

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

FILED

JAN 30 1995

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

HENRY D. GLEASON,)
)
Plaintiff,)
)
v.)
)
DONNA SHALALA, Secretary of)
Health and Human Services,)
)
Defendant.)

Case No. 93-C-572-BU

ENTERED ON DOCKET
DATE JAN 30 1995

ORDER AFFIRMING DENIAL OF BENEFITS

This is an appeal from a denial of social security disability benefits. Plaintiff was denied benefits for his alleged disability by the Appeals Council of the Department of Health and Human Services upon the recommendation of the Administrative Law Judge ("ALJ"). The decision of the ALJ rendered November 19, 1992 became the final decision of the Secretary, of which Plaintiff now seeks judicial review pursuant to 42 U.S.C. §405(g).

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and that duplication of this effort would serve no useful purpose. The Court, in its review of the pleadings and transcript of the record, has been granted the authority to enter a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence. Plaintiff requests that this case be reversed and that benefits be awarded Plaintiff.

Court review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. §405(g). This Court is not permitted to conduct a trial de novo but is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakly v. Heckler, 795 F.2d 64 (10th Cir. 1986); Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The transcript of the proceedings has been carefully reviewed by the Court. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that Plaintiff was not under a disability as defined by the Social Security Act.

The Court finds that the final administrative decision should be affirmed because there is substantial evidence in the record to support the ALJ's decision. Further, correct legal standards were followed in the ALJ's determination that Plaintiff was not disabled because he could perform other work in the national economy. See Casias v. Secretary of HHS, 933 F.2d 799, 800-01 (10th Cir. 1991).

ACCORDINGLY, the Court finds that the decision of the ALJ which is the final decision of the Secretary, is **AFFIRMED**.

IT IS SO ORDERED this 27 day of January, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

JAN 30 1995

ROBERT B. PITTS, JR.)

Plaintiff,)

v.)

DONNA SHALALA, Secretary of)
Health and Human Services,)

Defendant.)

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

Case No. 92-C-1054-BU

ENTERED ON DOCKET

DATE 1-31-95

ORDER AFFIRMING DENIAL OF BENEFITS

This is an appeal from a denial of social security disability benefits. Plaintiff was denied benefits for his alleged disability by the Appeals Council of the Department of Health and Human Services upon the recommendation of the Administrative Law Judge ("ALJ"). The decision of the ALJ rendered May 6, 1992 became the final decision of the Secretary, of which Plaintiff now seeks judicial review pursuant to 42 U.S.C. §405(g).

The Court finds that the ALJ has adequately and correctly set forth the relevant facts of this case and that duplication of this effort would serve no useful purpose. The Court, in its review of the pleadings and transcript of the record, has been granted the authority to enter a judgment affirming, modifying or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, Plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. Plaintiff requests that this case be reversed and that the Plaintiff be awarded benefits.

Court review of the Secretary's denial of Social Security disability benefits is limited to consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. §405(g). This Court is not permitted to conduct a trial de novo but is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakly v. Heckler, 795 F.2d 64 (10th Cir. 1986); Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The transcript of the proceedings has been carefully reviewed by the Court. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that Plaintiff was not under a disability as defined by the Social Security Act.

The Court finds that the final administrative decision should be affirmed because there is substantial evidence in the record to support the ALJ's decision. Further, correct legal standards were followed in the ALJ's determination that Plaintiff was not disabled because he could perform other work in the national economy. See Casias v. Secretary of HHS, 933 F.2d 799, 800-01 (10th Cir. 1991).

ACCORDINGLY, the Court finds that the decision of the ALJ which is the final decision of the Secretary, should be and is **AFFIRMED**.

IT IS SO ORDERED this 27th day of January, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 31 1995

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

JOHN LEE MARKLEY,
JOE WAYNE MARKLEY, and
RUTH M. BACHELOR,

Plaintiffs,

vs.

IMPERIAL GROUP, LTD., formerly
IMPERIAL LAND INVESTMENT COMPANY,
a Georgia corporation,

Defendant.

Case No. 76-C-400-B

ENTERED ON DOCKET

DATE JAN 31 1995

DISMISSAL

COME NOW the plaintiffs, JOHN LEE MARKLEY, JOE WAYNE MARKLEY
and RUTH M. BACHELOR, and hereby dismiss the above cause with prejudice.

Dated this 13th day of September, 1994.

John Lee Markley

JOHN LEE MARKLEY

Joe Wayne Markley

JOE WAYNE MARKLEY

Ruth M. Bachelor

RUTH M. BACHELOR
now known as RUTH M. MARKLEY
Ruth M. Markley

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

RANDY M. COLE,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 31 1995
93-C-0784-K

F I L E D
JAN 31 1995
Richard M. Lewis, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This action having come before the court for consideration, **IT IS ORDERED,**
ADJUDGED AND DECREED that judgment is entered as follows: **The case is remanded for**
further hearing by the Administrative Law Judge on the degree of Mr. Cole's mental
impairment.

The case is remanded per the Order of January 27, 1995.
DATED THIS 27 day of January, 1995.

Terry C Kern
TERRY C. KERN,
UNITED STATES DISTRICT JUDGE

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

EMT
JAN 31 1995

RANDY M. COLE,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

93-C-0784-K ✓

FILED
JAN 31 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

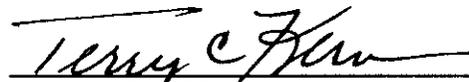
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed January 3, 1995 in which the Magistrate Judge recommended that the Secretary's decision be remanded so the ALJ can determine whether Mr. Cole's mental impairment (i.e., depression) keeps him from returning to work. The record clearly indicates that Mr. cole suffers from depression, but it is unclear as to what degree. As a result, the ALJ must re-examine the evidence in light of this opinion and then hold a supplemental hearing where the vocational expert again testifies.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 27 day of January, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE JAN 31 1995

ROBBIE ROWLAND,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendants.)

No. 94-C-458-K

FILED
JAN 31 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on February 18, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

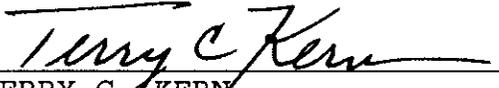
- (1) Defendants' motion to dismiss or for summary judgment (doc. #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 27 day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

GARY ALLEN THOMAS,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

DATE JAN 31 1995

No. 94-C-428-K

FILED
JAN 31 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on July 15, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

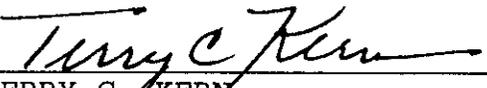
- (1) Defendants' motion to dismiss or for summary judgment (doc. #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 27 day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

EUGENE DURANT,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendants.)

No. 94-C-865-K

DATE JAN 31 1995

F I L E D

JAN 31 1995

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

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on November 21, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

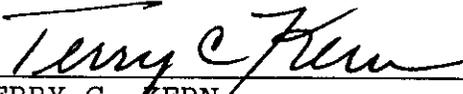
- (1) Defendants' motion to dismiss or for summary judgment (doc. #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 27 day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 30 1995

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

STEPHEN S. OWEN,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 94-C-459-B

ENTERED ON DOCKET
JAN 31 1995
DATE _____

ORDER

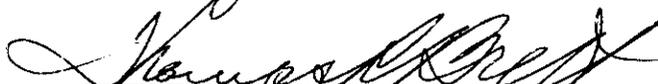
In the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 Petitioner challenges the computation of his earned time credits by the Oklahoma Department of Corrections. Respondent has moved to dismiss the petition for failure to exhaust state remedies, arguing that, if Petitioner is seeking immediate as opposed to speedier release, he has an adequate state remedy. In a recent supplemental response (submitted in response to this Court's order of December 23, 1994), Respondent informs the Court that even assuming Petitioner's allegations to be correct, the Petitioner is not entitled to an immediate release and, therefore, has no state remedy presently available to challenge the computation of his earned credits. Respondent reargues, however, that this habeas corpus action is not the proper remedy for the age discrimination claim and lack of notice claim which Petitioner raises in "Ground II" of his petition. Respondent contends that those claims relate more to the condition of Petitioner's confinement rather than to the legality or duration of his confinement.

After reviewing the record in this case, the Court concludes that Respondent's motion to dismiss for failure to exhaust state remedies should be denied and that his request to dismiss some of Petitioner's claims in "Ground II" should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondent's motion to dismiss for failure to exhaust state remedies (doc. #4) is **denied**;
- (2) Petitioner's age discrimination and lack of notice/hearing claims, raised in "Ground II" of his petition, are **dismissed without prejudice**; and
- (3) Respondent shall **address the merits** of Petitioner's claims under the earned-time-credit statute on or before twenty (20) days from the date of entry of this order.

SO ORDERED THIS 30 day of Jan, 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 30 1995

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

STEPHEN S. OWEN,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 94-C-459-B

ORDER

In the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 Petitioner challenges the computation of his earned time credits by the Oklahoma Department of Corrections. Respondent has moved to dismiss the petition for failure to exhaust state remedies, arguing that, if Petitioner is seeking immediate as opposed to speedier release, he has an adequate state remedy. In a recent supplemental response (submitted in response to this Court's order of December 23, 1994), Respondent informs the Court that even assuming Petitioner's allegations to be correct, the Petitioner is not entitled to an immediate release and, therefore, has no state remedy presently available to challenge the computation of his earned credits. Respondent reargues, however, that this habeas corpus action is not the proper remedy for the age discrimination claim and lack of notice claim which Petitioner raises in "Ground II" of his petition. Respondent contends that those claims relate more to the condition of Petitioner's confinement rather than to the legality or duration of his confinement.

After reviewing the record in this case, the Court concludes that Respondent's motion to dismiss for failure to exhaust state remedies should be denied and that his request to dismiss some of Petitioner's claims in "Ground II" should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Respondent's motion to dismiss for failure to exhaust state remedies (doc. #4) is **denied**;
- (2) Petitioner's age discrimination and lack of notice/hearing claims, raised in "Ground II" of his petition, are **dismissed without prejudice**; and
- (3) Respondent shall **address the merits** of Petitioner's claims under the earned-time-credit statute on or before twenty (20) days from the date of entry of this order.

SO ORDERED THIS 30 day of Jan, 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 30 1995

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

BOBBY E. LUCKY,
Plaintiff,
vs.
RON CHAMPION,
Defendant.

No. 94-C-002-B

ENTERED ON DOCKET

DATE JAN 31 1995

ORDER

In this prisoner's civil rights action, Plaintiff, appearing pro se, alleges that Defendant denied him the right of access to the court, denied him the right to an education, and disciplined him and transferred him to a maximum security prison in violation of the Due Process Clause. Defendant has moved to dismiss or for summary judgment. The Plaintiff has filed a motion for summary judgment which the Court construes in part as a response to Defendant's motion. The Plaintiff has also requested the Court to order the Oklahoma State Penitentiary to stop interfering with his legal mail. For the reasons stated below, the Court concludes that Defendants' motion to dismiss and/or for summary judgment should be granted and that Plaintiff's motion should be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 1, 1992, the principal at Dick Conner Correctional Center (DCCC) requested that Plaintiff's job status be modified from "education student" to "unassigned" due to lack of effective attendance and participation. (Attachment L to Special Report.)

Effective December 15, 1992, Plaintiff was reassigned from "education student" to "unemployed." No misconduct was issued.

On April 19, 1993, DCCC started an Intensive Supervision Program for inmates who were unemployed. The program was a classification action which restricted an inmate's privileges in an attempt to provide an incentive to unemployed inmates to seek employment. (Attachment B to Special Report). The Plaintiff was placed on the Intensive Supervision Program on April 19, 1993. (Attachment C.) As a result of numerous misconducts between April 22, and April 30, 1993 (while Plaintiff was on the Intensive Supervision Program), Plaintiff was reclassified as maximum security and on May 6, 1993, a Facility Assignment Form was submitted to the Population Office, requesting that Plaintiff be transferred to a higher security level. On May 10, 1993, Plaintiff was assigned to Oklahoma State Penitentiary (OSP). (Attachment I.)

Prior to his transfer, Plaintiff's property was inventoried, the legal materials belonging to other inmates were removed and returned to the inmates to whom they belonged. Plaintiff then signed an inventory form which stated that the inventory included all personal effects and property, including legal material, and that he had not left any personal property at DCCC. On May 13, 1993, Plaintiff was transferred to OSP and placed in restrictive housing unit.

In January 1994, Plaintiff filed this action under 42 U.S.C.

§ 1983 against Ron Champion, warden at DCCC.¹ He alleged that he was denied due process when his job assignment was changed from student to unemployed although he had not received a misconduct. He alleged he was denied the right of access to the court when he was denied use of the law library although he had seven cases pending on an application for post-conviction relief. Lastly, he alleged he was improperly transferred to a maximum security facility for using the law library and deprived of his personal property upon his transfer. Plaintiff sought relief in the form of a transfer to a medium security facility, \$500.00 in damages for each day he was assigned to restrictive housing unit at O.S.P, expungement of the misconduct report, and restoration of his earned credits. (Doc. #1.)

In March 1994, Defendant moved to dismiss or for summary judgment. He argued that Plaintiff was not denied any of his constitutional rights in his reclassification, access to the law library, or in his transfer to OSP. In the alternative, Defendant argued that he was entitled to qualified immunity. (Doc. #4.)

II. ANALYSIS

A. Dismissal for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d

¹Plaintiff's claim that he sued other officials in addition to Defendant Champion because the caption of his complaint states "Ron Champion, et al.," lacks any merit.

1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1512 (citing Owens v. Rush, 654 F.2d 1370; 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

After liberally construing Plaintiff's complaint in accordance with his pro se status, the Court concludes that Plaintiff has not sufficiently alleged the personal participation of Defendant Champion. An individual is not liable under 42 U.S.C. § 1983 unless he has caused or participated in the alleged constitutional deprivation. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). Nor is Defendant Champion a proper defendant in his official capacity. As a representative of the state, Warden Champion is not a "person" within the meaning of section 1983. See Hafer v. Melo, 112 S. Ct. 358, 362-363 (1991); Ruark, 928 F.2d at 950. The complaint against Defendant Champion can, therefore, be dismissed for failure to state a claim.

In order to provide a complete record in the event of an appeal, the Court will proceed to rule on Defendant's alternative motion for summary judgment.

B. Summary Judgment

1. Standard

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When

reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report

as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

2. Educational Opportunities

Plaintiff initially alleges that he was removed from his status as education student without a misconduct. Defendant argues that Plaintiff has no constitutional right to an education while incarcerated. This Court agrees. Deprivations of job and educational opportunities to prisoners do not violate the United States Constitution absent an equal protection challenge. Carter v. Gunter, 13 F.3d 404, 1993 WL 482950, **2 (10th Cir. Nov. 23, 1993) (unpublished opinion), cert. denied, 115 S.Ct. 143 (1994); Burnette v. Phelps, 621 F.Supp. 1157, 1159 (M.D. La. 1985). Accordingly, Defendant is entitled to judgment as a matter of law on this first claim.

3. Access to the Courts and the Law Library

Next, Plaintiff alleges that Defendant interfered with his

constitutional rights of access to the Courts and the law library. He alleges that although he had a deadline for filing an appeal from the denial of his application for post-conviction relief, Defendant permitted him to go to the law library only six hours per week.

A convicted inmate has a constitutional right to adequate access to the courts and the law library. Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986). In Bounds v. Smith, 430 U.S. 817, 827 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." The Tenth Circuit and many other Circuits have construed Bounds to require some showing of prejudice or injury--i.e., actual denial of access. See Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1990) (interference with plaintiff's right to counsel or to access to the courts without more does not give rise to a constitutional violation); Twyman v. Crisp, 584 F.2d 352, 357-58 (10th Cir. 1978) (use of library restricted to two hours a week did not lead to any prejudice, so no denial of access).

The Court concludes that Plaintiff has not demonstrated a violation of his constitutional right of access to the courts and the law library. The special report reveals that the DCCC's law library was open daily from noon until 8:00 p.m., Monday through

Friday while Plaintiff was assigned to the Intensive Supervision program. The special report further reveals that Plaintiff was in the law library a total of 42.75 hours during the period from April 19, 1993 until his transfer on May 13, 1993. (Attachment F, Special Report). Of these 42.75 hours, only 2.75 hours were between the hours of 5:00 p.m. and 8:00 p.m.

Even if Plaintiff suffered an injury as a result of being denied access to the court and the law library, this Court concludes that Plaintiff has not shown any actual injury as a result of Defendant's conduct. Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's claims of denial of access to the courts and the law library.

4. Transfer

Plaintiff's complaint about his reclassification and regressive transfer must also fail. Plaintiff has no constitutional right to be incarcerated in a particular cell or facility, and his transfer from DCCC to OSP, in and of itself, does not implicate a constitutional right of Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in remaining at DCCC is too insubstantial to rise to the level of a due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir.

1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his 'right' in violation of due process"). Additionally, federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

Accordingly, Defendant is entitled to judgment as a matter of law on this claim as well.

5. Loss of Personal Property

Plaintiff's claim of loss of his personal property upon his transfer must also fail. Even if the Court construed Plaintiff's claim to allege a negligent or an intentional deprivation of property under the Due Process Clause of the Fourteenth Amendment, Defendants would be entitled to judgment as a matter of law. See Hudson v. Palmer, 468 U.S. 517, 536 (1984). Although a prisoner may not be deprived of property by persons acting under color of state law without due process, Parratt v. Taylor, 451 U.S. 527, 537 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986), an unauthorized deprivation of property by a state employee is not a due process violation as long as a meaningful post-deprivation remedy is available. Freeman v. Department of Corrections, 949 F.2d 360, 362 (10th Cir. 1991). Due process is violated only if that post-deprivation procedure is unavailable, unresponsive, or inadequate. Id.

Defendants deny taking any of Plaintiff's property. The Report reveals that Plaintiff's property was inventoried the day before his transfer to OSP and that Plaintiff personally signed the inventory sheet acknowledging that all of his property was accounted for. The Report further reveals that legal materials belonging to other DCCC inmates was removed from Plaintiff's possession and returned to the other inmates.

In any case, even if Plaintiff's personal property was negligently or intentionally taken and destroyed, the destruction did not violate Plaintiff's due process rights because he had an adequate state post-deprivation remedy under Okla. Stat. tit. 51, § 151-55. See Hudson, 468 U.S. at 533. Accordingly, Defendant is entitled to judgment as a matter of law on Plaintiff's numerous claims of confiscation of property.

6. Qualified Immunity

In answer to Plaintiff's complaint Defendant has also asserted the defense of qualified or "good faith" immunity. Under qualified immunity, an official performing discretionary functions is immune from suit for actions objectively reasonable in light of clearly established law. See Anderson v. Creighton, 483 U.S. 635, 639-41 (1987); Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). The defense is intended to protect public officials from the burdens associated with trial. Hovater v. Robinson, 1 F.3d 1063, 1066 (10th Cir. 1993). "The contours of the right must be sufficiently clear that a reasonable official would understand that

what he is doing violates that right." Chapman, 989 F.2d at 397. It is not required that the very action in question has been held unlawful, only that in light of pre-existing law the unlawfulness is apparent. Id. Government officials are deemed to have presumptive knowledge of basic constitutional rights. Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982)). A competent official is responsible for keeping abreast of constitutional developments and should know the law governing his conduct. Id. While legal scholarship is not required, law enforcement officials should know the extent to which their authority extends. Id.

In light of the law existing at the time of the violations alleged in this case, the Court concludes, in the alternative, that Defendant would be entitled to qualified immunity as his actions were reasonable and constitutionally adequate.

C. Legal Mail

Lastly, the Court addresses Plaintiff's motion "to order OSP to stop interfering with [his] legal mail." The Defendant has objected to Plaintiff's motion. He argues that Plaintiff has not properly stated a claim for alleged violation of his rights at OSP in that he has neither included in his complaint nor served any official at OSP. The Court agrees. Plaintiff's motion must, therefore, be denied without prejudice.

III. CONCLUSION

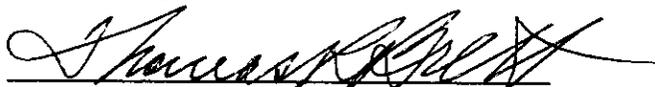
After viewing the evidence in the light most favorable to the

Plaintiff, the Court concludes that Defendant has made an initial showing negating all disputed material facts, that Plaintiff has failed to controvert Defendant's summary judgment evidence, and that Defendant is entitled to judgement as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendant's motion to dismiss and for summary judgment (doc. #4) is **granted**;
- (2) Plaintiff's motion for summary judgment (doc. #14) is **denied**; and
- (3) Plaintiff's motion to order OSP to stop interfering with his legal mail (doc. #12) is **denied without prejudice**.

SO ORDERED THIS 30 day of June, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ISHFAQ A. KHAN,

Plaintiff,

-vs-

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF ROGERS,
et. al,

Defendants.

ENTERED

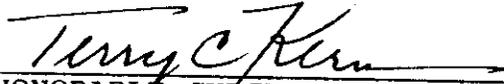
DATE JAN 31 1995

No. 93-C 665 K

O R D E R

NOW on this 27 day of January, 1995,
plaintiff's Application to Dismiss with Prejudice came on for
hearing. The Court being fully advised in the premises finds
that said Application should be sustained and the defendants,
should be dismissed from the above entitled action with
prejudice.

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


HONORABLE JUDGE KERN, JUDGE
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT

WILBURN, MASTERSON & SMILING
ATTORNEYS AT LAW
7134 S YALE AVE STE 560
TULSA OK 74136-6337
(918) 494-0414

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

JOHNATHAN RAYFIELD FREEMAN,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA POLICE DEPARTMENT,)
 et al.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JAN 30 1995

No. 94-C-547-B

FILED

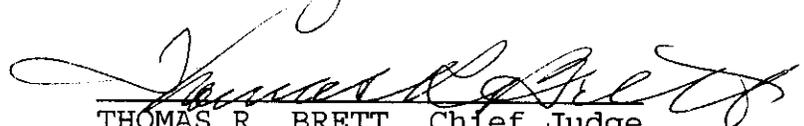
JAN 27 1995

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

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment and to deem confessed Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff. Plaintiff shall take nothing on his claim.

SO ORDERED THIS 27 day of Jan, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

JAN 27 1995

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

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

CHARLES E. ODOM,)
)
 Plaintiff,)
)
 v.)
)
 INDUSTRIAL INDEMNITY COMPANY,)
 a foreign insurance corporation,)
)
 Defendant.)

CASE NO. 94-C-980-B ✓

ENTERED ON DOCKET
DATE JAN 30 1995

ORDER

This matter comes on for consideration of Defendant's Motion to Dismiss or alternatively to remove this matter to Worker's Compensation Court (no federal docket #-filed in state court). Also for consideration is Plaintiff's Motion To Certify Question to the Supreme Court of Oklahoma.(docket # 8).

On October 10, 1991, Plaintiff, Charles E. Odom, (Odom) was injured on the job. Odom's employer, McDonnell Douglas, was provided Workers' Compensation insurance coverage by Defendant, Industrial Indemnity Company (Industrial). Odom instituted suit in the Workers' Compensation Court as a result of this injury. On or about January 11, 1994, a medical report was rendered on behalf of Industrial indicating Odom had impairments to the body as a whole as follows: 18% impairment as a result of his injury to the cervical spine, 11% impairment as a result of the injury to his left shoulder and 5% impairment to the left leg, as a result of injury to it.

In September, 1994, Odom filed an action against Industrial in

13

Tulsa County District Court, since removed here. In his Petition Odom alleged that Industrial failed to attempt to determine, after receiving the January 11, 1994 medical report, the amount of benefits owed to Odom in a bad faith effort to force Odom to settle for a lesser amount. Odom sought consequential damages and punitive damages.

In its Motion to Dismiss, Industrial alleges Odom failed to state a claim sufficient to sustain the action. The Court will consider Defendant's, made while the matter remained in state court, as a motion under Rule 12(b), Fed.R.Civ.P..

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that 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 Rule 12(b), Fed.R.Civ.P. admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). 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), *cert. denied*, 397 U.S. 1074 (1970).

Industrial alleges there are two cases which, combined, dispatch Odom's action. In Goodwin v. Old Republic Insurance Company, 828 P.2d 431 (Okla.1992), the Oklahoma Supreme Court "assumed" that a workers' compensation carrier may be subject to tort liability for a bad faith intentional refusal to pay a workers' compensation award. In that case the plaintiff made no

contention that, prior to the entry of the award, the insurance company demonstrated bad faith. The trial Court granted summary judgment for the insurance carrier and Goodwin appealed. The Oklahoma Supreme Court, after assuming that such a bad faith tort could exist after the entry of a workers' compensation award, concluded that under the facts therein no bad faith could have in fact existed based upon a delay of merely 18 days from award to payment.

This Court in Mary Beth Clinton v. Transportation Insurance Company, case number 93-C-791-B, acknowledging the Goodwin rationale, ruled that a workers' compensation bad faith claim, acknowledgedly separate and apart from the work relationship, arises against an insurer only after there has been an award against the employer or its insurance carrier.

