

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

FILED

APR - 7 1995

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

STANDARD INSURANCE COMPANY, an)
Oregon corporation and SECURITY)
LIFE INSURANCE COMPANY OF)
AMERICA, a Minnesota corporation,)
Plaintiffs,)

v.)

Case No. 94-C-1062-B /

DONALD A. MCCANCE, and)
NEVA DAVIS RICHARDSON,)
Defendants.)

ENTERED ON DOCKET
DATE APR 10 1995

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now, on this 5th day of April, 1995, after an evidentiary hearing in the *with proper notice to all parties given thereof,* above-styled and numbered cause, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about October 13, 1993, Loretta Faye McCance, was discovered murdered in Wagoner County, Oklahoma. Donald A. McCance has assisted the Wagoner County Sheriff in efforts to determine the person or persons responsible for the murder of Loretta Faye McCance and has offered a cash reward for information leading to an arrest and conviction.

2. Donald A. McCance has no knowledge or information as to the identity of the person or persons responsible for the death of Loretta Faye McCance. Inquiries of the Wagoner County Sheriff's office indicate that they have no suspects and that, therefore, everyone is a suspect.

3. At the time of the death of Loretta Faye McCance, her husband, Donald A. McCance was the primary beneficiary of a life insurance policy issued by Standard Insurance Company, policy

number 615364-01, with policy benefits of \$80,000.00, plus interest from October 13, 1993. The proceeds of the Standard Insurance Company policy are the subject of this interpleader action.

4. At the time of the death of Loretta Faye McCance, her husband, Donald A. McCance was the primary beneficiary of a life insurance policy issued by Security Life Insurance Company of America, policy number 3188, with Certificate No. CLO-8000125-11, with policy benefits of \$20,000.00, plus interest from October 13, 1993. The proceeds of the Security Life Insurance Company of America policy are the subject of this interpleader action.

5. There is no just reason for disqualification of Donald A. McCance as a beneficiary of either the Standard Insurance Company policy or the Security Life Insurance Company of America policy.

6. On November 14, 1994, Plaintiffs, Standard Insurance Company and Security Life Insurance Company of America filed this interpleader action and tendered into court the proceeds of two life insurance policies, more specifically described as follows:

Standard Insurance Company Policy No. 6152364.1, in the sum of \$80,000.00, plus interest from October 13, 1993; and Security Life Insurance Company of America, Policy No. 3188, with Certificate No. SLU-8000125-11, in the sum of \$20,000.00, plus interest from October 13, 1993.

7. Plaintiffs complaint seeks a determination as to the entitlement of defendants to the interplead insurance proceeds.

8. Plaintiffs complaint and Defendant Neva Davis Richardson's answer admit that Donald A. McCance is the primary beneficiary under both policies.

9. Neither the complaint filed herein by the Plaintiffs, nor the answer of Defendant, Neva Davis Richardson, allege that Donald A. McCance is disqualified from receiving the benefits under the subject policies, but merely assert that if he is disqualified, Defendant, Neva Davis Richardson, is entitled to the proceeds.

10. Neither the Plaintiffs, Standard Insurance Company and Security Life Insurance Company of America, nor the Defendant Neva Davis Richardson have presented any facts supporting disqualification of Donald A. McCance as a beneficiary of the life insurance policies.

11. Donald A. McCance is not precluded from recovering proceeds of the subject life insurance policies insofar as Donald A. McCance did not take, or cause or procure another to take the life of Loretta Faye McCance.

12. Neva Davis Richardson has no claim to the proceeds of the subject life insurance policies.

13. Plaintiffs have incurred attorney fees in the amount of \$2,073.75 and costs in the amount of \$134.61 in prosecuting this interpleader action, which attorney fees and costs are reasonable.

CONCLUSIONS OF LAW

14. Donald A. McCance is not a disqualified beneficiary by virtue of 84 O.S. 1994 Section 231.

15. The claims of Neva Davis Richardson to the proceeds of the insurance policies at issue herein should be denied.

16. Donald A. McCance is entitled to judgment awarding Donald A. McCance the proceeds of the insurance policies, including all accrued interest thereon, less sums necessary to satisfy the Court

Clerk's registry fees and the costs and attorney fees of Plaintiffs herein.

17. Plaintiffs are entitled to an award of attorney fees in the amount of \$2,073.75, and costs in the amount of \$134.61 to be paid from the interest proceeds of the policies.

18. The court has jurisdiction of the subject matter and parties hereto

Thomas R. Pett
UNITED STATES DISTRICT JUDGE

4-7-95

BRIAN J. RAYMENT, OBA #7441
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FILED

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

APR - 7 1995

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

STANDARD INSURANCE COMPANY, an
Oregon corporation and SECURITY
LIFE INSURANCE COMPANY OF
AMERICA, a Minnesota corporation,

Plaintiffs,

v.

DONALD A. MCCANCE, and
NEVA DAVIS RICHARDSON,

Defendants.

Case No. 94-C-1062-B

ENTERED ON BOOKS
DATE APR 10 1995

JUDGMENT

*Pursuant to the Findings of Fact and Conclusions of Law entered
this date* Judgment is hereby entered *in* favor of the Defendant, Donald

A. McCance, determining that Donald A. McCance is the primary beneficiary of the life insurance policies which are the subject of this action; determining that Donald A. McCance is not disqualified as a beneficiary under the terms of either life insurance policy; and directing the Clerk of this Court to disburse, as soon as practical upon maturity of the current investment, the insurance proceeds of \$107,333.44 previously deposited with the Clerk, together with all accrued interest thereon, as follows:

1. To the Clerk of the Court for appropriate registry fees.
2. To Gable & Gotwals, 15 West Sixth Street, Suite 2000 Tulsa, Oklahoma 74119-5447, for costs and fees the sum of \$2,208.36.
3. The remainder to Donald A. McCance, c/o Brian J. Rayment, 7666 East 61st Street, Suite 240, Tulsa, Oklahoma 74133.

Judgment is further entered in favor of the Plaintiffs discharging Plaintiffs, Standard Life Insurance Company and Security Life Insurance Company of America, from this interpleader

action and from any further liability or claim of the Defendants regarding the proceeds and interest of the policies at issue herein.

Judgment is further entered denying the claims of Neva Davis Richardson in and to the proceeds and interest of the policies at issue herein.

IT IS SO ORDERED.

Dated: April 7th, 1995.


UNITED STATES DISTRICT JUDGE

BRIAN J. RAYMENT, OBA #7441
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
APR - 7 1995 *[Signature]*

SHERMAN D. HAMILTON,)
)
 Plaintiff,)
)
 v.)
)
 MARVIN T. RUNYON, JR.,)
 Postmaster General,)
)
 Defendant.)

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

Civil No. 94-C-774-B ✓

ENTERED ON DOCKET
DATE APR 10 1995

ORDER

For good cause shown, and based upon the Stipulation of the parties entered herein, it is hereby ORDERED, DECREED and ADJUDGED that the above-captioned action shall be dismissed, with prejudice, in its entirety. The trial of this matter currently scheduled for April 17, 1995, is accordingly stricken.

[Signature]
THOMAS R. BRETT
United States District Judge

[Signature]
PHIL PINNELL, OBA #7169
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FILED
APR - 7 1995

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

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

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

No. 94-C-459-B

ENTERED ON BOOK
DATE APR 10 1995

ORDER

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

Petitioner is presently incarcerated pursuant to a conviction for Lewd Molestation from the District Court of Creek County in Case No. CRF-87-85 entered on April 21, 1988. Petitioner was sentenced to fifteen years imprisonment.

On May 5, 1994, Petitioner filed the instant petition challenging the award and computation of time credits by the Oklahoma Department of Corrections (DOC). He alleges (1) that Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the amended earned-time credit statute) is an ex post facto law as applied to him, and (2) that "the method currently employed by the DOC of comparing the 1981 version of Oklahoma Stat. tit. 57, §§ 138 and 224 with the 1988 amendments is contrary to the holdings of Ekstrand v. Oklahoma, 791 P.2d 92 (Okla. Crim. App. 1990),"¹ and violates his constitutional rights. Petitioner requests that the DOC be required to recalculate his time credits pursuant to Scales

¹Abrogated by Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993).

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v. Brewer, Case Nos. Civ-90-369-S and CIV-90-375-S (E.D. Okla., Apr. 7, 1993) (unpublished opinion).

I. BACKGROUND

The Tenth Circuit Court of Appeals recently summarized the statutory provisions at issue in this case and the changes implemented by the DOC as a result thereof.

Effective November 1, 1988, the State of Oklahoma substantially amended its inmate earned-time credit statute. Under the preamended version of the law, each prisoner received credits according to the job or activity to which he was assigned. Some jobs earned inmates three credit days for each day worked; others rewarded prisoners one-for-one. The statute also awarded inmates 20 credit days for each pint of blood that they donated, up to a maximum of 80 credit days per year.

The amended statute significantly altered this system. Each inmate now earns credits according to his time spent in one of four classifications. For instance, an inmate earns 44 credits for spending a month in Class 4, whereas he earns no credits for time spent in Class 1. Okla. Stat. Ann. tit. 57, 138(D)(2) (West Supp.1994). Inmates are assigned to a specific class level based on a variety of factors, including "rehabilitation, obtaining job skills and educational enhancement, participation in and completion of alcohol/chemical abuse programs, ... work attendance and productivity, conduct record, participation in programs, cooperative general behavior, and appearance." Id. 138(B). The amendments also eliminated the opportunity for inmates to earn credits by donating blood.

In Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals held that application of the amended statute to inmates convicted prior to November 1, 1988, "runs afoul of the prohibition of ex post facto laws." Id. at 95. The same court clarified its Ekstrand holding in State ex rel. Maynard v. Page, 798 P.2d 628 (Okla. Crim. App. 1990), where it stated that an inmate in Oklahoma was "entitled only to credits which were allowed under the law on the date the crime giving rise to his conviction was committed." Id. at 629.

After Ekstrand and Page, the DOC revised its system of awarding credits to permit inmates who committed their offense of conviction before November 1, 1988, to petition the Department for credits earned under the preamended version of the statute. The DOC, however, would not apply such credits to an inmate's sentence until 30 days before his discharge. Moreover, the DOC required the inmates themselves to keep track of the credits they earned under the old law.

In Scales v. Brewer, Unpub. Op., Case Nos. CIV-90-369-S and CIV-90-375-S (E.D. Okla., Apr. 7, 1993), the District Court for the Eastern District of Oklahoma adopted the findings of a federal magistrate judge who ruled that the DOC's new procedure for awarding time credits was also unconstitutional. The magistrate ruled that the DOC's application of the statute was ex post facto as applied to inmates who committed their offense of conviction before November 1, 1988, because it put such prisoners "at risk of continued confinement beyond their discharge date." Id. at 5.

Following Scales, the DOC again revamped its system of awarding time credits. The DOC now tabulates for each inmate how many credits he has earned under each version of the statute on a monthly basis and automatically awards the inmate the greater of the two totals.

Turnham v. Carr, 34 F.3d 1076, 1994 WL 413243 (10th Cir. Aug. 5, 1994) (unpublished opinion).

II. DISCUSSION

In the instant habeas action, Petitioner contends that the amended versions of sections 138 and 224 violate the Constitution's prohibition of ex post facto laws. Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be the subject of an ex post facto violation. If the credits under the 1981 statute exceed those under the 1988 amendments, Petitioner's sentence is reduced in accordance with the number of credits received under the 1981 statute for that month.

If, on the other hand, credits under the 1981 statute are more advantageous, that statute is applied that month.

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). As noted above, the DOC has implemented a procedure whereby Petitioner's circumstances are evaluated on a monthly basis, and Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation. See Turnham, 1994 WL 413243, at *2 (10th Cir. Aug. 5, 1994) (unpublished opinion) (holding that the 1988 amendments to sections 138 and 124 were not ex post facto laws).

Petitioner's contention that the DOC is improperly comparing the two systems in contravention of Scales is immaterial in this case. This Court is not bound by the holding in Scales that the pre-amended and amended versions of the earned-time credit statute cannot be compared. Therefore, Petitioner is not entitled to habeas corpus relief for violation of the Ex Post Facto Clause.

Petitioner contends, however, that he has a constitutionally protected right to earn credits under the pre-amended versions of the statute and to a job which earns the maximum credits. He also contends that the DOC's allocation of jobs under the pre-amended

version of the statute violate the Equal Protection Clause of the Fourteenth Amendment. This Court disagrees.

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986) (Constitution itself does not create a property or liberty interest in prison employment). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of the Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Petitioner, moreover, has done nothing more than allege that the assignment to the higher level jobs was the product of age discrimination. (Petition, doc. #1, at 16.) See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis of age, race, or handicap, in deciding whether to assign prisoner to a job or in deciding which

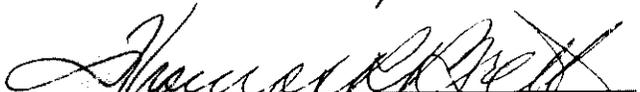
job to assign him).

To the extent that Petitioner contends that the assignment to prison employment violates the Equal Protection Clause of the Fourteenth Amendment, the Court concludes that he is not entitled to habeas corpus relief. Because Petitioner has not been treated differently as a result of a suspect classification, the assignment of jobs to inmates passes constitutional muster as long as it is reasonably related to some legitimate penological purpose. Templeman v. Gunter, 16 F.3d 367, 371 (10th Cir. 1994). As noted above, the assignment of jobs to inmates is wholly within the discretion of prison officials. See Oklahoma Stat. Ann. tit. 57, § 224 (West. Supp. 1994); see also Thurman, 1994 WL 413243, at *3 (10th Cir. 1994).

III. CONCLUSION

The petition for a writ of habeas corpus is hereby **denied**.

IT IS SO ORDERED THIS 7th day of Apr. 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 7 - 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RAYMOND WORLEY;)
DORIS A. WORLEY aka Doris Worley;)
STATE OF OKLAHOMA, ex rel.)
OKLAHOMA TAX COMMISSION;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

APR 10 1995
DATE _____

Civil Case No. 94-C-1151-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7 day of April,

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; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants, RAYMOND WORLEY and DORIS A. WORLEY aka Doris Worley, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RAYMOND WORLEY, was served with process on January 27, 1995, and signed a Waiver of Summons on February 3, 1995; that the Defendant, DORIS A.

WORLEY aka Doris Worley, signed a **Waiver** of Summons on February 1, 1995, and was served with process on February 7, 1995; **that** the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on January 23, 1995, by Certified Mail.

The Court further finds **that** the Defendant, DORIS A. WORLEY, is one and the same person as Doris Worley, and **will** hereinafter be referred to as DORIS A. WORLEY. The Defendants, RAYMOND WORLEY and DORIS A. WORLEY, are husband and wife.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on December 29, 1994; **that** the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on February 24, 1995; and that the Defendants, RAYMOND WORLEY and DORIS A. WORLEY, 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 Three (3), Block One (1), POWDER AND POMEROY ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

Also known as 1165 North Main, Tulsa, Oklahoma 74106

The Court further finds **that** on October 1, 1986, the Defendant, RAYMOND WORLEY, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, A FLORIDA CORPORATION, his mortgage note in the amount of

\$35,603.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, RAYMOND WORLEY, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, A FLORIDA CORPORATION, a mortgage dated October 1, 1986, covering the above-described property. Said mortgage was recorded on October 3, 1986, in Book 4974, Page 341, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 4, 1988, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA (formerly known as Commonwealth Mortgage Corporation) assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1454, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to THE LOMAS & NETTLETON COMPANY. This Assignment of Mortgage was recorded on June 7, 1988, in Book 5105, Page 329, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 16, 1989, LOMAS MORTGAGE USA, INC., formerly The Lomas & Nettleton Company, assigned the above-described mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 23, 1989, in Book 5190, Page 1563, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 17, 1989, the Defendants, RAYMOND WORLEY and DORIS A. WORLEY, 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 April 25, 1990, March 29, 1991, August 7, 1991, May 13, 1992, and July 2, 1993.

The Court further finds that the Defendant, RAYMOND WORLEY, 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 his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, RAYMOND WORLEY, is indebted to the Plaintiff in the principal sum of \$46,149.43, plus interest at the rate of 9 percent per annum from August 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 ad valorem taxes in the amount of \$191.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$4.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of \$158.36 which became a lien on the property as of December 12, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RAYMOND WORLEY and DORIS A. WORLEY, are in default, and have no right, title or interest in the subject real property.

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 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 against the Defendant, RAYMOND WORLEY, in the principal sum of \$46,149.43, plus interest at the rate of 9 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.41 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 \$191.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$4.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$158.36, plus accrued and accruing interest, for state taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, RAYMOND WORLEY, and DORIS A. WORLEY, 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, RAYMOND WORLEY, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without 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 Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$191.99, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

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

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$4.00, personal property taxes which are currently due and owing.

