security guard. However, substantial evidence supports the finding that Plaintiff can work in assembly, dispatcher, grinding machine operator and delivery truck driver.

¹¹ One court writes: "The treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant...relevant to other medical evidence before the fact-finder, including opinions of other physicians. The rule...provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder. *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir. 1987).

noted the reports from the Veterans Administration. *See, Exhibits 22, 23, 24, 25, 26, 27, 28, 29 and 30.* Consequently, the Court finds the argument without merit.

The final question is whether substantial evidence supports the ALJ's finding that Plaintiff could return to work. Substantial evidence is what "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" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

In this case, the medical evidence shows that Plaintiff suffers from severe low back pain, kidney problems and a partial loss of use of the left hand. But with the exception of Dr. Loy's finding that he was temporarily disabled for a two-month period in 1989, none of the medical evidence indicates that Plaintiff can no longer work.

Dr. Edwards found Plaintiff to be doing fairly well in September of 1989. Dr. Letcher found that Plaintiff suffered an injury to his "left ulnar nerve", but found no "neurological deficit". In August of 1989, Dr. Covington noted improvement in Plaintiff's condition. Dr. Cooper, the consulting physician, noted that Plaintiff "would be impaired in any activity requiring prolonged standing, walking, bending, twisting, and lifting", but did not find him to be unable to work. Dr. Graham indicates that, while Plaintiff has kidney problems, his "renal status is much better."

Some of the medical evidence supports Plaintiff's position. Plaintiff's testimony also bolsters his case. However, the medical reports of the foregoing doctors, coupled with the vocational expert's testimony, constitutes substantial evidence supporting the ALJ's findings.

Therefore, the Secretary's decision is AFFIRMED.

SO ORDERED THIS 10th day of March, 1994.



Handwritten signature of Jeffrey B. Wolfe, consisting of a large, stylized 'J' followed by 'B. Wolfe' and a horizontal line.

JEFFREY B. WOLFE
UNITED STATES MAGISTRATE JUDGE

MAR 11 1994

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

FILED

MAR 10 1994

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

LARRY LAUGHLIN,
Plaintiff

v.

KMART CORPORATION,
Defendant.

Case No. 93-C-97-B

O R D E R

This matter comes on for consideration of Defendant KMART Corporation's (KMART) Motions For Summary Judgment (docket entry # 40) and To Move Case to Non-Jury Docket (docket entry #49).

Preliminary Statement of Case

In the Court's recent Order of February 2, 1994 (docket entry #54) the following statement of allegations is set forth:

Plaintiff, a former automotive sales manager of Defendant, alleged in his first cause of action a breach of his employment contract with KMART by its failure to pay Plaintiff earned bonuses and raises based upon performance. Plaintiff alleges KMART encouraged and required employees, including Plaintiff, to illegally overcharge certain automotive fleet customers and that when Plaintiff failed to continue to participate in such activities his sales figures were not sufficient to entitle him to raises and bonuses.

In his second cause of action Plaintiff alleges a constructive discharge/wrongful termination claim based upon Plaintiff's allegations that he warned KMART supervisors against the illegal overcharging of automotive fleet customers and was retaliated against as a result of such warning.

In the present motion under consideration KMART moves for summary judgment on five issues:

(1) Plaintiff cannot establish that a significant motivation for KMART's actions toward him was retaliation for his complaints.

(2) As a matter of law, there is no Oklahoma common law cause of action for "constructive discharge".

(3) Plaintiff failed to state a cause of action for wrongful termination because he failed to articulate a "public policy" KMART was allegedly in violation of preliminary to Plaintiff's "whistle-blowing" which preceded his alleged constructive discharge.

(4) Plaintiff has failed to state a cause of action for breach of contract as a matter of law.

(5) Plaintiff failed to mitigate his damages by failing to reasonable seek and obtain gainful, comparable employment after his alleged constructive discharge.

The Court determines issues (1) (2) (3) and (5) relate to Plaintiff's second cause of action while issue (4) is germane to Plaintiff's first cause of action.

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); Widon 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 (10th Cir. 1988).

Plaintiff's First Cause of Action

Plaintiff alleges a breach of an employment contract with KMART by its failure to pay Plaintiff earned bonuses and raises based upon performance. Plaintiff acknowledges that he was an at-will employee during his tenure with KMART. Plaintiff argues,

however, that his performance with KMART earned him the right to a bonus for 1991 and a raise for 1992, both allegedly denied Plaintiff when he declined to encourage but rather opposed the overselling of parts and services to the Fleet customers within Plaintiff's area of supervision.

Further, Plaintiff now alleges he learned, through discovery which occurred on September 29 and October 1, 1993, that a KMART higher supervisor changed the performance rating¹ given Plaintiff by his immediate supervisor Brett Musser, which arguably resulted in Plaintiff failing to be awarded a bonus for the year 1991 and, ultimately a raise for 1992.

The Court concludes it is a matter to be determined by the fact finder whether Plaintiff was wrongfully precluded from a 1991 bonus and 1992 raise, for retaliatory reasons in violation of Plaintiff's eligibility for and prospects of such bonus and raise. The Court further concludes Defendant's motion for summary judgment on this issue is not well taken.

Plaintiff's Second Cause of Action

KMART's first issue: KMART argues that Plaintiff's unsupported speculation regarding KMART's alleged retaliatory actions against him is insufficient to justify presenting this issue to a jury; that Plaintiff has not provided this Court with evidence of a "nexus" between his complaints and KMART's actions. KMART's scores

¹ The Court held in its recent Order denying Plaintiff's request to belatedly amend his complaint that Plaintiff's allegation regarding the altered bonus rating was essentially a part of Plaintiff's breach of contract cause of action.

the lack of evidence showing that it intended to make Plaintiff's working conditions intolerable so as to force Plaintiff to resign; thus proof of significant motivation for such alleged retaliatory actions is missing.