On appeal to the Tenth Circuit Court of Appeals, that Court reaffirmed that under the "clear language" of Goodwin, a bad faith claim in a workers' compensation case arises only after, if at all, there has been an award entered.

Under the facts as alleged herein Odom has failed to state a claim upon which relief can be granted in view of Goodwin and Clinton. The alleged bad faith to which Odom refers occurred prior to any award being entered in that matter. Further, Odom's insistence that after the January 11, 1994 medical report was issued Industrial was then in a position to determine and pay Odom's claim is belied by the fact that the ultimate award entered on May 24, 1994 indicated that Odom:

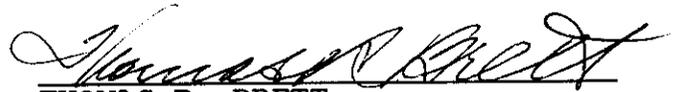
"suffered 23 per cent permanent partial disability to the BODY AS A WHOLE due to injury to the NECK, 10 per cent

permanent partial disability to the BODY AS A WHOLE due to the injury to the LOW BACK (with radicular symptoms to the LEFT LEG), 22 per cent permanent partial disability to the LEFT SHOULDER (with radicular symptoms to the LEFT ARM), and 5 per cent permanent partial disability to the LEFT LEG (KNEE)."

Charles E. Odom v. McDonald Corp. and Industrial Indemnity Co., No. 92-10767Y ¶4 (Okla. Workers' Compensation Court May 24, 1994.) This, of course, indicates that the Final Award differs from the January 11, 1994 medical report regarding percentages of disability. This suggests to the Court that any determination of benefits based upon the January medical report arguably would have been different from, and perhaps lower than, the final award. The Court concludes that even if Goodwin and Clinton allowed pre-award bad faith actions, the facts herein would not support same.

Accordingly, Industrial's Motion to Dismiss should be and the same is herewith GRANTED for the reasons stated. Industrial's alternative motion is, of course, DENIED as moot. Further, Odom's Motion to Certify Question is also DENIED as moot. This is accordingly DISMISSED.

IT IS THEREFORE ORDERED this 27 day of January, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 27 1995

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

MAX TRUE PLASTERING COMPANY,)
)
 Plaintiff,)
)
 VS.)
)
 UNITED STATES FIDELITY AND)
 GUARANTY COMPANY,)
)
 Defendant and Third-)
 Party Plaintiff,)
)
 VS.)
)
 BOB H. JOHNSON AGENCY and)
 JEFF JOHNSON,)
)
 Third-Party Defendants.)

CASE NO. 93-C-781-B

ENTERED ON DOCKET

DATE 1/30/95

O R D E R

This matter comes on for consideration of four motions which are:

- (1) Third-Party Defendants', Bob H. Johnson Agency and Jeff R. Johnson (Johnson), Motion to Dismiss (docket entry #29);
- (2) Johnson's Motion for Summary Judgment as against Defendant and Third-Party Plaintiff United States Fidelity and Guaranty Company (USF&G) (docket entry #33);
- (3) USF&G's Motion for Summary Judgment as against Plaintiff, Max True Plastering Company (True) (docket entry #35); and
- (4) USF&G's Motion to Strike True's Exhibit "C", attached to True's Objection to USF&G's Motion for Summary Judgment. (docket

entry #45).

The undisputed facts, as determined from the parties' pleadings and exhibits, appear to be as follows:

Max True Plastering (True), a Maryland corporation, is a Tulsa-based plastering and fireproofing contractor. True, through its principal owner Max True, formed, prior to 1980, a new association¹ with several of its employees, Cheatham, Gibson and Pierce, for the purpose of establishing in Dallas, Texas, a business eventually known as True Fireproofing Company (Fireproofing). On July 7, 1980, Fireproofing was incorporated, with the stock ownership devolving as follows: Max True-51%; Cheatham-19%; Pierce-10%; Gibson-10%; and Max True's son Danny True-10%.

In 1986 Max True's secretary, Wynona Sellers, became aware that Fireproofing was paying rent to a company called LCR Contractors (LCR), the latter being owned by Cheatham, Gibson and Pierce. Although this fact had not been disclosed to Max True, he choose not to cause Fireproofing to seek termination or otherwise attempt to affect the lease arrangement with LCR.

In "probably" 1990 Ms. Sellers also reported to True that Cheatham was purchasing personal gardening supplies with Fireproofing's funds. Again Max True did nothing nor caused any action to be taken. Further, it was contemporaneously discovered by

¹ The parties are in dispute whether or not the new association was a partnership.

Sellers that Cheatham was not properly documenting expenses at the Los Calinas Country Club but these matters were later substantiated to Sellers' satisfaction.

Beginning in 1988, True became insured in the amount of \$100,000.00 with USF&G under an employee fidelity policy. According to the terms of the policy USF&G agreed to and did insure True against loss resulting from employee dishonesty. The Johnson Agency, through Jeff Johnson, were the insurance agents who placed the policy with USF&G on behalf of their long-time customer True. Fireproofing was an additional named insured under the policy.²

None of these described incidents which occurred after True purchased the policy were reported to USF&G nor to the Johnson Agency.

On July 1, 1991, Sellers and Joyce Clark, a secretary in Fireproofing's Dallas office, met with Max True, True's CPA Carol Stephens and True's attorney Jerry Reed in Tulsa. Clark advised Max True that Cheatham, Gibson and Pierce were diverting construction subcontracts to LCR and also using Fireproofing's equipment, employees, and, perhaps materials for LCR projects. Stephens, Sellers, Clark and True immediately began an investigation.

On September 16, 1991, Max True confronted Cheatham, Gibson

² The policy provides, under the Joint Insured provision, that if more than one insured is named in the Declarations, the first named Insured (True Plastering) will act for itself and for every other Insured for all purposes of this insurance. This apparently explains why Fireproofing, the presumably separate corporation which suffering the alleged loss, is not the Plaintiff herein rather than the corporation, True Plastering.

and Pierce, demanding an explanation of their activities. Two days later, after consulting with their attorney, these three resigned from Fireproofing.

Max True, in either late September or early October, 1991, informed insurance agent, Jeff Johnson, of the situation regarding the Dallas employees, including their resignation after being confronted by True and his attorney Reed. Max True has testified that neither he nor Jeff Johnson, at that time, discussed the USF&G fidelity bond (policy) as to the possibility of a claim potentially payable under the policy because coverage under the policy occurred to neither of them. On October 11, 1991, True filed a civil suit in Texas against LCR and the former employees.

In June, 1992, True's attorney Reed wrote to North American Insurance Agency (the Johnson Agency had since merged with it), notifying the agency of a potential employee dishonesty claim under the policy and informing the agency of the Dallas litigation. All this information was forwarded to USF&G with a form notice of loss. USF&G took no action on the notice and did not open an investigation of the claim. In February, 1993 USF&G opened a claims file on the matter but made no response to several communications from the insured, True, during the spring and summer of 1993. On August 16, 1993 Max True called the USF&G adjuster to inquire about the claim. On that same date USF&G wrote True, denying the claim on the grounds that (1) True had not complied with provisions of the policy requiring prompt notice of the claim and submission of a proof of loss; and (2) that True's claims did not appear to fall

within the coverage of the policy which included theft of money, securities and tangible property but excluded intangible loss of "intellectual property", such as diversion of job opportunities and profits.

True filed this action against USF&G on August 30, 1993, alleging failure to pay the losses which amount to more than the \$100,000 coverage, and for bad faith in handling and denying the claim.

The Court will first consider motion (3), USF&G's Motion for Summary Judgment as against Plaintiff, Max True Plastering Company (True).

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).

USF&G argues that True failed to satisfy the Notice, Proof of Loss and suit filing conditions (notably the two year limitations period) contained in the policy. True counters that USF&G never furnished Proof of Loss forms and that USF&G was not prejudiced in any way even if, assuming arguendo, the notice of claim was untimely. True further avers that USF&G waived the notice of claim and proof of loss requirement by failing, in June, 1992, when notified by True's attorney Reed of a potential loss, to assert these alleged breaches of the notice requirement. Additionally, True argues that notice to the agent Jeff Johnson, in the fall of

1991, was sufficient notice to USF&G.

USF&G asserts Max True was aware of the alleged defalcation by the Dallas employees no later than July 1, 1991 (the Stephens, Sellers, Clark, Reed and True meeting in Tulsa) and that True is in violation of the policy's two-year filing provision by failing to file suit earlier than August 30, 1991. In counterpoint, True argues the loss was not discovered until Max True's confrontation with the Dallas employees on September 16, 1991, because earlier information was merely rumor to be investigated.³ Max True testified that at the time of the September 16 confrontation he had in his possession bonus checks of \$50,000 payable to each of the three employees, which he was prepared to deliver if the rumors could be explained.

Lastly, True argues that the statute of limitations for a written contract is five years, 12 O.S. §95(1), and that any attempt to illegally shorten the Oklahoma statute of limitations is void under Oklahoma law except for fire insurance policies, which are statutory. True cites Merchants & Manufacturers Ins. Co. v. Burns, 234 P.2d 409 (Okla. 1951) and Motors Ins. Corp. v. Stowers, 246 P.2d 341 (Okla. 1952) in support of its proposition that insurance contracts cannot illegally shorten the statutory period of limitation. True also cites 15 O.S. § 216.

In its reply, USF&G asserts that the two-year policy

³ Max True testified that Dallas secretary Clark was angry with Cheatham, Gibson and Pierce over an unrelated matter which caused True to desire full investigation of the matter before taking any action.

limitation for bringing actions is valid since authorized by 36 O.S. § 3617.

It is the Court's view that § 3617 allows a two-year suit limitation provision such as found in the instant policy. That section provides, in pertinent part, that:

"No policy delivered or issued for delivery in Oklahoma and covering a subject of insurance resident, located, or to be performed in Oklahoma, shall contain any condition, stipulation or agreement . . . (3) limiting the time within which an action may be brought to a period of less than two (2) years from the time the cause of action accrues in connection with all insurances other than property and marine and transportation policies insurances; in property and marine and transportation policies such time shall not be limited to less than one (1) year from the date of occurrence of the event resulting in the loss."

The Court notes the Merchants and Motors cases were decided prior to the passage of 36 O.S. § 3617.

However, the Court concludes that issues of material fact exist as to when the "loss discovery" occurred. Actions on the part of Max True could, in the Court's view, be reasonably interpreted by a fact finder to support the conclusion that, even on the day of confrontation - September 16, Max True remained uncertain as to the possibility of defalcations by Fireproofing's Dallas employees. The Court concludes these factual issues preclude summary judgment on the two-year limitation issue. Notwithstanding the Court is of the view that partial summary judgment is appropriate on the issue of whether the policy's two-year limitation provision is an illegal attempt to shorten the statutory period of limitations, which the Court concludes it is not.

Further, the Court finds issues of material fact preclude

summary judgment on the questions of Notice and filing Proof of Loss forms because of the involvement of insurance agent Jeff Johnson. Plaintiff urges, and the Court agrees, that Johnson (the agency and the individual) is the agent of USF&G by operation of statute. 36 O.S. §1423 provides:

"Every agent or limited insurance representative who solicits or negotiates an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the insurer, be regarded as representing the insurer and not the insured or his beneficiary. This provision shall not affect the apparent authority of an agent."

Further, "[T]he ultimate question is not what power the agent had, but what power the company had held him out as having. This, too, is a fact issue to be resolved by the trier." Oaks v. Motors Ins. Corp., 595 P.2d 789 (Okl.1979).

Lastly, USF&G is in the somewhat anomalous position of arguing the act (or non-acts) of insurance agent Jeff Johnson have no bearing on the liability issues yet USF&G is claiming against Johnson for indemnity in the event it is liable.⁴

In summary, the Court concludes that USF&G'S initial issue (MAX TRUE DID NOT SATISFY THE NOTICE, PROOF OF LOSS AND SUIT FILING CONDITIONS CONTAINED IN THE POLICY) is overruled except that partial summary judgment, as indicated above, is entered in favor

⁴ USF&G filed a Third-Party Complaint against the Bob H. Johnson Agency and Jeff Johnson, alleging that if it becomes liable to True because of the notice given Johnson in September/October, 1991, and/or because of the "reasonable expectations" of full coverage Johnson allegedly promised to True, that USF&G is entitled to judgment over and against Johnson for such amount.

of USF&G on the two-year limitation issue, the Court being of the view that such provision in the policy does not illegally shorten the statutory period.

The Court next considers USF&G's second issue on summary judgment, that Max True did not suffer a loss of covered property. USF&G argues that the policy only covers a loss through employees dishonesty of "money", "securities", or "property other than money and securities". The latter category is defined by the policy as "any tangible property other than "money" and "securities" that has intrinsic value . . .". The Court is of the view that this issue of USF&G'S relating to covered property cannot be reached until True's "reasonable expectations" issue is concluded.⁵ True alleges that it, through Max True, negotiated with insurance agent Jeff Johnson to obtain an employee dishonesty policy which would cover all forms of employee dishonesty.

⁵ In its Brief supporting its Motion for Summary Judgment, USF&G "anticipates Max True will argue that, notwithstanding the clear policy language, coverage should be extended because Mr. True "reasonably expected" he would be covered for all losses. Neither True nor USF&G moved for summary judgment on this issue nor has the Court been furnished deposition testimony of Max True and/or Johnson Agency representatives to substantiate what True reasonably expected. Further, the matter has not been briefed by either party herein. The Pre-Trial Orders both contained language that True contends that the "reasonable expectations" doctrine should apply here which doctrine holds that "technical definitions in a policy which operate to exclude coverage will not be interpreted so as to defeat the reasonable expectations of the purchaser of the policy. A significant feature of the reasonable expectations doctrine is that it is applied whether or not there is ambiguity in the policy." Both Pre-Trial Orders further state that as part of True's contentions that: "We believe Oklahoma would adopt the reasonable expectations doctrine. At last count, it had been adopted in 32 states and is rejected in only three." Whether or not there is a "reasonable expectation" issue herein remains for another day.

There is no motion pending regarding the "reasonable expectations" doctrine. Unless USF&G's motion for summary judgment on some issue other than loss of property coverage precludes recovery under the policy (e.g. the two-year limitation issue), USF&G's motion on the issue of loss of property coverage is premature, and is therefore overruled as such, because it must be first determined how broad the policy coverage is.

The Court next considers USF&G's issue that there is no evidence that Cheatham, Gibson and Pierce acted "with the manifest intent" to cause Max True to sustain a loss. The policy defines employee dishonesty as meaning "only dishonest acts committed by an "employee" . . . with the manifest intent to: (1) Cause . . . loss; and also (2) Obtain financial benefit." True did not respond to this issue. After considering the authorities cited by USF&G in support of this issue the Court concludes this is essentially a make-weight argument somewhat disingenuously deployed. The first case cited, Municipal Securities v. Ins. Co. of North America, 829 F.2d 7 (6th Cir. 1987), deals with a stock trader whose manifest intent was only to make money and, although she intended to violate her standing orders, it was not for the purpose of causing a huge loss; therefore, the fidelity bond did not obligate the insurer to indemnify the broker dealer for losses sustained when the trader violated the broker dealer's inventory limit. USF&G's second authority, Hartford Accident & Indemnity Insurance v. Washington Nat'l Ins., 638 F.Supp. 78, (N.D.Ill.E.D.1986), is of no assistance in the "manifest intent" query. In Hartford, the pivotal phrase in

the fidelity bond was "earned in the normal course of business", the Court opining (but denying summary judgment because of unresolved factual issues) that commissions not earned in the normal course of business were not covered by the fidelity bond.

The Court concludes USF&G's "manifest intent" argument is essentially without merit should be denied.⁶

The Court next considers USF&G's issue that True destroyed USF&G's subrogation rights by releasing the alleged wrongdoers and subsequently forfeited any right to recover under the policy.

There appears to be no dispute that Fireproofing settled the Dallas litigation against Cheatham, Gibson and Pierce before USF&G denied coverage for the reasons cited by it. In response, True cites authorities for the proposition "that as a prerequisite to the enforcement of a right of subrogation, the subrogee must have paid or, at least, have offered to pay in discharge of the subrogor's claim". Sexton v. Continental Casualty Co., 816 P.2d 1135 (Okla. 1991). True further charges that USF&G is estopped to claim any right of subrogation because it failed to investigate the claim and did nothing concerning it until denying the claim for the reasons stated.⁷

⁶ The Court does not preclude the propriety of an instruction on the issue of "manifest intent" if the facts developed at trial indicate this is a pivotal issue.

⁷ The denial was based on failure to give proper notice and file proof of loss under the policy. Further, and of more substance, USF&G denied the claim because of a lack of coverage under the policy because "[B]ased upon the Dallas County petition it appeared that Cheatham, Gibson and Pierce had merely diverted corporate "opportunities" -- an indirect loss (at best) that would not be covered under USF&G's policy". USF&G'S undisputed fact #14.

The Court concludes True's estoppel argument has arguable merit depending upon the factual resolution of whether and if USF&G actually or constructively received notice that Fireproofing gave USF&G notice that Fireproofing was preparing to settle the Dallas suit. By letter dated June 1, 1992, True's attorney Reed advised USF&G's agent North American Insurance Agency (with whom Johnson had merged) of the existence of a potential employee dishonesty claim under the policy and the Dallas litigation regarding the employee defalcations. North American, which presumptively received Reed's letter on June 2, 1992,⁸ forwarded a "loss notice" form to USF&G, attaching a copy of the Dallas litigation petition and asking to be notified "if there is anything more I need to do regarding this." There is no suggestion that North American received any response thereto.

On May 19, 1993, attorney Reed wrote North American explaining in detail a settlement offer in the Dallas litigation and advising that trial in that matter was set for May 25, 1993, and stated: "As I explained earlier, we plan to accept this offer and are presently preparing the documentation to implement it. If you have any objections to this settlement, please contact me immediately." North American, in a letter to USF&G dated May 25, 1993,⁹ forwarded Reed's rather urgent letter with the advisement that: "Should you

⁸ See Defendant's Ex. D to Johnson's Brief in support of Motion for Summary Judgment (docket #34) upon which a "Received" stamp is dated June 2, 1992.

⁹ The Court takes judicial notice that May 20, 1993, was a Thursday and the Memorial Day holiday was not observed on Monday, May 24 but rather on Monday, May 31, 1993.

have any questions or need any additional information, please give me a call." The letter was signed by Beverly Bowen on behalf of North American, and acknowledged North American received Reed's letter of May 20, 1995.¹⁰

The Court is of the view that under this record there are substantial issues of fact regarding what notice, actually or constructively, USF&G received of the impending Dallas litigation settlement which arguably precluded its subrogation rights. This, the Court concludes, could measurably affect USF&G's rights regarding estoppel to claim subrogation. The Court further concludes USF&G's motion for summary judgment on this issue is not well taken and should be denied.

The Court next considers USF&G's issue that because True Fireproofing Company was "an incorporated partnership" there is no coverage for losses resulting from any dishonest acts on the part of Cheatham, Gibson or Pierce. USF&G cites the partnership exclusion in the policy, arguing that an insured cannot recover for his own theft. No citations of authority are submitted.

It is unclear to the Court why USF&G would proffer this ground for granting summary judgment. The record herein, including USF&G's own statement of undisputed facts (#3), clearly shows that True

¹⁰ USF&G claims adjuster Ethan Trotter has testified that to his knowledge he never received Reed's May 19, 1993, letter and was not aware of it. Trotter further testified that he never received a fax from Bev Bowden of the North American agency dated July 12, 1993, wherein she stated she was sending Trotter a copy of Reed's May 19, 1993, letter. The facsimile transmission appears to be confirmed by Defendant's Exhibit K to Johnson's Brief in support of Motion for Summary Judgment.

Fireproofing, begun as a partnership, was and is now incorporated. It appears Fireproofing was incorporated in July, 1980, many years before the instant policy issued.

The Court concludes USF&G's partnership issue should be and is denied.

In its last ground for granting summary judgment in its favor USF&G argues that under the policy, the demonstrated dishonesty of the three Fireproofing employees in their: (1) leasing to Fireproofing the corporate premises through their then secret corporation LCR; (2) the purchasing of personal garden supplies with Fireproofing funds by Cheatham; and (3) the lack of substantiation of country club charges, also by Cheatham, caused the policy to be canceled from and after the summer of 1990 (the latest of such events). The policy provision in issue is:

"2. Additional Condition

Cancellation As To Any Employee: This insurance is canceled as to any "employee":

a. Immediately upon discovery by:

(1) You; or

(2) Any of your partners, officers or directors not in collusion with the "employee";

of any dishonest act committed by that "employee" whether before or after becoming employed by you."

The record does not establish that the LCR leasing arrangement, even though unknown to Max True, was a dishonest act, albeit perhaps an unethical act. Further, the unsubstantiated country club charges were substantiated to the satisfaction of the Dallas bookkeepers. Only the buying of garden tools with

Fireproofing funds suggests a dishonest act under this record. And this dishonest act, if established, relates solely to the employee Cheatham.

Further, Max True testified that prior to 1991 he never had any indication that the three employees, Cheatham, Gibson and Pierce were anything other than honest, as follows:

"Q. I would assume from your prior testimony that you would not have entered into a business relationship with Mr. Cheatham or Mr. Gibson or Mr. Pierce unless you believed there(sic) were honest.

A. Yes, right.

Q. And hard working.

A. Yes.

Q. Never had any indication to the contrary prior to 1991.

A. No.

Id. at 48.

Any statement or testimony by Mr. True indicating a contrary opinion suggests at least an unresolved issue of fact, thereby precluding summary judgment.

The Court concludes USF&G's cancellation issue should be denied as a ground for summary judgment because disputed issues of fact remain.

In summary, the Court denies USF&G's Motion for Summary Judgment as against True on all issues except that it grants partial summary judgment on the issue of whether the USF&G policy's two-year limitation provision is an illegal attempt to shorten the

statutory period of limitations, which the Court concludes it is not. Further, the Court makes no ruling regarding True's "bad faith" claim against USF&G since such issue was not included in the latter's summary judgment pleadings.

The Court will next consider: (1) Third-Party Defendants', Bob H. Johnson Agency and Jeff R. Johnson (Johnson), Motion to Dismiss or in the alternative a motion for more definite statement. (docket entry #29).

In its motion Johnson states that True's action against USF&G is grounded upon two theories: breach of contract and bad faith in reference to an insurance claim. Johnson argues that they cannot be liable in any event for the alleged bad faith of USF&G since they and their agency had nothing to do with the alleged lack of investigation, claim processing and/or alleged bad faith denial of True's claim. Johnson further argues that they were not a party to the insurance contract and therefore have no possible liability resulting from it because they were an agent of a disclosed principal who allegedly breached the insurance contract.

USF&G acknowledges that True could not have sued Johnson on a bad faith theory but argues that Johnson's actions or failures to act were a breach of his duties to USF&G. Implicit but unstated in this argument is that if Johnson's alleged failings were a part of USF&G's alleged bad faith or breach of contract with True (e.g. Johnson's delay in notifying USF&G could arguably contribute to USF&G's alleged failure to promptly investigate, consider and pay a claim), then Johnson may be liable to USF&G if the latter has to

respond in damages on these issues.

USF&G has proceeded against Johnson on an apparent indemnity theory (see Pre-Trial Order filed January 3, 1995, front page), traditionally a matter ex contractu. The Court is not aware that USF&G has pled a breach of contract action against Johnson which would arguably support indemnification. USF&G's Amended Third-Party Complaint, not mentioning "indemnity", alleges it is entitled to judgment "over and against" Johnson in an amount equal to any judgment rendered against USF&G. While the parties are essentially left to the vagaries of their own pleadings it is the Court's view that USF&G's claim against Johnson may sound more in the tort genre, i.e. Johnson's alleged negligent actions and failures to act have potentially exposed USF&G to liability. In an earlier filed Pretrial Order (December 13, 1994) it is stated that: "The third party claim was filed by the insurance company against the agent for breaching his duty to communicate all pertinent information to the insurance company, and for possibly making representations to the Plaintiff which could result in the reformation of the insurance policy."

The Court concludes this is essentially a causation issue dependent upon the resolution of factual issues such as: under the facts were Johnson's actions reasonable in failing to recognize, in September/October, 1991, the potential claim of True under the employee dishonesty policy and thereafter failing to give notice to USF&G of the potential claim? Further, were Johnson's actions reasonable in failing to expedite attorney Reed's notice of May 19,

1993, to Johnson's agency (North American Insurance) which, for all practical purposes, negated any opportunity for USF&G to object to the proposed settlement of the Dallas litigation thereby potentially eliminating subrogation pursuit?

The Court is of the view Johnson's Motion to Dismiss, based upon the theories advanced, is not well taken. The Court is of the view that Johnson's Alternative prayer, for a more definite statement, is appropriate given the uncertain nature of the basis of USF&G's claim against Johnson. Johnson argues, and the Court agrees, that USF&G's Amended Third-Party Complaint is vague and ambiguous in that "USF&G's claim for recovery "over and against" Johnson does not inform Third-Party Defendants of the legal grounds for this alleged right to recovery. Johnson is entitled to know whether USF&G seeks implied or contractual indemnity, common-law contribution, or some other legally cognizable type of recovery "over and against" Third-Party Defendants."