Fifth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of \$158.36, state taxes which are currently due and owing, plus accruing interest.

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.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

for Paul Powell
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State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 94-C-1151BU
LFR:flv

copy

F I L E D

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

APR 7 - 1995

STATE OF OKLAHOMA, EX REL.,)
the OKLAHOMA BOARD OF PRIVATE)
VOCATIONAL SCHOOLS,)

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

Plaintiff,)

vs.)

Case No. 94-C-233-B

ROY B. DAVID, individually,)
ALLIED HELICOPTER SERVICE,)
INC., and ALLIED HELICOPTER)
INTERNATIONAL, INC.,)

ENTERED ON DOCKET
DATE APR 10 1995

Defendants.)

ORDER

This matter comes before the Court on the Motion to Remand filed April 14, 1994 by the Plaintiff herein (Docket Entry No. 9) with Brief in Support thereof (Docket Entry #10); Defendants' Response to Motion to Remand filed May 13, 1994 (Docket Entry #14) with exhibits thereto (Docket Entry #15); and Plaintiff's Reply to Defendants' Response filed June 17, 1994 (Docket Entry #23).

After review of these pleadings, this Court hereby enters its findings:

This action was commenced by the Plaintiff with the filing of a Petition in the Oklahoma District Court in and for Tulsa County on February 14, 1994. Thereafter, the Defendants sought removal of the action by filing a notice on March 14, 1994. Although the action was originally commenced against Defendant Roy B. David and Allied Helicopter International, Inc., Allied Helicopter Service,

Inc. was added by amended complaint filed April 6, 1994.¹

By virtue of the original petition filed in the Tulsa County District Court, Plaintiff alleges that the Defendants failed to become properly licensed with the Oklahoma Board of Private Vocational Schools as required by Oklahoma law. Plaintiff seeks enforcement of the Oklahoma Statutes for violation of the licensing requirements; namely, that the Defendants be found in violation of the licensing statutes, that all contracts entered into between the Defendants and any person which were violative of the statutes be rescinded, that Defendants be required to pay Plaintiff's investigative and prosecutorial costs and attorney's fees.² In response to the removal of this action, the Plaintiff requests that the action be remanded to Tulsa County District Court, alleging that no federal question is at issue in this action which would engage this Court's original jurisdiction. Defendants respond to their request for remand, alleging that the subject matter of the Plaintiffs' action, being the licensing and operation of a flight school, is completely preempted by federal law, thereby conferring jurisdiction to this Court.

Typically, the burden is upon the party removing to establish his right to do so. Moreover, removal jurisdiction when challenged by a motion to remand must be clearly demonstrated and if significant doubts as to the propriety of removal exist, those

¹ Defendant Roy B. David was dismissed from this action by Joint Stipulation filed October 13, 1994.

² See Petition attached to Notice of Removal filed March 14, 1994 in Tulsa County District Court action CJ-94-0710.

doubts must be resolved against removal. State of New Jersey v. Moriarty, 268 F.Supp. 546, 554 (D.C.N.J. 1967).

Generally, only state court actions that originally could have been filed in federal court may be removed from state court to federal court by a defendant.³ Without a showing of diversity of citizenship, only federal question jurisdiction confer the required jurisdiction to the federal court.⁴ The determination of the existence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Gully v. First National Bank, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97-98, 81 L.Ed 70 (1936). Typically, if federal preemption is plead as a defense to a complaint, it cannot be raised as a basis for removal of the action to federal court. Franchise Tax Board of California v. Construction Laborer's Vacation Trust for Southern California, 463 U.S. 1, 12 103 S.Ct. 2841, 2847-48, 77 L.Ed 2d 420 (1983). An exception to this principle and the "well-pleaded complaint rule," is the "complete preemption" doctrine. As the Supreme Court has

³ Removal is governed by 28 U.S.C. § 1441 which provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the District Courts of the United States have original jurisdiction may be removed by the defendant or the defendants to the District Court of the United States for the District and Division embracing the place where such action is pending.

⁴ Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. Section 1331.

stated, "[o]n occasion, the Court has concluded that the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' . . . Once an area of state law has been complete preempted, any claim purportedly based on that preemptive state law is considered from its inception, a federal claim, and therefore arises under federal law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed 2d 318 (1987) citing Metropolitan Life Insurance Company v. Taylor, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547, 95 L.Ed 2d 55 (1987) and Franchise Tax Board, 463 U.S. at 24, 103 S.Ct. at 2854.

In the case at bar, the Defendants operate an aviation pilot school in Tulsa, Oklahoma. Defendants do not dispute that they have not been licensed by the State of Oklahoma. It is the position of the Plaintiff that Defendants' school falls within the definition of a "private school" under Oklahoma law and therefore is regulated by the Oklahoma Board of Private Vocational Schools. A "private school" in Oklahoma is "any privately owned business school, flight school, trade school, or other school offering courses to residents of Oklahoma in any business, profession, trade, technical, or industrial occupation for consideration or remuneration . . ." Tit. 70 Okla. Stat. § 21-101(1). In regulating or licensing private schools, the Oklahoma Statutes establish the Oklahoma Board of Private Vocational Schools as the authoritative agency. Tit. 70 Okla. Stat. § 21-102. The

requirement for a license for private schools is established by Tit. 70 Okla. Stat. § 21-103 which states:

A. It shall be unlawful to establish, conduct, operate or maintain a private school or to solicit or canvass for scholarships or tuition from a resident of Oklahoma unless a license to operate such school has been issued by the Board and is in effect. The Board shall issue a private school license upon determination that such school meets the standards fixed by the Board. A private school shall be issued only one license, regardless of the number of locations operated by such school.

The areas for which the Board is required to establish "standards" are related under Tit. 70 Okla. Stat. § 21-107 wherein the Board is required to:

fix minimum standards for private schools, which shall include standards for courses of instruction and training, qualifications of instructors, financial stability, advertising practices, and refund of tuition fees paid by students for courses of instruction or training not completed, and shall promulgate and adopt reasonable rules and regulations for the implementation of such minimum standards for the operation of private schools.

Defendants claim that the aforementioned state laws governing the regulation of private flight schools are completely preempted by federal laws governing the regulation of aviation. In particular, the express preemption provisions governing the federal aviation program state that:

(a) **Preemption**

- (1) Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority

under subchapter IV of this chapter to provide air transportation. 49 U.S.C. § 1305(a)(1). (emphasis added)⁵

Defendants also assert that preemption is implied through the provisions of 49 U.S.C. § 1427 which provides, in pertinent part: the Secretary of Transportation is empowered to provide for the examination and rating of (1) civilian schools giving instruction in flying . . . as to the adequacy of the course of instruction, the suitability and airworthiness of the equipment, and the competency of the instructors . . . the Secretary of Transportation is empowered to issue certificates for such schools . . .

In addition to the aforementioned statutory regulation, Defendants assert that the Federal Aviation Administration is promulgated other rules regarding certification of pilot schools. See 14 C.F.R. § 141.1 et seq. These regulations, largely concern the course of instruction and qualifications of instructors. Defendants received proper certification by the Federal Aviation Administration to operate as a pilot school.⁶

This Court concurs with the Defendants' position that the federal statutory and regulatory scheme for administering pilot schools so permeates this area that the portions of Tit. 70 Okla. Stat. § 21-107 which authorizes the Oklahoma Board of Private Vocational Schools to set minimum standards for "courses of

⁵ The exception contained in paragraph (2) of subsection (a) excludes the applicability of paragraph (1) to "any transportation by air of persons, property, or mail conducted wholly within the State of Alaska." 49 U.S.C. § 1305(a)(2).

⁶ See Exhibits in Support of Defendants' Response to Motion to Remand filed May 13, 1994, Exhibits A, B, C, D, E, F, G.

instruction and training [and] qualifications of instructors," is preempted by federal law. Although the clear and unambiguous language of the express federal preemption provision of the federal aviation program only includes the "rates, routes, or services of any air carrier" in its express preemption provisions, the other provisions outlined hereinabove show a clear implied intent that the states be preempted from usurping the supremacy of federal law.

However, this does not end the inquiry for determining "complete preemption." The remainder of regulation by the Oklahoma Board of Private Vocational Schools include determining the "financial stability, advertising practices and refund of tuition fees paid by students for courses of instruction or training not completed." These areas are not specifically regulated by federal law and therefore are not subject to preemption. Oklahoma undoubtedly possesses and has unambiguously expressed an interest in regulating the "administrative" functions of these private schools to insure that the students attending these schools receive the value of their educational investment. Accordingly, the State maintains an interest in insuring that these schools are bonded and deliver the education promised to its students. These interests are outside the scope of any express or implied regulation established through federal law governing aviation or flight schools. Accordingly, Congress has not expressed a clear intent for federal law to govern in these areas. For preemption to in fact be "complete" over the regulation of aviation schools, all such areas addressed by state statute would have to be subservient

to federal law. Such is not the case in this instance. See Richmond v. American Systems Corp., 792 F.Supp. 449, 456 (D.C.E.D. VA. 1992) citing Metropolitan Life Insurance Company, 481 U.S. at 63-64, 107 S.Ct. at 1546-47.⁷

The Defendants may be able to utilize the ordinary preemption of the requirements governing "standards for courses of instruction and training [and] qualifications of instructors" as a defense to that portion of the state court action. However, the remainder of the area of law covered by the Oklahoma Statute is not preempted. Therefore, removal is inappropriate and this matter should be remanded back to the Tulsa County District Court for further adjudication.⁸

Plaintiff also requests that it be awarded attorney's fees and costs associated with the "improper removal" of this action. Indeed, "an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). However, after evaluating this attempt at removal, this Court finds that considering the complexity and uncertainty of this issue, an award

⁷ As recognized by the Court in Burke v. Northwest Airlines, Inc., 819 F.Supp. 1352 (D.C.E.D. Mich. 1993), the Supreme Court has thus far only recognized two areas in which "complete preemption" applies -- the Labor Management Relations Act and the Employment Retirement Income Security Act.

⁸ As stated, it is settled law that a preemption defense to a state law claim, without more, is not enough to sustain removal jurisdiction. See, Metropolitan Life Insurance Company, 481 U.S. at 63, 107 S.Ct. at 1546; Caterpillar, Inc., 482 U.S. at 393, 107 S.Ct. at 2430; Franchise Tax Board, 463 U.S. at 14, 103 S.Ct. at 2848.

of attorney's fees and costs would be inappropriate. Accordingly, Plaintiff's request for such an award shall be denied.

IT IS THEREFORE ORDERED THAT the Motion to Remand filed by the Plaintiff herein on April 14, 1994 (Docket Entry #9) is hereby GRANTED. Accordingly, this action is REMANDED to the District Court in and for Tulsa County, Oklahoma for further adjudication.

IT IS FURTHER ORDERED THAT Plaintiff's request for attorney's fees and costs associated with the attempted removal is hereby DENIED.

IT IS SO ORDERED THIS 7th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
 NORTHERN DISTRICT OF OKLAHOMA **APR 7 - 1995** *RL*

JAMES JACKSON,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT PEUGH, GARY MCMANUS,)
 et al.,)
)
 Defendants.)

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

Case No. 93-C-1138-BU ✓

ENTERED ON DOCKET
APR 10 1995
 DATE _____

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendants, Robert Peugh and Gary McManus. Plaintiff has responded to the motion and Defendants have replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

The undisputed evidence reveals that on December 24, 1991, Defendants, Robert Peugh and Gary McManus, police officers for Bartlesville, Oklahoma, responded to a reported domestic disturbance between Cherlyn Derrick and Plaintiff, James Jackson. While enroute to the reported residence, Defendants were advised that Ms. Derrick had a protective order against Plaintiff. Defendants, upon arrival to the reported residence, observed Ms. Derrick on the front steps of the house across the street. Ms. Derrick was crying and appeared to be upset. Upon closer contact with Ms. Derrick, Defendants concluded that she was intoxicated. Ms. Derrick informed Defendants that she and Plaintiff had been drinking and that Plaintiff became physically abusive and began to kick her in the same leg he had broken several months ago.

Defendants observed bruises on the leg. Ms. Derrick also informed Defendants that Plaintiff had thrown her and her clothing out of the residence and that she suffered physical injuries from the removal. She also informed the officers that the residence belonged to Plaintiff's relations but that she had been residing there since August 1991. She further advised the officers that Plaintiff had been residing with her for about a week.

Defendants thereafter approached the residence and arrested Plaintiff. According to the affidavits submitted by Defendants, Plaintiff was arrested on the porch of the residence. Defendants state that prior to the arrest Plaintiff was advised that he was in violation of the protective order. Defendants also state that they observed Plaintiff had an odor about his breath and person associated with intoxication by alcohol. Defendants further state that they observed glazed and bloodshot eyes on Plaintiff. After Plaintiff was arrested, Defendants state that Plaintiff started back into the residence and Defendants grabbed him. An altercation ensued but Defendants were able to handcuff Plaintiff.

According to the affidavit submitted by Plaintiff, Defendants arrested him in his residence.

The undisputed evidence also reveals that while enroute to the police station, Plaintiff yelled obscenities and made threats of physical violence toward Defendant Gary McManus. Plaintiff was subsequently charged with violation of the protective order, resisting arrest, public intoxication and language calculate to arouse anger. Plaintiff was ultimately convicted on the charges of

resisting assist and language calculate to arouse anger.

The undisputed evidence also shows that after the arrest of Plaintiff, Defendants told Ms. Derrick to return to her residence and stay there. Defendants told her that they suspected she was intoxicated and that they would have to arrest her for public intoxication if she was found to be out later that evening. Defendants told Ms. Derrick that they were not arresting her then for public intoxication because they felt she was not in public of her own free will. Later that night, Plaintiff was arrested outside a local night club by Officer W.S. Owen for public intoxication.

Plaintiff has brought this action against Defendants pursuant to 42 U.S.C. § 1983, alleging violations of his constitutional rights. Plaintiff specifically alleges in his complaint against Defendants that Defendants arrested him without a warrant in his residence in violation of the Fourth Amendment, that Defendants failed to give Miranda warnings to Plaintiff in violation of the Fifth Amendment and that Defendants arrested Plaintiff, who is black, for public intoxication without arresting Ms. Derrick, who is white, in violation of the Equal Protection Clause of the Fourteenth Amendment.

At the outset, the Court concludes that Defendants are entitled to judgment on Plaintiff's § 1983 claim based upon Defendants' failure to give Plaintiff his Miranda warnings. The Tenth Circuit has held that police officers are not liable under § 1983 for their failure to give Miranda warnings. Bennett v.

Passic, 545 F.2d 1260, 1263 (10th Cir. 1976).

As to Plaintiff's claim under § 1983 for violation of the Equal Protection Clause under the Fourteenth Amendment, the Court also finds that Defendants are entitled to judgment. It is well-established that a person is not liable for deprivations of the constitutional right to equal treatment unless he acted with discriminatory intent or purpose. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264 (1977); Lewis v. City of Ft. Collins, 903 F.2d 752, 755 (10th Cir. 1990). In the instant case, Plaintiff has not presented sufficient evidence to establish that Defendants purposefully discriminated against Plaintiff in arresting Plaintiff for public intoxication and not Ms. Derrick. Indeed, Plaintiff has not presented any evidence to rebut Defendants' evidence that Ms. Derrick was not arrested for public intoxication because Defendants believed she was not in public of her own free will.

In regard to Plaintiff's § 1983 claim for violation of the Fourth Amendment based upon his arrest without a warrant, Defendants have raised qualified immunity as a defense. When a defense of qualified immunity has been raised by a defendant, the plaintiff has the burden to show with particularity facts and law establishing the inference that the defendant violated a constitutional right. Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994). Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no

material issues of fact remain about the objective reasonableness of his action in light of the law and the information he possessed at that time. Hinton v. City of Elwood, Kan., 997 F.2d 774, 779 (10th Cir. 1993) (citations omitted). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir. 1993) (citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

The Court concludes that Defendants' actions in arresting Plaintiff without a warrant were objectively reasonable. At the time of the arrest, Okla. Stat. tit. 22, § 40.3(B) provided:

A peace officer may arrest without a warrant a person anywhere, including his place of residence, if the peace officer has probable cause to believe the person within the preceding four (4) hours has committed an act of domestic abuse as defined by Section 60.1 of this title, although the assault did not take place in the presence of the peace officer. A peace officer may not arrest a person pursuant to this section without first observing a recent physical injury to, or an impairment of the physical condition of the alleged victim.