Viewing the record most favorably toward the non-movant, the Court concludes Plaintiff's 1991 bonus denial and 1992 raise denial, if motivated by retaliatory reasons, are unresolved fact issues for a jury. Significant to this is the undisputed fact that Plaintiff's performance ratings, preliminarily entered by Plaintiff's immediate supervisor Brett Musser, were ordered adjusted downward by Musser's supervisor², which downward departure, Plaintiff argues, eliminated Plaintiff's bonus and raise.³ The Court concludes KMART's motion on this issue is thereby precluded by disputed fact issues.

KMART's second issue: KMART argues that as a matter of Oklahoma law there is no cause of action for "constructive discharge", citing Large v. Acme Engineering and Manufacturing Corp., 790 P.2d 1086 (Okla. 1990) and Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793 (10th Cir. 1993) (applying

² Plaintiff's base salary was \$48,000 and his target bonus was an additional \$21,000. Defendant alleges in its Reply brief that "[A]ll four National Account Managers were subject to the identical process of rough draft, review and finalization, and Plaintiff's evaluation actually suffered less than the others." However, no citation to the record was provided in support of such statement.

³ There appears to exist a factual dispute regarding the bonus/raise impact of the downward adjustment. KMART argues Plaintiff's bonuses were an "unknown fact at that point (of Musser's initial evaluations)". However, it is patently obvious that any downward departure from the preliminary evaluation ill served Plaintiff's bonus/raise prospects.

Oklahoma law). It is undisputed that Plaintiff resigned from KMART, voluntarily, on October 1, 1992. In Hooks the Tenth Circuit Court of Appeals stated:

"Mr. Hooks contends Diamond constructively discharged him from his position as press operator by forcing him to return to full duty status while still suffering from an injury. The district court entered summary judgment, holding Mr. Hooks' constructive discharge claim failed as a matter of law. (fn. Mr. Hooks never clarified whether he brought his constructive discharge claim under state law or in conjunction with 42 U.S.C. § 1981. Because the district court addressed it as a state claim, and Mr. Hooks appears to argue state law, we will continue to consider it as a state law claim.) Thus far, Oklahoma has not recognized constructive discharge as a theory of recovery. (citing Large, *supra*). We are unwilling to extend Oklahoma law to recognize the theory based on Mr. Hooks' unsubstantiated allegations." Id. at 803.

KMART elected to excise the following from the above quote, arguing Oklahoma common law precludes constructive discharge as a basis for recovery under a Burk tort

"The district court entered summary judgment, holding Mr. Hooks' constructive discharge claim failed as a matter of law. Thus far, Oklahoma has not recognized constructive discharge as a theory of recovery."

In fact Large plainly states the refusal to adopt "constructive discharge" as a theory of recovery was limited to the facts of that case:⁴

"In this case, employee alleged that a constructive discharge occurred when employer transferred him to other job duties which were outside the collective bargaining agreement and that such transfer was without just cause, as defined by that agreement. The district court was presented only with the employee's conclusions that the transfer was to a less favorable position outside the collective bargaining unit and that the transfer with

⁴ Large involved an alleged retaliatory discharge for filing a worker's compensation claim.

without just cause. These facts are insufficient under any standard. It is evident that employee failed to make a *prima facie* showing of constructive discharge, much less, a retaliatory one. We refuse to adopt "constructive" discharge as a theory of recovery in Oklahoma under the facts presented in this case. Employee has failed to state a claim for which relief may be granted. Neither has employee demonstrated that a genuine issue of fact exists as to the claim for retaliatory "constructive" discharge."

The Court concludes KMART's motion as to issue (2) should be denied.

KMART's third issue: In this issue KMART alleges Plaintiff's so-called Burk tort, See, Burk v. K-Mart Corp., 770 P.2d 24 (Okla.1980); and Burk v. K Mart Corporation, 956 F.2d 213 (10th Cir.1991), is fatally defective because Plaintiff has not articulated the "public policy" KMART allegedly is in violation of by the yet unproven charges of illegal overselling or overcharging its automotive fleet customers.

Earlier, the Court, in its Order of July 7, 1993, denied Defendant's Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (docket entry #9)⁵ on this same issue. Further the Court, in its Order of February 2, 1994 (docket entry #54), in ruling upon Defendant's Motion in Limine, concluded:

"Plaintiff should be entitled to show any wrongdoing on the part of KMART to establish his theory of alleged retaliation for whistle-blowing activities. Further, Plaintiff arguably has a legitimate interest in showing wrongdoing, if such transpired, to establish his theory of constructive discharge. An employee who is, himself, participating in or ordered to participate in, illegal

⁵ The Court treated the motion as a Motion To Dismiss, not considering matters outside the pleading. Rule 12 (b)(6), Fed.R.Civ.P..

sales activity may well fear civil or criminal reprisal as a result of such activity thereby "forcing" a prudent but nonetheless unwilling leavetaking." Id. at 3.

The Court, upon further reflection, concludes Plaintiff's failure to articulate, at this late date in this proceeding, a public policy violation supportive of a Burk tort, is indeed fatal to Plaintiff's second cause of action.

The Court is unaware, and Plaintiff has failed to cite, any Oklahoma statutory authority regarding "overpricing" or "illegal overselling". Plaintiff's continued phraseology of Defendant's alleged "cheating its fleet customers" and "illegal pricing practices" are of little aid to the Court. The Court is aware of underpricing statutory proscriptions (see, e.g. 79 O.S. §81 *et seq*) but not overpricing prohibitions.

The Court concludes KMART's overpricing, if it did or does exist, is a matter of private concern between KMART and its allegedly overpriced, oversold fleet customers. Such practices, if extant, could serve as a basis for civil litigation between KMART's alleged wronged customers and KMART, but does not, the Court concludes implicate the public policy of the State of Oklahoma, the cornerstone of a Burk tort. The determination of public policy is a question of law for the Court. Pearson v. Hope Lumber & Supply Company, Inc., 820 P.2d 443 (Okla.1991). The internal policies of an employer do not constitute an expression of public policy. Vannerson v. University of Oklahoma, 784 P.2d 1053 (Okla.1989).

The Court concludes Defendant's motion for summary judgment on Plaintiff's third issue should be granted.

Defendant's fifth issue: This issue, failure to mitigate damages flowing from Plaintiff's alleged constructive discharge, relates only to Plaintiff's second cause of action, which the Court makes disposition of by granting Defendant's motion for summary judgment thereon.