Accordingly, USF&G is directed to file an Amended Third-Party Complaint within 20 days from the date hereof.

The Court next considers Johnson's Motion for Summary Judgment as against Defendant and Third-Party Plaintiff USF&G (docket entry #33). The Court defers decision on this motion for the reason that USF&G's Second Amended Third-Party Complaint, to be filed within 20 days from this date, could alter the parties' positions on summary judgment. After appropriate pleadings are concluded, and any

additional discovery, if necessitated¹¹, is completed, the Court will allow supplemental briefs to be filed by the parties.

The Court lastly considers USF&G's Motion to Strike True's Exhibit "C", attached to True's Objection to USF&G's Motion for Summary Judgment. (docket entry #45). This two-page exhibit purports to itemize the losses allegedly suffered by Fireproofing. True argues that the exhibit is essentially a summary statement, on page one, of Fireproofing's corporate expenses for the fiscal years between 6/30/86 to 6/30/91, taken from the company's tax returns and financial statements. At the bottom of page one are 10% and 20% calculations of each years' total expenses which True says merely illustrates the minimum amount of damages incurred by True "if one were to assume that the dishonest employees spent 10% or 20%, respectively, of their time engaging in dishonest activities." The Court agrees with USF&G that this illustration, based upon an assumption, unsponsored and unsubstantiated, is inadequate for the purposes of summary judgment.

Page 2 of the exhibit has an equal frailty. It is a five fiscal year summary of LCR's corporate profits, all of which True contends were diverted from Fireproofing. It also lacks sponsorship and substantiation and is equally objectionable to support or defend summary judgment.

The Court concludes Exhibit C, as stated, is objectionable and herewith stricken for the purposes of summary judgment

¹¹ The Court is not encouraging additional discovery at this point in the case and will assume no further discovery is necessary unless the parties make application thereto.

consideration.¹²

SUMMARY

In summary the Court: DENIES USF&G's Motion for Summary Judgment on all issues except that it GRANTS partial summary judgment on the issue of whether the USF&G policy's two-year limitation provision is an illegal attempt to shorten the statutory period of limitations, which the Court concludes it is not; MAKES NO RULING regarding True's "bad faith" claim against USF&G since such issue was not included in the latter's summary judgment pleadings. DENIES Johnson's Motion to Dismiss but GRANTS Johnson's Alternative prayer for a more definite statement, allowing USF&G 20 days from the date hereof to file its Second Amended Third-Party Complaint; DEFERS decision on Johnson's Motion for Summary Judgment for the reason that USF&G's Second Amended Third-Party Complaint, to be filed within 20 days from this date, could alter the parties' positions on summary judgment. After appropriate pleadings are concluded, and any additional discovery, if necessitated, is completed, the Court will allow supplemental briefs to be filed by the parties; and GRANTS USF&G's Motion to Strike Exhibit C, as objectionable as stated for the purposes of summary judgment consideration.

The pre-trial conference, scheduled for February 7, 1995, and

¹² Each side contends the yet unoffered deposition excerpts of witness Joyce Clark will benefit them in regard to this exhibit. True contends Clark has testified that at least 50% of the three Fireproofing employees' time was spent on LCR business while USF&G avers that, much to its surprise, "Ms. Clark could not quantify the amount of loss or even if a loss had occurred.!"

jury trial, scheduled for February 21, 1995, are stricken to be rescheduled as appropriate.

IT IS THEREFORE ORDERED this 27 day of January, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Use as orig.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 11 1995

Richard M. [Signature], Clerk
U.S. DISTRICT COURT

SUN COMPANY, INC., (R & M), a Delaware corporation,)
and TEXACO INC., a Delaware corporation,)

Plaintiffs,)

vs.)

Case No. 94-C-820-B

BROWNING-FERRIS, INC., a Delaware corporation, et al.,)

Defendants.)

DISMISSAL WITHOUT PREJUDICE

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant,
F.M. Shipley, ONLY without prejudice.

Dated this 10th day of January, 1995.

RHODES, HIERONYMUS, JONES
TUCKER & GABLE

By



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FILED

JAN 27 1995

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

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

THRIFTY RENT-A-CAR SYSTEM,)
 INC., an Oklahoma corporation,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD R. POTEAT, an individual)
 ANNABELL S. POTEAT, an)
 individual; and ROADRUNNER)
 CAR RENTAL & SALES, INC.,)
)
 Defendants,)
)
 and)
)
 FORD MOTOR CREDIT COMPANY,)
)
 Intervenor.)

No. 93-C-850-K ✓

**MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATIONS**

Being fully apprised of the facts and law regarding the above-captioned matter, the Magistrate Judge makes the following report and recommendation to the Court:

Report

1. The plaintiff, Thrifty Rent-A-Car System, Inc. ("Thrifty"), has sued the defendants for monies owed in connection with rental car franchises operated by one or more of the defendants in Albuquerque, New Mexico (the "Albuquerque Franchise"), El Paso, Texas (the "El Paso Franchise"), and Oklahoma City, Oklahoma (the "Oklahoma City Franchise").

Thrifty claims the following:

a. In connection with the Albuquerque Franchise, Donald R. Poteat is indebted to Thrifty in the amount of \$127,339.67, plus interest at \$62.80 per day from June 16, 1994, to the date of judgment;

b. In connection with the El Paso Franchise, Roadrunner Car Rental & Sales, Inc., Donald R. Poteat and Annabell S. Poteat are indebted to Thrifty in the amount of \$29,113.74, plus interest at \$14.36 per day from June 16, 1994, to the date of judgment; and

c. In connection with the Oklahoma City Franchise, Donald R. Poteat and Annabell S. Poteat are indebted to Thrifty in the amount of \$63,767.56, plus interest at \$31.45 per day from June 16, 1994, to the date of judgment.

2. On September 13, 1994, the Court referred to the Magistrate Judge "Plaintiff's Motion to Compel Answers to Interrogatories, to Compel Production of Documents, and to Compel Submission of Witness List" (Docket # 31)("Motion to Compel"). The Court also referred "Plaintiff's Motion for Sanctions" filed October 6, 1994 (Docket # 33)("Motion for Sanctions"). At the time the Motion to Compel was filed:

a. the defendants had been served with Thrifty's interrogatories on July 5, 1994, and had failed to answer;

b. the defendants had been served with Thrifty's request for production of documents on July 5, 1994, and had failed to respond; and

c. pursuant to the Case Management Scheduling Order, the defendants were required to exchange their witness list with Thrifty on August 31, 1994, but had failed to do so.

At the time the Motion for Sanctions was filed:

a. the defendants failed to answer Thrifty's interrogatories;

- b. the defendants failed to respond to Thrifty's request for production of documents;
- c. the defendants failed to submit their witness list;
- d. the defendants failed to appear at properly noticed depositions; and
- e. pursuant to the Case Management Scheduling Order, the defendants were required to exchange their exhibits with Thrifty on October 3, 1994, but had failed to do so.

3. The defendants failed to respond to Thrifty's Motion to Compel.

4. The defendants failed to respond to Thrifty's Motion for Sanctions.

5. A hearing before the Magistrate Judge was held on the Motion to Compel and Motion for Sanctions on October 26, 1994. At the hearing, the Magistrate Judge, at the request of the defendants, reset the hearing on the Motion to Compel and Motion for Sanctions for November 30, 1994, to permit continued settlement negotiations between the parties.

6. The parties failed to settle the case by November 30, 1994. At the hearing on the Motion to Compel and Motion for Sanctions on November 30, 1994, the Motion to Compel was granted based on the defendants' failure to comply with their obligations under the Federal Rules of Civil Procedure and the rules of this Court. The defendants were notified at the hearing that due to their total disregard of their obligations, the Magistrate Judge might be inclined to recommend that judgment be entered against them. Nevertheless, the Magistrate Judge stated he would give the defendants "one more chance." The defendants were given until January 4, 1995, to adequately respond to all outstanding discovery requests of the plaintiff and to fully comply with their discovery obligations. The Motion for Sanctions was taken under advisement. The parties were also ordered to agree upon a deposition schedule on or before January 4, 1995,

and to exchange witness lists by December 9, 1994. A supplemental discovery conference was set for January 5, 1995.

7. The defendants flagrantly and unjustifiably ignored the Court's Order of November 30, 1994, in many respects. The defendants did not serve adequate interrogatory answers or respond to document requests. The defendants failed to provide their exhibits. The defendants further failed to meet with Thrifty to prepare a deposition schedule.

8. On January 5, 1995, the Magistrate Judge held that the defendants were in violation of all court orders and deadlines, and that sanctions were appropriate against all defendants, but not counsel for the defendants. At the request of the plaintiff, however, action was delayed on the granted Motion for Sanctions for two (2) weeks. A hearing was reset for January 19, 1995.

9. On January 19, 1995, the defendants remained in violation of the Federal Rules of Civil Procedure, this Court's Local Rules and this Court's Orders by failing to do the following:

- a. provide Thrifty with adequate answers to Thrifty's interrogatories;
- b. provide Thrifty with responses to Thrifty's document requests;
- c. provide Thrifty with exhibits;
- d. appear for properly noticed depositions;
- e. cooperate with Thrifty and agree to a deposition schedule;
- f. respond to Thrifty's Motion to Compel; and
- g. respond to Thrifty's Motion for Sanctions.

10. The defendants have flagrantly and unjustifiably failed to obey this Court's orders to provide or permit discovery in this case. In so doing, the defendants totally disregarded their obligations under the Federal Rules of Civil Procedure, the Local Rules of this Court, this Court's Case Management Scheduling Order and other Orders of this Court. The defendants' failure is particularly inexplicable given the warning provided to them by the Magistrate Judge at the hearing on November 30, 1994.

Recommendation

11. Pursuant to Fed. R. Civ. P. 16(f) and Fed. R. Civ. P. 37, judgment should be entered in favor of the plaintiff and against the defendants on the plaintiff's claims against the defendants and on the defendants' claims against the plaintiff.

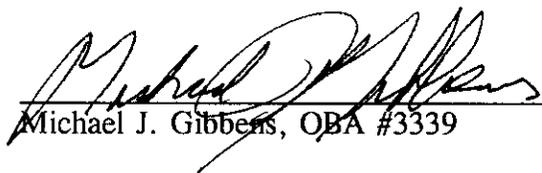
12. Judgment should be granted as follows:

- a. A judgment in favor of Thrifty and against the defendant, Donald R. Poteat, in the amount of \$127,339.67, plus interest at \$62.80 per day from June 16, 1994, to the date of judgment;
- b. a judgment in favor of Thrifty and against the defendants, Roadrunner Car Rental & Sales, Inc., Donald R. Poteat and Annabell S. Poteat, in the amount of \$29,113.74, plus interest at \$14.36 per day from June 16, 1994, to the date of judgment;
- c. a judgment in favor of Thrifty and against the defendants, Donald R. Poteat and Annabell S. Poteat, in the amount of \$63,767.56, plus interest at \$31.45 per day from June 16, 1994, to the date of judgment; and

d. a judgment in favor of Thrifty and against the defendants on the counterclaims of the defendants against Thrifty.


UNITED STATES MAGISTRATE JUDGE

Approved as to form:


Michael J. Gibbens, OBA #3339

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ATTORNEYS FOR DEFENDANTS

- d. a judgment in favor of Thrifty and against the defendants on the counterclaims of the defendants against Thrifty.

UNITED STATES MAGISTRATE JUDGE

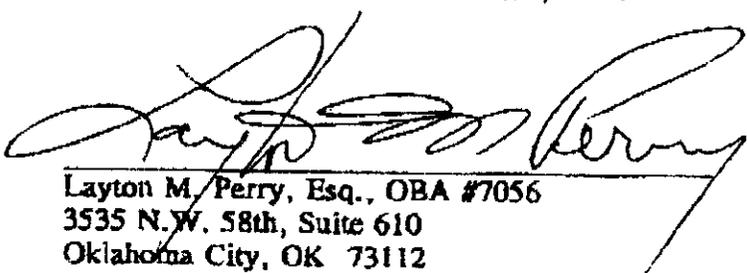
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ATTORNEYS FOR DEFENDANTS

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

F I L E D

JAN 27 1995

TOMMY RAY ISHAM,)
)
Plaintiff,)
)
vs.)
)
JULIA O'CONNER,)
)
Defendant.)

No. 94-C-6⁹⁸~~59~~-BU

... Clerk
DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 1-30-95

ORDER

In this civil rights action pursuant to 42 U.S.C. § 1983, Plaintiff, a pro se state inmate, alleges that his court appointed counsel, Julia O'Conner, provided ineffective assistance of counsel. He alleges that Ms. O'Conner showed "prejudice toward the plaintiff, incompetence and a conflict of interest" and coerced him to accept a plea bargain with the State. Plaintiff requests an order modifying his state sentence.¹

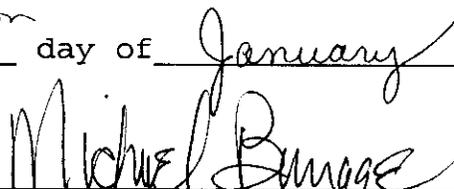
Defendant has moved to dismiss or for summary judgment on the ground that public defenders are not liable for allegedly violating the civil rights of those they are appointed to defend. The Court agrees. The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation. Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990); see also Polk County v. Dodson, 454 U.S. 312, 325 (1981) (public defender does not act

¹In his original complaint, Plaintiff sought the appointment of new counsel. (Doc. #1.)

under color of state law when representing an indigent defendant in a state criminal proceeding). While Plaintiff relies in his response on Tower v. Glover, 467 U.S. 914, 920 (1984), Plaintiff has not alleged in either his original or amended complaint that Defendant O'Conner conspired with state officials to deprive him of a federal right. Lastly, the Court notes that while Plaintiff may be able to state a malpractice claim under Oklahoma law against Ms. O'Conner and/or raise ineffective assistance of counsel in a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (after exhausting his state remedies), neither of those claims constitutes a federal case under section 1983.

After construing Plaintiff's pro se complaint liberally, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and accepting all of Plaintiff's allegations as true, Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988), it appears beyond doubt that Plaintiff can prove no set of facts to support his claim for relief. **ACCORDINGLY, IT IS HEREBY ORDERED that** Defendants' motion to dismiss for failure to state a claim (doc. # 6) is **granted** and that Plaintiff's complaint is hereby **dismissed**.

IT IS SO ORDERED this 27th day of January, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

JAN 30 1995

FILED

JAN 27 1995

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

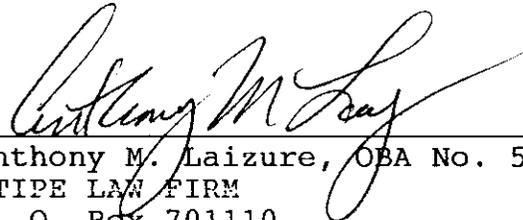
Case No. 94-19-K

JOHN SHANKLIN,)
)
Plaintiff,)
)
-vs-)
)
ELI LILLY AND COMPANY,)
)
Defendant.)

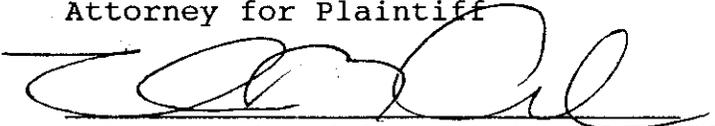
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Anthony M. Laizure, counsel for Plaintiff, John Shanklin, and John F. McCormick, Jr., and Thomas M. Askew, counsel for Defendant, Eli Lilly and Company, hereby show the Court that the issues between the Plaintiff and Defendant have been resolved pursuant to an agreement between the parties.

WHEREFORE, these parties pray that an Order of Dismissal With Prejudice be entered herein, dismissing Eli Lilly and Company with prejudice to further proceedings, with each party to bear its own costs, attorney fees and expenses from the date of filing of the case to the date of dismissal.



Anthony M. Laizure, OBA No. 5170
STIPE LAW FIRM
P. O. Box 701110
Tulsa, OK 74170
(918) 749-0749
Attorney for Plaintiff



John F. McCormick, Jr., OBA No. 5915
Thomas M. Askew, OBA No. 13568
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 Oneok Plaza
Tulsa, Oklahoma 74103
(918) 581-5500
Attorneys for Defendant

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

FILED

ALISHA KEUCK,

Plaintiff,

vs.

ROYAL MACCABEES LIFE INSURANCE
COMPANY,

Defendant.

JAN 26 1995

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

Case No. 94-C-729-B

ENTERED ON E-BOOKET
DATE JAN 27 1995

JUDGMENT

The Court, having entered its Order granting Defendant's Motion for Summary Judgment, hereby enters Judgment in favor of the Defendant, Royal Maccabees Life Insurance Company, and against Plaintiff, Alisha Keuck. The parties are to bear their own respective attorney's fees and costs.

Dated this 26 day of January, 1995.

S/ THOMAS R. BRETT

THOMAS R. BRETT
CHIEF JUDGE

pe

kkt

OBA# 5026

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

FILED

DEAN HARRINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MASSACHUSETTS BAY INSURANCE)
 COMPANY,)
)
 Defendant.)

JAN 26 1995

No. 94-C-437-K

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

ENTERED ON DOCKET

DATE JAN 27 1995

MUTUAL STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the plaintiff, Dean Harrington, and the defendant, Massachusetts Bay Insurance Company, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate and agree that the above captioned matter is hereby dismissed with prejudice to refiling.

Respectfully submitted,

By Joseph Clark
JOSEPH CLARK OBA# 1706
Attorney for Plaintiff, Dean Harrington
406 S. Boulder, Ste. 600
Tulsa, OK 74103
(918) 584-6404

By Dennis King
DENNIS KING OBA# 5026
Attorney for Defendant Mass. Bay
2431 E. 51st St., Ste. 603
Tulsa, OK 74105
(918) 749-5566

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Sale scheduled for February 23, 1995, be, and the same is hereby canceled.

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

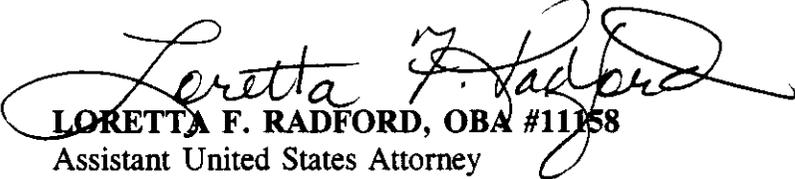
Dated this 26th day of Jan., 1995.

S/ THOMAS R. ROE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

FILED

JAN 26 1995

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

ANTHONY CHONG and
JAMES JOHNSON,

Plaintiffs,

vs.

HYSpan PRECISION PRODUCTS,
INC., a California Corporation,

Defendant.

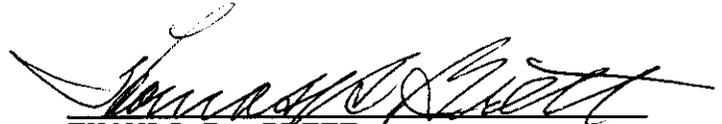
Case No. 94-C-979-B ✓

ENTERED ON DOCKET
DATE JAN 26 1995

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, Hyspan Precision Products, and against the Plaintiffs, Anthony Chong and James Johnson. Plaintiff shall take nothing of their claim. Costs are assessed against the Plaintiffs, if timely applied for under Local Rule 54.1, and each party is to pay its respective attorney's fees.

Dated, this 26th day of January, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

23

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

FILED

JAN 26 1995

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

ALISHA KEUCK,

Plaintiff,

vs.

ROYAL MACCABEES LIFE INSURANCE
COMPANY,

Defendant.

Case No. 94-C-729-B

ENTERED ON DOCKET

DATE

1/26/95

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, Royal Maccabees Life Insurance Company, filed its Motion for Summary Judgment on December 30, 1994. The Court hereby finds that said Motion for summary judgment is well taken, and, adopts and incorporates the undisputed facts set forth therein. Based upon such undisputed facts, and based upon the applicable law, the Court hereby grants Defendant's Motion for Summary Judgment.

IT IS SO ORDERED this 26 day of January, 1995.

S/ THOMAS R. BRETT

THOMAS R. BRETT
CHIEF JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TRAVIS MILTON HARVEY;
ROBERT J. OELKE;
DONALD P. HAVENER;
RONALD W. NUNNELEY;
SCHELL SECURITY OF TULSA, INC.;
CITIZENS BANK OF TULSA
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma

Defendants.

FILED

JAN 26 1995

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

ENTERED ON DOCKET

DATE 1/26/95

CIVIL ACTION NO. 94-C-303-B

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby *ORDERED* that the Judgment of Foreclosure entered herein on the 18th day of November, 1994 be vacated, Canceling the Sale scheduled for February 23, 1995, and dismissing this action without prejudice. The Court, having considered the motion and the records and files in this case, and being fully advised in the premises, finds that good cause has been shown for the relief sought and that the motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment of Foreclosure entered in the case on November 18, 1994, be, and the same is hereby vacated, set aside and held for naught.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Sale scheduled for February 23, 1995, be, and the same is hereby canceled.

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

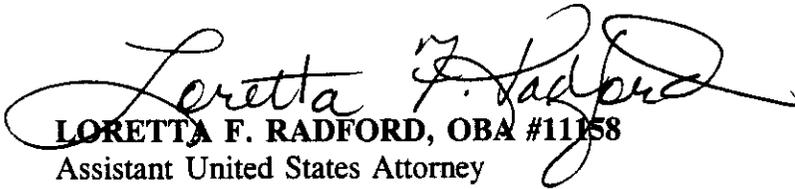
Dated this 26th day of Jan., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

FILED

JOHNATHAN R. FREEMAN,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

JAN 26 1995

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

No. 94-C-583-B

ENTERED ON DOCKET

DATE JAN 26 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 27, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment (doc. #7) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 26 day of Jan., 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 26 1995

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

JOHNATHAN RAYFIELD FREEMAN,)
)
Plaintiff,)
)
vs.)
)
TULSA POLICE DEPARTMENT,)
et al.,)
)
Defendants.)

No. 94-C-547-B

ENTERED ON DOCKET

DATE JAN 26 1995

ORDER

Before the Court are Defendants' motion for summary judgment, filed on December 1, 1994, and a January 6, 1995 motion to deem confessed the motion for summary judgment for failure to file a response. Plaintiff has not responded to either motion. On January 6, 1995, Plaintiff's counsel moved to withdraw as attorney or record because he "d[id] not believe a viable cause of action exists," and requested additional time for Plaintiff to seek other counsel.

Plaintiff's failure to respond to Defendants' motion for summary judgment constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motions for summary judgment and to deem

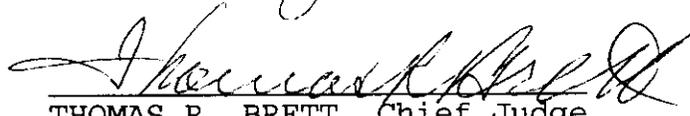
¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

confessed Defendants' motion for summary judgment (docs. #14 and #18) are **granted**;

- (2) Motion of counsel for Plaintiff to withdraw (doc. #16) is **granted**; and
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion for summary judgment or a motion for reconsideration no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 26th day of June, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 26 1995

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

WALLY DEAN FORMAN,)
)
 Plaintiff,)
)
 vs.)
)
 DISTRICT COURT OF DELAWARE)
 COUNTY AND TOM MAY,)
)
 Defendants.)

No. 94-C-817-B

ENTERED ON DOCKET

DATE 1/26/95

ORDER

In this civil rights action pursuant to 42 U.S.C. § 1983, Plaintiff, a pro se state inmate, has sued the District Court of Delaware County and Tom May, his court-appointed counsel. He alleges that he was wrongfully incarcerated without a speedy trial, and that he has been deprived of fresh air and sunshine. He also alleges that his court appointed counsel has provided ineffective assistance of counsel. He requests "immediate and unconditional release without recourse" and damages for his mental anguish.

Defendants have moved to dismiss or for summary judgment. They argue that the District Court of Delaware county is not a proper legal entity which can be sued in this section 1983 action and that Public Defender May was not acting under color of state law in his representation of the Plaintiff. The Court agrees.

State courts are not legal entities which can be sued under section 1983 because they are protected by Eleventh Amendment immunity. Midfelt v. Circuit Court of Jackson County, 827 F.2d 343, 345 (8th Cir. 1987). Moreover, the conduct of counsel, either retained or appointed, in representing clients, does not constitute

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action under color of state law for purposes of a section 1983 violation. Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990); see also Polk County v. Dodson, 454 U.S. 312, 325 (1981) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). While Plaintiff may be able to state a malpractice claim under Oklahoma law against Mr. May, that claim does not constitute a federal case. Lastly, Plaintiff's failure to object to Defendants' motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

After construing Plaintiff's pro se complaint liberally, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), and accepting all of Plaintiff's allegations as true, Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988), it appears beyond doubt that Plaintiff can prove no set of facts to support his claim for relief. **ACCORDINGLY, IT IS HEREBY ORDERED** that Defendants' motions to dismiss (docs. #4 and #5) are **granted** and that Plaintiff's complaint is hereby **dismissed with prejudice**.