Okla. Stat. tit. 22, § 60.1 defines "domestic abuse" as:

[A]ny act of physical harm, or the threat of imminent physical harm which is committed . . . against another adult

The undisputed facts establish that Defendants had probable cause to believe that Plaintiff had committed an act of domestic abuse within the preceding four (4) hours of Plaintiff's arrest. Defendants went to the residence at 518 South Cheyenne after a report of a domestic disturbance. While enroute to the residence, Defendants were informed that a protective order had been entered

which required Plaintiff not to injure or abuse Cherlyn Derrick and that he remain away from her. When Defendants arrived at the residence, they observed Ms. Derrick on the front steps of the house across the street. She was crying and appeared to be upset. She informed Defendants that she had been removed from the house by Plaintiff and that she had been injured by Plaintiff. Defendants observed her clothing strewn over the yard of the residence. They also observed bruises on her legs. Defendants were also aware of previous physical attacks upon Ms. Derrick by Plaintiff.

The Tenth Circuit has not addressed the constitutionality of §40.3(B), which was added by the Oklahoma Legislature in 1986. The Oklahoma Criminal Court of Appeals has addressed §40.3. However, in its decision, the Court only held that an arrest for a misdemeanor not committed in the officer's presence under §40.3(B) does not violate the Fourth Amendment. State v. Lee, 763 P.2d 385 (Okla.Crim. 1988). In light of §40.3 and no definitive ruling by the Tenth Circuit as to the constitutionality of §40.3, the Court finds that Defendants' compliance with the state statute was objectively reasonable and therefore, Defendants are entitled to qualified immunity.¹ Aacen v. San Juan County Sheriff's Department, 944 F.2d 691, 701 (10th Cir. 1991); Coen v. Runner, 854

¹Plaintiff has argued that Defendants may not rely upon §40.3(B) because they did not arrest Plaintiff for domestic abuse. The Court notes, however, that Defendants arrested Plaintiff for violation of the protective order. The protective order specifically provided that Plaintiff was not to injure or abuse Cherlyn Derrick. The Court concludes that Defendants did not arrest Plaintiff on a separate charge of domestic abuse or assault and battery does not negate Defendants' objective reasonableness in relying upon §40.3.

F.2d 374, 377-378 (10th Cir. 1988).

In reaching its decision, the Court is cognizant of the Tenth Circuit's ruling in Howard v. Dickerson, 34 F.3d 978, 981 (10th Cir. 1994). However, the Court finds that the instant case is distinguishable as the state statute at issue herein specifically permitted Defendants to arrest Plaintiff in his residence without a warrant.

Based upon the foregoing, the Court GRANTS Defendants' Motion for Summary Judgment (Docket No. 7) and DENIES Plaintiff's Motion for Summary Judgment (Docket No. 14). Judgment shall issue forthwith.

ENTERED this 7th day of ~~March~~^{April}, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

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

APR 7 - 1995

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

JAMES JACKSON,)
)
Plaintiff,)
)
vs.)
)
ROBERT PEUGH and GARY McMANUS,)
)
Defendants.)

Case No. 93-C-1138-BU ✓

ENTERED ON DOCKET

DATE APR 10 1995

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendants, Robert Peugh and Gary McManus, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Robert Peugh and Gary McManus, against Plaintiff, James Jackson.

DATED at Tulsa, Oklahoma, this 7^m day of ~~March~~ April, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 7 - 1995 *RC*

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

OIL, CHEMICAL AND ATOMIC)
WORKERS INTERNATIONAL UNION)
LOCAL 5-391,)
)
Plaintiff,)
)
vs.)
)
PETROLITE CORPORATION,)
)
Defendant.)

Case No. 93-C-1011-BU ✓

ENTERED ON DOCKET

DATE APR 10 1995

ORDER

This matter comes before the Court upon Defendant Petrolite Corporation's Motion for Summary Judgment. Based upon the parties' submissions and the following undisputed facts, the Court makes its determination.

1. Plaintiff, Oil, Chemical and Atomic Workers International Union Local 5-391, and Defendant, Petrolite Corporation, are engaged in a collective bargaining relationship.

2. Article XXI of the collective bargaining agreement between the parties provides in pertinent part:

Section 1. No employee shall be disciplined or discharged without just cause.

Section 2. (a) The Company may adopt rules or regulations and a procedure for discipline and discharge with respect thereto. . . .

Defendant's Exhibit No. 1.

3. The rules and regulations attached to the collective bargaining agreement provide in pertinent part:

Although the Company may impose a lesser penalty, the following shall be just cause for immediate discharge:

1. Neglect of duty.
2. Dishonesty, including falsifying of the Company's records, or making false statements when application for employment is being made.
14. Absence from work or lateness inconsistent with the policy of the Company.
17. Any unsafe act.

Defendant's Exhibit No. 1.

4. On November 11, 1992, Byron Tinsley, an employee of Defendant and one of Plaintiff's members, was discharged from employment on the basis that he had violated the above-cited rules and regulations.

5. In accordance with the collective bargaining agreement, a grievance was filed concerning Mr. Tinsley's discharge. The grievance was submitted to arbitration and on October 14, 1993, a hearing was held before the arbitrator, John C. Shearer.

6. On October 22, 1993, Arbitrator Shearer issued an Opinion and Award wherein he reduced Mr. Tinsley's discharge to disciplinary suspension of four weeks, and ordered that Mr. Tinsley be made whole for the period of his four week suspension. In reaching his decision, Arbitrator Shearer stated:

Grievant's acknowledgement of his violations, (in the face of having been caught "red-handed"), would constitute just cause for his discharge but for a very serious breach of due process by the Company. The evidence establishes that the Company had made its firm decision to discharge Grievant before it confronted him. The Company's "Rules and Regulations" specify that "the Company may impose a lesser penalty" than discharge. The evidence is convincing that Grievant was not afforded a meaningful opportunity to present his version in the hope of mitigation. . . .

Although Grievant's acknowledged violations

constituted just cause for severe discipline, the fact that prior to Management's final decision he was not afforded a meaningful opportunity to present his version, which might have persuaded the Company to mitigate, violated the just cause requirement for his discharge.

Defendant's Exhibit No. 2.

7. On November 8, 1993, Plaintiff filed another grievance claiming that Defendant had failed to bring Mr. Tinsley back to work.

8. Thereafter, on November 12, 1993, Plaintiff filed the instant action seeking to enforce Arbitrator Shearer's Opinion and Award.

9. On November 19, 1993, Defendant mailed a letter to Mr. Tinsley outlining his return to work.

10. On December 6, 1993, Defendant filed an answer and a counterclaim in the instant action.¹ In the counterclaim, Defendant requested the Court to declare that the arbitration award be set aside and that the arbitration award be of no legal effect.

11. On December 21, 1993, Mr. Tinsley returned to work as a 1st Class Laborer.

12. On February 4, 1994, Mr. Tinsley received the sum of \$10,512.57 for back pay, less appropriate offsets, from Defendant.

In its summary judgment motion, Defendant contends that

¹Plaintiff, in his brief, argues in a footnote that Defendant waived its right to pursue its counterclaim to vacate the arbitrator's award by not reserving its right in the letter sent to Plaintiff outlining his return to work. The Court, however, finds no evidence of waiver based upon the letter and therefore, finds Plaintiff's argument without merit.

Arbitrator Shearer's Opinion and Award should not be enforced as requested in Plaintiff's Complaint but should be modified so as to deny the grievance. According to Defendant, an arbitration award may only be enforced if it draws its essence from the collective bargaining agreement. Defendant argues that the arbitration award at issue does not draw its essence from the collective bargaining agreement because it does not follow the express provisions of Defendant's rules and regulations. Defendant argues that once the arbitrator found Mr. Tinsley committed four violations of Defendant's rules and regulations, he was bound under the collective bargaining agreement to uphold Defendant's decision to discharge. Defendant argues that the express language of the rules and regulations provides that Defendant may discharge for violation of one of the cited rules. Defendant argues that because it decided to discharge Grievant rather than to impose a lesser penalty, such decision had to be upheld by the arbitrator. By reducing the penalty from discharge to suspension, the arbitrator impermissibly substituted his judgment for the express language of Defendant's rules and regulations. Defendant further argues that the arbitration award does not draw its essence from the collective bargaining agreement as it imposed a "due process" obligation upon Defendant which was not provided in the agreement. Because the arbitrator impermissibly modified the collective bargaining agreement so as to impose such obligation, Defendant contends that the arbitration award is not enforceable. Finally, Defendant argues that even if the arbitration award is found to be

enforceable, it has complied in good faith with the award.

Plaintiff, in response, contends that the arbitration award should be enforced. Plaintiff contends that the rules and regulations promulgated by Defendant were not part of the collective bargaining agreement. According to Plaintiff, the arbitrator was within in his jurisdiction to interpret the "just cause" provision of the collective bargaining agreement to include procedural due process. Plaintiff contends that procedural due process is in fact a standard requirement in arbitration. Therefore, Plaintiff requests that the Court deny Defendants' summary judgment motion and grant summary judgment in its favor.

The review of an arbitration award is narrow in scope. Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692, 694 (10th Cir. 1977). Indeed, the Tenth Circuit in Mistletoe stated:

The courts may not review the merits of a grievance or an award. An arbitration award will be enforced if "it draws its essence from the collective bargaining agreement." In determining whether an award draws its essence from the Union contract, the courts have applied various tests. An arbitrator's award must be upheld unless it is contrary to the express language of the contract, or unless it is so "unfounded in reason and fact, so unconnected with the wording and purpose of the * * * agreement as to 'manifest an infidelity to the obligation of the arbitrator.'" The award does not draw its essence from the agreement if "viewed in the light of its language, its context, and any other indicia of the parties' intention," it is without rational support.

Id. at 694.

Having reviewed the arbitrator's Opinion and Award, the collective bargaining agreement and the rules and regulations adopted by Defendant, the Court finds that the Opinion and Award

does not draw its essence from the collective bargaining agreement. Article XXI of the collective bargaining agreement provides that no employee shall be disciplined or discharged without just cause. It also provides that Defendant may adopt rules or regulations concerning discipline and discharge. The rules and regulations promulgated by Defendant specifically set forth certain items which constitute "just cause for immediate discharge." The arbitrator found that Mr. Tinsley was guilty of four separate and distinct items listed in the rules and regulations which fell within the definition of "just cause for immediate discharge." However, the arbitrator failed to enforce the "immediate discharge" by concluding that Defendant had to first confront Mr. Tinsley before discharging him. In so doing, the Court finds that the arbitrator ignored the express language of the collective bargaining agreement and dispensed his own brand of industrial justice. The rules and regulations say that the acts, which the arbitrator found to be just cause for discipline, are just cause for immediate discharge. Therefore, the arbitrator could not rewrite the rules and regulations to impose procedural due process.

The Court notes that the arbitrator, in reaching his decision, relied upon Defendant's ability to "impose a lesser penalty" under the rules and regulations. The Tenth Circuit disposed of a similar argument by stating:

We find no ambiguity in the use of "may" rather than "will." The provision gives the employer the option to discharge or not. The employer exercised the option and discharged [the grievant].

Id. at 695.

The rules and regulations promulgated by Defendant under Article XXI provide Defendant with the option to discharge immediately or impose a lesser penalty. Because Defendant exercised its option to discharge immediately, the Court concludes that the arbitrator could not require Defendant to first investigate and allow Mr. Tinsley to tell his side of the story.

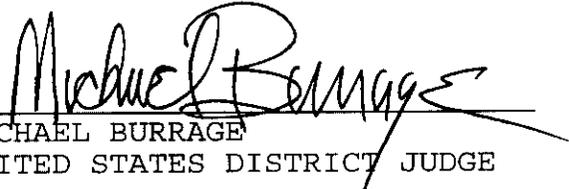
In its response, Plaintiff cites to Chauffeurs, Teamsters and Helpers, Local Union 878 v. Coca-Cola Bottling Company, 613 F.2d 716 (8th Cir. 1980), to support the arbitrator's decision to include the requirement of procedural due process. The Court finds that the case is distinguishable. In Chauffeurs, the arbitrator construed the term "just cause" to include procedural due process. In affirming that decision, the Eighth Circuit found that the contract at issue was silent on what procedural prerequisites attached to the requirement that a discharge be for just cause. The court found that the arbitrator was required to decide what "just cause" meant and his decision that "just cause" included procedural implications was not beyond the scope of his authority. However, unlike the agreement in Chauffeurs, the language of the rules and regulations adopted by Defendant are not silent as to procedural prerequisites. The rules and regulations specifically read "just cause for immediate dismissal." In other words, the enumerated causes for "immediate dismissal" are equated with "just cause" for dismissal. Therefore, it was not necessary for the arbitrator to define "just cause" and the arbitrator's decision to include a requirement of procedural due process before discharging

Mr. Tinsley for violation of the rules and regulations ignored the express language of the rules and regulations.

Because the arbitrator found that Grievant violated the four cited rules of Defendant, any of which violations subjected him to discharge, and the rules and regulations provide that any one such violation would be just cause for immediate discharge, the Court finds that the Opinion and Award should be modified to deny the grievance in its entirety.

Accordingly, Defendant Petrolite Corporation's Motion for Summary Judgment (Docket No. 5) is GRANTED. Judgment shall issue forthwith.

ENTERED this 7th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 7 - 1995

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

OIL, CHEMICAL AND ATOMIC)
WORKERS INTERNATIONAL UNION)
LOCAL 5-391,)
)
Plaintiff,)
)
vs.)
)
PETROLITE CORPORATION,)
)
Defendant.)

Case No. 93-C-1011-BU

ENTERED ON DOCKET

DATE APR 10 1995

JUDGMENT

This action came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Petrolite Corporation, and against Plaintiff, Oil, Chemical and Atomic Workers International Union Local 5-391, and that Defendant, Petrolite Corporation, recover of Plaintiff, Oil, Chemical and Atomic Workers International Union Local 5-391, its costs of action.

Dated at Tulsa, Oklahoma, this 7th day of April, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

F I L E D

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

APR 7 1995

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

DEWEY HORTON,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, SECRETARY OF HEALTH)
 AND HUMAN SERVICES,)
)
 Defendant.)

Case No. 93-C-846-E

ENTERED ON DOCKET
DATE APR 10 1995

O R D E R

Now before the Court is the appeal of the Plaintiff Dewey L. Horton (Horton) to the Secretary's denial of disability benefits.

Plaintiff, who claims that he is disabled due to the combination of his mental impairment with pain in his head, neck, back, left shoulder, left elbow, and left knee, applied for disability benefits on March 9, 1991, alleging he became disabled on August 9, 1989. He was denied benefits by the administrative law judge, but the case was remanded for further consideration of his mental impairment and his residual functional capacity, as well as to obtain evidence from a vocational expert. After a hearing on remand, where the ALJ considered the evaluation of both the psychologist and the vocational expert, Plaintiff's application for benefits was again denied. He exhausted his administrative remedies, and brings this appeal.

Plaintiff, who was 47 years old at the time of the last administrative hearing, completed the sixth grade and part of the seventh grade. His reading and writing are limited, and he has a low I.Q. and limited dexterity. He claims to be able to walk for one hour before resting, and lift about 20 pounds. He lies down to

control his pain. He has been employed as a janitor, a foundry worker, a garbage collector, and a material handler.

Plaintiff first injured his lower back in 1980, and had surgery. In 1984, he was hit on the head, injuring his neck and back. In 1989 he sustained a left shoulder injury, and had two surgeries. After the last surgery, Plaintiff's treating physician, Dr. Covington, released him back to work for full duty, and merely recommended a different type of employment (that did not require lifting of large barrels) when he continued to have pain. Dr. Farrar, who examined Plaintiff on behalf of his attorney, found Plaintiff to be 100% disabled. Dr. Reimer, who examined Plaintiff on behalf of the Social Security Administration, found that Plaintiff had some weakness and decrease in sensation on the left side, but found that he did respond to pinprick and vibratory sense, his straight-leg-raising were negative, and there was no increased heat or inflammatory response.

Plaintiff underwent a vocational evaluation ordered by his attorney wherein he was found to have an I.Q. score of 61 which falls within the mentally retarded range, and was found, based on vocational studies, not to be able to perform light or sedentary work. Dr. Minor Gordon, Ph.D., who examined Plaintiff, however, found that Plaintiff had an I.Q. of 76, and that he was "intellectually and psychologically capable of performing some type of routine repetitive tasks on a regular basis."

The ALJ found that evidence of borderline mental retardation exists, but that Plaintiff's severe pain was exaggerated and not

supported by medical conditions. He found, relying on the testimony of the vocational expert, that Plaintiff could perform some light work, such as a light laundry work, light food service, or light assembly, which precluded a finding of disability.

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 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 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.