The Court next considers Defendant's Motion To Move Case To Non-Jury Docket. Defendant argues that Plaintiff failed to demand a jury trial within 30 days from the date of removal. Plaintiff responds that he endorsed a Jury Demand on his state court petition which is sufficient under former Local Rule 13, now Rule 81.2. The Court concludes Defendant's Motion should be and the same is hereby DENIED.

Summary

In summary, the Court concludes Defendant's Motion for Summary Judgment as to Plaintiff's First Cause of Action should be and the same is hereby DENIED and that Defendant's Motion for Summary Judgment as to Plaintiff's Second Cause of Action should be and the same is hereby GRANTED. Defendant's Motion To Move Case To Non-Jury Docket is DENIED.

IT IS SO ORDERED, this 10th day of March, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAR 11 1994

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

GERALD R. PETERS,)
)
 Plaintiff,)
)
 vs.)
)
 MCDONNELL DOUGLAS CORPORATION,)
 a Maryland corporation, Tulsa)
 Division,)
)
 Defendant.)

Case No. 93-C-376-B

FILED

MAR 10 1994

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

ORDER

Now before the Court for its consideration is the Defendant's Motion for Summary Judgment (Docket #24) on Plaintiff's first and fifth causes of action.¹

Plaintiff, Gerald R. Peters ("Peters"), was employed by Defendant, McDonnell Douglas Corporation ("MDC"), from June 1966 to July 1992. Plaintiff alleges in his first cause of action that age was a motivating factor in Defendant's decision to give him a Relative Performance Rating of "4" and to subsequently lay him off. Plaintiff's fifth cause of action alleges he was laid off in retaliation for filing a charge of age discrimination with the Oklahoma Human Rights Commission.

The following facts are not in dispute:

1) MDC is an aerospace manufacturer with its principal place of business in St. Louis, Missouri. MDC operates a subassembly

¹ The Court previously granted Plaintiff's Motion to Dismiss his second, third and fourth causes of action and therefore Defendant's motion seeks summary judgment on Plaintiff's only two remaining claims.

facility in Tulsa, Oklahoma. (Agreed Pre-Trial Order, p.2).

2) Beginning in 1990 and continuing to the present, MDC has experienced a dramatic decline in its business. (Exhibit "A" to Defendant's Brief, Affidavit of Stuart Blankenship).

3) In June, 1990, John McDonnell, President of MDC, announced a company wide cost cutting program which was designed to reduce expenses by \$700,000,000.00. A significant percentage of this cost cutting effort would occur through labor reduction. (Exhibit "B" to Defendant's Brief, Letter by John McDonnell dated June 20, 1990, entitled "The Hard Reality.")

4) In order to reduce expenses, MDC management decided that work force reductions at the Tulsa facility were necessary. (Exhibit "A" to Defendant's Brief, Affidavit of Stuart Blankenship.)

5) Major layoffs began in Tulsa in August, 1990. There have been thirty (30) separate layoffs in Tulsa between August, 1990 and December, 1993 resulting in over 1,700 employees being laid off. (Exhibit "C" to Defendant's Brief, Affidavit of Randy Embry.)

6) On December 3, 1993, MDC announced a complete closing of its Tulsa facility. (Exhibit "C" to Defendant's Brief, Affidavit of Randy Embry.)

7) Plaintiff became employed by MDC on June 13, 1966. (Complaint at ¶ 12.²) Between 1966 and 1992, Plaintiff was laid off from work at MDC six or seven times. (Exhibit "D" to

² Complaint refers to Plaintiff's Amended Complaint filed with this Court on September 20, 1993.

Defendant's Brief, Peters Deposition, Vol. 1, p. 34.³) On July 6, 1992, Plaintiff, age 55, was laid off from the position of Materials and Process Analyst ("M & P Analyst") (a salaried, non-collective bargaining unit position).

8) By July 6, 1992, one thousand fifty-five (1,055) employees had been laid off at the Tulsa facility. (Exhibit "C" to Defendant's Brief, Affidavit of Randy Embry.) Since July 6, 1992, six hundred ninety-six (696) additional employees have been laid off in Tulsa as a result of the Company's efforts to reduce expenses. (Exhibit "C" to Defendant's Brief, Affidavit of Randy Embry.)

9) MDC Tulsa has historically performed employee performance evaluations. The evaluations measure an employee's performance over the previous year, and are used to determine compensation and bonus adjustments for the next year. (Exhibit "C" to Defendant's Brief, Affidavit of Randy Embry.) Once he became a salaried employee, Plaintiff received performance evaluations. (Exhibit "D" to Defendant's Brief, Peters Deposition, Vol. 1, pp. 176-177.)

10) In November, 1991, as part of its company wide performance review process, MDC implemented a "Performance Pay Matrix" which relates an employee's Relative Performance Rating ("RPR") to a payout range, using a forced labor distribution. The RPR is a number from 1 to 5, 1 being the best performance, which indicates an employee's performance relative to a peer group and to

³Peters Deposition, Vol. 1, p. ____, refers to the deposition of Plaintiff, Gerald R. Peters, taken August 10 and 11, 1993.

the targeted forced labor distribution (i.e., mandatory bell curve rating system). In this case, the targeted labor distribution was:

<u>RPR</u>	<u>TARGETED DISTRIBUTION</u>
1	5% of salaried employees
2	20% of salaried employees
3	60% of salaried employees
4	15% less those receiving an RPR of "5"
5	

(Exhibit "E" to Defendant's Brief, Booklet on 1992 Performance Management Process.)

11) Plaintiff was informed of this evaluation process at a meeting prior to the start of the evaluation process. (Exhibit "D" to Defendant's Brief, Peters Deposition, Vol. 1, pp. 107-108.)

12) The Relative Performance System Ratings for Plaintiff's peer review group for the year 1991, was as follows:⁴

<u>NAME</u>	<u>AGE</u>	<u>RPR</u>
D. L. Hayes	31	02
D. J. Holloway	51	02
A. E. Thompson	38	02
S. K. Cabiness	37	03
D. E. Driskill	42	03

⁴Plaintiff contends the individuals in his group (Technical and Administrative Support Group) were not his peers because some of the members of the group had significantly different duties and responsibilities. It is undisputed, however, that these individuals were grouped together for purposes of review and evaluation.