IT IS SO ORDERED this 26 day of Jan., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

WILLARD GRAIN & FEED, INC.,
d/b/a WIL-GRO FERTILIZER,

Plaintiff,

vs.

AL NADER (CAGLAYAN), and
CATALYST DEVELOPMENT
CORPORATION,

Defendants.

Case No. 94-C-943-*PK*

FILED

JAN 25 1995

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

STIPULATION OF DISMISSAL WITH PREJUDICE

All parties, by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), hereby stipulate to a dismissal of this action with prejudice, each side to bear its own attorneys fees and costs.

WILLARD GRAIN & FEED, INC.
d/b/a WIL-GRO FERTILIZER,
Plaintiff

By: Gene C. Buzzard
John Henry Rule, Esq.
Gene C. Buzzard, Esq.
GABLE & GOTWALS
2000 BANK IV Center
15 West Sixth Street
Tulsa, OK 74119-5447

AL NADER (CAGLAYAN), and
CATALYST DEVELOPMENT CORPORATION,
Defendants

By: Claire V Egan
Claire V. Egan, OBA #554
J. Patrick Cremin, OBA #2013
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172-0141

ENTERED ON DOCKET

DATE 1-26-95

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

NORTHERN DISTRICT OF OKLAHOMA
U.S. DISTRICT COURT
Richard M. Lawrence, Clerk
JAN 26 1995

FILED

ANTHONY CHONG and JAMES)
JOHNSON,)
)
Plaintiffs,)
)
vs.)
)
HYSpan PRECISION PRODUCTS, INC.,)
a California Corporation,)
)
Defendant.)

Case No. 94-C-979-B

ENTERED ON DOCKET

DATE JAN 26 1995

O R D E R

Before the Court for consideration is a Motion to Dismiss (Docket #2) filed by Defendant Hyspan Precision Products ("Hyspan") that was converted to a Motion for Summary Judgment by the Court on December 12, 1994.

Plaintiffs Anthony Chong and James Johnson allege they were fired by Hyspan for refusing to submit to a drug test. They allege that this retaliatory discharge violates the Oklahoma Work-Place Drug Testing Standards Act ("Act"), 40 O.S. § 551 *et seq.*, as well as Oklahoma public policy under Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989).

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, the court

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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.

477 U.S. at 317 (1986). 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).

The Tenth Circuit Court of Appeals stated:

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 . . . [r]ather, 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.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

I. STATEMENT OF UNDISPUTED FACTS

1. The Plaintiffs were terminated from employment by Hyspan on May 9, 1994, for refusing to submit to a drug test (Plaintiffs' Exhibit A, p. 19).

2. Hyspan initiated its drug testing policy in February 1992 (Coy affidavit, Defendant's Exhibit 1; Plaintiffs' Exhibit A, p. 20).

3. Hyspan revised its employee handbook to reflect the drug testing policy on January 1, 1994 (Plaintiffs' Exhibit B).

II. LEGAL ANALYSIS

A. The Oklahoma Work-Place Drug Testing Standards Act

The Court first addresses the issue of whether the Act was violated by Hyspan when Hyspan officials terminated the Plaintiffs for refusing to submit to a drug test. Section 564 of the Act states that:

[o]n or after the effective date of this act no employer shall implement a drug or alcohol testing program subject to the provisions of this act unless the program is in compliance

with the provisions of this act and the rules promulgated pursuant thereto. Provided, a drug or alcohol testing program subject to the provisions of this act which is in effect prior to the effective date of this act shall be in compliance with the provisions of this act and the rules promulgated pursuant thereto no later than July 1, 1994.

The Act went into effect on June 10, 1993. This provision states that any private employers with a drug-testing policy in effect on June 10, 1993, had until July 1, 1994, to comply with the Act.

Hyspan has presented to the Court an affidavit from Roy L. Coy ("Coy"), Hyspan's Tulsa plant manager, stating that Hyspan initiated its drug testing program in February 1992, thereby exempting Hyspan from the provisions of the Act at the time the Plaintiffs were terminated (Defendant's Exhibit 1).

Plaintiffs, in an attempt to dispute the date of the policy's implementation, submitted a copy of Hyspan's employee handbook, revised January 1, 1994, and a memo written by Coy regarding the new handbook. The memo states that "there have been several changes, additions and deletions in the operations guidelines", specifically noting, among other items, the addition of a drug and alcohol policy. The memo further states, however, that the employee handbook had not been revised since January 1, 1988. The fact that the handbook was revised in 1994 does not create a factual dispute regarding the date Hyspan began its drug testing policy. It is entirely consistent with the evidence that the policy began in 1992, but the handbook was not revised to reflect the change until 1994. Further, the transcript supplied by Plaintiffs indicates that a memo was sent to all employees on

February 12, 1992, regarding the new drug and alcohol policy initiated by Hyspan (Plaintiffs' Exhibit A, p. 20).

The Plaintiffs argue, however, that even if Hyspan was exempt from the Act at the time it terminated the Plaintiffs' employment, the doctrine of equitable estoppel would bar Hyspan from claiming immunity under the Act. Plaintiffs allege that, by publishing the policy in the revised handbook and requiring its employees to read and acknowledge the handbook by February 9, 1994, Hyspan induced a reasonable reliance that the testing program would be in compliance with the Act. This argument is without merit, as the policy makes no mention of the Act. Therefore, any reliance that the policy would comply with the Act--to which Hyspan was not subject--was not reasonable.

Plaintiffs also argued, in their Response to Defendant's Motion to Dismiss, that Hyspan's drug policy already was in compliance with the Act on May 9, 1994. They argue that the Act does not provide immunity for violations of the Act by an employer who had a pre-existing policy which was in compliance with the Act. This argument also is without merit. The statute is clear: the Act does not apply to *any* private employers with an existing drug-testing policy until July 1, 1994, regardless of what the policy entailed.

The Court finds that Hyspan's Motion for Summary Judgment should be and is hereby GRANTED as to the issue of whether Hyspan violated the Act.

B. Plaintiffs' Burk tort claim

The Court now considers Plaintiffs' claim that they were terminated in violation of public policy, as allowed under Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). The narrow public policy exception to the at-will termination rule applies when discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law. Id. at 28. A public policy breach presents a question of law. Pearson v. Hope Lumber & Supply Co., 820 P.2d 443, 444 (Okla. 1991).

Plaintiffs allege that the Act provides a clear statutory mandate of public policy that employers may not subject employees to random and unreasonable drug-testing. However, the Court believes it would be incongruous to hold, on one hand, that Hyspan did not violate the Act, and, on the other hand, hold that Hyspan violated the public policy espoused by the Act that Hyspan did not violate.

The Court finds that Hyspan's Motion for Summary Judgment should be and is hereby GRANTED as to the issue of whether Hyspan violated Oklahoma public policy by discharging Plaintiffs.

IT IS SO ORDERED THIS 26th DAY OF January , 1995.


THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

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

KENNETH DEAN,

Plaintiff,

v.

L.L. YOUNG,

Defendant.

Case No. 94-C-132-K ✓

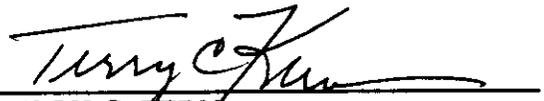
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed December 14, 1994, in which the Magistrate Judge recommended that the Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) should be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that the Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1) is denied.

Dated this 24 day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

s:dea.or

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

ENTERED ON DOCKET

DATE JAN 26 1995

SHARON FURR,

Plaintiff,

vs.

SINCLAIR OIL CORPORATION,
a Wyoming corporation,

Defendant.

Case No. 93-C-955-K

FILED

JAN 26 1995

FILED IN COURT ROOM 101
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

In accordance with the jury verdict rendered on November 23, 1994 entered in favor of the Defendant, Sinclair Oil Corporation, and entered against the Plaintiff, Sharon Furr, judgment is hereby entered in favor of Sinclair Oil Corporation on all claims. Costs are assessed against Plaintiff if timely applied for under Local Rule 54.1. Each party is to bear its own attorney fees.

DATED this 23 day of January, 1995.

s/ TERRY C. KERN

TERRY R. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 25 1995

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

MARVIN WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Defendants.)

No. 94-C-721-B ✓

ENTERED ON DOCKET

JAN 26 1995

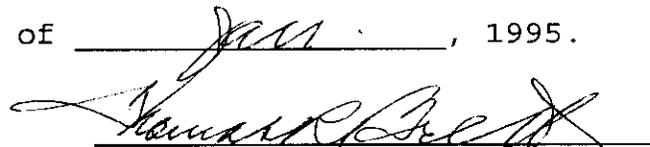
DATE _____

ORDER

Now before the Court is Plaintiff's pro se motion to dismiss this civil rights action. The Defendants have not responded.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion to dismiss (doc. #6) is **granted**; Defendants' motion to dismiss or for summary judgment (doc. #5) is **denied as moot**; and this action is hereby **dismissed with prejudice**.

SO ORDERED THIS 25 day of Jan, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

ROBBIE R. ROWLAND,)
)
Plaintiff,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Defendants.)

No. 94-C-589-B

ENTERED ON DOCKET
DATE JAN 26 1995

FILED

JAN 25 1995

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

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 1, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

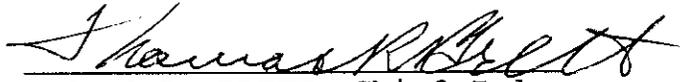
- (1) Defendants' motion to dismiss or for summary judgment (doc. #5) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 25 day of Jan., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

JOHNATHAN RAYFIELD FREEMAN,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ et al.,)
)
Defendants.)

No. 94-C-630-B

FILED

JAN 25 1995

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

ENTERED ON DOCKET

DATE JAN 26 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 13, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

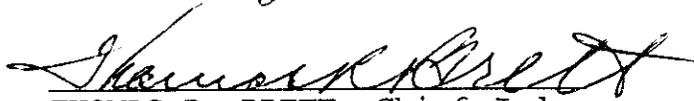
- (1) Defendants' motion to dismiss or for summary judgment (doc. #6) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 25 day of Jan., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 25 1995

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

DONNIE JOE FRYE,
Plaintiff,
vs.
RON CHAMPION, et al.,
Defendants.

No. 94-C-361-B

ENTERED ON DOCKET

DATE JAN 26 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on June 28, 1994. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment (doc. #5) is **granted** and the above captioned case is **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir.

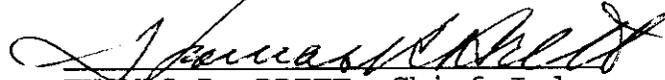
¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

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1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 25th day of Jan., 1995.



THOMAS R. BRET, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

JAN 2 1995

BUSH COMPRESSION INDUSTRIES,
INC., an Oklahoma corporation,

Plaintiff,

vs.

CORONA AIR COMPRESSOR CORPORATION,
a New York corporation, d/b/a
CORONA COMPRESSOR SERVICE CO.,
INC.,

Defendant.

Richard M. ...
Case No. 94-C-745-B
ENTERED ON DOCKET
DATE JAN 26 1995

NOTICE OF DISMISSAL

Pursuant to Federal Rule Civ. Pro. 41(a)(1)(i), Plaintiff Bush Compression Industries, Inc., by and through its counsel, Leslie Zieren of Cornish & Zieren, Inc., hereby gives notice of its dismissal of its Complaint against Defendant Corona Air Compressor Corporation, d/b/a Corona Compressor Service Company, Inc., which defendant has not filed an answer.

CORNISH & ZIEREN, INC.

By *Leslie Zieren*
Leslie Zieren, OBA #9999
321 South Boston, Suite 917
Tulsa, Oklahoma 74103-3321
(918) 583-2284

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE
The undersigned certifies that a true copy
of this document has been served on each
of the parties to this case by ...
show or to their attorney ...
25 day of January, 1995.
Fiona Adler

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

FILED

JAN 24 1995

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

CHARLEEN WORKMON,)
)
Petitioner,)
)
vs.)
)
RICHARD MORTON, et al.,)
)
Respondents.)

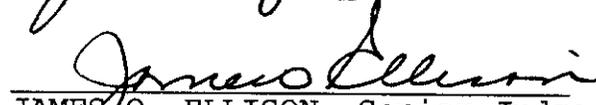
No. 92-C-567-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

FILED
JAN 24 1995

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

GREGORY SCOTT BRIANS,
Petitioner,
vs.
RON CHAMPION, et al.,
Respondents.

No. 92-C-787-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 1-25-95

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

FILED

JAN 24 1995

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

LOUIS L. WASHINGTON,)
)
) Petitioner,)
)
) vs.)
)
) STANLEY GLANZ, et al.,)
)
) Respondents.)

No. 90-C-916-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24TH day of January, 1995.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 1-25-95

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

FILED

JAN 24 1995

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

LLOYD DEAN HARJO,)
)
) Petitioner,)
)
 vs.)
)
) RON CHAMPION, et al.,)
)
) Respondents.)

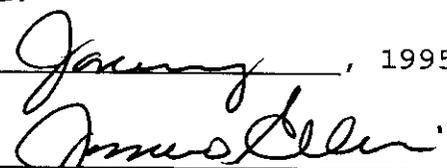
No. 91-C-727-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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ENTERED ON DOCKET
DATE JAN 25 1995

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

FILED

JAN 24 1995

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

SEA-LAND SERVICE, INC., a)
a Delaware corporation,)

Plaintiff,)

vs.)

No. 94-C-481-K

MALO, INC., an Oklahoma)
corporation,)

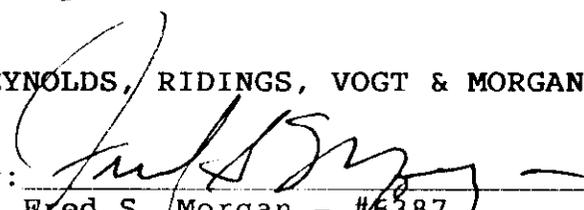
Defendant.)

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the plaintiff, Sea-Land Service, Inc., by and through its attorney, Fred S. Morgan, of Reynolds, Ridings, Vogt & Morgan, and defendant, Malo, Inc., by and through its attorney, Kenneth M. Smith of Riggs, Abney, Neal, Turpen, Orbison & Lewis, and pursuant to Rule 41 of the Federal Rules of Civil Procedure dismiss with prejudice the above-entitled case.

Dated this 23rd day of January, 1995.

REYNOLDS, RIDINGS, VOGT & MORGAN

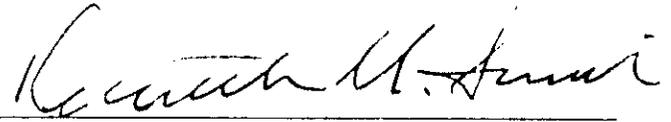
By: 

Fred S. Morgan - #6387
Attorneys for Trustee
First National Center West
120 N. Robinson, Suite 2200
Oklahoma City, OK 73102
(405) 232-8131

SIGNATURE PAGE

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
SEA-LAND SERVICE, INC. v. MALO, INC.
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
CASE NO. 94-C-481-K

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By: 

Kenneth M. Smith - OBA #8374
Attorneys for Defendant
502 West 6th Street
Tulsa, OK 74119-1010
(918) 587-3161

ms.83M.122994

F I L E D

JAN 25 1995

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

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

NELVA CAUDILL,)
)
Plaintiff,)
)
vs.)
)
DONNA SHALALA, SECRETARY OF HEALTH)
AND HUMAN SERVICES,)
)
Defendant.)

Case No. 92-C-690-E ✓

O R D E R

Now before the Court is the appeal of Plaintiff Nelva Caudill (Caudill) of the Secretary's denial of her application for Social Security Disability and Supplemental Security Income benefits.

The Administrative Law Judge denied Caudill's claim on October 11, 1989, and the Appeals Council remanded for consideration of her mental condition. After an additional hearing, the ALJ again denied Caudill's claim, finding that Plaintiff did not have a mental impairment sufficient to render her disabled, and the Appeals Council affirmed. The Sole issue presented on appeal is whether the Secretary erred in "choosing" the testimony of the medical expert over the consulting psychiatrist in denying the Plaintiff's claim for benefits.

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the

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review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, *i.e.*, the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record of if there is a mere

scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d at 750 (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The evidence in this case is that Caudill is 64 years old and has a sixth grade education. She has not worked since November, 1984, when she became unable to work due to diabetes, high blood pressure, back problems, and depression. Prior to that time she had been a home health care provider for approximately 15 years. She had also held jobs as a janitor, a dishwasher, and a clerk in a stockyard.

On remand, the Secretary found that Caudill retained the residual functional capacity to "perform work of a sedentary, light, or medium nature not requiring an ability to understand, remember, and carry out complex job instructions." Thus, she concluded, Caudill was both physically and mentally capable of returning to her past relevant work as a bluesheet clerk, kitchen helper, or janitor. In reaching this conclusion, the Administrative Law Judge rejected the opinion of Dr. Gordon, the consulting psychologist, who concluded that Caudill suffers from psychological

problems that explain her feelings of pain and render her disabled.

Caudill does not appeal from the Secretary's finding that she is not physically disabled, but only objects to the Secretary's findings regarding her mental condition, and specifically, the Secretary's rejection of the report of Dr Gordon. Plaintiff states the general rule that a treating physician's opinion should be given substantial weight, Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988), and argues, by analogy that an examining consulting physician's opinion should be given greater weight than that of a Medical Advisor who did not examine plaintiff but merely observed her while testifying. Even accepting the applicability of the rule to this case "by analogy," it must be noted that the rule has an exception if there is "good cause" for rejecting the opinion of the treating physician. Id., at 245.

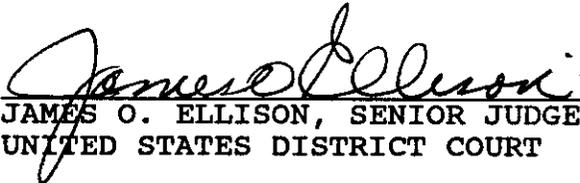
Here, the ALJ rejected the conclusion of the examining psychologist, finding that the protocol from the chronic pain battery was of "questionable validity." This conclusion is supported by Dr. Mancuso who testified that Dr. Gordon's report and assessment of work abilities were inconsistent with each other. For example, Dr. Gordon found plaintiff to be satisfactorily groomed and cleanly dressed, but gave her a "poor/none" rating in his assessment. He also noted that she did all of the activities of a housewife, but gave her a "poor/none" rating in his assessment of her ability to function. Dr Mancuso also noted that plaintiff's normal I.Q. scores were inconsistent with her "poor/none" ability to carry out all job duties. Because of these inconsistencies, the

ALJ properly rejected the opinion of Dr. Gordon.¹ See Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Moreover, the ALJ's conclusion that Plaintiff was not disabled is supported by substantial evidence. After observing plaintiff testify, Dr. Mancuso testified that Plaintiff was not clinically depressed, had normal intellectual and social functioning, and no difficulty of concentration. The vocational expert testified that Plaintiff could perform jobs such as janitor or kitchen helper, although he admitted that if he accepted the testimony of Dr. Gordon, Caudill would be considered disabled.

The decision of the Secretary to deny benefits is affirmed.

IT IS SO ORDERED THIS 24TH DAY OF JANUARY, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

¹ Plaintiff also argues that the ALJ did not make sufficient findings of his reasons for rejecting Dr. Gordon's report, since he merely noted that parts of it were "of questionable validity." While the findings may not be as complete as one would like, the decision of the administrative law judge makes it clear that he fully considered the opinions of both psychologists, and was not persuaded by the results of the chronic pain battery. Obviously, this is due either to the inconsistencies within Dr. Gordon's report and or the conclusions of Dr. Mancuso based on his observations.

FILED

JAN 24 1995

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

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

CARMEN PENNY PATTON,
Petitioner,
vs.
JOY HADWINGER, et al.,
Respondents.

No. 92-C-866-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24TH day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

FILED

JAN 24 1995

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

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

CLYDE CHUCULATE,
Petitioner,
vs.
JACK COWLEY, et al.,
Respondents.

No. 92-C-793-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

FILED

JAN 24 1995

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

JOE K. CHASE,
Petitioner,
vs.
RON CHAMPION, et al.,
Respondents.

No. 92-C-1019-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

FILED

JAN 24 1995

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

JAMES NAPOLEON, JR.,
Petitioner,
vs.
RON CHAMPION, et al.,
Respondents.

No. 92-C-1143-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

FILED

JAN 24 1995

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

THURMAN WILSON,
Petitioner,
vs.
WARDEN CODY, et al.,
Respondents.

No. 92-C-1113-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON LOG-RET
DATE 1-25-95

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

FILED

JAN 24 1995

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

GERALD LEE CARROLL,
Petitioner,
vs.
EDWARD EVANS, et al.,
Respondents.

No. 92-C-704-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 1-25-95

9

FILED

JAN 24 1995

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

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

KENNETH LEON BURRELL,
Petitioner,
vs.
STEPHEN KAISER, et al.,
Respondents.

No. 92-C-236-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

FILED

JAN 24 1995

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

JEFFREY HARRISON MCCARVER)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al)
)
 Defendants.)

No. 94-C-1167-B

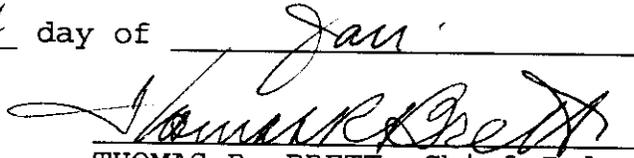
EMERSON COURT REPORT
DATE JAN 25 1995

ORDER

Plaintiff's pro se motion to dismiss without prejudice (doc. # 3) is now at issue before the Court.

After reviewing the motion, the Court concludes that it should be granted. **ACCORDINGLY, IT IS HEREBY ORDERED that** Plaintiff's motion to dismiss without prejudice is **granted** and that the above captioned case is **dismissed without prejudice** at this time.

SO ORDERED THIS 24 day of Jan, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 24 1995

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

PATRICK MEADOWS,
Petitioner,
vs.
JIM DENNIS, et al.,
Respondents.

No. 93-C-84-EV

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 24th day of January, 1995.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-25-95

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

ENTERED ON DOCKET

DATE JAN 25 1995

F I L E D

JAN 24 1995

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

THEODORE FORD,

Petitioner,

vs.

JACK COWLEY, et al.,

Respondents.

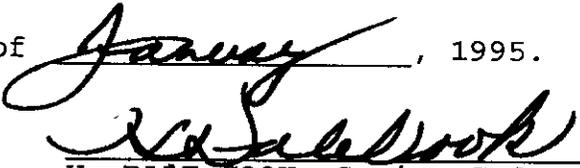
No. 88-C-631-C

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed in part and reversed in part with instructions to dismiss Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 23rd day of January, 1995.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GLADYS MARTIN;)
 CITY OF BROKEN ARROW, Oklahoma;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

JAN 24 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT
ENTERED ON BOOKS
DATE JAN 25 1995

CIVIL ACTION NO. 94-C 363B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day
of Jan, 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Neal B. Kirkpatrick, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken**
Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney;
the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,**
appears not, having previously filed its disclaimer; and the
Defendant, **Gladys Martin,** appears not, but makes default.

The Court being fully advised and having examined the
court file finds that the Defendant, **City of Broken Arrow,**
Oklahoma, acknowledged receipt of Summons and Complaint on April
25, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma**
Tax Commission, acknowledged receipt of Summons and Complaint on

April 19, 1994; that Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 15, 1995; and that Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on April 14, 1994.

The Court further finds that the Defendant, **Gladys Martin**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 26, 1994, and continuing through November 30, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Gladys Martin**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Gladys Martin**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing

and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on April 29, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on April 29, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Disclaimer on May 9, 1994, and filed a second Disclaimer on August 10, 1994; and that the Defendant, **Gladys Martin**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

Lot Thirteen (13), Block Seven (7), LEISURE PARK II, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Kenneth Martin, for judicially determining that Kenneth Martin is one and the same person as Kenneth R. Gay, and for judicially terminating the joint tenancy of Kenneth Martin and the Defendant, Gladys Martin.

The Court further finds that Kenneth Martin, and the Defendant, Gladys Martin, became the record owners of the real property involved in this action by virtue of that certain General Warranty Deed dated March 4, 1989, from Robert A. Skiff and Amy E. Skiff, husband and wife, to Kenneth Martin and Gladys Martin, husband and wife, and not as tenants in common, on the death of one the survivor, the heirs and assigns of the survivor, to take the entire fee simple title, which General Warranty Deed was filed in the records of Tulsa county, Oklahoma, on March 30, 1989 in Book 5174, Page 2333.

The Court further finds that Kenneth Martin died on August 24, 1991 while seized and possessed of the real property being foreclosed, and that upon the death of Kenneth Martin, the subject property vested in his surviving joint tenant, Gladys Martin, by operation of law. The Certificate of Death No. 18967 was issued by the Oklahoma State Department of Health certifying Kenneth Martin's Death.

The Court further finds that on November 7, 1991, the death certificate of Kenneth Martin was amended to show a name change to Kenneth R. Gay. Kenneth Martin and Kenneth R. Gay are one and the same person.