This case was decided by the ALJ at the fifth sequential step, and thus the burden was on the Secretary to demonstrate that the Plaintiff was not disabled because he could perform other work in the national economy. Plaintiff argues, however, that this burden was not met, and that the ALJ erred in determining that Plaintiff had a Residual Functional Capacity to perform a full range of light work reduced by borderline mental retardation, in finding that the

Plaintiff had a limited education, and in failing to ask a proper question of the vocational expert. Defendant argues that the ALJ did not err in these respects.

Plaintiff argues that the ALJ should not have concluded that he could perform the full range of light work reduced by borderline mental retardation. Plaintiff relies on the definition of light work at 20 C.f.R. §1567(b):

Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, [he] must have the ability to do substantially all of these activities.

Plaintiff argues that he does not meet this definition because of his testimony that he could not stand on his feet for too long without hurting or having headaches. In essence, he claims that he has pain inducing impairments which preclude light work. However, the administrative law judge analyzed his complaints of pain under the criteria of Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) and 40 C.F.R. §404.1529 and found that his complaints of pain were not credible (were overstated), and that there was no objective medical basis for the severity of pain claimed by Plaintiff. The ALJ based his findings on the opinion of Dr. Covington that Plaintiff was doing fine and could go back to work. The Court finds that this conclusion is based on substantial evidence.

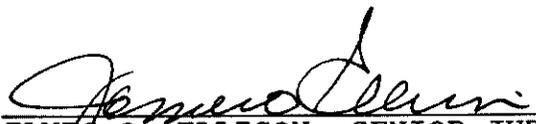
Plaintiff also argues that the ALJ erred in finding that he had a limited education, because this classification presumes that

he had at least a seventh grade level of education and was literate. Plaintiff claims that the evidence does not support this conclusion because he is able to read and write "only a little," and cannot read a newspaper. However, the question asked of the vocational expert did not reference a "limited education," but rather a sixth grade education, and thus was factually correct. Moreover, the ALJ based his decision on the testimony of the vocational expert and not on the grid rules.

Lastly, Plaintiff argues that the hypothetical question asked of the vocational expert was incorrect because it did not include the finding that Plaintiff was borderline mentally retarded. This argument, however, ignores the fact that the question asked of the expert included the facts that Plaintiff had a 6th grade education and a marginal I.Q. with a limited ability to read or write or use numbers. Additionally, when the question was altered to include the facts that Plaintiff had a reading level of 3rd grade and an arithmetic level of 5th grade, the expert did not change his opinion that there were jobs within the national economy that Plaintiff could perform.

The conclusion of the administrative law judge denying benefits to Plaintiff is affirmed.

IT IS SO ORDERED THIS 4TH DAY OF ^{April}~~MARCH~~, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

DOROTHY MOUNCE, individually)
 and as Personal Representa-)
 tive of the ESTATE OF)
 TIMOTHY MOUNCE, DECEASED,)
)
 Plaintiff,)
)
 v.)
)
 THE PRUDENTIAL INSURANCE)
 COMPANY OF AMERICA and)
 PEGGY MOUNCE,)
)
 Defendants.)

FILED
IN OPEN COURT

APR 7 1995 *RL*

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

Case No. 94-cv-747-H ✓

ENTERED ON DOCKET

DATE APR 10 1995

FINAL JUDGMENT FOR DEFENDANT,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Defendant, The Prudential Insurance Company of America ("Prudential"), filed a counterclaim for interpleader, tendered the disputed funds into the registry of this Court, and disclaimed any interest therein. Prudential has now filed a Motion for Final Judgment, Permanent Injunction, and Attorney's Fees pursuant to 29 U.S.C. §§ 1132(a)(3), Fed. R. Civ. P. 22, 54(b), 56, 65, and N.D.L.R. 54.1, 54.2, and 67.1. The Court hereby finds that there is no just reason for delay, and therefore directs the entry of final judgment as to Prudential pursuant to Fed. R. Civ. P. 54(b). Specifically, Prudential is discharged as a stakeholder and dismissed as a party from this action; Prudential is awarded final judgment on plaintiff's claims against it; Prudential is awarded final judgment against the other parties on its interpleader claim; Prudential is awarded final judgment declaring that it has no liability to any of the other parties in connection with the subject matter of this interpleader action; and Prudential is awarded final judgment permanently enjoining the other parties from instituting or prosecuting any proceeding (other than this action) affecting the property at issue; and Prudential shall receive final judgment and an order in compliance with N.D.L.R. 67.1 immediately awarding fees and costs to Prudential.

[Signature]
 UNITED STATES DISTRICT JUDGE

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

FILED

APR - 6 1995

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

ROBERT H. COLLIER,

Plaintiff,

vs.

Case No. 94-C-352-B

BURLINGTON NORTHERN RAILROAD
COMPANY,

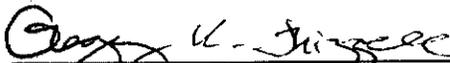
Defendant.

ENTERED IN CLERK'S OFFICE
DATE APR 07 1995

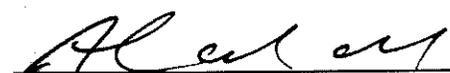
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff and Defendant herein, and, pursuant to Rule 41(a)(1), Fed.R.Civ.P., file this stipulation of dismissal with prejudice signed by the parties who have appeared in the action.

Respectfully submitted,



Gregory K. Frizzell, OBA #11089
4755 CityPlex Tower
2448 E. 81st Street
Tulsa, Oklahoma 74137
(918) 492-7995
LOCAL COUNSEL FOR PLAINTIFF



A. Camp Bonds, Jr.
Bonds, Matthews, Bonds & Hayes
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Muskogee, Oklahoma 74402-1906
(918) 683-2911
COUNSEL FOR DEFENDANT

7

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

F I L E D

APR - 6 1995

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

CASTOR CLYDE BUCK JR. CORPORATION,)
GREG HUTCHESON, President, and)
GREG HUTCHESON, Stockholder,)

Plaintiffs,)

v.)

TAMMY ANN BUCK, Stockholder;)
CASTOR CLYDE BUCK JR., former)
Stockholder; TAMMY ANN BUCK,)
individually, and CASTOR CLYDE)
BUCK, individually,)

Defendants.)

Case No. 95-C-257-B

ENTERED
DATE APR 07 1995

ORDER

Before the Court are Plaintiffs' motion to seal affidavits (Dockets #8-11), and a Motion to Dismiss and request for the return of the affidavits and a disputed stock certificate filed in this case (Docket #14). Because Defendants have not filed an answer in this case, Plaintiffs do not need a court order to dismiss. See Fed.R.Civ.P. 41(a)(1). However, the Motion is granted.

Plaintiffs have requested that the affidavits be kept under seal because the affiants fear for their jobs should the information contained in the affidavits be made public. The Court, therefore, will grant Plaintiffs' Motion to seal the affidavits. However, the motion for return of the affidavits is denied.

The Court hereby orders the Court Clerk to return to Plaintiffs the disputed stock certificate.

IT IS SO ORDERED this 6th day of April, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DILED

FILED
APR 07 1995
Clerk

TONY MAKRES,

Plaintiff,

v.

AMKO SALVAGE CO., d/b/a
AMKO SALES CO., INC., an
Oklahoma corporation, and
VICTOR CARY, an individual,
and DAN CLINGENPEEL, an
individual, and the Unnamed
Representative of the Estate
of Ron Self, Deceased, and
ALICE CARY,

Defendants.

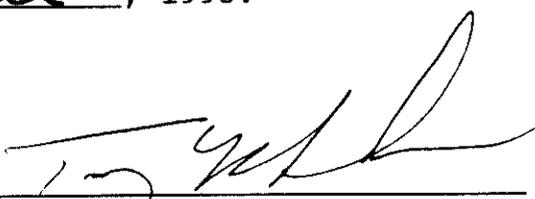
Case No. 94-C-778-B

FILED
APR 07 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiff's causes of action in this case against Defendants, AMKO Salvage Co., d/b/a AMKO Sales Company, Inc., Victor Cary, Dan Clingenpeel the Unnamed Representative of the Estate of Ron Self, Deceased, and Alice Cary.

DATED this 5th day of April, 1995.



Tony Makres
Plaintiff

BUFOGLE & ASSOCIATES

BY: *R H Reno*
Richard H. Reno
Bufogle & Associates
3105 East Skelly Drive
Suite 600
Tulsa, OK 74105
(918) 743-8598

DOENER, SAUNDERS, DANIEL
& ANDERSON

By: *Kathy R Neal*
Kathy R. Neal
320 South Boston Ave. Suite 500
Tulsa, OK 74103
(918) 582-1211

Attorneys for Defendants

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

FILED

APR - 6 1995

TONY MAKRES,
Plaintiff,

v.

AMKO SALVAGE CO., d/b/a
AMKO SALES CO., INC., an
Oklahoma corporation, and
VICTOR CARY, an individual,
and DAN CLINGENPEEL, an
individual, and the Unnamed
Representative of the Estate
of Ron Self, Deceased, and
ALICE CARY,

Defendants.

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

Case No. 94-C-778-B

ENTERED ON DOCKET
APR 06 1995

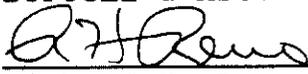
STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of the causes of action in this case of Defendant, AMKO Salvage Co., d/b/a AMKO Sales Company, Inc., asserted by way of counterclaims against Plaintiff, Tony Makres.

DATED this 5th day of April, 1995.



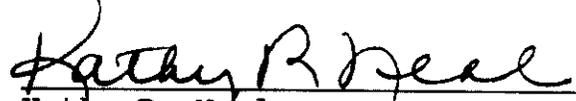
Tony Makres
Plaintiff

By: 

Richard H. Reno
Bufogle & Associates
3105 East Skelly Drive
Suite 600
Tulsa, OK 74105
(918) 743-8598
Attorneys for Plaintiff

DOENER, SAUNDERS, DANIEL
& ANDERSON

By:



Kathy R. Neal
320 South Boston Ave. Suite 500
Tulsa, OK 74103
(918) 582-1211

Attorneys for Defendants

FILED

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

APR - 6 1995

Richard L. Layton, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SAM RAMSEY and JERRY RAMSEY,)
)
 Plaintiffs,)
)
 vs.)
)
 GUARDSMARK, INC.,)
)
 Defendant.)

Case No. 92-C-055B
85

ON DOCKET

APR 07 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiffs' causes of action in this case against Defendant, Guardsmark, Inc.

DATED this 6th day of April, 1995.

Lester D. Henderson

Lester D. Henderson
16 North Park
P.O. Box 205
Sapulpa, OK 74067-0205
(918) 227-2733

and

D. Gregory Bledsoe

D. Gregory Bledsoe
1717 South Cheyenne Ave.
Tulsa, OK 74119-4664
(918) 599-8123
Attorneys for Plaintiff

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By:



Kathy R. Neal
320 South Boston Ave., Suite 500
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(918) 582-1211
Attorneys for Defendant
Guardsmark, Inc.

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

FILED
APR 06 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DANIEL E. DELO,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-0762-K

O R D E R

Under authority of 42 U.S.C. §405(g), Plaintiff, Daniel E. Delo ("Delo"), seeks reversal of the Secretary's denial of disability benefits. Plaintiff contends the Secretary erred (1) by improperly concluding that his seizure disorder was not equivalent to the epileptic disorder described in the regulations, (2) by failing to consider the limiting effects of the prescribed medication in combination with the effects of the seizure disorder, and (3) by improperly rejecting the medical opinion that he was an alcoholic.

I. Background

On April 15, 1991, Plaintiff simultaneously filed applications for supplemental security income benefits under Title XVI and disability income benefits under Title II of the Social Security Act. These application were denied through the Administrative Hearing level. When the Appeals Council denied review on June 21,

1993, the decision of the Administrative Law Judge (ALJ), issued on December 17, 1992, became the final decision of the Secretary. Delo now appeals the disallowance of disability benefits under the Social Security Act.

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, the ALJ concluded the sequential process at Step 4, determining that Delo's impairments did not prevent him from performing his past relevant work. The ALJ found that Mr. Delo met the disability insured status requirements on June 15, 1987, the date he became unable to work and continued to meet them through March 31, 1990. The ALJ concluded that Mr. Delo has a severe seizure disorder, peptic ulcer disease, and chest pain syndrome, but not an impairment, or combination of impairments, listed in or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4. The ALJ said Delo's allegations of inability to work due to pain, loss of consciousness, nausea, and low energy are not credible or supported by the medical documents in evidence. Delo was found to have the residual functional capacity to perform work-related activities with exceptions for lifting more than 20 pounds at a time, lifting or carrying over 10 pounds frequently, standing or walking more than 6 hours in an 8-hour day, driving or operating dangerous machinery, and exposure to unprotected heights. In light of those conclusions, the ALJ determined that Delo could perform his past relevant work as a retail store manager as that work is performed within the national economy and was therefore not under a disability at any time through December 17, 1992, the date of the decision. (Tr. 35-36).

II. Discussion

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 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.

A. Seizure Disorder

Delo argues that his seizure disorder meets or equals Listing § 11.03 for epilepsy, and that he therefore is disabled. The ALJ concluded that Delo's seizure disorder did not meet the severity criteria, and thus did not meet or equal an impairment, or combination of impairments, listed in the regulations. Section 11.03 of the Listings provides:

11.03 Epilepsy -- minor motor seizures (petit mal, psychomotor, or focal), documented by EEG and by detailed description of a typical seizure pattern, including all associated phenomena; occurring more

frequently than once weekly in spite of at least 3 months of prescribed treatment. With alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day.

20 C.F.R. Pt. 404, Subpt. P, App. 1. The contested issues in this action with regard to Section 11.03 involve EEG documentation, frequency of seizures, and Delo's commitment to treatment.

1. EEG Documentation

Delo concedes that his seizure disorder does not equal the Listing in the strictest sense, since the disorder is not documented by an EEG. (Tr. 27, 267). However, a claimant can be disabled by either meeting the standard or by proving a disability which is equivalent to the one described in the standard. 20 C.F.R. § 404.1578. While EEG documentation is an important means of demonstrating that the seizures are caused by an identifiable abnormality in the brain, it is not the only means. In Bradley v. Bowen, 660 F.Supp. 276 (W.D.Ark. 1987), a district court overlooked an absence of EEG evidence and relied on diagnoses by physicians as well as CAT scans to link calcification of the brain to the plaintiff's seizure problems. Similarly, the Eighth Circuit has emphasized that the value of using an EEG for determining the severity of seizures should not be overrated. Braswell v. Heckler, 733 F.2d 531, 533 (8th Cir. 1984).

Courts have minimized the EEG requirement because the questions addressed by the EEG may be answered by other clinical data. Medical research shows that patients with definite epilepsy

have been known to have perfectly normal EEG records. Id. Here, even though the abnormal EEG traces have not been obtained, the function of such EEG examinations has been served by other means. Delo's examining physician, Dr. Varsha Sikka, noted a normal EEG but indicated that the CT scan showed "atrophy due to chronic seizures and alcoholism." (Tr. 161, 164). Moreover, Delo's seizures have been documented by medical reports since 1988 when Delo suffered a seizure that brought him to the St. John Medical Center in Tulsa, Oklahoma. To treat this problem, Claimant has been prescribed anti-convulsant medications such as Dilantin and Tegretol. Therefore, the absence of an EEG confirmation is not fatal to Delo's claim.

2. Frequency

There is also a frequency component to the Listing, requiring seizures to take place more than once weekly. Delo maintained a seizure diary from February 1991 to May 1992 in which he documents that he suffered up to six seizures a month. On average, he suffered, according to his own estimates, 3.5 seizures a month. Again, this number is not identical to the once weekly requirement in the Listing. But it would be stretching the requirement of §11.03 to require more than one blackout each and every week to meet the definition. Brasswell, 733 F.2d 531, 533. It is clear that in some periods, Delo suffered the requisite number of seizures. For instance, at the end of 1991, he noted seizures on November 3, November 4, November 10, November 16, November 21,

December 3, December 5, December 20, and December 24. Similarly, he experienced seizures on five different days in April of 1992. In short, Delo frequently suffered from more than one seizure per week. Also, the severity of the seizures, allegedly rendering Delo functionally incapacitated for as long as 24 hours at a time, must be factored into this analysis.

3. Compliance with and Effectiveness of Treatment

Within the regulatory definition of epilepsy, the Court must consider whether the seizures continued in spite of prescribed medical treatment. With regard to this component, it is important to consider Delo's continual consumption of alcohol during the relevant period despite contrary medical advice. It is also necessary to consider whether the results of blood testing reflected that Delo was not taking his anti-seizure medication.