<u>NAME</u>	<u>AGE</u>	<u>RPR</u>
V. J. Kidd	58	03
R. E. Lewis	53	03
K. S. Scobey	32	03
A. H. Shaw	50	03
R. I. Wood	49	03
J. W. Baden, Jr.	52	04
G. L. Peters	55	04

(Exhibit "F", Merit Review Worksheet dated March 5, 1992.)

13) On his 1991 performance appraisal (the evaluation is actually prepared in January, 1992), Plaintiff was assigned an RPR of "4." (Exhibit "A", Affidavit of Stuart Blankenship.)

14) Plaintiff filed a charge of age discrimination with the Oklahoma Human Rights Commission on April 8, 1992, alleging that the RPR of "4" was given to him as a result of his age.

15) MDC's work force continued to disintegrate through 1992 as a result of continuous reductions in force. (Exhibit "C", Affidavit of Randy Embry.)

16) The Quality Assurance group was informed by upper management in St. Louis in June, 1992, that still more cutbacks were needed. The Director of Quality Assurance in Tulsa, Stuart Blankenship, and the supervisors who reported directly to him were instructed to analyze the functions performed by the Quality Assurance group and the performance and skills of all personnel in his group. Blankenship required his managers to suggest for layoff those persons whom they could most easily do without, while still

performing the most essential duties assigned to the Quality Assurance group. Blankenship made the final decisions regarding layoff of all employees within his group. (Exhibit "A", Affidavit of Stuart Blankenship.)

17) Faced with the requirement to reduce personnel, Blankenship made the decision to lay Plaintiff off. Others M & P Analysts who were not laid off at the time Plaintiff was laid off were John Baden, age 52, David Driskill, age 42 and Ken Ihde, age 42. (Exhibit "A", Affidavit of Stuart Blankenship.)

18) Plaintiff's longevity in a previous job in the Collective Bargaining Unit ("CBU") allowed him to "bump" back into a job as an ultrasonic inspector rather than losing employment. Plaintiff received a \$400.00 per month pay increase as a result of this reassignment. (Exhibit "D", Peters Deposition, Vol. 1, pp. 167-168.)

19) Plaintiff worked as an ultrasonic inspector from July 6, 1992 to September 11, 1992, when, as a result of additional and continuing reductions in the MDC work force, he was laid off from work. This layoff was based on seniority under the terms of the Collective Bargaining Agreement between the United Aerospace Workers Union ("UAW") and MDC. (Exhibit "C", Affidavit of Randy Embry.)

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

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

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

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

short of 'significantly probative.' . . .

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

Analysis and Authorities

Plaintiff's First Cause of Action - Age Discrimination

Plaintiff's first cause of action alleges he was discriminated against because of his age in violation of the Age Discrimination in Employment Act (ADEA). It is not altogether clear, however, what specific actions or decisions by MDC the Plaintiff contends were discriminatory.⁵ Nevertheless, the Court concludes Plaintiff has failed to establish a case of age discrimination with regard to any

⁵ There appears to be four distinct actions taken by Defendant which Plaintiff may be contending were motivated by Plaintiff's age and had an adverse affect on Plaintiff.

1) The creation of the "review group" which included Plaintiff and 11 other employees for purposes of giving each employee a relative performance rating.

b) The decision to give Plaintiff a relative performance rating of "4".

c) The decision in July, 1992, to lay off Plaintiff from his position as an M & P analyst.

d) The decision in September, 1992, to lay off Plaintiff from his position as an ultrasonic inspector.

of Defendant's actions.

An ADEA plaintiff has the burden of establishing that age was a "determining factor" in the employer's challenged decision. See Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1400 (10th Cir. 1988). In order to meet this burden, the plaintiff can present direct or circumstantial evidence that age was a determining factor in the decision or the plaintiff may rely on the proof scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), and its progeny. Lucas, 857 F.2d at 1400. Under the McDonnell proof scheme, in order to establish a *prima facie* case of age discrimination in a reduction in force case, a plaintiff must prove:

1. he was a member of the protected age group;
2. he was doing satisfactory work;
3. he was discharged despite the adequacy of his work; and
4. there is evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

Id., 857 F.2d at 1400-01.

Although MDC has admitted the first three elements, it contends Plaintiff has not provided sufficient evidence from which a reasonable factfinder could conclude that MDC intended to discriminate against Plaintiff because of his age. The Court agrees.

Plaintiff takes issue with many of MDC's decisions, but fails to establish that age was a determining factor in any of the decisions. Plaintiff suggests that he was unfairly placed in a

group for evaluation purposes that contained employees who were not his "peers" because they had different supervisors and different job responsibilities.⁶ Although the grouping of employees in this fashion may not be the most equitable or accurate method of evaluating an employee's skills, there is no evidence to suggest MDC took this approach for the purpose of discriminating against Plaintiff or older employees generally. Plaintiff's group included twelve employees with ages ranging from 31-58, six of whom were over 50 years old. Despite viewing the evidence in a light most favorable to the Plaintiff, the Court concludes no reasonable inference of age discrimination can be drawn from these facts.

Plaintiff also disagrees with the relative performance ranking he received. He contends, and apparently another employee (Kenneth Ihde) agrees, Plaintiff should have received an RPR of "3" and Dave Driskell should have received an RPR of "4". This assertion, even if true, is insufficient to establish that MDC's evaluation of Plaintiff was a pretext for age discrimination.⁷ Branson v. Price

⁶ Plaintiff's review group contained three other employees (Dave Driskell, John Baden, and A.H. Shaw) with the same job title (M & P Analyst) as Plaintiff. He contends these are the true "peers" against whom he should have been evaluated. These employees ages and ratings are as follows:

<u>NAME</u>	<u>AGE</u>	<u>RPR</u>
D. E. Driskell	42	03
A. H. Shaw	50	03
J. W. Baden, Jr.	52	04
G. L. Peters	55	04

⁷ Although Plaintiff's counsel reaches the unfettered conclusion that the decision to give Plaintiff an RPR of "4" was "more likely than not predicated on age rather than an objective analysis of relative performance of other Materials and Process Analysts", the evidence she cites simply does not support this

River Coal Company, 853 F.2d 768,772 (10th Cir. 1988) and Lucas, 857 F.2d at 1403-04. The Court also concludes no reasonable inference can be drawn from the fact that the only two employees in Plaintiff's group to receive an RPR of "4" were over 50 years old as there appears to be no correlation between the employee's ages and the evaluations they received.