The Court further finds that on July 1, 1983, Jeffrey L. Doss and Janet H. Doss, executed and delivered to LIBERTY MORTGAGE COMPANY their mortgage note in the amount of \$57,650.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Jeffrey L. Doss and Janet H. Doss, husband and wife, executed and delivered to LIBERTY MORTGAGE COMPANY a mortgage dated July 1, 1983, covering the above-described property. Said mortgage was recorded on July 5, 1983, in Book 4703, Page 1504, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1986, Liberty Mortgage Company assigned the above-described mortgage note and mortgage to GMAC MORTGAGE CORPORATION OF IOWA. This Assignment of Mortgage was recorded on April 4, 1986, in Book 4933, Page 3174, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 10, 1989, GMAC Mortgage Corporation of Iowa f/k/a Norwest Mortgage Inc. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, DC, his successors and assigns. This Assignment of Mortgage was recorded on October 16, 1989, in Book 5213, Page 2345, in the records of Tulsa County, Oklahoma.

The Court further finds that Jeffrey L. Doss and Janet H. Doss were granted a divorce decree on February 20, 1987, case

number FD-87-612, in Tulsa County District Court, Tulsa, Oklahoma.

The Court further finds that on March 13, 1987, Jeffrey L. Doss, a single person, and Janet H. Doss, a single person, granted a General Warranty Deed to Robert Allan Skiff and Amy Elizabeth Skiff, husband and wife, joint tenants. This General Warranty Deed was recorded on March 13, 1987, in Book 5007, Page 2587, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 1, 1989, the Defendant, Gladys Martin, and Kenneth Martin, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on October 1, 1990 and October 1, 1991.

The Court further finds that the Defendant, Gladys Martin, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Gladys Martin**, is indebted to the Plaintiff in the principal sum of \$89,302.74, plus interest at the rate of 12 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Kenneth Martin; and to a

judicial determination that Kenneth Martin is one and the same person as Kenneth R. Gay; and to a judicial termination of the joint tenancy of Kenneth Martin and the Defendant, Gladys Martin, in the real property involved herein.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$48.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of \$46.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, **Gladys Martin**, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, disclaims any right, title or interest in the subject property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of

redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Gladys Martin**, in the principal sum of \$89,302.74, plus interest at the rate of 12 percent per annum from March 29, 1994 until judgment, plus interest thereafter at the current legal rate of 7.34 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Kenneth Martin be and the same is hereby judicially determined to have occurred on August 24, 1991, in the City of Broken Arrow, County of Tulsa, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT the joint tenancy of Kenneth Martin, and the Defendant, Gladys Martin, in the above-described real property be and the same hereby is judicially terminated as of the date of the death of Kenneth Martin on August 24, 1991.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$94.00 for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, City of Broken Arrow, Oklahoma, has no right, title, or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Gladys Martin, State of Oklahoma ex rel Oklahoma Tax Commission and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Gladys Martin, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer,
Tulsa County, Oklahoma, in the amount of
\$94.00, personal property taxes which are
currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of
redemption (including in all instances any right to possession
based upon any right of redemption) in the mortgagor or any other
person subsequent to the foreclosure sale.

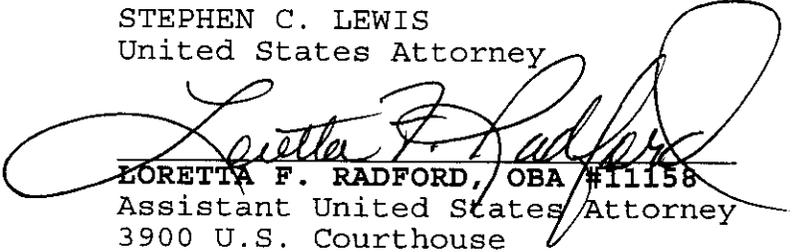
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

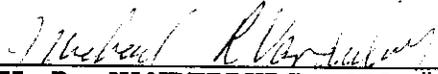
STEPHEN C. LEWIS
United States Attorney



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



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



MICHAEL R. VANDERBURG, OBA #9180
City Attorney
P.O. Box 610
Broken Arrow, Oklahoma 74012
(918) 251-5311
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 363B

LFR:lg

FILED

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

JAN 25 1995

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

TERRY P. KOLKMANN)
)
 Plaintiff,)
)
 vs.)
)
 CONNECTICUT MUTUAL LIFE INSURANCE)
 COMPANY, a Connecticut corporation,)
)
 Defendant.)

Case No. 93-C-375-E ✓

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 24th day of January, 1995.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 1-25-95

ENTERED ON DOCKET

DATE JAN 25 1995
FILED

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

JAN 24 1995

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

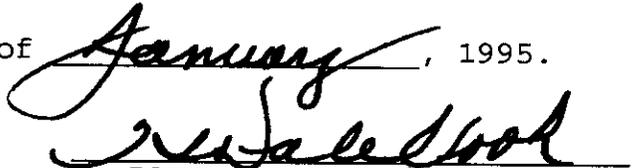
KENNETH REYNOLDS,)	
)	
Petitioner,)	
)	
vs.)	No. 92-C-987-C
)	
RON CHAMPION, et al.,)	
)	
Respondents.)	

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 23rd day of January, 1995.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 25 1995

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

PRODUCERS OIL COMPANY, and)
CHARLES GOODALL REVOCABLE TRUST,)
)
Plaintiffs,)

vs.)

PHOENIX ASSURANCE COMPANY OF)
NEW YORK, HARTFORD FIRE INSURANCE)
COMPANY, ALBANY INSURANCE COMPANY,)
FEDERAL INSURANCE COMPANY,)
UNDERWRITERS AT LLOYD'S, LONDON,)
and SUN COMPANY, INC.)

Defendants.)

Case No. 93-C-431-B

ENTERED ON DOCKET
JAN 25 1995
DATE _____

O R D E R

Before the Court for consideration are a Motion for Summary Judgment (Docket #120) filed by Defendant Underwriters at Lloyd's, London ("Lloyd's"), and a Motion for Partial Summary Judgment as to Defendant Lloyd's (Docket #126), filed by Plaintiffs Producers Oil Company ("Producers") and Charles Goodall Revocable Trust ("Trust").

Producers and the Trust have sued Lloyd's on an insurance policy written by Lloyd's to recover money lost from the alleged theft of oil by Marion Zane "Rink" Thompson, who worked for Producers at the fields where the oil was allegedly stolen. Producers operated the oil fields; the Trust owned the working interest in the oil. The question facing the Court here is whether Thompson was an employee or an independent contractor. If Thompson was an employee, or was in "lawful possession" of the oil, Lloyd's

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alleges that the policy exclusion prevents recovery. Alternatively, if Thompson was neither an employee nor in lawful possession of the oil, Lloyd's argues that Producers has no insurable interest in the stolen oil because the oil was not in its "care, custody or control" as required by the policy.

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); Winton Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court 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.

Celotex, 477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." and "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).

The Tenth Circuit Court of Appeals stated:

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 . . . [r]ather, 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.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

I. STATEMENT OF UNDISPUTED FACTS

1. The property from which the oil in question was produced is the Romulus unit in Pottawatomie County, Oklahoma. The Romulus unit is made up of two leases: the Lambdin and the Robertson. (Knoblock deposition, p. 19).

2. Producers operates the Romulus unit, but owns no interest in the wells, oil, tank batteries, flow lines, pumping equipment, or other oil production equipment. Producers owns no interest in the surface or the minerals. Its sole source of income in connection with the Romulus unit is from operating the unit.

(Knoblock deposition, p. 15, 24).

3. Producers operates approximately 300 wells in addition to those in the Romulus unit. (Knoblock deposition, p. 15; Snyder deposition, p. 98).

4. Producers employs pumpers to operate its properties. Producers categorizes some pumpers as employees and others as independent contractors. (Knoblock deposition, p. 13).

5. Marion Zane "Rink" Thompson was first employed by Producers in 1972 as a pumper at the Romulus unit. (Snyder deposition, p. 66).

a. Thompson was an employee of Producers beginning in 1972. On December 8, 1986, he signed a contract that purported to change his status from that of employee to that of independent contractor. (Plaintiff's Exhibit A to Response in Opposition to Motion for Summary Judgment).

b. Thompson's duties as a pumper remained the same after the contract was signed, regardless of whether he was designated an employee or an independent contractor. (Knoblock deposition, p. 18, 95).

c. Thompson's duties as a pumper, both while he was an employee and while he was an independent contractor, are defined in a document called "Pumper's Duties", (Defendant's Motion for Summary Judgment, Exhibit A).

Such duties include:

i. Gauge production stock tanks and record correctly in a gauge book;

ii. Calculate production; Note downtime and reason

on gauge report for any well down previous 24 hours and give report to foreman;

iii. Report extraordinary changes in well production, along with needed changes and/or repairs to foreman;

iv. Take production well tests as may be required and report on necessary forms or gauge sheet;

v. Treat wells with emulsion breakers, paraffin solvents, corrosion inhibitors, etc., as directed by foreman;

vi. Maintain surface equipment in efficient operating condition, specifically: (a) Maintain stuffing boxes; (b) change oil filters in engines as required; (c) install fan belts and drive belts when possible; (d) maintain and replace/repair magnetos, carburetors and starting motors when possible; (e) maintain and repair/replace ignition wires, cables and plugs; (f) repair simple lead line and SWD line leaks when possible; (g) keep tanks and pumping unit clean and free from accumulated dirt and grease, when possible; (h) report worn or inoperative equipment and lease roads in need of repair to foreman; and (i) make minor engine and pumping unit repairs and adjustments;

vii. Maintain lease area in cleanest possible condition; void of used equipment and trash; and

viii. Notify foreman of any activity of interest on offsetting leases, such as: workovers, acid jobs, re-completions, new wells, etc.

d. Thompson, both before and after the December 1986 contract, was required to get approval from his supervisor, who was a Producers employee, prior to conducting repairs. (Knoblock deposition, p. 20).

e. Thompson was in charge of security at the Romulus unit on behalf of Producers. (Knoblock deposition, p. 22, 23).

f. Thompson was the "eyes and ears" at the Romulus site on behalf of Producers. He was Producers' representative

to landowners and oil companies. (Knoblock deposition, p. 23).

g. Thompson was in charge of notifying purchasers of Romulus-produced oil when the tank batteries were full enough to justify removal of the oil. (Knoblock deposition, p. 26, 27).

6. Producers reclassified Thompson as an independent contractor in December 1986 due to low prices in the oil industry and Producers' desire to lower its operating costs. (Knoblock deposition, p. 47, 63).

7. To Knoblock's knowledge, Thompson was not bonded. (Knoblock deposition, p. 48).

8. The supervisory role between Producers and Thompson did not change after December 1986. (Knoblock deposition, p. 56).

9. Producers held Certificate of Insurance No. 61375 from noon January 25, 1990, through January 25, 1991, with Lloyd's. The Trust was an additional named insured. (Defendant's Exhibit B).

a. Section 1 of the policy in reference to oil lease property (all risks), states at paragraph 1:

PROPERTY INSURED: Property in the assured's care, custody and control or for which the assured may be legally liable consisting of tanks, pumps, machinery, pipe, and all other similar equipment and/or personal property of a mobile or floating nature, including all crude petroleum in tanks, usual to the operation to the producing oil or gas well as per schedule on file with Global Special Risks, Inc. of Texas, while situated at producing well-sites anywhere within the United States including while in transit.

b. Paragraph 5 provides exclusions to coverage under the policy. Subparagraph D states:

Notwithstanding anything contained herein to the contrary, this section does not insure:

D. Theft if due to infidelity of employees or the conversion, embezzlement or secretion by any person in lawful possession of the property or failure of such persons to return property loaned, rented or used by them.

10. For the purposes of this Motion for Summary Judgment only, Lloyd's assumes that Thompson may have stolen some oil during the policy period.

II. LEGAL ANALYSIS

If the evidence regarding the employee/independent contractor status is reasonably susceptible of only one inference, the question is to be decided by the Court. Murrell v. Goertz, 597 P.2d 1223, 1225 (Okla. App. Ct. 1979). However, when the status of the employee/independent contractor

forms a material issue in the case and the facts bearing on that issue are disputed, or where there is room for a reasonable difference of opinion to be drawn from the known facts, the issue is for the jury under proper instructions by the court ... and it is error to withhold the issue from their [sic] determination.

Id.

Thompson and Producers signed a contract stating that, as of December 1986, Thompson was an independent contractor instead of an employee. "Where a contract is in writing, ordinarily the question

of whether the relation of employer and independent contractor is created is one of law for the court." Texaco Inc. v. Layton, 395 P.2d 393, 398 (Okla. 1964). However, the existence of a contract is not the end of the inquiry:

[A] contract which, upon its face, creates the relation of employer and independent contractor will not protect the employer if from facts and circumstances appearing in the evidence it may be reasonably inferred that notwithstanding the contract the real relation was that of master and servant.

Id. at 398. Therefore, the Court must evaluate the actual relationship between Producers and Thompson, instead of merely the relationship as outlined by the contract. The determination of whether someone is an employee or an independent contractor turns on whether the employer "had the right to control, or purported or attempted to control, the manner of the doing of the job by the alleged servant...." Hunter Construction Co. v. Marris, 388 P.2d 5, 7 (Okla. 1963).

An independent contractor is one who performs a service for another according to his own methods and manner, free from control and direction of his employer in all matters connected with the performance of the service except as to the result. Texaco, 395 P.2d at 398, *citing* Miller Construction Co. v. Wenhold, 458 P.2d 637 (Okla. 1969).

The December 1986 contract clearly intends to set up an independent contractor relationship. However, the history of the relationship between the parties strongly implies an employee-employer relationship, thereby suggesting factual issues for the

trier of fact to resolve. The Court cannot, as a matter of law, state that the facts of this case are capable of only one inference.

The next question before the Court is whether Thompson was in "lawful possession" of the oil. If so, the policy exclusion applies. Producers argues that Thompson never "possessed" the oil until he stole it; because he stole it, his possession was not "lawful". The undisputed facts indicate that Thompson had access to the oil and was in charge of its distribution to buyers. However, the Court cannot state as a matter of law that Thompson's control of the oil at the site was indeed "possession" of the oil. The Court believes the question is one for jury determination.

Finally, the Court addresses whether Producers has an insurable interest in the oil. Lloyd's alleges that, if Thompson was neither an employee nor in lawful possession of the oil, Producers has no insurable interest in the stolen oil because the oil was not in its "care, custody or control" as required by the policy.

The Court finds this argument to be without merit. The oil was pumped and stored by Producers; it certainly was within Producers' "care" and "custody". The issue of whether Thompson had "lawful possession" of the oil is irrelevant to the issue of whether the oil was in Producers' care. Further, the policy states that it insures

[p]roperty of the Assured, in the Assured's care, custody and control or for which the Assured may be legally liable consisting of tanks, pumps, machinery, pipe, and all other

similar equipment and or personal property of a mobile or floating nature, including all crude petroleum in tanks

See Defendant's Exhibit B, p. 7.

If the terms of an insurance policy are unambiguous, they are to be accepted in their ordinary sense and enforced to carry out the expressed intention of the parties. Dodson v. St. Paul Insurance Co., 812 P.2d 372, 376 (Okla. 1991). Whether an insurance contract is ambiguous is a matter for the court to determine as a matter of law. Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okla. 1993).

The clear language of the insurance contract states that it covers "crude petroleum in tanks" that is within Producers' care, custody or control. Producers operated the Romulus unit. At the very least, the oil was in its "care" while waiting to be sold to oil companies. The Court finds, as a matter of law, that Producers has an insurable interest in the oil, regardless of Thompson's individual status as to Producers or the oil.

The Court holds that there is a material dispute for jury determination as to whether Thompson was an employer or an independent contractor after December 1986. The Court further holds that the question of whether Thompson was in lawful possession of the oil presents a factual question for the jury also. Therefore, both Producers' and Lloyd's motions for summary judgment on the issue of whether Thompson was an employee, and on the issue of whether Thompson was in lawful possession of the oil are hereby DENIED. Because there are no material facts before the

Court as to the relationship between Thompson and the Trust, the Court makes no ruling as to the Trust on this issue.

The Court further holds that, as a matter of law, if Thompson is not determined to be an employee and/or in lawful possession of the oil, Producers has an insurable interest in the oil. Therefore, Lloyd's motion for summary judgment is DENIED, and Producers' motion for summary judgment is GRANTED in part on the issue of insurable interest.

IT IS SO ORDERED THIS 25th DAY OF JANUARY, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

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

JAN 23 1995

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

JAMES JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 ROB EDEN, et al.,)
)
 Defendants.)

Case No. 94-C-111-BU

ENTERED ON DOCKET

DATE JAN 24 1995

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendants, Rob Eden, Emmett Eads, and the Oklahoma Department of Human Services. Plaintiff, James Jackson, has responded to the motion and upon due consideration of the parties' submissions, the Court makes its determination.

In February, 1992, Plaintiff, a black male, applied for the position of social work assistant in Washington County, Oklahoma. Plaintiff was not offered the position. Thereafter, Plaintiff commenced this suit against Defendants, Rob Eden, Emmett Eads and the Oklahoma Department of Human Services, pursuant to 42 U.S.C. § 1981, alleging that he was not selected for the social work assistant position because he was black and/or because he was male.

In their motion, Defendants, Rob Eden, Emmett Eads and the Oklahoma Department of Human Services contend that they are entitled to judgment on Plaintiff's section 1981 claims on the basis that a claim for sex discrimination is not cognizable under section 1981, a claim for race discrimination does not exist because there is no evidence of intentional racial discrimination

on the part of Defendants and the Oklahoma Department of Human Services is immune from liability under section 1981 by virtue of the Eleventh Amendment to the United States Constitution.

At the outset, the Court concludes that Defendant, Oklahoma Department of Human Services, is entitled to summary judgment on Plaintiff's claims. The Eleventh Amendment to the United States Constitution provides in pertinent part:

"[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State"

U.S. Const. amend. XI. The United States Supreme Court has stated that although "[t]his language expressly encompasses only suits brought against a State by citizens of another State, . . . the Amendment bars suits against a State by citizens of that same State as well." Papasan v. Allain, 478 U.S. 265, 276 (1986) (citing Hans v. Louisiana, 134 U.S. 1 (1890)). Thus, absent waiver, consent to suit or congressional abrogation of immunity, a suit in which the State of Oklahoma or one of its agencies or departments is named as a defendant is generally proscribed by the Eleventh Amendment, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984), and "[t]his bar exists whether the relief sought is legal or equitable." Papasan, 478 U.S. at 276 (citing Pennhurst, 465 U.S. at 100-01).

Because Defendant, Oklahoma Department of Human Services, has neither waived nor consented to suit in federal court, the Court finds that Defendant, Oklahoma Department of Human Services, an agency and arm of the State of Oklahoma, is immune from liability

under the Eleventh Amendment for Plaintiff's claims asserted under section 1981. In addition, to the extent Plaintiff has alleged section 1981 claims against Defendants, Rob Eden and Emmett Eads, in their official capacity, the Court concludes that such claims are also barred by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 165 (1985) (claims against persons in their official capacity are actually claims against the entity which employs them).

With respect to Plaintiff's section 1981 claim for sex discrimination against Defendants, Rob Eden and Emmett Eads, in their individual capacity, it is well-established that section 1981 does not reach incidents of discrimination on the basis of sex. Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979); Webb v. District of Columbia, 864 F.Supp. 175 (D.D.C. 1994). Consequently, the Court finds that Defendants, Rob Eden and Emmett Eads, in their individual capacity, are entitled to summary judgment as to Plaintiff's sex discrimination claim based upon section 1981.

As to Plaintiff's claim of racial discrimination against Defendants, Rob Eden and Emmett Eads, in their individual capacity, Plaintiff's charge is cognizable under section 1981. However, Defendants contend that summary judgment is warranted on Plaintiff's claim because Plaintiff has failed to present sufficient evidence of intentional racial discrimination. Defendants argue that in support of his claim, Plaintiff only relies upon alleged statistical disparity in the Washington County

office. According to Defendants, the racial composition of the Washington County office does not support intentional racial discrimination.

From reviewing Plaintiff's pleadings liberally, it appears that Plaintiff is seeking to recover damages under section 1981 based upon a disparate impact theory as well as a disparate treatment theory. The Court, however, finds that the record does not support a claim under the disparate impact approach. The definitions of disparate treatment and disparate impact are found in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In that case, the Supreme Court stated that a disparate treatment case involves a situation where "the employer simply treats some people less favorably than others because of their race, color, religion or natural origin." Id. at 335, n. 15. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Id. A claim of disparate impact exists when "employment practices that are basically neutral in their treatment of different groups in fact fall more harshly on one group than another and cannot be justified by business necessity." Id. Proof of discriminatory motive is not required under the disparate impact theory.

The disparate impact theory of discrimination has generally been applied in cases where clearly identifiable employment requirements or criteria resulted in less favorable treatment of a protected group. It also has been applied in cases where employers

habitually engaged in routine, general methods of determining whether applicants or employees were qualified for particular positions. Coe v. Yellow Freight Systems, Inc., 646 F.2d 444, 450-451 (10th Cir. 1981). In the instant case, Plaintiff's allegations do not fall within the categories of cases to which the disparate impact analysis has been applied. Plaintiff has not alleged and the record does not reflect that Defendants systematically followed a standard practice or procedure for hiring social work assistants which had a discriminatory effect on black applicants. Consequently, the Court finds that Plaintiff has no claim of racial discrimination against Defendants under the disparate impact theory.

Under the disparate treatment theory, the thrust of a plaintiff's case is that, compared with other like qualified candidates, the plaintiff was treated differently because of his race. Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991). In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court enunciated a scheme of proof for establishing discrimination under the disparate treatment theory. Although McDonnell Douglas involved a Title VII claim, the Supreme Court has extended the application of the scheme of proof to section 1981 claims. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Under the McDonnell Douglas analysis, a plaintiff must first establish a prima facie case of discrimination. In regard to a claim of failure to hire, a plaintiff must demonstrate that (1) he is a member of a racial minority; (2) he applied and was

qualified for an available position; (3) that, despite his qualifications, he was rejected; and (4) that the employer continued to seek applicants from persons of plaintiff's qualifications. McDonnell Douglas, 411 U.S. at 802. Once the prima facie case has been established, a presumption of discrimination exists. The burden of production shifts to the defendant to rebut the presumption. Id. The defendant can meet this burden by articulating a legitimate, nondiscriminatory reason for the employment decision. Id. The defendant's explanation of the legitimate reason must be clear and reasonably specific. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251 (1981). The burden then shifts back to the plaintiff to show that the proffered reason is a pretext for discrimination. This burden merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. Id. at 256. The plaintiff can meet this burden by directly showing racial discrimination actually motivated the defendant or indirectly by demonstrating that the defendant's reason is unworthy of belief. Drake, 927 F.2d at 1160. The plaintiff can make an indirect showing of pretext with statistical evidence or examples of others receiving disparate treatment. Id.

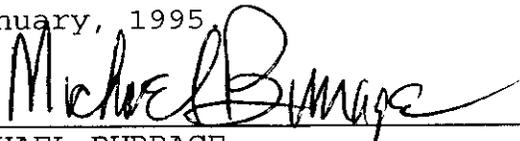
The parties in their briefs have not addressed whether Plaintiff can established a prima facie case of discrimination as enunciated in McDonnell Douglas. Defendants have simply argued that Plaintiff cannot show intentional racial discrimination based upon statistical disparity in the Washington County office.

Intentional racial discrimination, however, can be established through the McDonnell Douglas scheme of proof. From reviewing the record, it appears that Plaintiff has alleged prima facie case of discrimination in his complaint. He has alleged that he is black, that he applied and was qualified for the social worker assistant position, that he was rejected and that a white person was hired for the position. Defendants therefore must articulate a legitimate non-discriminatory reason for not hiring Plaintiff. If Defendants meet their burden, Plaintiff must then present sufficient evidence demonstrating that the proffered reason is a pretext for discrimination.

In light of the record, the Court concludes that summary judgment in favor of the Defendants on Plaintiff's section 1981 claim based upon disparate treatment is not warranted at this time. However, Defendants, Rob Eden and Emmett Eads, in their individual capacity, are granted leave to file another summary judgment motion, if appropriate, which addresses the evidence in this case in the context of the McDonnell Douglas scheme of proof. Should Defendants desire to file a motion, Defendants are directed to do so within fifteen (15) days from the date of this Order. Plaintiff shall thereafter respond to the motion within fifteen (15) days.

Accordingly, the Court GRANTS in part and DENIES in part Defendants' Motion for Summary Judgment (Docket No. 8).

ENTERED this 20th day of January, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

~~EXHIBIT A~~

FILED

JAN 20 1995

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

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

THE WILLIAMS COMPANIES, INC.)
EMPLOYEES' INVESTMENT PLAN, THE)
WILLIAMS COMPANIES, INC., BONUS)
EMPLOYEE STOCK OWNERSHIP PLAN,)
and THE WILLIAMS COMPANIES, INC.,)
EMPLOYEE STOCK OWNERSHIP PLAN.)

Plaintiffs,)

v.)

Case No. 92-C-713-E ✓

JEFFREY SCOTT LARSH, as Executor and)
personal representative of the late John)
Walter Larsh, and as Trustee of the Matthew)
Eric Larsh Trust, TERESA SUE LARSH and)
MATTHEW ERIC LARSH, a minor,)

Defendants.)