The evidence is clear that Delo abused alcohol. Dr. Sikka noted that Delo's brain showed brain atrophy due to chronic seizures or alcoholism. (Tr. 161). Dr. Evans continually reported Delo's drinking levels and diagnosed Delo as a binge drinker who experienced alcoholism. (Tr. 169). Furthermore, Dr. Robert Smith wrote succinctly that "this man is an alcoholic." (Tr. 273). The notes of treating physician, Dr. Evans, clearly suggest that Delo was told on various occasions that continued use of alcohol would have a negative impact on his seizure disorder. His notes are replete with references to questions asked and answers given concerning recent alcohol use. According to the consultative

physician, Dr. Michael Karathanos, Delo's seizures were clearly a product of alcohol abuse or alcohol withdrawal. (Tr. 267). Delo has been described as a persistent user of alcohol who drinks about one fifth of whiskey per week and is either a binge drinker or a drinker of moderate amounts consistently. (Tr. 27). Delo was counselled to restrict his drinking in order to alleviate the seizures. No evidence has been presented to show that Delo adhered to this advice for any significant length of time.

An individual with a disabling impairment that is amenable to treatment capable of restoring the ability to work must follow the prescribed treatment. Titles II and XVI: Failure to Follow Prescribed Treatment, SSR 82-59, 1982 WL 31384 (S.S.A. 1982). If treatment is not followed, that individual may not be found under a disability, unless justifiable cause exists for the failure to follow such treatment. Justifiable cause would exist if the individual was physically unable to undergo the treatment. Id. In a case dealing with treatment of an alcoholic, the Fourth Circuit has held, "Disability benefits cannot be denied because of a claimant's continued alcohol abuse if the claimant is unable to stop drinking." Gordon v. Schweiker, 725 F.2d 231, 236 (4th Cir. 1984) Assuming Delo is an alcoholic, it makes no sense to deny him assistance solely on the basis that he did not stop drinking as part of the prescribed treatment.

Therefore, it becomes necessary to consider the ALJ's evaluation of Delo's alcohol problem and whether or not Delo had lost the ability to control his drinking. Id; See also Hayner v.

Shalala, 1984 WL 608610, No. 93-4079-RDR, (D. Kan. 1994). Despite the above-referenced evidence of alcohol abuse, the ALJ determined that any alcohol problem was a non-severe mental or emotional impairment. In making this decision, the ALJ cited Delo's statement that he does not have a drinking problem. (Tr. 31). In the hearing before the ALJ, Delo flatly denied any drinking problem and said he was never told that alcohol worsened his seizure disorder. (Tr. 71).

Q. Okay, have you ever had a drinking problem?

A. No, sir.

Q. Never?

A. No, sir.

Q. In your records there was an indication that your doctor had told you that drinking could be a problem with the seizures. Doctor ever told you that?

A. No, Sir.

Given the numerous annotations made by physicians regarding Delo's drinking patterns, Delo's statements should have been met with deep skepticism. (Tr. 167, 168, 169, 171, 204, 242). The ALJ should have pursued this matter by asking Delo about his drinking habits. The ALJ failed even to ask whether or not Delo was an occasional drinker, a determination that is highly relevant to whether or not Delo adhered to medical advice. Admittedly, Delo's flat denials to the ALJ's questions did not help matters. However, in light of the documented tendency of those who abuse substances to deny dependency or a "drinking problem," the ALJ should have given the issue closer attention. Questions concerning "drinking habits" as

distinct from a "drinking problem" may well have elicited extraordinarily relevant information.

Along with the colloquy with Delo at the hearing, the ALJ further commented, with regard to potential alcoholism, there were no deficiencies in concentration, persistence, or pace that would require Delo to withdraw from work situations. However, in light of the medical documentation of alcohol abuse, this observation seems insufficiently supported to disregard the relevant medical evidence. Also, it should be noted that Dr. Evans recorded during one 2-week period Delo went without alcohol and his seizure disorder improved during that time period (Tr. 167, 242). While this medical notation may indicate that Delo has the ability to stop drinking for certain limited periods of time, it also underlines that the ALJ should have inquired further into this area. Instead, the ALJ gave short shrift to evidence about Delo's alcohol troubles.

The ALJ further held that Delo had not complied with prescribed treatment pursuant to evaluation of Delo's blood serum levels, concluding that "most probably the patient was delinquent in taking his medication." (Tr. 34). Delo, on the other hand, indicated that he had been taking the medications as prescribed. (Tr. 68). Moreover, when Dr. Evans was contacted, he reported that Delo was attempting to comply with prescribed medication. (Tr. 173). Although the record contains several notations concerning Delo's reduced blood serum levels, it contains no objective findings regarding his absorption and metabolism of the drugs.

Neither Delo's treating physicians nor the consulting medical expert resolved why his blood levels were essentially sub-therapeutic. (Tr. 33, 267).

Section 11.00 of the Listing of Impairments concerns evaluation of blood level evidence when the evidence suggests that a patient is failing to take prescribed medication. The provision states:

Determination of blood levels of phenytoin sodium or other anticonvulsive drugs may serve to indicate whether the prescribed medication is being taken. . . . *Should serum drug levels appear therapeutically inadequate, consideration should be given as to whether this is caused by individual idiosyncrasy in absorption [or] metabolism of the drug.* When the reported drug levels are low, therefore, the information obtained from the treating source should include the physician's statement as to why the levels are low and the results of any relevant diagnostic studies concerning the blood levels.

20 C.F.R. Part 404, Subpart P, App. 1, Sec. 11.00 (1989) (emphasis added); see also Lucas v. Sullivan, 918 F.2d 1567, 1573 (11th Cir. 1990). The ALJ never considered issues of individual idiosyncrasy in metabolism or absorption nor did any physician report such information. The ALJ has an obligation to develop the Record in all relevant areas, an obligation not fully adhered to in this regard. Musgrave v. Sullivan, 966 F.2d 1371, 1374-75 (10th Cir. 1992). If the seizures continued despite full compliance with treatment then Delo has a stronger case for disability benefits.

B. Side-Effects of Medication

Delo argues that the ALJ failed to properly consider the side-

effects of prescribed medication on his ability to work. In light of the uncertainty still existing in the Record concerning whether or not Delo even took prescribed medications, it would be premature to resolve whether or not Plaintiff suffered excessive side-effects. Once the ALJ has fully considered evidence concerning Delo's blood serum levels and Delo's compliance with the treatment plan, it can better evaluate the effects of the prescribed amount of medication on Delo's ability to work.

C. Alcoholism as Impairment

This Court has evaluated the issue of Delo's alcohol consumption habits under the rubric of the definition of epilepsy under §11.03 in the Listings. Evidence of alcoholism is relevant to Delo's capacity to follow medical advice that he avoid alcohol in order to prevent seizures. Clearly, the same concerns held by the Court with regard to alcoholism as it relates to failure to follow treatment apply to Delo's second basis for appeal--an argument that the ALJ failed to consider the medical diagnosis that he suffered from alcoholism. Just as Delo's alcohol problems must be fully explored to assess capacity to comply with medical advice, they must be explored to determine Delo's ability to work at all. If alcoholism affects ability to work, it must be considered by the ALJ even though alcoholism, by itself, is not a listed impairment. O'Connor v. Sullivan, 938 F.2d 70, 74 (7th Cir. 1991).

I. Conclusion

Because the ALJ failed to adequately develop the record and apply the correct legal standards, this Court must REVERSE and REMAND for further evaluation by the ALJ. Upon remand, the ALJ should explore Delo's drinking habits during the appropriate time period to determine the extent, if any, of his alcohol problem; determine whether or not Delo's alleged alcoholism precludes him from complying with medical advice or from working altogether; evaluate and procure medical evidence to assess idiosyncracies or irregularities in metabolism that could explain Delo's blood serum levels; and evaluate evidence concerning whether Delo's seizures would be controlled even if he followed a treatment plan.

SO ORDERED THIS 6 DAY OF APRIL, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE APR 07 1995

FREEDOM RANCH, INC., d/b/a
FREEDOM HOUSE, an Oklahoma
non-profit corporation,

Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA,
an Oklahoma municipal
corporation,

Defendant.

FILED

APR 06 1995

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

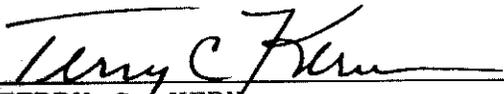
No. 94-C-223-K

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 6 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE APR 07 1995

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

F I L E D

APR 07 1995

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

FREEDOM RANCH, INC., d/b/a)
FREEDOM HOUSE, an Oklahoma)
non-profit corporation,)

Plaintiff,)

vs.)

THE CITY OF TULSA, OKLAHOMA,)
an Oklahoma municipal)
corporation,)

Defendant.)

No. 94-C-223-K

O R D E R

Before the Court is the motion of the defendant to dismiss or in the alternative for summary judgment. Plaintiff challenges the constitutionality and validity of defendant's zoning scheme and its application to plaintiff's property.

The same issue has been addressed twice. In Application of Freedom Ranch, Inc., 878 P.2d 380 (Okla. Ct. App.), cert. denied, 115 S.Ct. 636 (1994), the Oklahoma Court of Appeals denied plaintiff's challenge. This Court's Order of September 29, 1994 in Freedom Ranch, Inc. v. City of Tulsa, et al., 93-C-96-K, approved the analysis of the Oklahoma Court of Appeals and found the doctrines of issue and claim preclusion applicable to defeat plaintiff's claim. The fact that the present litigation involves a different piece of property does not alter the legal principles which have already been established. Defendant's motion is well taken.

It is the Order of the Court that the motion of the defendant

18

to dismiss or in the alternative for summary judgment is hereby
GRANTED.

ORDERED this 6 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

WEEDEN GROUP, INC.,
an Oklahoma corporation,

Plaintiff,

v.

NATIONAL EDUCATION CENTERS,
INC., d/b/a SPARTAN SCHOOL
OF AERONAUTICS CAMPUS, a
California corporation,

Defendant.

FILED

APR 06 1995

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

ENTERED ON DOCKET

APR 07 1995

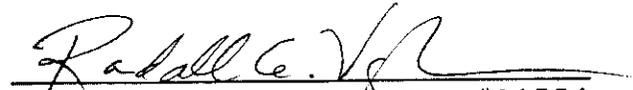
No. 94 C-819-H DATE

DISMISSAL WITH PREJUDICE

Plaintiff, Weeden Group, Inc. and Defendant, National Education Centers, Inc., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, all issues therein presented having now been compromised and released between the parties. The parties agree that the Court shall retain jurisdiction to resolve any future disputes which may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees.


Thomas M. Bingham, OBA #796
Richard A. Pizzo, OBA #11964
1611 South Denver
Tulsa, OK 74119

Attorneys for Plaintiff


Randall G. Vaughan, OBA #11554
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONEOK Plaza
Tulsa, OK 74103

Attorneys for Defendant

ENTERED ON DOCKET
DATE APR 07 1995

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

APR 1995

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

JOE MCMURRY, JR. AND MICHAEL W.)
GIBSON, d/b/a SPRING RIVER RANCH,)
)
Plaintiff,)
)
vs.)
)
DAVID STARKEY, d/b/a GREEN ACRES)
EXOTICS)
Defendant)

No. 94-C-806-K

ADMINISTRATIVE CLOSING ORDER

The Defendant, David Starkey, having filed a petition in bankruptcy and these proceedings being stayed thereby, it is hereby 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 or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 31 day of March, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

APR - 6 1995

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

WILMA I. MCGUIRK,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 94-C-1002-B

ENTERED IN DOCKET

APR 03 1995

ORDER

Before the Court is Defendant's Motion to Remand (Docket #4) for further administrative action. Defendant's unopposed motion is hereby granted.

IT IS SO ORDERED THIS 6th DAY OF APRIL, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

APR 06 1995
DATE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ONE PARCEL OF REAL PROPERTY)
LOCATED AT ROUTE 1, BOX 166,)
CLEVELAND, PAWNEE COUNTY,)
OKLAHOMA, CONTAINING 1.60)
ACRES, MORE OR LESS, AND ALL)
BUILDINGS, APPURTENANCES,)
IMPROVEMENTS, AND CERTAIN)
CONTENTS THEREON,)
)
and)
)
SIX VEHICLES,)
)
and)
)
SIX BANK ACCOUNTS AND)
ONE CERTIFICATE OF DEPOSIT,)
)
Defendants.)

CIVIL ACTION NO. 95-C-224-B

FILED
APR - 5 1995
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

STIPULATION FOR FORFEITURE

It is hereby stipulated by and between Jimmy Walton Downey, Jr., and Cathy Marie Downey, husband and wife, on the one hand, and the United States of America, on the other, as follows:

1. That Jimmy Walton Downey, Jr., and Cathy Marie Downey do hereby consent to the forfeiture of the following-described real property, the buildings, appurtenances, improvements, and certain contents thereon, hereafter referred to as the defendant real property, and the following-described personal property, to the United States of America, for disposition according to law.

In furtherance of the terms of this Stipulation for Forfeiture Jimmy Walton Downey, Jr., and Cathy Marie Downey agree to execute Quit-Claim Deeds covering all right, title, and interest they have in and to the following-described real property:

REAL PROPERTY:

ONE PARCEL OF REAL PROPERTY LOCATED AT ROUTE 1, BOX 166, CLEVELAND, PAWNEE COUNTY, OKLAHOMA, CONTAINING 1.60 ACRES, MORE OR LESS, AND ALL BUILDINGS, APPURTENANCES, IMPROVEMENTS, AND CONTENTS THEREON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

The South 337 feet of the North 575 feet of the West 207 feet of the NE/4 of Section 7, Township 20 North, Range 8 East, Pawnee County, Oklahoma, containing 1.60 acres, more or less, and all buildings, appurtenances, improvements, and contents thereof.

CONTENTS

Including, but not limited to the above-ground swimming pool.

VEHICLES:

1. ONE 1987 CHEVROLET ASTRO VAN
VIN 1GNDM15Z6HB116233,
2. ONE 1991 PONTIAC SLE,
VIN 1G2JB14K1M7555248,
3. ONE 1992 PONTIAC BONNEVILLE,
VIN 1G2HX53L5N1280554,

4. ONE 1992 CHEVROLET PICKUP,
VIN 2GCEC19K4N1139311,
5. ONE 1990 FORD MUSTANG,
VIN 1FACP42E2LF223110,
6. ONE 1983 BAYLINER CAPRI BOAT,
VIN BL1B41CSO3833AQ12,

**BANK ACCOUNTS AND
CERTIFICATE OF DEPOSIT:**

1. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

The entire proceeds, including accrued interest, of Joint Checking Account No. 0-644-945, in the name of Jimmy and Cathy Downey.
2. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

The entire proceeds, including accrued interest, of Super NOW account in the name of Jimmy and Cathy Downey.
3. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

Certificate of Deposit in the name of Jimmy and Cathy Downey, with a principal amount of \$10,000.00, plus any accrued interest.
4. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

The entire proceeds, including accrued interest, of Rainmaker Game Farms Account of Jimmy Downey, Account No. 0-874-174.

5. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

The entire proceeds, including accrued interest, of Accounts No. 0-644-923 and 1-144-499 in the name of Richelle Downey.

6. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

Entire proceeds, including accrued interest, on the account in the name of Jimmy Downey, Jr.

7. **FIRST BANK OF CLEVELAND,
CLEVELAND, OKLAHOMA**

Entire proceeds, including accrued interest, on the account in the name of Charles Downey.

2. That Claimants Jimmy Walton Downey, Jr., and Cathy Marie Downey stipulate and agree that the defendant real property, buildings, appurtenances, improvements, and certain contents, vehicles, bank accounts, and certificate of deposit are subject to forfeiture pursuant to 18 U.S.C. § 981 and 19 U.S.C. § 1613, for the reasons alleged in the Complaint for Forfeiture In Rem.

3. That plaintiff, United States of America, and Claimants, Jimmy Walton Downey, Jr., and Cathy Marie Downey agree to the forfeiture of all right, title, and interest of Jimmy Walton Downey, Jr., and Cathy Marie Downey in and to the defendant real and personal properties upon the following terms:

4. That Claimants Jimmy Walton Downey, Jr., and Cathy Marie Downey agree to release and forever discharge any and all claims and demands which they may have against the United States of America, including, but not limited to, the United States Department of Justice and its agencies, including, but not limited to, the Federal Bureau of Investigation, its agents and employees, and the United States Department of the Treasury/Internal Revenue Service, and its agents and employees; on account of the arrest, seizure, and forfeiture of the defendant real and personal properties, and further agree to abandonment of any claims they may have to the defendant real and personal properties, with prejudice and without costs, upon compliance with the agreements, terms, and conditions set forth herein.

5. That Claimants Jimmy Walton Downey, Jr., and Cathy Marie Downey execute this Stipulation for Forfeiture for the disposition of any and all right, title, and interest they may have in and to the defendant real and personal properties.