The Court further concludes Plaintiff has failed to present evidence creating an inference that he was laid off from his M & P analyst position or his ultrasonic inspector position because of his age. LaGrant v. Gulf & Western Mfg. Co., Inc., 748 F.2d 1087, 1090 (6th Cir. 1984) ("The mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case of age discrimination.")

In summary, Plaintiff has failed to provide any evidence from which a reasonable inference can be drawn that MDC intended, through any of its actions, to discriminate against Plaintiff because of his age.⁸

conclusion.

Plaintiff's counsel makes numerous factual allegations throughout her response brief without citing to any evidence in the record. Furthermore, Plaintiff's counsel repeatedly cites to evidence which does not support the factual allegation for which it is cited.

⁸ The evidence submitted by Plaintiff to support his claim of age discrimination is not probative of MDC's intentions. For instance, Plaintiff states in his affidavit:

From the time Chris Kochan was making management decisions he systematically removed every minority, women, foreign born and older employees having significant tenure with the company including: [eight named individuals].

Furthermore, assuming *arguendo* that Plaintiff has established a *prima facie* case of age discrimination, the Court concludes Plaintiff has failed to demonstrate that the proffered explanations of MDC are just a pretext and that age was, in fact, a determinative factor in MDC's decisions. E.E.O.C. v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988).

MDC contends each of its decisions affecting Plaintiff were based on MDC's exercise of prudent business judgment regarding the needs of the company and Plaintiff's performance and skill when compared to those of his peer group. The Court concludes this is a legitimate, non-discriminatory reason for MDC's actions. While Plaintiff may not agree with Defendant's business judgment regarding the grouping of employees for evaluations, the evaluations of particular employees or the needs of the company, he has not provided a reasonable basis for a jury to find that age was a determining factor in any of the decisions. Lucas, 857 F.2d at

This unsubstantiated allegation does not raise a sufficient inference of discrimination against the Plaintiff to survive a motion for summary judgment. Likewise, the deposition testimony of Kenneth Ihde that he would have given Plaintiff an RPR of "3" is insufficient to raise an inference of age discrimination.

The Court also finds no probative value in the affidavits of two former MDC employees who allege they were discriminated against or in the Wall Street Journal article which states that more than 100 former employees of MDC have filed age-bias complaints with the EEOC since 1990.

Plaintiff also heavily relies on the Oklahoma Human Rights Commission (OHRC) report and determination which concluded Plaintiff had been discriminated against because of his age. However, the EEOC reviewed the OHRC findings and concluded that the evidence did not establish a violation of the ADEA. The findings of the OHRC are not binding on this Court and furthermore, the Plaintiff has failed to provide any evidence to support the agency's findings.

1403. "The Court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." Lucas, 857 F.2d at 1402-03. For these reasons, MDC's motion for summary judgment on Plaintiff's first cause of action should be granted.

Plaintiff's Fifth Cause of Action - Retaliatory Discharge

Plaintiff's fifth cause of action alleges that MDC violated the ADEA when it discharged Plaintiff from his M & P Analyst position in retaliation for his filing a claim of age discrimination with the OHRC. It is undisputed that Plaintiff filed a complaint with the OHRC on April 8, 1992, alleging his age was a factor in MDC's decision to give him an RPR of "4". It is also undisputed that Plaintiff was laid off from his position as an M & P Analyst in July, 1992.

In order to establish a claim of retaliatory discharge, Plaintiff must prove:

- 1) he was engaged in statutorily protected activity;
- 2) he suffered an adverse employment decision or conduct subsequent to or contemporaneous with such protected activity; and
- 3) that direct or circumstantial evidence demonstrates that there is a reasonable basis for believing that a causal connection exists between the protected activity and the employers decision.

Purrington v. University of Utah, 996 F.2d 1025, 1033 (10th Cir. 1993). The third element (the causal connection) may be demonstrated "by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." Burris v. United Tel. Co. of Kansas,

Inc., 683 F.2d 339,343 (10th Cir. 1982).

Plaintiff points out that only 3 months passed between the time he filed his complaint with the OHRC and the day he was laid off from his M & P analyst position. Plaintiff also contends (without pointing to supporting evidence in the record) that he "was the only Material and Process Analyst who filed a Complaint alleging age discrimination with the Oklahoma Human Rights Commission and is the only materials and process analyst who received a 4 who has been laid off." Plaintiff also alleges (without providing evidence) that several other persons appeared on the lay-off list, but only Plaintiff was actually laid off between April and July 1992.

Assuming *arguendo* that the above stated evidence and allegations creates an inference of a causal connection between Plaintiff's protected activity and his subsequent lay off, the burden of production then shifts to MDC to articulate a legitimate, nondiscriminatory reason for the adverse action. Purrington, 996 F.2d at 1033 (10th Cir. 1993). MDC contends the decision to dismiss Plaintiff was based on economic necessity under the mandate of work force reduction and MDC's analysis of those remaining employees' historical job performance, diversity of skills and ability to carry on the essential functions of the job. MDC contends it determined Plaintiff was a poorer performer than those remaining in his particular job function. The Court concludes this is a legitimate, non-discriminatory reason for dismissing Plaintiff.

Therefore, the Court must grant Defendant's motion for summary

judgment unless the Plaintiff can demonstrate that the articulated reason was a mere pretext for discrimination. Purrington, 996 F.2d at 1033 (10th Cir. 1993). Plaintiff has no evidence whatsoever that MDC's articulated basis for his dismissal is merely pretext. Thus, Plaintiff has failed to create a sufficient question of material fact to survive Defendant's motion for summary judgment on Plaintiff's fifth cause of action.

For the reasons stated herein, Defendant's Motion for Summary Judgment (Docket #24) should be and is hereby GRANTED.