ORDER

This case was submitted to the Court on stipulated facts and exhibits and on motions for summary judgment and briefs filed by all the parties. The Court has reviewed the stipulated facts, set forth below, and all briefs filed by the parties. As discussed more fully, the motions for summary judgment of the captioned plaintiffs as well as that of the defendant Teresa Sue Larsh, both of whom requested the same relief, are granted; the motions for summary judgment of defendant Jeffrey Scott Larsh and defendant Matthew Eric Larsh are denied.

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FACTS

1. The Plaintiff Investment Plan is an employee stock ownership plan which, among other things, allows employees to contribute a percentage of their eligible monthly compensation to the Plan with the Company matching a portion of the employee's salary deferral and after-tax contributions to the Plan. The Investment Plan is an "employee pension benefit plan" as that term is described in 29 U.S.C. §1002(2)(A), and is governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§1001 *et. seq.*

2. The Plaintiff BESOP is a leveraged employee stock ownership plan and stock bonus plan which, among other things, is designed to invest in qualifying employer securities for the benefit of eligible participating employees. BESOP is an "employee pension benefit plan" governed by ERISA.

3. The Plaintiff ESOP is a defined contribution, payroll-based employee stock ownership plan which, among other things, allows employees to have plan accounts, the assets of which are invested in The Williams Companies, Inc.'s common stock. The ESOP is an "employee pension benefit plan" governed by ERISA.

4. The defendant Jeffrey Scott Larsh ("Scott Larsh") is the personal representative of the late John Walter Larsh ("John Larsh"), and Trustee of the Matthew Eric Larsh trust. Matthew Eric Larsh ("Matthew Larsh") is the minor son of John and Sue Larsh.

5. The defendant Teresa Sue Larsh ("Sue Larsh") is the former wife of John Larsh.

6. John Larsh was employed at various times by operating subsidiaries of The Williams Companies, Inc. On May 14, 1985, John Larsh executed a Beneficiary Designation Form for the Northwest Energy Company Employees' Savings Plan, the Northwest Energy

Company Employee Stock Ownership Plan, the Northwest Energy Company Bonus Employee Stock Ownership Plan, and the Northwest Central Pipeline Corporation Employee Stock Ownership Plan. Sue Larsh was named the Primary Beneficiary, and Matthew Larsh, the Contingent Beneficiary. *Id.*

7. In or about March of 1986, the Northwest Energy and Northwest Central Pipeline plans merged into the Investment Plan, the BESOP, and the ESOP at issue here. The Beneficiary Designation Form therefore became applicable to the plaintiff Plans.

8. John Larsh did not execute any other beneficiary designation forms for any of the plaintiff Plans, nor did he indicate to plaintiffs, in writing or otherwise, that the beneficiary should be changed.

9. On July 11, 1986, the District Court in and for Cleveland County, Oklahoma, entered a Decree of Divorce between Sue Larsh and John Larsh. Paragraph 6 of the Decree ordered that John Larsh be awarded ". . . all the parties' right, title and interest in and to all that personal property which is in his possession and control, including . . . the savings plan with his employer."

10. On June 26, 1991, John Larsh died.

11. On September 11, 1991, the Administrative Committee of the Investment Plan, the BESOP and the ESOP announced its intention to pay the proceeds of the Plans to Sue Larsh in accordance with the beneficiary provision of each of the Plans and with the beneficiary designation cards.

12. On or about January 25, 1992, counsel representing Scott Larsh requested that the proceeds of the Plans be "transferred to and paid to Matthew Eric Larsh and for his benefit."

13. Paragraph 9.5 of the BESOP provides that "[o]n the death of a Participant . . . the Participant's undistributed matured benefit shall be distributed . . . to the Beneficiary or Beneficiaries designated by the Participant on a Beneficiary Designation Form provided by the Committee."

14. Paragraph 8.2(b) of The Williams Companies Employees' Investment Plan provides that a Participant may change the Beneficiary of the Plan only by filing a new Beneficiary designation with the Administrative Committee.

15. Paragraph 7.2 of the ESOP provides that the Accrued Benefit be paid "to the Beneficiary or Beneficiaries designated by the Participant on a Beneficiary designation form provided by the Committee." Under the terms of the ESOP and BESOP, a change of Beneficiary is not effective until a new Beneficiary designation form is filed with the Committee.

16. Based on the stipulated facts set forth above, particularly the plaintiffs' stated intention to pay the proceeds of the Plans to Sue Larsh and Scott Larsh's request that the proceeds be paid to Matthew Larsh, plaintiffs filed the instant action requesting a judgment declaring the rights of all parties and particularly holding that the payment of the Plan proceeds to Sue Larsh is correct and proper in all regards.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to this action and the subject matter of this action and venue is proper in this Court.

2. Employee benefit plans such as the plaintiffs herein are governed by the Employee Retirement Income Security Act of 1974 (as amended), 29 U.S.C. §1001 *et. seq.* ("ERISA"). ERISA preempts all common law claims relating to benefit plans. *Ingersoll Rand Co. v.*

McClendon, _____ U.S. _____, 111 S.Ct. 478, 112 L.Ed. 2d 474 (1990); *see also* *Gilbert v. Burlington Industries*, 756 F.2d 320 (2nd Cir. 1985), *affirmed mem.*, 106 S.Ct. 3267 (1986). Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" are superseded. *Ingersoll Rand*, 111 S.Ct. at 482. A law "relates to" an employee benefit plan "if it has a connection or a reference to such a plan". *Id.* 111 S.Ct. 483; *Metropolitan Life Insurance Company v. Hanslip*, 939 F.2d 904, 906 (10th Cir. 1991).

2. Therefore, the question of whether a named beneficiary on a pension benefit plan should be paid the proceeds of the accounts is governed by the provisions of ERISA. The common law of the state of Oklahoma, including its provisions for the transfer of property in an action for divorce, is preempted. In particular, 15 O.S. §178, which automatically voided beneficiary designations to spouses upon the granting of a divorce, and upon which Defendant Scott Larsh and Matthew Larsh must rely, is preempted and of no effect here.

3. There is a limited exception to the basic principles that divorce decrees, as other state court orders, are preempted by ERISA, and that exception is for "qualified domestic relations orders" (QDROS), 29 U.S.C. §1144(a)(b)(7). A court order related to spousal rights is a QDRO if it "creates or recognizes the existence of an alternate payees right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable" under a plan, 29 U.S.C. §1056(d)(3)(B) and if the order includes:

1. The name of the participant and the name of the mailing address of an alternate payee;

2. The amount of percentage of benefits payable to an alternate payee or a manner of determining the amount or percentage;
3. The number of payments or period affected by the order; and
4. The plan to which the order applies.

29 U.S.C. §1056(d)(3)(C)(i)-(iv); *Carland v. Metropolitan Life Insurance Company*, 935 F.2d 1114 (9th Cir. 1991).

4. Because the divorce decree in question here does not meet the above-referenced requirements, it cannot be an exempt QDRO. The decree simply does not "provide all the necessary information to determine the identity of a beneficiary without creating unreasonable administrative burdens for the plan administrator." *Carland*, 935 F.2d at 1120.

5. An ERISA beneficiary is bound by the dictates of the Act to make decisions concerning the payment of benefits according to its terms and the provisions of the employee benefits plan. 29 U.S.C. §1104(a)(1)(D). In addition, benefit plans may rely on the beneficiary designation forms. *Carland v. Metropolitan Life, supra*. Here, all three plaintiff plans contain provisions that provide that upon the death of a participant, the participant's undistributed matured benefit shall be distributed to the beneficiary or beneficiaries designated by the participant on a beneficiary designation form. Thus, the plain language of the plans dictates that the plaintiffs disburse the proceeds of the accounts to the beneficiary named in the designation forms, in this case defendant Sue Larsh. The plans may rely on the beneficiary designation forms. *Carland v. Metropolitan Life*.

FEES

With the exception of Matthew Eric Larsh, each party is to bear its own costs and fees in this matter. By agreement of the parties, the fees of William Farrior, court appointed guardian *ad litem* for defendant Matthew Eric Larsh, shall be paid by the plaintiffs collectively, Jeffrey Scott Larsh as executor and personal representative of the late John Walter Larsh and Teresa Sue Larsh each paying directly to Farrior \$977.70, and Farrior shall accept such three payments of \$977.70 in full satisfaction of the attorney fee obligation.

ORDERED this 12th day of Jan., 1995.



JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

R. Mark Solano

Brian S. Gaskill

William E. Farrior

Douglas G. Stuart

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

FILED
RECEIVED
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
JOYCE S. KYLE,)
)
Defendant.)

Case No. 94-C-1100 K

DEFAULT JUDGMENT

The default of Defendant Joyce S. Kyle for failure to plead or otherwise defend having been duly entered, and Defendant having failed to appear or take further proceedings, and it appearing that Plaintiff's claim against Defendant is for a sum certain based upon Plaintiff's supporting affidavit, and it further appearing the Defendant is not an infant or an incompetent person, and is not in the military service,

IT IS ORDERED that default judgment be and is hereby entered in favor of Plaintiff and against Defendant in the amount of \$183,311.37, together with interest in the amount of \$6,870.41 for the period from August 11, 1994 through January 10, 1995, plus \$45.20 per day from January 10, 1995, through date of judgment, plus post-judgment interest at the rate provided for by law, plus costs in the sum of \$120.00 and reasonable expended attorney's fees in the amount of \$750.00.

DATED this 20 day of January, 1995.

s/ TERRY C. KERN

~~CLERK OF THE COURT~~

JAN 24 1995

WILLARD T. COLE,
Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS,
Defendant.

No. 93-C-571-K

FILED

JAN 24 1995

FEDERAL CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Plaintiff Willard T. Cole ("Plaintiff") seeks review of the Secretary's decision to deny his application for social security disability benefits under 42 U.S.C. § 405(g).

Plaintiff filed his request for benefits in September of 1991 alleging disabilities arising from a crushed left foot injury and injury to the right knee, with back pain. After denial by initial and reconsidered determinations, Plaintiff requested a hearing before an administrative law judge (ALJ). The ALJ found that Plaintiff's impairment does not prevent him from performing sedentary and light jobs enumerated by the vocational expert and thus was not disabled. On April 20, 1993, the Appeals Council denied Plaintiff's request for review. Plaintiff has now sought review in the district court and raises the following issues to be considered:

- 1) The ALJ did not consider the combined effects of his back, foot, and knee impairments.

- 2) The hypothetical question posed by the ALJ to the vocational expert did not include all of the restrictions relevant to Plaintiff's condition.

Discussion

Before the Court is the appeal of the Plaintiff to the Secretary's denial of disability benefits. The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform

alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

In this case, ALJ proceeded to step five after determining that Plaintiff could not perform past work as a delivery courier, a janitor, and a trash service foreman. While the ALJ found that Plaintiff indeed suffered from a severe impairment, the ALJ found that Plaintiff had the residual functional capacity ("RFC") for the full range of light work reduced by restrictions on prolonged standing and prolonged use of foot controls. (Tr. 26). The ALJ also found Plaintiff able to perform numerous jobs at the sedentary level.

The Secretary's decisions and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d 297, 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency

decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The first objection raised by Plaintiff involves the alleged failure by the ALJ to consider the limiting effect of all of Plaintiff's impairments in combination while making his RFC assessment. This argument is unavailing. An examination of the ALJ's decision demonstrates a commitment to evaluating the impairments in combination. The ALJ considered various opinions by physicians who treated and examined the Plaintiff and evaluated the effects of his several impairments. Furthermore, in discussing Plaintiff's assertions of disabling pain, the ALJ explicitly reviewed the combined effects of Plaintiff's back, knee, and foot impairments, in addition to Plaintiff's alleged urethral stricture, blood pressure, gas and ulcer condition, and allegations of mental, skin, epilepsy and vision deficits. (Tr. 18-19). The ALJ did not "so fragmentize [Plaintiff's] several ailments . . . that he failed properly to evaluate their effect in combination upon this claimant." Owens v. Heckler, 770 F.2d 1276, 1282 (5th Cir. 1985).

The second objection raised by Plaintiff involves the hypothetical propounded by the ALJ to the vocational expert. Having decided that Plaintiff retained the ability to perform alternate work, the Secretary still bears the burden of showing that work exists in the national economy which Plaintiff can perform. 42 U.S.C. § 423(d)(2)(A).

Since the ALJ found that Plaintiff retained an RFC that was

reduced by further restrictions, he properly called a vocational expert to establish the existence of jobs in the economy that Plaintiff could perform. However, it is well settled that if the hypothetical questions which elicit an expert's testimony do not relate with precision all of the claimant's impairments, that testimony "cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991).

Plaintiff contends that there were two main deficiencies in the hypothetical question propounded by the ALJ.¹ First, Plaintiff argues that the hypothetical presented to the vocational expert inaccurately restricted the type of foot controls the hypothetical individual could use rather than the *length of time* he could operate such foot controls. (Tr. 67-68) (stating in the hypothetical that Plaintiff "could not operate controls with his left foot that would require ankle motion"). Second, Plaintiff contests the language used by the ALJ in the hypothetical supposing

¹The ALJ presented the hypothetical in the following manner:

Let's assume that the claimant is a 49 year old individual, who . . . has in general the physical capacity to perform . . . light and sedentary work activity. [T]his individual would be able to stand and/or walk with normal breaks for a total of about 6 hours in an 8 hour day. He would be limited in the lower extremity, in that he could not operate controls with his left foot that would require ankle motion.

The hypothetical continued by including limitations on climbing, kneeling, long distance ambulation, and occasional chronic pain.

that claimant could stand for six hours during an eight hour day.

The ALJ found that Plaintiff was restricted in performing light work by limitations on the "prolonged operation of foot controls." (Tr. 26) In making this determination, the ALJ gave to Plaintiff the benefit of the doubt, since Plaintiff was working as a dump truck driver at the time of the hearing. Obviously, this job required Plaintiff to operate the foot controls associated with driving.

In the hypothetical, however, the ALJ asked the vocational expert to assume that the Plaintiff could not operate controls with his left foot that would require ankle motion. (Tr. 67-68). As the Plaintiff has noted, this question is not entirely consistent with the ALJ's specific finding that Plaintiff could not perform prolonged operation of foot controls. (Tr. 26). However, this inconsistency does not constitute a fatal defect in the hypothetical. The medical information reflects that Plaintiff suffered pain as a result of any type of weight or pressure in his left foot. (Tr. 14) (Exh.19) In turn, this restriction in Plaintiff's left foot was the subject of the ALJ's hypothetical. Moreover, this restriction in left foot capabilities was fully discussed in the body of the ALJ's opinion. (Tr. 5-7). Although the ALJ uses more ambiguous language in listing his specific findings (describing the ailment as an inability to perform prolonged operation of foot controls), it is clear that the hypothetical was an accurate reflection of the medical evidence.

Second, the Plaintiff alleges that the hypothetical

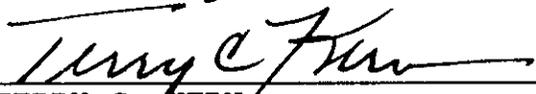
inaccurately assumed that Plaintiff could stand for about six out of eight hours a day. In his written opinion, the ALJ never specifically found that Plaintiff could stand for six out of eight hours a day. Instead, the ALJ simply determined that the Plaintiff was limited in his capability for "prolonged standing." (Tr. 26). Moreover, no treating physician found that Plaintiff could stand for six out of eight hours subsequent to a medical evaluation. It is true that RFC assessments made by non-examining physicians contained in the Record state that Plaintiff could stand for six hours out of an eight hour day. (Tr. 155, 175, 183). However, none of these assessments were made by physicians who actually examined the Plaintiff. Moreover, one RFC assessment noted that Plaintiff could stand for six hours during an eight hour day only where the Plaintiff was standing on a smooth surface. (Tr. 155). In light of Plaintiff's chronic knee difficulties, this ambiguity in the Record and in the hypothetical requires clarification. (Tr. 193, 221). See Thompson v. Sullivan, 987 F.2d 1482 (discussing the obligation of the ALJ to develop the record fully). It is not certain whether the vocational expert would have reached the same result had the ALJ included in the hypothetical a restriction on prolonged standing rather than a statement suggesting that Plaintiff could stand for six out of eight hours a day.²

In view of the hypothetical offered to the vocational expert

²The vocational expert stated that Plaintiff could perform jobs such as a crossing guard given the limitations provided in the hypothetical. If the hypothetical limited Plaintiff's ability to stand for long periods of time, the vocational expert might not have included this position as a job possibility for the Plaintiff.

and used by the ALJ, substantial evidence did not exist to conclude that Plaintiff could perform other work requiring him to stand for six out of eight hours in a day. Therefore, the ALJ's decision is reversed and remanded so it can be clearly determined whether sufficient jobs exist in the economy that are consistent with Plaintiff's inability to stand for a prolonged period of time.

IT IS SO ORDERED THIS 19 DAY OF January, 1994



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED

JAN 23 1995

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

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

O'DELL LAWRENCE BROWN,)	
)	
Petitioner,)	
)	
vs.)	No. 94-C-968-E ✓
)	
R. MICHAEL CODY,)	
)	
Respondent.)	

ORDER

Before the court is respondent's motion to dismiss for failure to exhaust state remedies (doc. #4). Respondent asserts the Petitioner has neither filed a direct appeal with the Oklahoma Court of Criminal Appeals nor an application for post-conviction relief, raising before the Oklahoma state courts the issues which Petitioner alleges in the instant habeas action. See 22 O.S. 1991. § 1080-1089. Petitioner has not responded.

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

ENTERED ON DOCKET
DATE 1-24-95

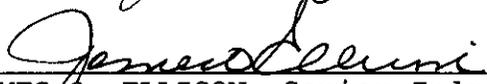
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Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted all the various grounds for relief he has alleged. Although Petitioner filed two applications for post-conviction relief in Tulsa County District Court, he failed to appeal the denial of his first application, and in his second application for post-conviction relief he only requested the right to appeal his initial application out of time. Therefore, the issues which Petitioner seeks to raise in this petition have never been presented to the state's highest court. In addition, the Court notes that the Petitioner has not responded to respondent's motion to dismiss. This constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondents' motion to dismiss for failure to exhaust state remedies (docket #4) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice**.

IT IS SO ORDERED this 23^d day of January, 1995.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 23 1995

ROBERT LEWIS BRIXLEY,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

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

No. 91-C-852-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, advises this Court that the Oklahoma Court of Criminal Appeals has affirmed in part his state appeal, reversed in part with instructions to dismiss, and reversed and remanded in part for a new trial. Petitioner alleges that the above ruling has mooted his delay issue in this habeas corpus action.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 23^d day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-24-95

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

F I L E D

JAN 23 1995

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

JOHNNY LEE WASHINGTON,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

No. 92-C-0079-E ✓

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has reversed and remanded for a new trial Petitioner's state appeal and has, thus, mooted the delay issue. Counsel advises the Court that Petitioner is not in custody at this time.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 23^d day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 1-24-95

48

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

FILED

JAN 23 1995

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

DONALD RAY WILSON,)	
)	
Petitioner,)	
)	
vs.)	No. 92-C-1016-E
)	
MICHAEL CODY, et al.,)	
)	
Respondents.)	

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, advises the Court that the recent ruling by the Oklahoma Court of Criminal Appeals in Petitioner's state direct appeal has mooted the delay issue in this case. The record reveals that the Court of Criminal Appeal affirmed Petitioner's state appeal in CRF-90-90 and CRF-90-92, and reversed with instructions to dismiss Petitioner's appeal in CRF-90-91.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 23rd day of January, 1995.

James O. Ellison
JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 1-24-95

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT

F I L E D

JAN 23 1995

KRISTIAN GARRETT,)
)
Plaintiff,)
)
vs.)
)
OKLAHOMA TRIBAL)
ASSISTANCE PROGRAM, INC.,)
)
Defendant.

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

CASE NO. CIV-93-C1024-BW

ENTERED ON DOCKET

DATE JAN 24 1995

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Kristian Garrett, and hereby dismisses with prejudice toward refiling same, her petition, and all causes of action contained therein as to Defendants, Oklahoma Tribal Assistance Program, Inc.

Kristian Garrett
Kristian Garrett

HARRIS, WHITEBREAD & CONE
Attorneys for Plaintiff

BY: Todd A. Cone
Todd A. Cone # 015208
117 E. Frank Phillips
Bartlesville, Okla. 74003
(918) 336-1377

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of _____, 1994, I mailed a true and correct copy of the above and foregoing Dismissal with Prejudice to Monty Stroud, 209 Keetoowah, Tahlequah, OK 74464, with sufficient postage thereon fully prepaid.

Todd A. Cone
Todd A. Cone

Respondent has filed several responses to which Petitioner has replied. For the reasons stated below the Court concludes that petitioner's petition for a writ of habeas corpus should be denied.

I. BACKGROUND

Petitioner was sixteen years old when he was charged with burglary in the second degree in Case No. 69-1263 and three months later with murder (subsequently reduced to manslaughter in the first degree) in Case No. 69-2181. Petitioner pled guilty to the burglary and manslaughter charges in July 1969 and February 1970 respectively. Under the Oklahoma juvenile code provisions in effect at that time, males of sixteen and seventeen were prosecuted as adults, while females of the same age were treated under the juvenile code unless certified to stand trial as adults. Okla. Stat. tit. 10, § 1101 (1968 Supp). Therefore, under that statute, it was proper for the Petitioner to have been tried as an adult.

In 1972, however, the Tenth Circuit Court of Appeals held that statute unconstitutional because it violated the Equal Protection Clause. See Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). In Radcliff v. Anderson, 509 F.2d 1093 (10th Cir.), cert. denied, 421 U.S. 939 (1975), the Tenth Circuit determined that the ruling of Lamb should be applied retroactively. In Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978), the Tenth Circuit assessed the procedures by which to determine the

finds, as more fully set out below, that Petitioner would not have been certified as an adult in Case No. CRF-69-1263, the Court need not address his contention with regard to Case No. CRF-69-2181.

proper relief when a conviction is challenged under Lamb and concluded, citing Kent v. United States, 383 U.S. 541 (1966), that the conviction need not be set aside if it is established that the juvenile court would have certified the petitioner for treatment as an adult. "The ruling in Bromley was premised on the holding of an evidentiary hearing, either in state or federal court, to determine whether a particular adult certification would have been made in juvenile court." Kelley v. Kaiser, 992 F.2d 1509 (10th Cir. 1993). Following the decisions in Bromley and Kent, however, the Oklahoma Court of Appeals held that an evidentiary hearing would be granted only if the appellant presents "some valid reason to believe that certification would have been denied." Edwards v. State, 591 P.2d 313, 321 (Okla. Crim. App. 1979), rejected by Kelley v. Kaiser, 992 F.2d 1509 (10th Cir. 1993).

Shortly after the decision in Edwards, Petitioner filed a post-conviction application challenging his conviction in Case No. CRF-69-1263. On March 13, 1980, the state district court held a hearing under Edwards at which Petitioner appeared in person and with his attorney. On March 18, 1980, the Court issued its opinion, finding that Petitioner would have been certified in this case to stand trial as an adult. Relying on the factors set out in Okla. Stat. tit. 10, § 1112, the Court further found as follows:

1. That the crime was a felony crime against property.
2. That the offense was against property only, but Petitioner was charged with the crime of Murder, three months after this offense for which homicide Petitioner was subsequently convicted of the amended charge of Manslaughter in the First Degree

in Oklahoma county District Court Case No. CRF-69-2181. The Court considers this recent subsequent crime and finds that it was a violent, aggressive crime against a person.

3. That Petitioner was sixteen years and seven months old at the time of this offense, having completed the 10th grade as an approximately average student.
4. That Petitioner had a rather extensive juvenile arrest record prior to this offense and had numerous contacts with juvenile agencies by supervision of Juvenile Court probationary facilities for 3 or 4 years prior to this offense, including nine months at the state institution in Boley.
5. That it was not likely that Petitioner would have been rehabilitated through the procedures and facilities available to the Juvenile Division of the District Court and there was insufficient prospect for adequate protection of the public had Petitioner been retained in the juvenile system.

(Attachment A to Respondent's Supplemental Response, doc. #10).

In July 1991, Petitioner sought post-conviction relief in Case No. CRF-88-1815. He alleged (1) that the trial court failed to inform him of his right to appeal without cost and of his right to appointed counsel; (2) that the trial court erred in enhancing his sentence on the basis of the two 1969 convictions because there was no showing that Petitioner had been advised of his rights in the prior felony convictions; and (3) that trial counsel provided ineffective assistance when he failed to investigate his 1969 prior convictions to determine whether they were proper for enhancement purposes. The district court denied petitioner's application, finding that the proper method to attack his prior conviction was to seek post-conviction relief in those cases. The Oklahoma Court

of Criminal Appeals affirmed on December 23, 1991.²

II. DISCUSSION

A. Right to Appeal at Public Expense and with Appointed Counsel

In his first ground for relief, Petitioner argues that the trial court failed to inform him of his right to appeal without cost and of his right to appointed counsel on appeal. He argues that he was prejudiced because his defense counsel did not advise him that he had appealable issues as required by Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991). Respondent argues that the trial court advised Petitioner that he could appeal without cost and with appointed counsel, and in any case, the petitioner does not have a constitutional right of being informed of his appeal right following a plea of guilty.