6. That this Stipulation for Forfeiture shall forever and completely bar any action or claim in any tribunal, in any matter whatsoever, whether state, federal, or otherwise, by Jimmy Walton Downey, Jr., and Cathy Marie Downey relating to the forfeiture of the defendant real and personal properties.

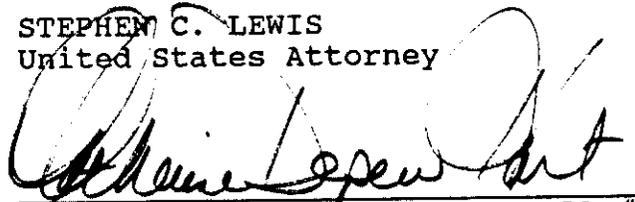
7. That the intent and purpose of this Stipulation for Forfeiture is to forfeit the defendant real and personal

properties to the United States of America, and to simultaneously protect the United States of America, the United States Department of Justice, including, but not limited to, the Federal Bureau of Investigation, the United States Department of the Treasury, including, but not limited to the Internal Revenue Service, and their present and former employees, from any claims or suits related to the forfeiture action in which the defendant real and personal properties are named as defendants.

WE SO AGREE.

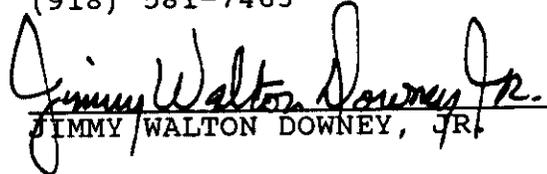
Executed this 7th
day of Dec. 1993.

STEPHEN C. LEWIS
United States Attorney



CATHERINE DEPEW HART, OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

Executed this 7th
day of Dec. 1994.



JIMMY WALTON DOWNEY, JR.

Executed this 7th
day of Dec. 1994.



CATHY MARIE DOWNEY

N:\UDD\CHOOK\FC\DOWNEY1\04254

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

ENTERED ON DOCKET
APR 06 1995
DATE
FILED

ROBERT HICKS,)
)
Plaintiff,)
)
vs.)
)
BOARD OF COUNTY COMMISSIONERS)
OF CREEK COUNTY, OKLAHOMA,)
DOUG NICHOLS, CREEK COUNTY)
SHERIFF, DEPUTY SHERIFF)
GEORGE ELLIOTT, DEPUTY SHERIFF)
RON POWERS, and OTHER UNKNOWN)
DEPUTIES OF THE CREEK COUNTY)
SHERIFF'S OFFICE,)
)
Defendant.)

No. 93-C-549-K

APR - 5 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court are various post-trial motions of the parties, which shall be addressed seriatim. This action pursuant to 42 U.S.C. §1983 for alleged violation of civil rights was tried to a jury. On January 19, 1995, the jury returned a verdict in favor of the remaining defendant, Sheriff Doug Nichols, and against the plaintiff. On February 13, 1995, this Court entered Judgment upon the verdict.

On February 6, 1995, plaintiff's then-counsel filed a motion to withdraw. Defendant responded, stating it had no objection to the motion once the cost hearing before the Court Clerk had been held. The Court complied with this request, and did not grant the motion to withdraw until March 3, 1995. However, on February 22, 1995, defendant filed a motion to strike plaintiff's pro se pleadings, arguing he was still represented by attorney of record. The Court rejects this transparent attempt to lead plaintiff into

a procedural trap. Plaintiff no longer wishes to retain the services of counsel, but he is entitled to make post-trial motions and protect his appellate rights as well. Counsel was not permitted earlier withdrawal because defendant requested he not be. Defendant's motion (#88) is denied.

Plaintiff's motion (#84) to strike defendant's bill of costs is also denied. The stated basis is the bill of costs was filed before Judgment on the verdict was entered. While the filing may have been premature, the bill of costs remains valid upon subsequent entry of Judgment. In any event, defendant resubmitted his bill of costs within the 14-day limit of Local Rule 54.1A.

Plaintiff has also filed a motion (#90) to review awarding of costs. He contends the award of \$1938.18 approved by the Court Clerk will cause plaintiff financial hardship. Rule 54(d) F.R.Cv.P. creates a presumption that the prevailing party shall recover costs. Klein v. Grynberg, 44 F.3d 1497, 1506 (10th Cir.1995). Plaintiff has attached to his motion an affidavit stating his average yearly income from 1989 to 1993 was \$8,961.80, which derives from a union pension and Social Security payments, and that he has no job or hope of obtaining one. The Court does not doubt that payment of costs will be a financial hardship upon plaintiff, but he has not demonstrated inability to pay them. Costs may even be taxed against a party who is permitted to proceed in forma pauperis. 28 U.S.C. §1915(e); Washington v. Patlis, 916 F.2d 1036, 1039 (5th Cir.1990). The Court concludes plaintiff has not overcome the presumption of Rule 54(d). Further, the Court has

reviewed the costs awarded by the Court Clerk and finds them reasonable. The motion is denied.

Finally, plaintiff has filed a motion (#85) for post-judgment relief, which contains both a request for judgment as a matter of law and a request for new trial. A Rule 50 motion for judgment as a matter of law invokes the standard previously applied to a motion for directed verdict or for judgment notwithstanding the verdict. See F.R.Cv.P. 50 advisory committee's note (1991 amendment). Such a motion is properly granted "only if, viewing the evidence in the light most favorable to the nonmoving party, all the evidence and the inferences to be drawn from it are so clear that reasonable persons could not differ in their conclusions." Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir.1991). In the case at bar, the evidence was conflicting, and a reasonable inference was possible that excessive force was or was not used. Judgment as a matter of law will not be granted in plaintiff's favor. A motion for new trial will be granted only if the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence. Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir.1984). Again, the evidence presented to the jury was sufficiently conflicting that this standard is not met. The Court will not overturn the verdict.

It is the Order of the Court that the motion of the defendant to strike plaintiff's pro se pleadings is DENIED; plaintiff's motion to strike defendant's bill of costs is DENIED; plaintiff's motion and amended motion to review awarding of costs are DENIED;

plaintiff's motion for post-judgment relief is DENIED.

ORDERED this 4 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

RUSSELL McINTOSH,
Plaintiff,
vs.
BANCOKLAHOMA MORTGAGE CO.,
et al.,
Defendants.

No. 94-C-929-B

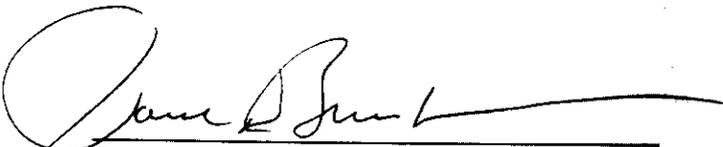
FILED

APR -4 1995

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

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO FIRST MORTGAGE COMPANY**

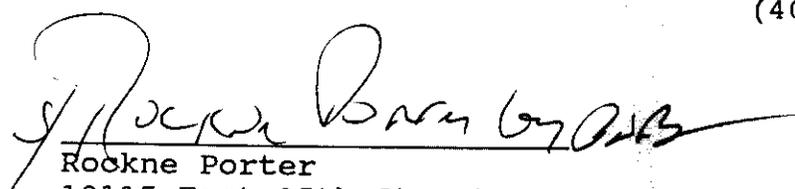
Come now the Plaintiff, Russell McIntosh, by and through his attorneys, Braswell & Associates, Inc., and the Defendant, First Mortgage Co., and hereby enter into a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure.



Paul D. Brunton
610 S. Main St., Ste. 312
Tulsa, OK 74119-1258
Attorney for First Mortg.
(918) 583-3600



Michael T. Braswell, OBA# 1082
BRASWELL & ASSOCIATES, INC.
3621 N. Kelley, Suite 100
Oklahoma City, OK 73111
Attorney for Plaintiff
(405) 232-1950



Rockne Porter
10115 East 25th Street
Tulsa, OK 74129
(918) 627-3234
Attorney for First Mortgage



Russell McIntosh, Plaintiff

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

FILED

APR - 4 1995

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

PAUL DANIEL,

Plaintiff,

94-C-0109-B

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, Donna Shalala, Secretary,
Defendant.

ENTERED ON DOCKET
APR 05 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Paul McDaniel seeks judicial review of a decision by the Secretary of Health and Human Services. The Secretary denied Social Security disability benefits to Plaintiff, concluding that he could return to work as a light delivery driver, janitor, bench worker, order clerk and assembly worker. Plaintiff challenges that decision, alleging that he can no longer work.¹

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Healy*, 835 F.2d 1314, 1316 (10th Cir. 1987).² A finding of "no

¹ In examining whether the Secretary's decision is supported by substantial evidence, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary is made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by filing a petition for review with the court within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

² One treatise summarized the relevant evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical history, laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant or others concerning the claimant's impairments, restrictions, and limitations; statements made by the claimant or others during the course of examination or treatment; daily activities, efforts to work, or other relevant statements made to medical sources during the course of examination or treatment; the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any other medical source."

substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler*, 707 F.2d 1284, 1285 (11th Cir. 1985).³

In the instant case, the issue is whether substantial evidence supports the ALJ's decision. Plaintiff, a 54-year-old at the time of the hearing before the Administrative Law Judge ("ALJ") alleges that he is disabled because of a 1992 five vessel coronary artery bypass graft (heart surgery). Following that surgery, Dr. Constance Wash, Plaintiff's treating physician, filled out a Residual Functional Capacity ("RFC") evaluation which indicated the following:

- That Plaintiff could sit up to eight hours a day.
- That Plaintiff could stand up to three hours a day.
- That Plaintiff could walk up to three hours a day.
- That Plaintiff could alternate between sitting, standing and walking up to five hours a day. *Record at 211.*

governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).

³ A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found, at step 5, that Plaintiff could return to work.

The ALJ appears to have relied, for the most part, on Dr. Wash's RFC in determining that Plaintiff could return to several types of "light work." Light work requires that a person have the ability to lift 20 pounds and the ability to do a good deal of walking or standing. In addition, "the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday." *Social Security Ruling 83-10*. That ALJ then interpreted Dr. Wash's evaluation of Plaintiff's RFC to mean that Plaintiff could walk and stand for 6 hours of the workday -- a reasonable interpretation.

However, Dr. Wash's finding that Plaintiff can alternatively walk, sit and stand up to 5 hours a day muddles the issue. On one hand, Plaintiff legitimately contends that finding is substantial evidence that he cannot perform the jobs listed by the ALJ and, as a result, is disabled. On the other hand, the ALJ, in effect, sidestepped the finding. *Record at 21*.⁴ Moreover, no other doctor completed an RFC evaluation on Plaintiff⁵ and the other evidence, including Plaintiff's testimony, does not clear up the question.⁶

No specific case law was found on how the ALJ should (or can) interpret what appears to be a contradictory RFC. Obviously, the ALJ had several options. The most obvious one was to have Dr. Wash testify or provide further information as to her RFC evaluation (i.e., Why did she conclude Plaintiff could walk and stand up to six hours a day

⁴ The ALJ simply concludes that Dr. Wash's finding means that Plaintiff can "frequently" alternate between sitting, standing and walking.

⁵ The consultative examination by Dr. Paul J. Krauter, M.D. contains little, if any, substantive information on the Plaintiff's medical condition. Dr. Krauter did not include an RFC evaluation and offered a brief one-page summary of his findings. In theory, the consultative examination is ordered to give the ALJ pertinent evidence on which to base his decision. In this case, the examination appeared cursory and of little use to the decision here.

⁶ Plaintiff testified that he could walk up to a mile and sit up to a half an hour. However, Dr. Wash also opined on March 13, 1992 that Plaintiff could work. *Record at 185*. In addition, the ALJ also noted that Plaintiff sat for 70 minutes at the hearing. *Record at 20*.

(three hours each) but only alternatively sit/stand/walk up to five hours a day?) The ALJ also could have rejected Dr. Wash's RFC evaluation, or part of it, by giving legitimate and specific reasons. The ALJ could have provided further explanation as to how he construed Dr. Wash's evaluation. However, it appears that none of these options were chosen and, as a result, the Magistrate Judge recommends the case be remanded for further consideration.

No precedent mandates this conclusion, but persuasive reasoning was found in *Talbot v. Heckler*, 814 F.2d 1456, 1463 (10th Cir. 1987). In that case, the court discussed how the alternative standing/sitting/walking evaluation could impact on a claimant's ability to do light work:

Alternate sitting, standing, or walking by implication precludes the kind of extensive sitting, standing and walking contemplated by the definition of light activity. To elaborate, being able to sit, stand, or walk alternately for only six hours collectively would seem to impose significant restrictions on ability to perform light work, since light work by definition is work that "requires a good deal of walking or standing..."

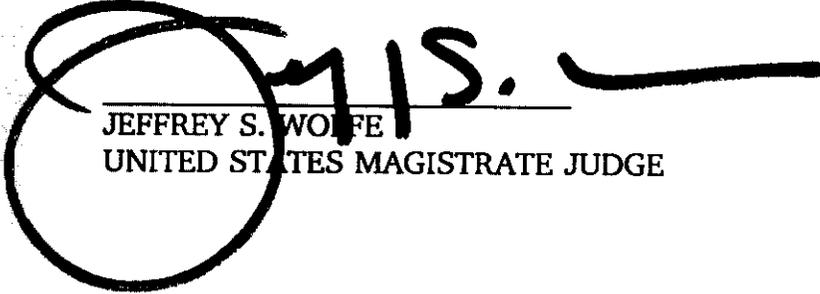
While the foregoing could arguably be *dicta*, the reasoning is nevertheless applicable to the instant case. Dr. Wash found that Plaintiff could alternately sit/stand/walk up to 5 hours a day. As discussed in *Talbot*, this imposed significant restrictions on Plaintiff's ability to perform the work enumerated by the ALJ. This decision is bolstered in part by the Vocational Expert's testimony. When asked to include the restriction in the hypothetical question, the Vocational Expert testified that Plaintiff could not do the jobs discussed by the ALJ. *Record at 77.*

Therefore, the United States Magistrate Judge recommends the case be REMANDED for further consideration. On remand, the ALJ must (1) order that Plaintiff undergo a

consultative examination that includes an RFC evaluation; and (2) allow Plaintiff the opportunity to have Dr. Wash testify and/or provide additional evidence explaining her findings. In addition, a supplemental hearing should be held where a Vocational Expert testifies, taking into full consideration the additional findings and opinions, above. The ALJ should re-examine the evidence in toto to determine if Plaintiff can return to work.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁷

Dated this 3rd day of April, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁷ See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

EOD 4-5-95

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

TERRY V. BLAIR,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

FILED
APR - 4 1995
94-C-0108-Bd M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Terry V. Blair applied for Social Security disability benefits, alleging he could no longer work. The Secretary of Health and Human Services denied that application. Blair now appeals that decision to this Court and the matter has been referred to the United States Magistrate Judge for a Report and Recommendation.¹

Plaintiff raises two issues, both of which involve his allegation of alcoholism. He first contends that the Administrative Law Judge ("ALJ") failed to adequately inquire into whether he is addicted to alcohol. The second issue is whether the ALJ properly considered the effect of Plaintiff's alleged alcohol abuse, in combination with medication used to control his pain.

The pertinent facts are summarized as follows: Plaintiff was 27 years old at the time of the hearing and had a seventh-grade education. On June 25, 1992, Plaintiff, while

¹ In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

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sitting on a road median, received injuries to his skull and face after being struck by a car. He says he was drunk at the time. Following the accident, Plaintiff was hospitalized for some two weeks with a skull fracture, broken ribs, a collapsed left lung and a concussion. Since the accident, Plaintiff testified that he has been in "a lot of pain" and that he cannot work for more than 30 minutes at a time because of dizzy spells and muscle cramps.

In his application for benefits, Plaintiff indicated that he could not work because of injuries suffered in the accident. However, he made no mention of alcoholism on the application and offered no such information at the hearing before the ALJ. Plaintiff was represented by counsel during the hearing. The ALJ subsequently denied disability benefits, concluding that Plaintiff could perform medium work with the exception of lifting more than 50 pounds occasionally and 25 pounds frequently.

On appeal, Plaintiff now argues that his "alcoholism" prevents him from working. To bolster that claim, Plaintiff notes that he has been arrested at least three times for public drunkenness and at least two times for driving under the influence of alcohol. *Plaintiff's Brief at page 2 (docket #10).*

The first issue is whether the ALJ, despite Plaintiff's failure to raise the "alcoholism" impairment, fulfilled his duty of inquiry. It is well-settled that an ALJ, even if a claimant is represented by counsel, has a "basic obligation...to ensure that an adequate record is developed during the disability hearing consistent with the issues raised." *Henrie v. U.S. Department of Health and Human Services*, 13 F.3d 359 (10th Cir. 1993)(emphasis added).