IT IS SO ORDERED THIS 10th DAY OF MARCH, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

MAR 1 1994

FILED
MAR 10 1994

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

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

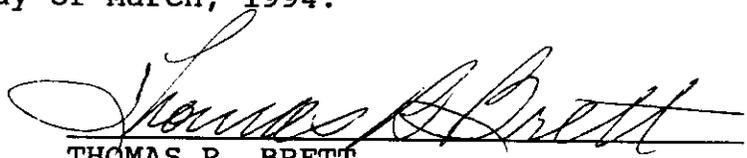
GERALD R. PETERS,)
)
 Plaintiff,)
)
 vs.)
)
 MCDONNELL DOUGLAS CORP., a)
 Maryland corporation,)
)
 Defendant.)

No. 93-C-376-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, McDonnell Douglas Corporation, and against the Plaintiff, Gerald R. Peters. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1, and each party is to pay its own respective attorney's fees.

Dated, this 10th day of March, 1994.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 3-11-94

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

SARAH O. BUSSINGER,)
)
 Plaintiff(s),)
)
 v.)
)
 SECRETARY OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant(s).)

FILED
 MAR 18 1994
 Richard M. Lawrence, Court Clerk
 U.S. DISTRICT COURT

92-C-0164-E

ORDER

Now before the Court is Sarah Bussinger's appeal of a decision by the Secretary to deny her Social Security benefits. Ms. Bussinger raises four issues. The first is whether substantial evidence supports the Secretary's decision. Second, did the Administrative Law Judge ("ALJ") properly evaluate Ms. Bussinger's complaints of pain? The third issue is whether the ALJ asked an improper hypothetical question. Finally, she contends that the ALJ should not applied the "grid" regulations. For the reasons discussed below, the Secretary's decision is affirmed.

I. Procedural History/Summary of Medical Evidence

Ms. Bussinger ("Plaintiff") has filed three applications for supplemental security income ("SSI") benefits. She applied initially on March 29, 1988 and again on April 21, 1989. Both applications were denied by the Secretary and Plaintiff did not appeal. Plaintiff filed the instant application on February 21, 1990, alleging disability due to back

13

and knee problems.¹

The Secretary denied Plaintiff's application on May 23, 1990 and on reconsideration October 9, 1990. On January 22, 1991, the ALJ held a hearing. The pertinent evidence submitted to the ALJ is as follows.

Plaintiff, 38 years old with a sixth grade education, testified that she was unable to work because of pain in her lumbar spine, neck and knee. She also testified that she had arthritis, cysts muscle spasms, hypertension and urinary and bowel problems. She also said she cannot drive because of the pain and is unable to bend, stoop, reach, pull or lift. *Record at 31-48.*

Plaintiff has been hospitalized numerous times for lower back and knee problems between 1983 and 1990. On May 16, 1989, Dr. W. T. Manning, an M.D. said he had examined Plaintiff frequently. His impression was that she had chronic low back syndrome with muscle spasms, noting that she was unable to do any "productive activity." *Record at 212.*

On February 15, 1990, emergency room doctors examined Plaintiff for back pain. X-rays revealed "mild scoliosis" and muscle spasms. She was prescribed a muscle relaxant, anti-inflammatory medicine and a soft cervical collar. *Id. at 228.*

On May 10, 1990, Dr. B.G. Henderson, D.O., a consulting physician, examined Plaintiff. Dr. Henderson, who noted that Plaintiff was 5-foot-4 and 172 pounds, opined that she may have *coccydynia*. He also stated that she was obese, had hypertension,

¹ Since Plaintiff did not appeal the first two denial decisions, *res judicata* applies and this Court has no jurisdiction. *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990). Therefore, Plaintiff was not disabled from March 29, 1988 to June 14, 1989. The only issue before this Court is whether the ALJ erred in finding that Plaintiff was not disabled after June 14, 1989.

tachycardia and problems with her range of motion. *Id. at 229-230.* Dr. Henderson also wrote: "She is unable to walk on heels or toes due to the pain in her back. She moves very carefully and guards her back quite a bit."²

Vocational expert Ruth Ferguson testified that Plaintiff could work in light and sedentary jobs if her pain could be controlled with medication. She, however, also testified that Plaintiff could not work if she had to lay down most of her work shift.

On May 16, 1991 -- following the testimony of Ms. Ferguson and Plaintiff -- the ALJ issued the following findings:

1. The medical evidence establishes that the Plaintiff has lumbar spine pain and arthritic pain, but that she does not have an impairment or combination of impairments listed in...Appendix 1, Subpart P, Regulations No. 4.
2. The Plaintiff's testimony, including that regarding pain, is not credible to the extent that it would prevent the claimant from performing sedentary work activity.
3. The Plaintiff has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for occasional lifting of more than 10 pounds at a time, frequent walking and standing; and repetitive bending, stooping, and lifting. The claimant's pain does not affect her concentration or prevent the performance of work-related activities.
4. The 38-year-old Plaintiff has the residual functional capacity for the full range of sedentary work reduced by the limitations in No. 3.
5. Plaintiff's capacity for the full range of sedentary work has not been significantly compromised by her additional nonexertional limitations. Accordingly, using the above-cited rule as a framework for decisionmaking, the claimant is not disabled.

Following the ALJ's decision, Plaintiff filed a Request For Review. On February 5, 1992, the Appeals Council denied that request. Plaintiff then filed the instant appeal on

² In October of 1990, Plaintiff was diagnosed with lumbar arthritis. Treatment was prescribed and she was advised to lose weight.

February 26, 1992.³

II. Legal Analysis

In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g).⁴ The Court'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). Substantial evidence is what "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" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).⁵

The first issue is whether the ALJ erred in his evaluation of Plaintiff's pain. The rule on evaluating complaints of pain is examined in *Luna v. Bowen*.⁶ The ALJ must first

³ The docket sheet reflects that the Secretary filed a response on September 11, 1992. Thirteen months later, on October 4, 1993, the case was transferred from United States Magistrate Judge John Leo Wagner to the undersigned. On January 27, 1994, both parties signed a Consent To Proceed.