After carefully reviewing the transcript of the plea hearing, the Court concludes that Petitioner's first ground for relief is clearly meritless. The state court not only advised Petitioner that he had a right to appeal, but also specifically explained to him the steps necessary for completing the same. The state court

²Although petitioner has not exhausted his claims in Case No. CF-88-1756, the Respondent recognizes that exhaustion of the same claims would be futile.

Respondent also notes that Petitioner sought post-conviction relief in Case No. CRF-69-2181 on the ground that his plea was invalid under Boykin and Lamb. The district court denied relief, finding that Petitioner's plea of guilty was knowingly and voluntarily entered. The court also denied an evidentiary hearing under Edwards, concluding that Petitioner had not stated any valid reason to believe that he would not have been certified as an adult if a hearing had been held. The Court of Criminal Appeals affirmed relying on a state procedural bar. (Attachment C to Respondent's supplement response, doc. #10.)

also reminded Petitioner that if he wanted to appeal his appointed counsel, a state public defender, would represent him. (Plea & Sentencing Hearing Transcript at 8-9, attached to Rule 5 Response, doc. #5.)

Even assuming the state court failed to notify Petitioner of his right to an appeal at public expense and of his right to counsel on appeal, the Court concludes that Petitioner would not be entitled to habeas relief on this ground. It is well established that a state trial court is not constitutionally required to inform a petitioner of his right to appeal a guilty plea. See Barber v. United States, 427 F.2d 70, 71 (10th Cir.), cert. denied, 400 U.S. 867 (1970); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968). Nor does an attorney have an absolute duty in every case to advise a defendant of his right to appeal after a guilty plea. Laycock v. State of New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989). In fact by pleading guilty a defendant indicates that he wishes to waive his appellate right. Id. Therefore, the alleged failure to notify Petitioner of his right to an appeal at public expense and of his right to counsel on appeal does not warrant habeas relief. Cf. Wooldridge v. Kaiser, 937 F.2d 617, slip op. at 2 (10th Cir. 1991) (unpublished opinion) (holding that trial court's failure to inform petitioner of his right to appeal a plea of guilty did not state a claim for habeas relief).

B. Enhancement

Next Petitioner contends that the trial court erred in

enhancing his sentence on the basis of his 1969 prior convictions. He alleges that his 1969 guilty pleas were void under Boykin v. Alabama, 395 U.S. 238 (1969), because he was not advised of his right to a trial by jury, right to confront his accusers, and his privilege against compulsory self-incrimination. He also alleges that the March 1980 hearing certifying him as an adult in Case No. CRF-69-1263 did not meet federal standards.

1. Validity of Prior Convictions

As to Petitioner's contention that his 1969 guilty pleas were invalid under Boykin, Respondent argues that Petitioner waived this complaint when he voluntarily pled guilty to these convictions as enhancement of his 1988 charges. In the alternative, Respondent argues that they have been prejudiced by the delay in bringing this allegation-- approximately twenty-four years after the guilty pleas were entered--and moves the Court to dismiss this claim under Rule 9(a) of the Rules Governing Section 2254 Cases. Respondent advises the Court that the 1969 plea hearing were never transcribed and that the court reporters who were present cannot be reached.

Petitioner replies that he did not waive any complaint concerning the validity of his prior convictions in that he neither pled guilty as to the prior convictions nor stipulate as to them. Petitioner further replies that the State did not present any proof of the prior convictions and the Court did not ask him about the prior convictions. (Docs. #13 and #20.)

After reviewing the record in this case, the Court concludes

that, even if Petitioner had not waived his claims as to the 1969 convictions when he pled guilty to the 1988 charges as enhanced by the 1969 convictions, those claims should be dismissed under Rule 9(a) of the Rules Governing Section 2254 Cases. The twenty-four year delay in raising these claims has clearly prejudiced the state's ability to respond in this case. See Mansfield v. Champion, 992 F.2d 1098, 1104-05 (10th Cir. 1993); Bowen v. Murphy, 698 F.2d 381, 383 (1983). The transcript of the 1969 guilty-plea proceedings is not available and the court reporters who were present cannot be reached.³

Accordingly, Petitioner's claims that his 1969 pleas were void because he was not advised of his right to a trial by jury, right to confront his accusers, and his privilege against compulsory self-incrimination must be dismissed under Rule 9(a).

2. Certification Hearing in Case No. CRF-69-1263

Petitioner also challenges the enhancement of his 1988 convictions on the ground that the March 1980 hearing certifying him as an adult in CRF-69-1263 did not meet federal standards. He alleges that the district court improperly relied on Edwards v. State, 591 P.2d 313 (Okla. Crim. App. 1979), instead of Sherfield v. State, 511 P.2d 598 (Okla. Crim. App. 1973), and considered a

³In any event, the Supreme Court has recently clarified that the Boykin presumption is valid only when applied to a direct attack on a guilty plea and inappropriate in a collateral attack. Parke v. Raley, 113 S.Ct. 71 (1993); see also Mansfield v. Champion, 992 F.2d 1098, 1105 (10th Cir. 1993).

crime subsequent to that which occurred in Case No. CRF-69-1263.⁴

Whether Petitioner would have been certified by the juvenile court to stand trial as an adult is a fact question governed by the provisions of 28 U.S.C. § 2254(d). See Kelley v. Kaiser, 922 F.2d 1509, 1514 (10th Cir. 1993). Under that section, state court fact findings must be presumed to be correct by this federal court unless "the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing." Id.

In support of his first contention Petitioner relies on Kelley v. Kaiser, 922 F.2d 1509 (10th Cir. 1993), where the Tenth Circuit Court of Appeals held that the Edwards standard--requiring a petitioner to present a valid reason that certification would not have occurred before an evidentiary hearing could be held--was improper. Kelley involved a situation where the state courts resolved the certification issue without a hearing. The Tenth Circuit was, therefore, faced with the question "whether the state court, by relying on Edwards to resolve the certification issue without such a hearing, ha[d] employed a constitutionally adequate fact-finding procedure." Kelley, 922 F.2d at 1515. The Court answered that question in the negative and found as follows:

Requiring Mr. Kelley to make a showing that adult certification would not have occurred denies him the benefit of the statutory presumption, accorded to females [of] his age, that he would be treated as a juvenile. Mr. Kelly was seventeen years old at the time of his 1965 conviction. Given the statutory presumption that juveniles would be treated in the juvenile system, this

⁴The Court notes that Respondent waived any exhaustion defense as to this issue in that Petitioner did not appeal the denial of his post-conviction application in CRF-69-1263.

fact alone is sufficient to make a prima facie showing that he would have been certified as an adult. Having enacted an unconstitutional distinction between the treatment of males and females, the state can not as part of the remedy for the resulting unconstitutional conviction reincorporate a gender distinction making it more onerous for males than females to obtain the benefit of the juvenile court system.

Kelley, 992 F.2d at 1515. The Court reiterated that when a certification determination is made after-the-fact, the entire burden of proof must be shouldered by the State as required in Kent v. United States, 383 U.S. 541 (1966), and Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978). Kelley, 992 F.2d at 1515.

Unlike Mr. Kelley, Petitioner was not denied the benefit of the statutory presumption--that he would be treated under the juvenile code unless certified to stand trial as an adult--before an evidentiary hearing could be held. Therefore, the mere fact that the state court cited Edwards in its written opinion does not render the state fact-finding procedure inadequate. Petitioner argues, however, that the state court did not follow the guidelines set out in Sherfield. This Court disagrees. In making its findings of fact the state court specifically followed the factors set forth in Sherfield v. State, 511 P.2d 598 (Okla. Crim. App. 1973), and Kent v. United States, 86 S.Ct. 1045 (1966).⁵ The state court considered the maturity of the Petitioner, the Petitioner's previous arrest record and contacts with juvenile court institutions, and the prospects for rehabilitation through the

⁵The Oklahoma legislature has incorporated these factors in Okla. Stat. tit. 10, § 1112.

juvenile court system.

While the state court considered a crime which occurred subsequent to the crime charged in Case No. CRF-69-1263, this Court does not find that improper. In Edwards v. State, 591 P.2d at 322, the Oklahoma Court of Criminal Appeals recognized that a state court, determining whether a defendant would have been entitled to certification, could consider all the evidence bearing on the nature of the offenses committed as well as all "the subsequent criminal misconduct occurring in close proximity in time." In Johnston v. State, 625 P.2d 1261, 1262 (Okla. Crim. App. 1981), the Court of Criminal Appeals defined "subsequent criminal misconduct" to refer to "criminal conduct that occurred so closely in time that the trial court would have known about it at the time the certification hearing would have been conducted."

Unlike Johnston where the subsequent criminal misconduct occurred four months after appellant's conviction for the crime voidable under Lamb, Petitioner's subsequent criminal misconduct occurred only three months after his burglary charge in CRF-69-1263. Because the murder charge was so close in time to the burglary charge in CRF-69-1263, it is plausible that the juvenile court would have known about it if it had conducted a certification hearing. Therefore, the Court finds that consideration of Petitioner's murder charge, later reduced to manslaughter in the first degree in CRF-69-2181, was not error.

Because Petitioner has not demonstrated that any of the exceptions to the presumption of correctness set forth in section

2254(d) apply to this case, or that the factual determinations made by the state court are not fairly supported by the evidence in the state court record, the Court concludes that the state court's adult certification findings of fact are entitled to a presumption of correctness. See Kelley, 922 F.2d at 1516. Based on these findings, the Court concludes that Petitioner would have been certified as an adult in 1969 and therefore that the sentence in CRF-69-1263 was available for enhancement purposes.

C. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. To establish the second prong, a petitioner who has pled guilty must show a reasonable probability that without counsel's errors, he would not have pled guilty and would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

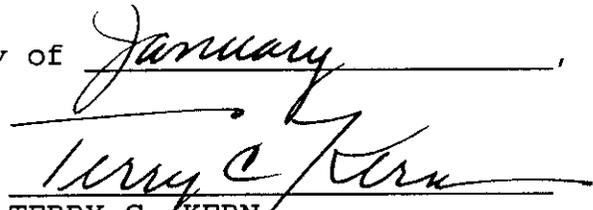
Even if Petitioner's counsel were ineffective for failing to investigate his prior convictions to determine whether they were proper for enhancement purposes, the only manner in which Petitioner can establish prejudice is to show that his prior

convictions were improperly used to enhance his punishment. Because the Court has found that the 1969 convictions were properly used for enhancement purposes, Petitioner cannot meet the prejudice prong of the Strickland test. Therefore, Petitioner is not entitled to habeas relief.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, Petitioner's application for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 20th day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED

JAN 20 1995

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

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

ULUS GUY, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA, RON CHAMPION)
 WARDEN, SUSAN B. LOVING, DAVID MOSS,)
 JAY DALTON, BILL LUNN, TOM BRETT,)
 FRANK MCCARTHY, PETE SILVA, CLIFFORD)
 HOPPER, JOHNNIE O'NEAL, JEFFREY S.)
 WOLFE,)
)
 Defendants.)

Case No. 94-C-60-EV ✓

O R D E R

Now before the court is the Motion to Object to the Report and Recommendation of the United States Magistrate Judge (Docket #21) of the Plaintiff Ulus Guy, Jr. in the above captioned matter.

Plaintiff, appearing pro se, brings this action alleging violations of his constitutional rights during his criminal trials¹ and during his criminal appeal. He names as Defendants a Department of Corrections warden, the Oklahoma Attorney General, two state district judges, a district attorney, an assistant district attorney, a federal judge, a federal magistrate, and his own attorneys. Numerous motions to dismiss were filed, and the United States Magistrate Judge recommended that the motions to dismiss be granted and that, since the remaining Defendants have

¹ Plaintiff was tried for murder. His first trial ended with a mistrial because of prosecutorial misconduct, and his second trial resulted in a conviction.

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DATE 1-23-95

not been served, the case be dismissed in its entirety. In his Report and Recommendation, the United States Magistrate Judge found that, since Plaintiff was not defending or appealing an action in forma pauperis, he was not entitled to the transcript of his first trial at government expense, that Plaintiff was not entitled to appointment of counsel, a jury trial, or a preliminary injunction. The Magistrate Judge also found that the Susan Loving should be dismissed because Plaintiff had not established a sufficient link between the Attorney General and any constitutional violation; that Ron Champion should be dismissed because he was not properly served with process and because Plaintiff's claim against Champion was not properly brought in a 1983 lawsuit; that Johnnie O'Neal, Frank McCarthy and Pete Silva, who were Plaintiff's public defenders, should be dismissed because any claims against them would be barred by the applicable statute of limitations² and because public defenders are not acting under color of state law in criminal proceedings; that Judge Hopper should be dismissed because of judicial immunity; and that David Moss should be dismissed because of prosecutorial immunity. Plaintiff filed an objection to the report and recommendation of the Magistrate Judge, essentially rearguing the merits of his case (i.e. that his constitutional rights were violated because he was tried although he was not selected out of a live line-up, because his counsel was

² Plaintiff complained that the public defenders violated his rights when they chose not to file a motion to dismiss following his 1984 line-up, and his 1985 mistrial, and when they failed to get a transcript of his first trial for his appeal.

ineffective, because the second trial constituted double jeopardy, and because he was deprived of trial transcripts in perfecting an appeal). These arguments do not address the report and recommendation of the Magistrate Judge and will not be considered.

Plaintiff makes two arguments, however, that address the recommendations of the Magistrate Judge and that the Court will therefore consider. He acknowledges that, ordinarily, court appointed counsel in criminal proceedings are not acting under color of state law, but argues, relying on Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985), that they are acting under color of state law if they conspire with state officials to deprive their client of constitutional rights. Even accepting this proposition and assuming, arguendo, that Plaintiff can prove such a conspiracy, this does not prevent dismissal of the public defenders. Plaintiff's claim against these parties is barred by the statute of limitations and must be dismissed.

Lastly, Plaintiff argues that he should be allowed the discovery he requested (access to the transcript of his first trial) and that he is willing to pay for it, and not asking that it be provided at the government's expense. Regardless, however, of Plaintiff's willingness to pay for the transcript, his §1983 claims must be dismissed pursuant to the recommendation of the Magistrate Judge, and he is therefore not entitled to any discovery.

The Report and Recommendation of the United States Magistrate Judge is adopted and affirmed, Defendants' motions to dismiss are granted, and Plaintiff's remaining claims are dismissed for failure

to serve the remaining Defendants.

IT IS SO ORDERED THIS 20th DAY OF JANUARY, 1995.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
JAN 20 1995

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

IN RE:)
)
CARLA L. DEAN, n/k/a)
CARLA L. DAVIS,)
)
Debtor,)
)
CARLA L. DEAN n/k/a)
CARLA L. DAVIS,)
)
Plaintiff,)
)
vs.)
)
GLOBE LIFE AND ACCIDENT)
INSURANCE COMPANY;)
CHARLES BRITTON (C.B.) HUDSON;)
GENE CALAME; and)
STEVEN K. McKINNEY,)
)
Defendants.)

Case No. 86-03360-W
(Chapter 7)

Adv. No. 94-0055-C

District Court
No. 95-C-7-B

ENTERED ON DOCKET
JAN 23 1995
DATE _____

ORDER DISMISSING APPEALS AND CROSS-APPEAL

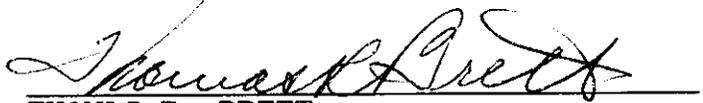
There is before the Court the Joint Motion for Dismissal of Appeals from the Order of the Honorable Stephen J. Covey dated December 23, 1994, by Appellant, Lee R. Barnett, and Cross-Appellants, Globe Life and Accident Insurance Company, Charles Britton (C.B.) Hudson, Gene Calame and Steven K. McKinney. The Court being fully advised in the premises finds that the Joint Motion for Dismissal of Appeals should be granted and that the pending appeal and cross-appeal are hereby dismissed with prejudice.

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The Court further finds that the parties shall bear their own respective costs and attorney fees incurred in connection with the appeal and cross-appeal of this matter.

IT IS SO ORDERED.

DATED this 20 day of January, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

JEANNE MARIE DRULEY,)
)
Petitioner,)
)
vs.)
)
JACK COWLEY,)
)
Respondent.)

No. 94-C-675-B

ENTERED ON DOCKET

DATE JAN 23 1995

FILED

JAN 20 1995

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

ORDER

Respondent has moved to dismiss Petitioner's application for a writ of habeas corpus for failure to exhaust state remedies. He asserts that Petitioner has failed to seek an appeal out of time in the Oklahoma state courts and therein establish that she was denied an appeal through no fault of her own. Petitioner has objected to Respondent's motion. She argues that although she never sought an appeal out of time, she has filed a petition for a writ of habeas corpus which the Oklahoma Court of Criminal Appeals has denied.

I. BACKGROUND

In the present petition for a writ of habeas corpus, Petitioner challenges her conviction for second degree murder in Tulsa County Case No. CRF-85-1462. Petitioner did not attempt to withdraw her guilty plea in a timely manner. Petitioner did, however, file a previous application for federal habeas corpus which this Court dismissed for failure to exhaust state remedies. See Case No. 93-C-759-B.

Petitioner then filed a petition for a writ of habeas corpus in the Oklahoma Court of Criminal Appeals. On December 23, 1993,

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the Court of Criminal Appeals denied the petition, finding that Petitioner was "incarcerated under a valid Judgment and Sentence and thus ha[d] not established that confinement [was] unlawful or that a writ of habeas corpus should issue." The Court further stated:

Petitioner bypassed a direct appeal and has thereby waived the right to raise any issues concerning the conviction which could have been raised in an appeal. Petitioner has not sought an appeal out of time by filing an application for post-conviction relief in the District Court of Tulsa County and establishing, with tangible evidence, that Petitioner was denied an appeal of the conviction through no fault of Petitioner's. Accordingly, the petition for a writ of habeas corpus should be, and is hereby, DENIED.

(Ex. B attached to Respondent's rule 5 response, doc. #13.)

II. ANALYSIS

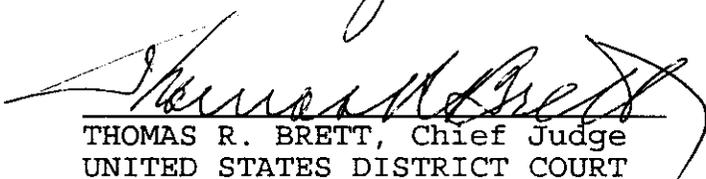
The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented"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

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

not exhausted her state remedies. Because Petitioner has not yet filed an application for post-conviction relief and sought an appeal out of time, the Oklahoma state courts have not had an opportunity to address the merits of her claim. 22 O.S. 1991, §§ 1080-1089. Petitioner must therefore give the Oklahoma State courts that opportunity. In the event Petitioner is not granted the relief which she seeks, after filing an application for post-conviction relief in Tulsa County District Court and appealing the denial, if any, to the Court of Criminal Appeals, she may refile her petition for a writ of habeas corpus in this Court.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondents' motion to dismiss (docket # 16) is **granted** and that the petition for a writ of habeas corpus is **dismissed without prejudice**.

IT IS SO ORDERED this 20 day of Jan., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 20 1995

RAMONA KEPLER,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH
AND HUMAN SERVICES,

Defendant.

No. 92-C-752-E

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

O R D E R

Before the Court is the appeal of the plaintiff Ramona Kepler (Kepler) to the Secretary's denial of disability benefits.

Kepler brings this appeal of the denial of Social Security Disability and Supplemental Security Income Disability Benefits, asserting that the Secretary erred in finding that she was not credible in her claims of chronic disabling pain, and in finding that she was able to perform her past relevant work as a clerical worker. Kepler argues that the ALJ improperly disregarded the testimony of the medical advisor, Dr. Harold Goldman, that Kepler was suffering from a pain syndrome and that her pain was real and relied instead on the post-hearing report of psychologist Dr. Cullen Mancuso that she was capable of working despite her pain. Kepler also argues that the ALJ's reliance on the vocational expert was incorrect because the hypothetical to the vocational expert was incomplete and did not take into account her testimony regarding her pain and her need to lay down frequently.

Legal Analysis

The Secretary must follow a five-step process in evaluating a

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claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir.

1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d at 750 (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The evidence at the hearing and supplemental hearing established that Plaintiff was born on March 4, 1955 and was 36 years old at the time of the hearings. She had a high school education and two semesters of college. She last worked in 1984 and a clerical worker for a horse shoe college, and previously had worked for Sears in the collection department and for two banks inputting information on a computer. Kepler was diagnosed with scoliosis as a teenager and had surgery in 1984 to insert a Herrington Rod to stabilize her back. Her medical records indicate that most of the back pain resolved after her surgery and that tendinitis was responsible for her left shoulder pain. She was reported to be doing "great" thereafter, and there was no explanation for her subsequent complaints of pain.

At the hearing, she testified that she has been in pain since

the first surgery, and has frequent migraine headaches. She does light housework, but cannot run errands, can only walk one block, and has shoulder as well as back pain. She testified that she could only sit for 1 to 2 hours and stand for 20 minutes and that she spends 70 % of her time in the reclining position. She drives a car only in emergencies and finds it uncomfortable to ride in a car. She also testified that she merely took over the counter medicine and that she used a heating pad at night and various back braces.

Dr. Goldman, the medical advisor testified that Kepler's scoliosis caused a pain syndrome and that she has suffered from a pain syndrome since at least 1984. He testified Kepler could engage in light or sedentary work on a sustained basis, but because of the pain syndrome, "would find it difficult to do so." He did note, that as, far as the medical records indicate, Kepler had no medical contraindication to returning to work safely.

Dr. Young, the vocational expert testified that Plaintiff could return to her past work, which was primarily semi-skilled, sedentary clerical work. He also testified, however, that if the plaintiff's testimony regarding the severity of her pain, and the effect that it had on her ability to function was truthful, she would no be able to engage in substantial gainful activity.

In a report based on a consultation after the hearing but before the supplemental hearing, Dr Cullen Mancuso, psychologist, diagnosed Plaintiff with an hysterical personality. He noted that Kepler's treating physicians had found no basis for her pain

complaints, and concluded that she was not precluded from working by virtue of mental impairments or psychiatric disorder.

Plaintiff objected to the findings of the ALJ arguing that the use of Dr. Mancuso's "post-hearing" medical report constitutes a denial of due process because she was not given the opportunity to cross examine Dr. Mancuso or rebut his findings, because he incorrectly found that she was not credible on her claims of chronic pain, and did not have a mental impairment or a subjective pain disorder, and because the hypothetical question presented to the vocational expert was "incomplete." At the hearing on this matter, Plaintiff withdrew her objection to Dr. Mancuso's report, and argued that it backed up Dr. Goldman's testimony about pain syndrome.

The Court, however, does not interpret Dr. Mancuso's report in this manner. Dr. Mancuso found that Plaintiff is not precluded from working by virtue of mental impairments or psychiatric disorder. Dr. Mancuso examined Plaintiff, and Dr. Goldman did not. More weight should be given to the opinion of an examining physician than to the opinion of a reviewing physician who has never examined the patient. Talbot v. Heckler, 814 F.2d 1456, 1463 (10th Cir. 1987). The Court does not find that Plaintiff has any psychiatric or mental disability that precludes work.

With respect to Plaintiff's credibility on pain, the Court notes the fact that Plaintiff did not have any restrictions in her ability to perform mental activities or functioning. Additionally, Plaintiff did some housework, some cooking, socializing, attended

church, helped her daughter with homework, and took care of the family finances. She only took over-the-counter medications for her pain and used a heating pad. Moreover, the consulting psychologist found that she had the mental ability to perform her past relevant work. The finding that Plaintiff is not credible is supported by substantial evidence.

Lastly, Plaintiff complains of the "incomplete" hypothetical given to Dr. Young. Plaintiff asserts that the hypothetical was incomplete because it did not consider her testimony that she is only up approximately two hours during the day and that she stayed in bed approximately two days a week with incapacitating pain. However, the Court has found that the ALJ was correct in finding that plaintiff was not credible on her complaints of pain, and the hypothetical question, therefore, was complete.

The decision to deny benefits is affirmed.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 23 1995

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

FILED

JAN 23 1995

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

ROB ODOM,

Plaintiff,

v.

OKLAHOMA DEPARTMENT OF
CORRECTIONS and WINNIFRED
OUSLEY,

Defendants.

Case No. 94-C-254-K

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Rob Odom, and Defendants, State of Oklahoma, ex rel. Department of Corrections, Tulsa Community Corrections Center, and Winifred Ousley, by and through their respective counsel of record and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, make known their Stipulation of Dismissal with Prejudice of the above styled cause with respect to all Defendants.



Jackson M. Zanerhaft
Attorney for Plaintiff



Rebecca Pasternik-Ikard
Attorneys for Defendants State of Oklahoma, ex rel. Department of Corrections, and Tulsa Community Corrections Center



Andrew B. Morsman
Attorney for Defendant Winifred Ousley

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

FILED

JAN 20 1995

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

AYSEL D. OZTURK,)
)
Plaintiff, Counter-Defendant,)
)
vs.)
)
JAMES M. LAMB,)
)
Defendant, Counterclaimant,)

CASE NO. 94-C-1179-B

ENTERED ON DOCKET
DATE JAN 23 1995

O R D E R

This matter comes on for sua sponte consideration of the putative removal of four state court matters now posited with the Tulsa County District Court, its Probate/Guardianship Court, its Probate Court and its Family Domestic Court, being numbers CJ 93-93-2882, PG 92-331, P 93-936, and FD 93-8922, respectively.

The Court takes judicial notice that the above four matters are captioned in the state court as follows:

In the Matter of Ayse S. Altinseli, a Partially Incapacitated Person, Case No. PG¹92-331.

In the Matter of the Estate of Ayse S. Altinseli, Case No. P²93-936.

Aysel D. Ozturk, Plaintiff vs. James M. Lamb, Case No. CJ³ 93-2882.

¹ PG is the designation for Probate Guardian.

² P is the designation for Probate.

³ CJ is the designation for Civil Jurisdiction.

Aysel D. Ozturk, Plaintiff vs. James M. Lamb, Case No. FD⁴93-8922.

In the present matter Plaintiff Aysel D. Ozturk failed to comply with 28 U.S.C. § 1146 in that Plaintiff failed to file "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action⁵. Additionally, the Court notes that the present Plaintiff is not a defendant in the state court matters as contemplated by the removal statutes. 28 U.S.C. §§ 1441, 1443, and 1446.

The Court concludes these matters were improvidently removed if removed at all. The Court concludes these matters should be and the same are hereby REMANDED to the Tulsa County District Courts of their appropriate jurisdiction.

IT IS THEREFORE ORDERED this 20th day of January, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ FD is the designation for Family Domestic.

⁵ Plaintiff's own designation as "Counter-defendant" in the style of this matter is a nullity insofar as the removal process is concerned.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN MALAVE aka JUAN JOSE MALAVE;)
 UNKNOWN SPOUSES OF JOHN MALAVE)
 aka JUAN JOSE MALAVE; DAWN M.)
 MUTSCHLER fka DAWN M. MALAVE aka)
 DAWN MARIE MALAVE; UNKNOWN)
 SPOUSES OF DAWN M. MUTSCHLER fka)
 DAWN M. MALAVE aka DAWN MARIE)
 MALAVE; DEBBIE SHELTON; UNKNOWN)
 SPOUSES OF DEBBIE SHELTON; BONNIE)
 TINKHAM; UNKNOWN SPOUSES OF)
 BONNIE TINKHAM; ERWIN L. KENNEDY;)
 DANA C. KENNEDY;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE JAN 23 1995

JAN 23 1995

FILED

JAN 23 1995

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

CIVIL ACTION NO. 94-C 549K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day
of January, 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and Board of County Commissioners, Tulsa County,
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, **John Malave**
aka Juan Jose Malave, Unknown Spouses of John Malave aka Juan
Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie
Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave
aka Dawn Marie Malave, Debbie Shelton, Unknown Spouses of Debbie

Handwritten signature/initials

Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, John Malave aka Juan Jose Malave will hereinafter be referred to as ("John Malave"); and the Defendant, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave will hereinafter be referred to as ("Dawn M. Mutschler").

The Court being fully advised and having examined the court file finds that the Defendant, John Malave, waived service of Summons on June 3, 1994, which was filed on June 7, 1994; and that the Defendant, Debbie Shelton, was served with Process on September 21, 1994, as shown on the U.S. Marshal's Service.

The Court further finds that the Defendants, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy, were served by publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 13, 1994, and continuing through November 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with

due diligence cannot ascertain the whereabouts of the Defendants, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to

their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on June 14, 1994; and that the Defendants, **John Malave aka Juan Jose Malave, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Debbie Shelton, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

LOT (1), Block Twelve (12), THIRD CRESTVIEW ESTATES, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 12, 1985, Erwin L. Kennedy and Dana C. Kennedy, executed and delivered to SECURITY BANK their mortgage note in the amount of \$45,635.00,

payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Erwin L. Kennedy and Dana C. Kennedy, husband and wife, executed and delivered to SECURITY BANK a mortgage dated September 12, 1985, covering the above-described property. Said mortgage was recorded on September 20, 1985, in Book 4893, Page 1173, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 12, 1985, SECURITY BANK assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on October 4, 1985, in Book 4897, Page 186, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 18, 1988, Mortgage Clearing Corporation assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development its successors and assigns. This Assignment of Mortgage was recorded on November 22, 1988, in Book 5141, Page 1058, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John Malave and Dawn M. Mutschler, currently hold the record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on November 1, 1988, the Defendants, John Malave and Dawn M. Mutschler, entered into an agreement with the Plaintiff lowering the amount of the monthly

installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1989, June 1, 1989, and November 1, 1989.

The Court further finds that on September 28, 1989, the Defendants, John Malave and Dawn M. Mutschler, filed their Chapter 7 petition for relief in the United States Bankruptcy Court for the Northern District of Oklahoma, Case number 89-2937W, which was discharged on January 22, 1990, and closed on March 12, 1990.

The Court further finds that the Defendants, John Malave and Dawn Mutschler, were granted a divorce in Tulsa District Court, Case No. FD 92-2107, on March 8, 1993.

The Court further finds that the Defendants, John Malave and Dawn M. Mutschler, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **John Malave and Dawn M. Mutschler**, are indebted to the Plaintiff in the principal sum of \$77,742.49, plus interest at the rate of 11.5 percent per annum from May 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal

property taxes in the amount of \$11.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of \$11.00 which became a lien as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **John Malave aka Juan Jose Malave, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Debbie Shelton, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, and Dana C. Kennedy**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **John Malave and Dawn M. Mutschler**, in the principal sum of \$77,742.49, plus interest at the rate of 11.5 percent per annum from May 18, 1994 until

judgment, plus interest thereafter at the current legal rate of _____ percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff, for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$22.00 for personal property taxes for the years 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **John Malave aka Juan Jose Malave, Unknown Spouses of John Malave aka Juan Jose Malave, Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Unknown Spouses of Dawn M. Mutschler fka Dawn M. Malave aka Dawn Marie Malave, Debbie Shelton, Unknown Spouses of Debbie Shelton, Bonnie Tinkham, Unknown Spouses of Bonnie Tinkham, Erwin L. Kennedy, Dana C. Kennedy and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **John Malave and Dawn M. Mutschler**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or

without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$22.00, personal property taxes which are currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

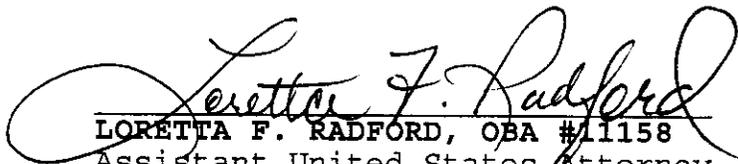
right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY G. KEAN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 549K

LFR:lg

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

FILED

JAN 20 1995

Richard L. Lewis
U.S. District Court
Northern District of Oklahoma
Clerk

R

JONATHAN W. NEAL,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ,)
)
 Defendants.)

No. 94-C-1183-K

ENTERED ON DOCKET

DATE JAN 23 1995

ORDER

Plaintiff, an inmate at the Tulsa County Jail, has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations set forth in the motion, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis. The Court concludes, however, that Plaintiff's claims should be dismissed as frivolous under 28 U.S.C. § 1915(d).

In this civil rights action, Plaintiff sues Sheriff Stanley Glanz for failing to copy correctly and in a timely manner certain of his legal materials. Plaintiff seeks \$50,000 in damages and an order releasing him from jail. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable

basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

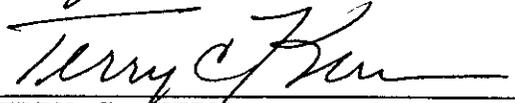
After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claim against Sheriff Stanley Glanz for failing to copy properly and in a timely fashion certain of his legal materials is based on an indisputably meritless legal theory. See West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Plaintiff's repeated allegations of negligence do not amount to a fourteenth amendment violation. See, e.g., Daniels v. Williams, 474 U.S. 327 (1986). Accordingly, Plaintiff's complaint must be dismissed as frivolous under 28 U.S.C. § 1915(d).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion for leave to proceed in forma pauperis (docs. #2 ~~██████~~) is **granted**; and
- (2) Plaintiff's civil rights complaint is **dismissed** as

frivolous under 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 19th day of January, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

OXY USA INC.

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA

Defendant.

)
)
)
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)
)
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)
)

94-C-228-K

ENTERED ON DOCKET

DATE 1/23/95

**ORDER ADMINISTRATIVELY CLOSING CASE TO FACILITATE SETTLEMENT
NEGOTIATIONS**

Upon the request of Magistrate Judge John Leo Wagner, the assigned settlement judge in this case, which request was specifically and explicitly authorized by all parties to this litigation, the clerk is hereby ORDERED to strike all settings and scheduling dates, and administratively close this case during the pendency of settlement negotiations. The parties are advised that no motion will be considered or ruled upon during the period of administrative closure.

This case shall be reopened as of July 21, 1995, and set for a case management conference as soon thereafter as practicable, in the event the court is not first advised of the completion of a settlement agreement. It may be reopened by further order of the court in advance of that date if the court is advised by the settlement judge that the settlement effort has reached an impasse.

The court retains jurisdiction of this case during the administrative closure period for the purpose of enforcing its settlement conference order. In that regard, all participants in

the settlement process shall continue to fully comply with all supervisory directives of the settlement judge during the administrative closure period.

Dated this 19 day of January, 1991.



Terry C. Kern
UNITED STATES DISTRICT JUDGE

S:\OXYADCLO.ORD

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

ENTERED IN BOOKET
DATE JAN 23 1995

CLIFFORD L. PERRIN,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION, et al.,)
)
 Respondent.)

No. 94-C-930-KT

FILED
JAN 23 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

At issue before the Court is Petitioner's pro se petition for a writ of habeas pursuant to 28 U.S.C. § 2254. In his petition, Petitioner alleges delays associated with prosecuting and deciding his direct criminal appeal before the Oklahoma Court of Criminal Appeals. Respondent has filed a Rule 5 response to which Petitioner has replied. For the reasons stated below, the Court concludes that the petition should be denied.

I. BACKGROUND

On June 28, 1992, Petitioner received a thirty-year sentence for the crime of rape in the first degree in Washington County District Court, Case No. CRF-92-117. Although a Notice of Intent to Appeal was filed on the same day, the Oklahoma Indigent Defense System (OIDS) did not properly perfect the appeal. On May 26, 1993, the Court of Criminal Appeals granted an appeal out of time with applicable deadlines commencing from the date of that order. Petitioner's counsel (who had a contract with OIDS) filed Petitioner's brief simultaneously with the filing of the Petition-in-Error on July 29, 1993. The State filed its response brief on

September 10, 1993. The Court of Criminal Appeals has not rendered a decision as of the date of this order.

II. ANALYSIS

As a preliminary matter this Court must address whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). Because Petitioner has alleged, among other issues, inordinate delay in the processing of his direct criminal appeal, the Court turns to Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), to determine whether exhaustion should be excused in this case. In Harris, the Tenth Circuit Court of Appeals held that "the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient justification by the State." Id. at 1556. When a petitioner has been granted an appeal out of time, however, "the length of the appellate process should be measured from the entry of that order unless, of course, delay in perfecting the appeal in the first instance is attributable to the State." Id. at 1556 n.9.

On the basis of the record in the instant case, the Court concludes that excusing Petitioner's failure to exhaust state remedies is appropriate. Although less than two years have passed since May 26, 1993 (the date of entry of the order granting Petitioner an appeal out of time), "the delay in perfecting the appeal in the first instance is attributable to the State." Id.

As noted in the background section of this order, the Oklahoma Indigent Defense System failed to properly perfect the appeal and therefore the State is responsible for the delay preceding the entry of the order granting an appeal out of time. Petitioner is, therefore, excused from exhausting his state remedies. See Taylor v. Hargett, 27 F.3d 483 (10th Cir. 1994).

As the Circuit discussed in Harris, however, "proceeding directly to the merits of a petitioner's claims after excusing exhaustion may not be the preferred course of action, or even an effective one." Id. at 1557. The Court will, therefore, consider whether the delay in adjudicating Petitioner's direct appeal gives rise to an independent due process claim. Id. In determining whether inordinate delay in adjudicating Petitioner's direct criminal appeal violated his substantive due process rights, this Court must balance the following factors:

- a. the length of the delay;
- b. the reason for the delay and whether that reason is justified;
- c. whether the petitioner asserted his right to a timely appeal; and
- d. whether the delay prejudiced the petitioner by
 - i. causing the petitioner to suffer oppressive incarceration pending appeal; or
 - ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or
 - iii. impairing the petitioner's grounds for appeal or his or her defense in the event of a reversal and retrial.

Harris, 15 F.3d at 1559. Even though a court is required to

balance all four factors, "ordinarily, a petitioner must make some showing on the fourth factor--prejudice--to establish a due process violation." Id.

In his reply (doc. #10), Petitioner alleges that the delay he suffered as a result of the representation by OIDS is sufficient ground in and of itself to establish prejudice. The Court disagrees. The Tenth Circuit Court of Appeals has specifically stated that prejudice cannot be presumed from delay alone "absent a delay so excessive as to trigger the Doggett presumption of prejudice." Harris, 15 F.3d 1538, 1565. Although Petitioner has suffered some delay in adjudicating his appeal, the Court does not believe that the delay in this case has been sufficiently long to trigger a presumption of prejudice under Doggett v. United States, 112 S.Ct. 2686 (1992). Cf. Taylor, 27 F.3d at 483, 486 (10th Cir. 1994) (where a two-year and nine-month delay in filing a petitioner's opening brief was insufficient to establish presumed prejudice under Doggett). Nor does the fact that Petitioner's trial counsel failed to raise the statute of limitation argument at trial suffice to establish prejudice under Harris. Accordingly, Petitioner's due process claim as a result of appellate delay must be denied at this time.

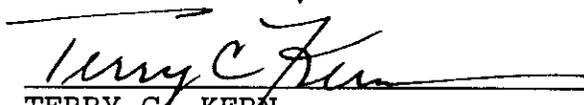
Petitioner's ineffective-assistance-of-counsel claim as a result of delay must also fail. In Harris, 15 F.3d at 1569, the Tenth Circuit Court of Appeals held that once counsel files an appellate brief any ineffectiveness because of delay ends. Accordingly, any relief based on ineffective assistance of counsel

is foreclosed.

III. CONCLUSION

Because the Petitioner can make no showing of prejudice resulting from the delay in adjudicating his appeal, the Court concludes that the Petitioner has not suffered a due process violation as a result of the delay. Petitioner's motion for reconsideration of appointment of counsel (doc. #9) and his petition for a writ of habeas corpus (doc. #1) are hereby **denied**.

SO ORDERED THIS 19th day of January, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MICHAEL R. ROBISON aka MICHAEL)
RAY ROBISON; LOLA F. ROBISON aka)
LOLA FRANCIS ROBISON; KURTZ &)
ASSOCIATES, INC.; COUNTY)
TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

JAN 19 1995

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

ENTERED ON DOCKET
DATE 1-23-95

CIVIL ACTION NO. 94-C 425B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day
of Jan., 1995. The Plaintiff appears by Stephen C.
Lewis, United States Attorney for the Northern District of
Oklahoma, through Loretta F. Radford, Assistant United States
Attorney; the Defendants, **County Treasurer, Tulsa County,**
Oklahoma, and **Board of County Commissioners, Tulsa County,**
Oklahoma, appear by Dick A. Blakeley, Assistant District
Attorney, Tulsa County, Oklahoma; and the Defendants, **Michael R.**
Robison aka Michael Ray Robison, Lola F. Robison aka Lola Francis
Robison, and Kurtz & Associates, Inc., appear not, but make
default.

The Court being fully advised and having examined the
court file finds that the Defendant, **Michael R. Robison aka**
Michael Ray Robison, will hereinafter be referred to as ("**Michael**
R. Robison"); that the Defendant, **Lola F. Robison aka Lola**
Francis Robison, will hereinafter be referred to as ("**Lola F.**

Robison"); and that the Defendants, **Michael R. Robison and Lola F. Robison** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Kurtz & Associates, Inc.**, waived service of Summons on April 29, 1994, which was filed on May 2, 1994.

The Court further finds that the Defendants, **Michael R. Robison and Lola F. Robison**, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 13, 1994, and continuing through November 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Michael R. Robison and Lola F. Robison**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, **Michael R. Robison and Lola F. Robison**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and

documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 19, 1994; and that the Defendants, **Michael R. Robison, Lola F. Robison, and Kurtz & Associates, Inc.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on June 2, 1993, Lola F. Robison filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-1835-C. On April 21, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

Lot Three (3), Block Three (3), BRIARGLEN EXTENDED, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on May 20, 1983, Douglas R. Divelbiss and Dena J. Divelbiss, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. their mortgage note in the amount of \$58,050.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Douglas R. Divelbiss and Dena J. Divelbiss, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC. a mortgage dated May 20, 1983, covering the above-described property. Said mortgage was recorded on May 24, 1983, in Book 4693, Page 1684, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 22, 1988, TURNER CORPORATION OF OKLAHOMA, INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development its successors and assigns. This Assignment of Mortgage was recorded on December 28, 1988, in Book 5148, Page 449, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Michael R. Robison and Lola F. Robison, currently hold the record title to the subject real property by virtue of a General Warranty Deed dated September 12, 1985, and recorded on September 24, 1985 in Book 4894, Page 712, in the records of Tulsa County, Oklahoma. The Defendants, Michael R. Robison and Lola F. Robison, are the current assumptors of the subject indebtedness.

The Court further finds that on January 1, 1989, the Defendants, Michael R. Robison and Lola F. Robison, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, Michael R. Robison and Lola F. Robison, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Michael R. Robison and Lola F. Robison**, are indebted to the Plaintiff in the principal sum of \$95,454.78, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$36.00 which became a lien on the

property as of June 23, 1994; a lien in the amount of \$45.00 which became a lien as of June 25, 1993; a lien in the amount of \$57.00 which became a lien as of June 25, 1993; and a lien in the amount of \$28.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Michael R. Robison, Lola F. Robison, and Kurtz & Associates, Inc.**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Michael R. Robison and Lola F. Robison**, in the principal sum of \$95,454.78, plus interest at the rate of 11.5 percent per annum from March 1, 1994 until judgment, plus interest thereafter at the current legal rate of 7.34 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced

or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$¹⁰⁸166.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Michael R. Robison, Lola F. Robison, Kurtz & Associates, Inc. and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Michael R. Robison and Lola F. Robison**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, County Treasurer,
Tulsa County, Oklahoma, in the amount of
\$266.00, personal property taxes which are
currently due and owing.

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of
redemption (including in all instances any right to possession
based upon any right of redemption) in the mortgagor or any other
person subsequent to the foreclosure sale.

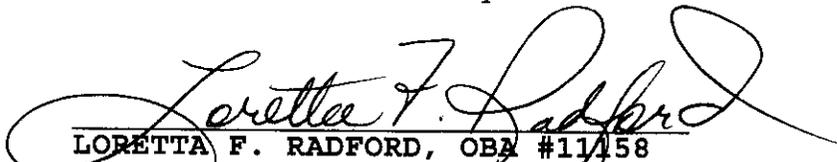
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under
and by virtue of this judgment and decree, all of the Defendants
and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BROWN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 425B

LFR:lg

ENTERED ON DOCKET
JAN 23 1995
DATE

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

FILED

JAN 19 1995

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

LONNIE EDWARD LAMB,
Petitioner,
vs.
JACK COWLEY,
Respondent.

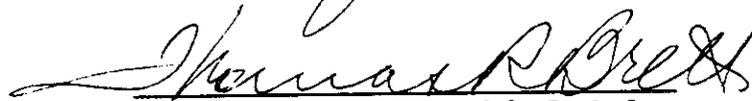
No. 93-C-696-B

ORDER

On November 17, 1994, this Court ordered that the Respondent address the merits of Petitioner's claims of ineffective assistance of counsel with regard to Count I in Case No. CF-92-1139. On December 22, 1994, the Respondent advised the Court that the present habeas action is now moot because the District of Tulsa county dismissed Count I of Case No. CF-92-1139 on February 1, 1994. The Petitioner has neither responded nor advised the Court of his new address.

Because the judgment and sentence has been vacated, the issue of ineffective assistance of counsel is no longer alive. Accordingly, Petitioner's request for habeas corpus relief is now moot and the petition for a writ of habeas corpus (doc. #1) is hereby **dismissed**.

SO ORDERED THIS 19th day of Jan, 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JAN 19 1995

R.E.O., INC., d/b/a
TULSA BOAT SALES,

Plaintiff,

v.

TIG INSURANCE COMPANY, f/k/a
TRANSAMERICA INSURANCE COMPANY,
and K & K INSURANCE AGENCY, INC.,
a/k/a K & K INSURANCE GROUP, INC.

Defendants.

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

Case No. 94-C-0093-B

ENTERED ON DOCKET

DATE 1-23-95

ORDER OF DISMISSAL WITH PREJUDICE

UPON Application and Stipulation of the plaintiffs and
defendants, and for good cause shown:

IT IS HEREBY ORDERED, that the plaintiff's claims against
the defendants be and the same is hereby dismissed upon the merits
and with prejudice to any further action as to the defendants, each
party to bear their/its own costs.

DATED this 19 day of Jan., 1994⁵.

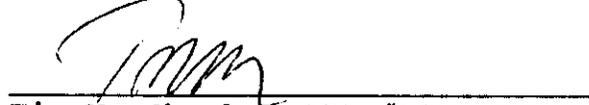
S/ THOMAS B. BRET

By: _____
UNITED STATES, DISTRICT JUDGE

Approved:



Darrell W. Williams
Kathryn A. Herwig
CLARK & WILLIAMS
5416 South Yale Avenue - # 600
Tulsa, Oklahoma 74135
ATTORNEYS FOR PLAINTIFF


Tim N. Cheek - OBA #11257
CHEEK, CHEEK & CHEEK
311 North Harvey Avenue
Oklahoma City, Oklahoma 73102
ATTORNEY FOR DEFENDANT

ENTERED ON DOCKET

JAN 23 1995

DATE

FILED

JAN 19 1995

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

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

KEVIN DEWAYNE WILLIAMS,
Petitioner,
vs.
RON CHAMPION, et al.,
Respondents.

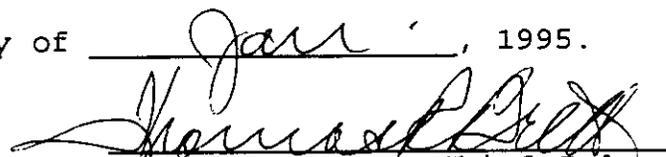
No. 92-C-775-B

ORDER

On December 15, 1994, the Court granted Petitioner an extension of time to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, the Petitioner has not responded. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 19th day of Jan, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

JAN 20 1995

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

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

CHARLES KENNEDY,
Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS,
Defendant.

No. 93-C-187-E ✓

O R D E R

NOW BEFORE THE COURT is Plaintiff's appeal of the Secretary's denial of disability benefits.

This matter came up for hearing before the Court January 20, 1995. The Court has determined that the record does not allow the Court to enter an order at this time. The Record must be reopened for the limited purpose of further development in the following areas:

1) A medical expert, Dr. Harold Goldman, testified at the hearing held February 28, 1992, before the Administrative Law Judge (ALJ). Dr. Goldman found that Plaintiff suffered from two disabilities: an inability to reach overhead, and an inability to lift over 50 pounds (Tr. 58). In the findings, the ALJ concluded that Plaintiff suffered from a third disability: he is unable to "use the hands excessively" (Tr. 34). It is unclear from the Record what the ALJ's intent was in using the term "excessively." The extent of impairment, if any, of Plaintiff's hands must be

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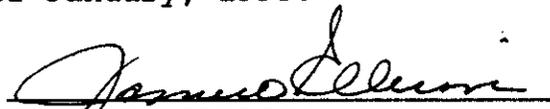
DATE 1-23-95

clarified.

2) If it is determined on remand that Plaintiff suffers from a hand impairment, that information must be provided to a vocational expert. A vocational expert, Frank Banford, testified at the Plaintiff's hearing. Mr. Banford's testimony was based on the medical expert's testimony -- that Plaintiff suffered from only the two stated impairments (Tr. 86). The existence of a hand impairment may impact a vocational expert's findings. The potential of a hand impairment was discussed at the hearing, but the vocational expert did not offer a quantitative estimate on whether any employment was available to Plaintiff, assuming his hands were disabled (Tr. 88).

IT IS THEREFORE ORDERED that this case is hereby remanded for further proceedings consistent with this opinion.

ORDERED this 20th day of January, 1995.



JAMES O. ELLISON
UNITED STATES DISTRICT COURT