The issue of whether an ALJ has met his duty of inquiry is not clear-cut and, as a result, must be judged on a case-by-case basis. However, the undersigned reads *Henrie* to

require that a claimant who is represented by counsel must, at a minimum, raise the issue about which there is concern at the hearing before the ALJ's duty to inquire begins. To find otherwise would open the door to new issues raised for the first time on appeal, with a corresponding claim that the ALJ failed to fully inquire. The duty to fully inquire does not require the ALJ to, in effect, become a mind-reader. *See, Pilarczyk v. Sullivan*, 803 F.Supp. 1317, 1324 (N.D. Ill. 1992)(*Court found no duty imposed on the ALJ to conduct investigation unless (1) Plaintiff alleges a mental impairment at the time of the hearing and (2) Plaintiff comes forward with proof of such an impairment.*) Otherwise, a Plaintiff could potentially raise an impairment for the first time on appeal and argue that the ALJ did not fulfill his basic duty of inquiry. Consequently, the ALJ did not err on this issue.²

The same reasoning dictates a similar result on the second issue raised by Plaintiff. Plaintiff contends that the ALJ should have considered the effect of alcohol abuse when determining whether his headaches (and/or pain) was severe. However, if the issue was not raised by Plaintiff or his counsel, it seems odd to hold the ALJ responsible for such an omission. *See, Henrie*, 13 F.2d at 361 ("*We emphasize that it is not the ALJ's duty to be the claimant's advocate. Rather the duty is one of inquiry and factual development.*")³ The standard on review, is whether substantial evidence supports the ALJ's findings; not

² Plaintiff cites *Gomez v. Sullivan*, 761 F.Supp. 746 (D. Colo. 1991) to support his argument on this issue. But *Gomez* is readily distinguished for two reasons. First, the record in *Gomez* indicates that the medical record frequently mentioned the claimant's alcohol problem and the claimant had actually testified about his drinking problems at the hearing. Second, part of the result in *Gomez* came because the claimant had regular seizures and problems with "uncontrolled alcoholism." *Id.* at 753. That is not the case here as Plaintiff failed to offer any significant evidence of alcoholism.

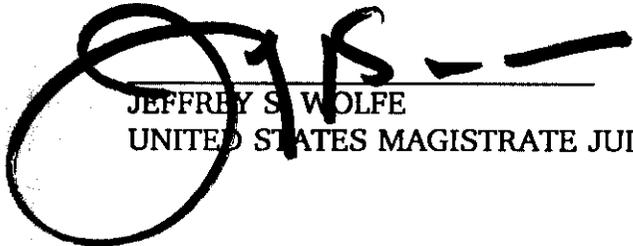
³ On appeal, Plaintiff argues that the record is "replete with references to [Plaintiff's] long-term, chronic abuse of alcohol." *Plaintiff's Brief* at page 5. However, of the 226-page record, the undersigned found only three pages discussing Plaintiff's drinking. On page 133 of the *Record*, Dr. Michael Loggan noted that Plaintiff had "chronic alcohol abuse with malnutrition." On page 220 of the *Record*, Dr. Thomas Goodman notes in his report that Plaintiff told him of the arrests for public drunkenness and driving under the influence. Dr. Goodman, however, indicated that Plaintiff also told him he had decreased his drinking after the accident.

whether any evidence exists in the record. Here, while there are a few isolated references to "alcohol abuse", there is not a record as was before the court in *Gomez*. Isolated references, as here, do not trigger the duty of inquiry, especially as claimant, represented by counsel, did not address the issues at the time of hearing.

Therefore, since substantial evidence supports the ALJ's decision, the United States Magistrate Judge recommends the Secretary's decision to deny disability benefits be **AFFIRMED**.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁴

Dated this 3rd day of April, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁴ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

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

F I L E D

CHARLES L. FREDERICK,)
)
Plaintiff(s),)
)
v.)
)
EDWARD L. EVANS, et al,)
)
Defendant(s).)

APR - 4 1995

Le

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

94-C-0090-B

H ✓

ENTERED ON DOCKET

DATE APR 05 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the Court is a Petition For Writ of Habeas Corpus (docket #1) by Plaintiff Charles Frederick. A Tulsa County District Court sentenced Frederick to 110 years in prison after he plead guilty to charges ranging Lewd Molestation to First-Degree Rape (CRF-86-2147). Frederick did not file a direct appeal with the State of Oklahoma concerning these convictions. However, Frederick now seeks habeas relief for what he contends was bias on the part of the prosecutor and for ineffective assistance of counsel.

The procedural and factual history of the case is well-documented and need not be repeated here.¹ Simply put, the issue is whether Frederick -- who failed to file a direct appeal on his convictions -- is procedurally barred from raising his habeas claims. The procedural bar "rule" is outlined in *Coleman v. Thompson*, 111 S.Ct. 2546 (1991):

In all cases where a state prisoner has defaulted his federal claims in a state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation or demonstrate that failure to consider the claim will result in fundamental

¹ The undersigned issued orders on May 17, 1994, September 9, 1994, September 21, 1994 and October 7, 1994 concerning this case. They are incorporated into this Report and Recommendation.

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miscarriage of justice. (emphasis added).

In the undersigned's May 17, 1994 Order, the Magistrate Judge found that Frederick defaulted his federal claims in a state court pursuant to an independent and adequate state procedural rule. *See page 2, May 17, 1994 Order (docket #6)*. Consequently, the only issue remaining is whether Frederick can demonstrate cause and actual prejudice for the alleged violation or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

Frederick says his attorney's "ineffective assistance" is why he did not file the direct appeal. Frederick contends that he told his attorney to file a direct appeal, but that the attorney did not do so. To adequately examine Frederick's argument, the undersigned held an evidentiary hearing where Frederick was represented by counsel.²

I. Summary of Testimony At Evidentiary Hearing

Three persons testified at the December 20, 1994 evidentiary hearing: Frederick, Frederick's mother³, and Curtis Parks, who is the attorney Frederick accuses of ineffective assistance of counsel.

Frederick testified that Parks, a court-appointed attorney, advised him to enter a plea of guilty. According to Frederick, the reasoning for Parks' advice is that the attorney believed a jury would likely find him guilty. Frederick subsequently pled guilty on July 21, 1986.

² Mr. Craig Bryant, an Assistant Federal Public Defender in the Northern District of Oklahoma, represented Petitioner at the evidentiary hearing. This hearing was held in accordance with Rule 8 of Rules Governing Habeas Corpus cases under Section 2254.

³ Twyla Frederick, Petitioner's mother, testified that she was in court during the sentencing of her son and that she talked to Parks on the telephone sometime in 1992.

Shortly after he pled guilty, Frederick testified that he told another attorney the facts of his case and that he had pled guilty and received the 110-year sentence. That attorney, whom Frederick could not identify, told him that he got a "raw deal." Frederick then testified that he talked with Parks during that day and told him he wanted to appeal. Frederick also testified that, after the sentencing, he called Parks' office to tell him to file an appeal. Frederick also testified that he sent a letter to Tulsa County District Judge Jay Dalton (who had sentenced him) asking to withdraw the guilty plea. Frederick also acknowledged that he had no written or other evidence supporting his version of the facts.

Parks, an attorney for 27 years and experienced in criminal defense, testified that he had several conversations with Frederick prior to the guilty plea. He testified that he had spoken with the Tulsa District Attorney's office and a plea bargain was offered. Parks testified that he relayed the offer to Frederick and that Frederick "readily" accepted it. Contrary to Frederick's testimony, Parks testified that he did not recall speaking or seeing Frederick after the guilty plea. In addition, Parks testified that he did not recall receiving any telephone messages from Frederick or receiving a letter from Judge Dalton.⁴

II. Findings of Fact

The question of whether Frederick has shown cause and prejudice is, for the most part, a factual one. Frederick claims that he communicated his wishes to appeal his guilty plea to Parks. Parks testified that he does not recall any such communication. Based on the testimony at the evidentiary hearing and the evidence in the record, the undersigned finds the following facts:

⁴ Parks acknowledges that his memory of the facts was somewhat hazy. He testified that he, as a general practice, purges old files and that this 1986 case file had, in fact, been purged.

1. Curtis Parks was appointed to serve as Frederick's counsel on June 19, 1986.
2. Parks visited Frederick two or the times prior to the July 21, 1986 guilty plea.
3. Frederick told Parks he wished to accept the negotiated plea offered by Assistant District Attorney Donna Priore. Little discussion took place between Parks and Frederick prior to agreeing to the plea. Parks described it as "one of the quickest conversations of that nature" he has had in his 27 years of practice.
4. On July 21, 1986, Frederick voluntarily entered his plea. The state judge properly explained the charges to Frederick and informed him of his right to appeal. Frederick said he was pleased with the performance of his counsel.
5. Frederick did not communicate to Parks that he wanted to appeal.

II. Legal Analysis

If an attorney's errors cost his client the opportunity to file a direct appeal, the cause-and-prejudice test is met under the procedural default analysis. *Hannon v. Maschner*, 845 F.2d 1553, 1557 (10th Cir. 1988). The reasoning behind such a rule is that such a failure constitutes "ineffective assistance of counsel." The Supreme Court explains why:

In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake...A first appeal as of right is therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985).

In this case, the question, for the most part, is a factual one. Since the undersigned finds that Frederick has not presented sufficient evidence to show that he told Parks of his wishes to file a direct appeal, Parks was not constitutionally ineffective. Therefore, Parks has shown neither cause nor prejudice for his failure to file a direct appeal. In addition,

no showing has been made that failure to consider Frederick's habeas claims would constitute a "fundamental miscarriage of justice". Therefore, the United States Magistrate Judge recommends the case be **DISMISSED**, as federal habeas review of Frederick's claims is barred under *Coleman v. Thompson*, supra.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁵

Dated this 3rd day of April, 1995.


JEFFREY V. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁵ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

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

FILED

APR 4 - 1995 *ll*

ROBERT G. TILTON, an
individual,

Plaintiff,

vs.

GARY L. RICHARDSON,

Defendant.

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

No. 94-C-508-BU

ENTERED ON DOCKET
DATE APR 05 1995

ORDER

This matter comes before the Court upon the Joint Application to Strike Existing Scheduling Order (Docket No. 28) filed by the parties on March 16, 1995. For good cause shown, the Court hereby GRANTS the Motion to the extent that the current scheduling deadlines are hereby STRICKEN. Rather than staying this matter, the Court hereby DIRECTS the Clerk of the Court to administratively close this matter in his records without prejudice to the rights of the parties to reopen this proceeding to obtain a final determination of the litigation.

If either party desires to re-open this case, said party shall file an application to reopen on or before July 1, 1995 for the purpose of obtaining a final determination of this litigation. Upon the reopening of this case, the Court will schedule a case management conference. If such application is not filed, the plaintiff's action shall be deemed to be dismissed with prejudice.

ENTERED this 4th day of ^{April} ~~March~~, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

APR 4 - 1995 *fl*

STEVEN WILLIAMS,)
)
 Petitioner,)
)
 vs.)
)
 R. MICHAEL CODY, et al)
)
 Respondents.)

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

No. 92-C-963-C

ENTERED ON DOCKET
APR - 5 1995
DATE _____

ORDER

On February 6, 1995, the Court granted Petitioner a second extension of time to respond to the November 8, 1994 order which required Petitioner either to dismiss this habeas corpus action as moot or to file a brief addressing the merits of his appellate delay claims. On February 13, 1993, Petitioner's mail was returned to the Court with the notation discharged on January 31, 1995.

Because the Petitioner has yet to notify the Court of his new address, the Court hereby **dismisses** this action without prejudice for lack of prosecution.

SO ORDERED THIS 4th day of April, 1995.

H. Dale Cook
H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

DATE ~~APR 05 1995~~

FILED

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

APR 4 1995

MERRILL LYNCH, PIERCE, FENNER)
& SMITH, INC.,)
)
Plaintiff,)
)
vs.)
)
PAUL WALKER,)
)
Defendant.)

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

Case No. 95-C-0042-K

STIPULATION OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1) the parties to the above-captioned cause hereby stipulate that the above-captioned matter may be, and is hereby, dismissed by Plaintiff.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER
& GABLE

By: *William S. Leach*
William S. Leach, OBA #14892
Oneok Plaza
100 W. 5th Street, Suite 400
Tulsa, Oklahoma 74103-4287
(918) 582-1173
Attorney for Plaintiff

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: *Claire V. Eagan*
Claire V. Eagan, OBA #554
320 S. Boston Ave., Suite 400
Tulsa, OK 74103-3708
(918) 594-0444
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 05 1995

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF ARTHUR FIELDS aka)
ARTHUR R. FIELDS, SR., Deceased;)
THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF EVA LOIS FIELDS)
NORDWALL, Deceased;)
THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF ARTHUR FIELDS, JR.,)
Deceased;)
JAMES E. FIELDS aka JAMES EDWARD)
FIELDS, individually;)
JAMES E. FIELDS aka JAMES EDWARD)
FIELDS, Administrator of the)
Estate of Ahnawake M. Fields aka)
Ahnawake Martha Fields, Deceased;)
JAMES E. FIELDS aka JAMES EDWARD)
FIELDS, Administrator With Will)
Annexed of the Estate of Arthur)
Fields aka Arthur R. Fields, Sr.,)
Deceased;)
GWEN LOIS NORDWALL TINKER;)
RICHARD RALPH NORDWALL;)
AHNAWAKE ROSE NORDWALL YANDELL;)
RAYMOND CURTIS NORDWALL;)
ARTHUR FIELDS, III;)
LISA FIELDS;)
LYLE FIELDS;)
MICHAEL SCOTT FIELDS;)
RAMONA DELORES FIELDS)
aka RAMONA CASTLEBERRY;)
CHARLES BUCHANAN FIELDS;)
RICHARD D. FIELDS;)
RAYMOND C. FIELDS;)
HARRISON O. FIELDS;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
COUNTY TREASURER, Pawnee County,)
Oklahoma; and)
BOARD OF COUNTY COMMISSIONERS,)
Pawnee County, Oklahoma,)
)
Defendants.)

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

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of United States Magistrate Judge filed on the 15th day of March, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. 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 United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 4 day of April, 1995.

/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

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

FILED
APR 3 1995
Richard M. Law, Jr., Court Clerk
U.S. DISTRICT COURT

ROSALIE G. CLARK, Individually and)
as Surviving Spouse and Next of)
Kin of LOUIS O. CLARK, Deceased,)
Plaintiff,)
v.)
FIBREBOARD CORPORATION, et al.,)
Defendants.)

Case No. 92-C-62-B

APR 04 1995

ORDER

COMES NOW the Court having considered the Joint Application for Dismissal with Prejudice agreed to by Plaintiff and Defendant Kaiser Refractories (a division of Kaiser Aluminum & Chemical Corporation), it appearing that these parties have fully and finally settled their disputes.

IT IS, THEREFORE, ORDERED that the above-captioned action be dismissed with prejudice as to Defendant Kaiser Refractories (a division of Kaiser Aluminum & Chemical Corporation), Plaintiff and this Defendant to pay their own costs.

SO ORDERED this 2nd day of Apr, 1995.

Thomas R. [Signature]
United States District Court Judge

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

FILED
APR 5 1993
Edward T. Lawless, Court Clerk
U.S. DISTRICT COURT

DEVLIN WAYNE FIELDS,
an individual,

Plaintiff,

v.

JAC, INC., a corporation,
d/b/a DENIM AND DIAMONDS,

Defendant.

Case No. 93-C-184-B

APR 6 4 1993

DISMISSAL WITHOUT PREJUDICE

COMES ON for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma the Plaintiff's, DEVLIN WAYNE FIELDS, Motion to Dismiss the above-entitled action. The Court, having considered said Motion finds that the same should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiff's, DEVLIN WAYNE FIELDS, Motion to Dismiss the above-entitled action without prejudice to refileing is granted and that the above-entitled action is hereby dismissed without prejudice.

S/ THOMAS R. BRETT

Judge of the United States District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR - 3 1995

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
HAROLD E. RAGSDALE; LINDA S.)
RAGSDALE; STATE OF OKLAHOMA)
ex rel OKLAHOMA TAX COMMISSION;)
MYLES B. NORMAN; CONSTANCE L.)
NORMAN; CITY OF BROKEN ARROW,)
Oklahoma; COUNTY TREASURER,)
Tulsa County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
Defendants.)

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

SECRET
APR 04 1995

CIVIL ACTION NO. 94-C 684B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of April,

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; the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission,** appears not having previously filed its Disclaimer; the Defendant, **City of Broken Arrow, Oklahoma,** appears by Michael R. Vanderburg, City Attorney; the Defendants, **Harold E. Ragsdale and Linda S. Ragsdale,** appear by their attorney, James H. Beauchamp; and the Defendants, **Myles B. Norman and Constance L. Norman,** appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Harold E. Ragsdale and Linda S. Ragsdale,** each acknowledged receipt of

NOT

FILED LITIGANT'S IMMEDIATELY
UPON RECEIPT.