⁴ 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."

⁵ When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("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; (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).

⁶ 834 F.2d 161 (10th Cir. 1987).

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.

A review of the record indicates the ALJ did not err on this issue. He found that Plaintiff did have a pain-producing impairment and that there was a nexus between the impairment and her complaint's of pain. He then properly analyzed the evidence pursuant to the *Luna* directive.⁷ Wrote the ALJ:

In assessing the severity of the claimant's subjective complaints of pain, the ALJ gives careful consideration to the claimant's credibility. The claimant alleges, in part, that she is unable to work due to her ovarian surgery...and her frequent episodes of pneumonia. The claimant also contends that she cannot work due to cysts in her wrists and left shoulder area. The documentary medical evidence does not support these allegations...Regarding the claimant's back condition, the documented laboratory findings have shown no severe problems...The ALJ can find no substantial evidence of any medically documented functional limitations that would indicate severe pain. Additionally, the record demonstrates that claimant has failed to follow prescribed treatment. Record at 15.

The second issue is whether the ALJ erred in his hypothetical question. A hypothetical question must "relate with precision" all of a claimant's impairments to constitute substantial evidence. *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991). Plaintiff does not specify as to what part of the hypothetical question was improper.

⁷ *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 claimant's daily activities, and the dosage, effectiveness and side effects of medication. *Id.* at 166. In the instant case, the ALJ found that, while she did walk with a cane and had problems with her routine daily activities, that her credibility was suspect.*

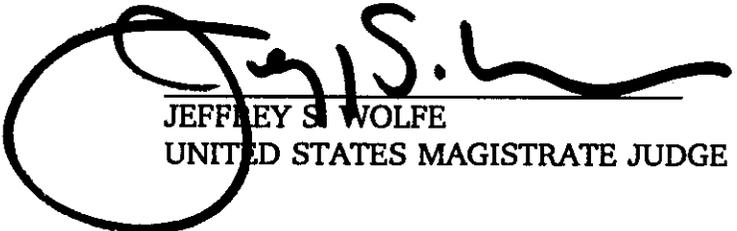
Moreover, the undersigned finds that the question did "relate with precision" Plaintiff's impairments.⁸

The third issue is whether the ALJ improperly relied on the "grid" regulations when deciding this case. In *Huston v. Bowen*, 838 F.2d 1125, 1131 (10th Cir. 1988), the court wrote:

Automatic application of the grids is appropriate only where a claimant's residual functional capacity (RFC) and other characteristics precisely match a grid category. RFC is primarily a measure of exertional capacity, i.e. strength. Residual capacity, however, sometimes is curtailed by nonexertional limitations, such as postural or sensory limitations. Where such is the case, the grids may not be applied mechanically but may serve only as a framework in aid in the determination of whether sufficient jobs remain within a claimant's RFC range (sedentary, light, medium and heavy and very heavy).

In the instant case, the simply relied on the "grids" as framework for his decision. That was not in error. In addition, a review of the testimony and medical reports shows that substantial evidence supports the ALJ's decision.⁹ Consequently, the Secretary's decision to deny Plaintiff benefits is AFFIRMED.

SO ORDERED THIS 10th day of March, 1994.


JEFFREY S WOLFE
UNITED STATES MAGISTRATE JUDGE

⁸ The ALJ asked whether an 34- to 37 year-old individual with no basic work record whose pain could be controlled with medication could work. The vocational expert said such an individual could work as a line server, crossing guard, maid and dry cleaning machine operator.

⁹ The issue in this case is whether Plaintiff was disabled at anytime between June 14, 1989 and May 16, 1991. None of the doctors examining Plaintiff found her to be disabled. Doctors did diagnose her with "mild scoliosis" and muscle spasms, hypertension and noted problems with her range of motion. However, they also found her to obese and recommended that she lose weight. The medical evidence, coupled with the testimony of the vocational expert, constitutes substantial evidence supporting the decision. It also should be noted that the ALJ discounted part of Plaintiff's testimony concerning her condition -- which is within his province.

DATE 3-11-94

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

KEITH E. BRANDINGER,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
SECRETARY OF HEALTH AND)
HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-480-E ✓

F I L E D

MAR 10 1994

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

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 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

In the case at bar, the ALJ made his decision at the fifth step of the sequential

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 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).

evaluation process.² He first found that the claimant's earnings record showed he met the special insured status requirements of the Social Security Act for disability purposes on October 1, 1981 and continued to meet those requirements through September 30, 1986, but not thereafter. This was significant, because in order to be entitled to a period of disability and disability insurance benefits, the claimant had to be found disabled pursuant to applicable provisions of the Social Security Act on or before September 30, 1986.

The ALJ found that claimant had the residual functional capacity to perform the requirements of work except for lifting more than 20 pounds occasionally or more than 10 pounds frequently. He concluded that claimant was unable to perform his past relevant work as a carpenter and any of his past relevant jobs. He found that claimant had the residual functional capacity to perform the full range of light work, was 36 years old, which is defined as a "younger individual," and had a high school education and computer training. He then applied the Social Security regulations and concluded that, considering the claimant's residual functional capacity, age, education, and work experience, he was not disabled, at any time from October 1, 1981, through September 30, 1986.

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

(1) That the case should be remanded for a hearing on whether

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).

claimant's first period of disability should have been terminated.

- (2) That the ALJ's finding that plaintiff's allegations of pain were not credible to the extent that they precluded work was in error.
- (3) That the case should be remanded for vocational expert testimony because the ALJ erred in deciding on his own that there are a substantial number of jobs in the national economy that claimant could perform.
- (4) That the ALJ erred in failing to give great weight to the fact that plaintiff has received a 100% Veterans Administration disability rating.

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).

There is no merit to claimant's first argument that this case should be remanded for an administrative hearing to contest the termination of claimant's benefits. He suffered a fall in 1975 and underwent a decompressive laminectomy and lateral fusion at the L1-L5 area. His impairments significantly limited his ability to perform basic work activities, and he was found entitled to disability insurance benefits on November 30, 1976 (TR 197). On June 1, 1978, the Social Security Administration requested information on his medical condition (TR 205), and he was examined by Dr. Kenyon Kugler, who concluded he could work in a job that would allow him to electively sit and stand and take pain medications (TR 215-216). As a result, in July 1978, his right to benefits was terminated (TR 217). The Notice of Social Security Termination stated that an explanation of appeal rights was on the reverse side, but the copy in the record is blank on the reverse side (TR 219).

Claimant did not appeal and reapplied for a period of disability and disability insurance benefits on February 20, 1990, alleging disability since October 1, 1981.

Claimant contends that he did not receive notice of his right to request an administrative hearing to contest the termination and therefore was denied his due process rights. There is no doubt that he received notice and explanation of the termination (TR 217-220). The Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 349 (1976), concluded that an evidentiary hearing was not required prior to the termination of disability benefits.

This case should be remanded for a hearing including vocational expert testimony. The ALJ concluded that there are a significant number of jobs in the national economy that claimant can perform (TR 12), after "carefully [studying] the medical records in this case." (TR 14). He found a lack of medical evidence for the critical 1981-1986 period (TR 14). He noted that Dr. Stephen Eichert had reported that claimant's pain was well controlled by medication (TR 150), x-rays of his spine on April 1, 1981 were all "negative," and claimant received good relief from a TENS unit (TR 13, 15). He noted that an "unidentified individual" described claimant as "100% disabled" on February 2, 1985 (TR 14 and 146), but the progress notes associated with the statement of disability and other medical records did not show continuous disability for twelve months (TR 14). On March 9, 1990, claimant reported he had had no inpatient hospitalization between 1977 and 1987, the period which is significant for determination of entitlement to benefits in this case (TR 14 and 124).

The ALJ referred to the letter from Dr. Gerard F. Shea on May 16, 1990, which

stated:

This letter is in regard to the above captioned individual who had been seen in my office from March, 1986 to March, 1987 complaining of muscle spasm in his back together with an associated limitation of motion in his lumbar spine resulting in marked impairment of the patient's ability to walk requiring the use of a cane. Unfortunately, the records for my examinations and treatment of this patient during this time frame have been destroyed due to fire and is based primarily upon my recollection thereof.

To the best of my recollection this patient should have been considered disabled and apparently has sustained a permanent partial impairment to the body as a whole dating back to the time of my initially seeing him in March of 1986.

(TR 180). The ALJ noted that Dr. Shea made reference to partial impairment and did not define his use of the word "disabled." The ALJ concluded that Dr. Shea did not consider the term "disability" within the meaning of applicable provisions of the Social Security Act.

(TR 14).

The ALJ went on to consider claimant's subjective complaints of pain. 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, 987 F.2d 1482 (10th Cir. 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). "[T]he 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.

The ALJ considered statements of the claimant, medications, daily activities, observations of treating and examining physicians, the claimant's work record, objective test results, precipitating and aggravating factors, and functional restrictions imposed by doctors (TR 15). He noted that the claimant testified he attended computer training classes for six months in 1985 and worked for his step-father in 1980 and 1984 as a carpenter's helper getting tools and trimming woodwork 8 hours per day, standing almost the entire time and lifting 10-15 pounds at a time (TR 33-34). While claimant reported severe problems in October 1989 with subsequent surgery, by that time, the claimant's insured status had expired. The claimant reported his activities in 1986 included watching television, raising pigs and chickens and feeding them (which required 2-3 hours of daily tending), visiting with friends, gardening, and performing small jobs for people (TR 42-45). The ALJ concluded this record reflected "work and work-like activities." (TR 15).

Finding that observations of treating and examining physicians, to the extent supported by objective test results, did not show severe and disabling functional restrictions between October 1, 1981 and September 30, 1986, the ALJ concluded the evidence was lacking for signs and findings one would expect to support a degree of pain that might have been considered disabling at that time. (TR 15). The ALJ found that claimant's pain was not of such intensity, frequency and duration as would significantly effect the ability to perform basic work activities between October 1, 1981 and September 30, 1986 (TR

15). The ALJ concluded that claimant could have functioned in work requiring him to lift no more than 20 pounds at a time with frequent lifting and carrying of objects weighing no more than 10 pounds, without experiencing significant pain and had the residual functional capacity to perform light work on a sustained basis during the period at issue (TR 15-16).

However, the ALJ's finding regarding claimant's noncredibility does not compel a finding of not disabled. Rather, the credibility determination is just a step on the way to the ultimate decision. The ALJ must demonstrate that claimant retains the exertional and nonexertional capacity to perform a significant number of jobs in the national economy, despite the level of nondisabling pain he suffers and the type and degree of limitations that restrict his occupational opportunities. Ragland v. Shalala, 992 F.2d 1056, 1060 (10th Cir. 1993). The ALJ did not demonstrate this, but rather he placed the burden on claimant to prove that his impairment significantly affected his ability to engage in a full range of work at the light work level. Further, the ALJ improperly found that plaintiff had a residual functional capacity for a full range of light work based on the absence of evidence to the contrary. The Secretary cannot meet the burden of proving that a claimant can perform work at a particular residual functional capacity level by relying on the absence of contraindication in medical records. Thompson, 987 F.2d at 1491. The ALJ's impression that plaintiff exaggerated his pain is not substantial evidence, by itself, to support the finding that plaintiff can perform work at the light work level. Talbot, 814 F.2d at 1464. The Secretary presented no evidence that plaintiff had the capacity to perform the full range of light work during the period at issue.

In addition, although a Veterans Administration disability rating is not binding on the Secretary, it is evidence that should be given great weight. Hogard v. Sullivan, 733 F.Supp. 1465, 1468 (M.D. Fla. 1990); Olson v. Schweiker, 663 F.2d 593, 597 n. 4 (5th Cir. 1981). The ALJ failed to give great weight to the 90% disability ratings given to claimant by the Veterans Administration on October 1, 1986 (TR 183). On October 2, 1990, the rating was raised to 100% disability (TR 184).

This case is remanded for a supplemental hearing at which testimony by a vocational expert is to be presented on the impact of plaintiff's pain on his ability to perform light work from October 1, 1981 through September 30, 1986. The Veterans Administration disability rating is also to be given great weight.

Dated this 9th day of March, 1994.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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