Summons and Complaint via Certified Mail on September 23, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint via Certified Mail on July 13, 1994; that the Defendants, **Myles B. Norman and Constance L. Norman**, each acknowledged receipt of Summons and Complaint via Certified Mail on December 1, 1994; and that the Defendant, **City of Broken Arrow, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified Mail on July 14, 1994.

The Court further finds that the Defendants, Harold E. Ragsdale and Linda S. Ragsdale are husband and wife.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on August 3, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on August 5, 1994, and subsequently filed a Withdrawal of Answer and Issuance of Disclaimer on January 31, 1995; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on July 18, 1994; that the Defendants, **Harold E. Ragsdale and Linda S. Ragsdale**, filed their Answer on October 7, 1994; and that the Defendants, **Myles B. Norman and Constance L. Norman**, 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 SEVENTEEN (17), BLOCK ONE (1), WINDSOR
ESTATES SECOND, AN ADDITION TO THE CITY OF
BROKEN ARROW, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on February 13, 1986, Myles B. Norman and Constance L. Norman, executed and delivered to FIRSTIER MORTGAGE CO. their mortgage note in the amount of \$77,300.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Myles B. Norman and Constance L. Norman, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated February 13, 1986, covering the above-described property. Said mortgage was recorded on February 18, 1986, in Book 4924, Page 2596, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 30, 1986, FirstTier Mortgage Co. assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on November 26, 1986, in Book 4985, Page 1130, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 22, 1988, LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors in office and assigns. This Assignment of Mortgage was recorded on July 22, 1988, in Book 5116, Page 1202, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Harold E. Ragsdale and Linda S. Ragsdale, currently hold the record title to the property by virtue of a General Warranty

Deed dated June 29, 1987, and recorded on June 29, 1987, in Book 5035, Page 648, in the records of Tulsa County, Oklahoma. **The Defendants**, Harold E. Ragsdale and Linda S. Ragsdale are the current assumptors of the **subject** indebtedness.

The Court further finds that on August 1, 1988, the Defendants, Harold E. Ragsdale and Linda S. Ragsdale, 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 March 1, 1989.

The Court further finds that on August 21, 1990, the Defendants, Harold E. Ragsdale and Linda S. Ragsdale, filed their **Chapter 13** petition for relief in the United States Bankruptcy Court for the Northern District of Oklahoma, Case Number 90-02401-W, which was discharged on September 13, 1993.

The Court further finds that **the Defendants**, Harold E. Ragsdale and Linda S. Ragsdale, 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, **Harold E. Ragsdale and Linda S. Ragsdale**, are indebted to the Plaintiff in the principal sum of \$130,704.17, plus interest at the rate of 10 percent per annum from June 16, 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 \$38.00 which became a lien on the

property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

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 Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject 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 Defendants, **Myles B. Norman and Constance L. Norman**, 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, **Harold E. Ragsdale and Linda S. Ragsdale**, in the principal sum of \$130,704.17, plus interest at the rate of 10 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 6.41 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 \$38.00 for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject 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, **Harold E. Ragsdale, Linda S. Ragsdale, Myles B. Norman, Constance L. Norman, 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 Defendants, **Harold E. Ragsdale and Linda S. Ragsdale**, 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 **\$38.00**, 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.

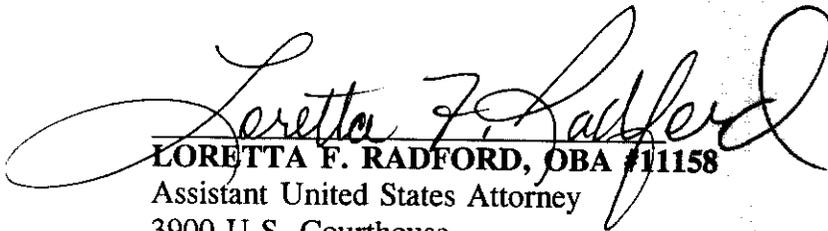
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no **right of redemption** (including in all instances any right to possession based upon any **right of redemption**) in the mortgagor or any other person subsequent to the foreclosure sale.

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**.

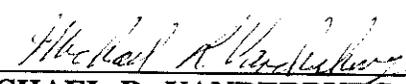
UNITED STATES DISTRICT JUDGE

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


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



JAMES H. BEAUCHAMP, OBA #634

7322 S. 85th East Ave., Suite 100

Tulsa, Oklahoma 74133-3137

(918) 252-0111

Attorney for Defendants,

Harold E. Ragsdale and

Linda S. Ragsdale

Judgment of Foreclosure

Civil Action No. 94-C 684B

LFR:lg

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

F I L E D

APR - 4 1995

RL

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

WILLIAM HAROLD WANLESS, JR.,)
)
Plaintiff,)
)
vs.)
)
G. WILLIAMS, individually,)
and the DEPARTMENT of)
VETERANS AFFAIRS,)
)
Defendants.)

No. 94-C-390-K *HW*

ENTERED ON DOCKET

DATE APR 04 1995

ORDER

Before the Court are Defendants' motion to dismiss and for summary judgment and Plaintiff's motion to dismiss without prejudice.

After reviewing the record in this case, the Court concludes that Defendants' motion should be denied without prejudice and that Plaintiff's motion to dismiss should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss and for summary judgment (doc. #9) is **denied without prejudice**;
- (2) Plaintiff's motion to dismiss without prejudice (doc. #12) is **granted**; and
- (3) This action is **dismissed without prejudice**.

SO ORDERED THIS 3RD day of APRIL, 1995.

Sven Erik Holmes
SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

JAMES DAVID THORNBRUGH,)
)
 Plaintiff,)
)
 vs.)
)
 THOMAS R. BRETT, et al.,)
)
 Defendants.)

No. 94-C-618-H ✓

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

FILED
APR - 4 1995
ENTERED ON DOCKET
APR 04 1995
DATE _____

ORDER

Plaintiff, a federal prisoner, brings this Bivens type action against U.S. District Judge Thomas R. Brett, U.S. Attorney Stephen C. Lewis, Assistant U.S. Attorneys Ben Baker, Susan Pennigton, and Neal Kirkpatrick, FBI Officer J. Deadtherage, and Secret Service Officer McDade, for violation of his constitutional rights during his criminal prosecution and jury trial.¹ He alleges in a conclusory fashion the following claims:

1.1 Plaintiff alleges that the named defendants have acted separately, in conspiratorial conjunction with each other in a conscious knowing indifferent manner, designed to deliberately cause the Plaintiff to be denied his rights guaranteed by the Constitution of the United States of America, and therefore denied due process of law.

1.1(a) The wrongful acts alleged in section 1.1. are alleged to have had significantly undermined the Plaintiffs absolute right to protected rights of the United States Constitution, and guaranteed right of due process of law, usurpation of police powers of the sovereign state of Oklahoma, and ther[e]by violating the rights guaranteed under the Tenth Amendment of the United States Constitution to the sovereign state of Oklahoma and its people.

¹Plaintiff seeks to extend this cause of action to the estate of Assistant U.S. Attorney Ben Baker because Baker is presently deceased.

1.1(b) The Plaintiff alleges that his life threatening forced imprisonment without said due process of law is a wanton deliberate con[s]cious act of reckless disregard of Plaintiff's constitutionally protected rights.

(Complaint, doc. #1, at 1.)

In section "6" of his complaint, Plaintiff further alleges that each defendant "refused to uphold the Constitution of the United States and failed to keep his Oath of Office." (Doc. #1 at 4-5.) Plaintiff seeks actual damages and punitive damages in the amount of four million dollars from each of the named defendants.

The Court has previously granted Plaintiff leave to proceed in forma pauperis but has cautioned Plaintiff that his complaint would be dismissed as frivolous under 28 U.S.C. § 1915(d) unless he would set out his claims with more clarity and specificity. In particular, the Court noted that Plaintiff had utterly failed to allege any unconstitutional activities of the defendants or what constitutional rights had been violated. Plaintiff's proposed amended complaint is now before the Court for consideration.

In his proposed amended complaint, Plaintiff alleges that he was denied his rights under the Fourteenth Amendment when "Judge Brett violated his oath of office . . . by his failure to protect Plaintiff against violations of Tenth Amendment rights . . ." and when he "violated the Plaintiff's right to a trial by [an] impartial jury." As a result of the above violations, Plaintiff alleges that "the jurisdiction of Judge Brett's court fail[ed] to reach [his] case." He further alleges that Judge Brett "failed [sic] numerous motions for transcripts, further denying Plaintiff Due Process" and that he "appointed th[e] same counsel each time

Plaintiff has been back before the Court." (Proposed Amended Complaint at 1-2.)

As to Ben Baker, Plaintiff alleges that he violated his oath of office "by his vicious release of information to the news media, as prohibited by law, and by allowing perjured testimony in both the Grand Jury, and in the trial." Plaintiff further alleges that "the withholding [sic] of evidence, witnesses, and proper locations also denied this Plaintiff Due Prodess [sic] of law, and equal protection of the law." (Proposed Amended Complaint at 2-3.)

With regard to Susan Pennington, Neal B. Kirkpatrick, and Stephen C. Lewis, Plaintiff merely alleges that these Defendants "failed to uphold the Constitution for the United States, therefore failing [their] Oath of Office." Lastly, Plaintiff alleges that Deathrage "arrested Plaintiff, and conducted [a] wrongful and malicious search of the vehicle" and that McDade failed to uphold his oath of office when he failed to produce witnesses of which he was aware and failed to correct the false testimony given by Deathrage. (Proposed amended complaint at 3-5.)

As noted in the December 30, 1994 order, this Court may deem an in forma pauperis complaint frivolous only if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 324 (1989). A dismissal under 28 U.S.C. § 1915(d) is appropriate for "a claim based on an indisputably meritless legal theory or if "the factual contentions are clearly baseless." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). Inarguable legal conclusions include those

against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Hall v. Belmon, 935 F.2d 1106, 1108 (10th Cir. 1991). Fanciful factual allegations instead refer to those assertions which are clearly baseless, fantastic, or delusional. Denton, 112 S. Ct. at 1733. If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Hall, 935 F.2d at 1109.

The Court has liberally construed Plaintiff's proposed amended complaint in accordance with his pro se status, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), and is satisfied that Plaintiff's allegations are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. The Tenth Circuit Court of Appeals has recognized that "[c]onstitutional rights allegedly invaded, warranting an award of damages, must be specifically identified," and that "[c]onclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); see also Reed v. Dunham, 893 F.2d 285, 286 (10th Cir. 1990) (per curiam) (affirming a section 1915(d) dismissal given the "complete absence of factual allegations supporting plaintiff's conclusory reference to the denial of their rights . . . under the fourteenth amendment").

It is quite apparent that this Plaintiff, being dissatisfied with the results of his criminal appeal, simply turned around and sued all those persons who were involved in his criminal

prosecution, including the judge who presided over the criminal trial. He argues indirectly that Judge Brett is not entitled to the absolute immunity extended to him by Stump v. Sparkman, 435 U.S. 349 (1978), because he acted in the absence of jurisdiction. This Court disagrees. Clearly Judge Brett presided over Plaintiff's case in his judicial capacity and acted within the scope of his particular responsibility and therefore is entitled to absolute immunity. See Stump, 435 U.S. at (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990).

Plaintiff's general allegations that Ben Baker, Susan Pennington, Neal Kirkpatrick, Stephen Lewis, J. Deathrage, and McDade "failed to uphold [their] Oath of office" in violation of his constitutional rights are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. See Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10th Cir. 1990). In any case, the U.S. Attorney and Assistant U.S. Attorneys are entitled to absolute immunity from this suit because their performance was "intimately associated with the judicial phase of the criminal process." Dicesare v. Stuart, No. 93-5019 (10th Cir. Dec. 20, 1993) (citing Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). Lastly, the Court notes that the Plaintiff has utterly failed to allege any agreement among any of the named defendants to support his conspiracy claim.

Accordingly, the Court concludes that this action is frivolous and should be and is hereby **dismissed** under 28 U.S.C. §1915(d).

Plaintiff's motion for leave to amend (doc. #6) is granted.

SO ORDERED THIS 3RD day of APRIL, 1995.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APR 04 1995

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

DATE

JESSE B. BALFOUR, JR.,

Petitioner,

v.

EDWARD L. EVANS, JR.,

Respondent.

FILED

APR - 4 1995

95-C-166-K

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

ORDER

The undersigned vacates the Order (docket #2) granting the Motion for In forma Pauperis in the instant case.

SO ORDERED THIS 3rd day of April, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

4

ENTERED ON DOCKET
DATE APR 04 1995

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

WILLIAM J. RUSS,

Plaintiff,

vs.

DIXIE WALKER, et al.,

Defendants.

No. 93-C-724-K

FILED

APR 1995

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

ORDER

Plaintiff William Russ filed this civil rights suit against Defendants in August of 1993. Defendants, represented by Oklahoma Attorney General Susan B. Loving, filed an Answer in October of that year. In December of 1993, the attorneys for Plaintiff were granted a conditional leave to withdraw.

Shortly thereafter, on December 22, 1993, Plaintiff William Russ filed a Motion to Withdraw From Complaint. No response was filed, nor have any other pleadings been filed since the Motion to Withdraw From Complaint. The Motion is granted, and the case is dismissed without prejudice.

ORDERED this 3 day of April, 1995


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

11

ENTERED ON DOCKET

DATE APR 03 1995

F I L E D

MAR 31 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 A. FIELDS,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA DEPARTMENT OF)
 CORRECTIONS, et al.,)
)
 Defendants.)

No. 94-C-1012-E

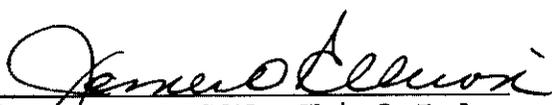
ORDER

At issue before the Court is Plaintiff's motion to dismiss this case without prejudice. The Defendants have not objected.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion to dismiss (doc. #11) is **granted**;
- (2) This action is **dismissed without prejudice**;
- (3) Defendants' motion to dismiss or for summary judgment (doc. #9) is **denied as moot**; and
- (4) The Clerk shall **mail** to the Plaintiff a copy of his motion to dismiss.

SO ORDERED THIS 30th day of March, 1995.


JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAR 31 1995

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

BERNARD SCHWARTZ and)
AILEEN H. SCHWARTZ,)
)
Plaintiffs,)
)
vs.)
)
METROPOLITAN LIFE INSURANCE)
COMPANY,)
)
Defendant.)

Case Number: 94-C-619-B

RECEIVED
APR 03 1995

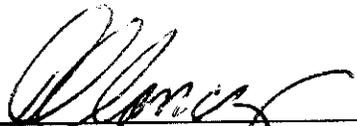
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Bernard and Aileen Schwartz, and Defendant, Metropolitan Life Insurance Company, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

The parties are to bear their own attorney's fees and costs.

RESPECTFULLY SUBMITTED,

RICHARDSON & STOOPS



FRED E. STOOPS, SR., OBA #8666
TIMOTHY P. CLANCY, OBA #14199
6846 S. Canton, Suite 200
Tulsa, OK 74136
(918) 492-7674



ELSIE DRAPER, OBA #2482
TIMOTHY A. CARNEY, OBA #11784
GABLE & GOTWALS
2000 Bank IV Center
Tulsa, OK 74119

25

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

FILED

MAR 31 1995

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

GEORGIA B. BESSER,)
)
Plaintiff,)
)
vs.)
)
FIBREBOARD CORP., et al,)
)
Defendants.)

Case No. 91-C-932-B

APR 03 1995

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby 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 or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by 8-31-95, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 31st day of March, 1995.



THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

18

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

FILED
MAR 29 1995

Edward G. Law 3738, Court Clerk
U.S. DISTRICT COURT

RONALD OUSLEY,
Plaintiff,
vs.
STANLEY GLANZ, et al.,
Defendants.

No. 94-C-256-B ✓

FILED ON DOCKET
APR 03 1995

ORDER

On November 28, 1995, the Court granted Plaintiff leave to amend his complaint within twenty days from the date of entry of the order, otherwise the Court will presume the Plaintiff no longer wishes to pursue this litigation and will proceed to dismiss his condition-of-confinement claim against Defendant Glanz for failure to state a claim. The Plaintiff has neither moved for leave to amend nor for an extension of time.

Accordingly, Plaintiff's condition-of-confinement claim against Defendant Glanz is hereby dismissed with prejudice.

SO ORDERED THIS 29th day of Mar, 1995.



THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT