

ENTERED ON DOCKET

DATE ~~MAY 19 1995~~
FILED

MAY 18 1995

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

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

IN RE:)
)
 OZEY, ERHAN NMN)
)
 Debtor,)
)
 SS# 447-58-2453)
)
 JOSEPH Q. ADAMS, Trustee,)
)
 Appellee,)
)
 vs.)
)
 ERHAN OZEY,)
)
 Appellant.)

District Court Case No. 94-C-932-B

Case No. 93-04157-W (Chapter 7)

ORDER

This order pertains to Trustee's Motion to Dismiss the Appeal of Defendant-Appellant Erhan Ozey (Docket #10)¹ and Appellant's Objection to Trustee's Motion to Dismiss (Docket #12). Joseph Q. Adams, Trustee ("Trustee") asks the court to dismiss the appeal of the order of the United States Bankruptcy Court for the Northern District of Oklahoma filed September 22, 1994, requiring Defendant-Appellant Erhan Ozey ("Ozey") to turn over property to the Trustee. The Trustee claims that the record designated by Ozey is insufficient to allow appellate review.

Ozey's "statement of issues" on appeal indicates that the appeal is based on the sufficiency of the evidence, as it claims numerous factual and legal findings are clearly

¹"Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

erroneous and that the Trustee did not prove his case by a preponderance of the evidence that Ozey owns the equipment or has the authority to turn it over. (Ex. "B" to Trustee's Motion to Dismiss the Appeal of Defendant-Appellant Erhan Ozey (Docket #10)). Ozey has not designated the transcript of the September 15, 1994 hearing on the motion, the March 31, 1994 hearing at which he admitted that the equipment belonged to him, or any of the trial evidence of the Trustee as part of the record on appeal.

Under Bankruptcy Rule 8010(a)(1)(E), the brief of an appellant is to contain his contentions and the reasons therefor "with citations to the authorities, statutes and parts of the record relied on." Rule 8001 states that "[f]ailure to an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal."

In In re Lederman Enterprises, Inc., 997 F.2d 1321, 1323 (10th Cir. 1993), the Tenth Circuit stated: "[I]t is counsel's responsibility to see that the record excerpts are sufficient for consideration and determination of the issues on appeal and the court is under no obligation to remedy any failure of counsel to fulfil that responsibility." Deines v. Vermeer Mfg. Co., 969 F.2d 977, 979 (10th Cir. 1992) (quoting General Order, 10th Cir. Oct. 25, 1990, p. 5). The court also cited Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 976 (10th Cir. 1991).

In the alternative, the Trustee moves for an order compelling Ozey to designate the September 15, 1994 hearing transcript, all trial exhibits, including the March 31, 1994 hearing transcript, and the transcript of the denial-of-discharge hearing to enable the court to address the broad "sufficiency of the evidence" issues that Ozey has identified for appeal.

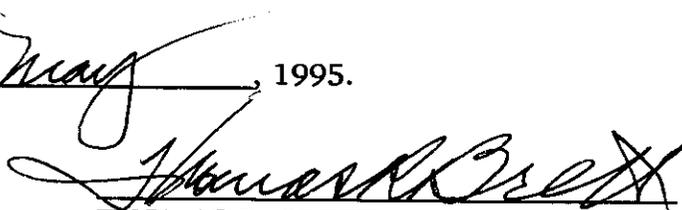
Ozey objects to the motion of the trustee to dismiss and states he has filed an amendment to his designation of record and has ordered the transcript of the September 15, 1994 hearing. The reporter has advised Ozey that the transcript is very short and will be ready within two weeks. He points out that the Trustee failed to file a counter-designation of record to include the items which he now asserts are the basis for the dismissal of this appeal.

Ozey contends that there has been no showing of prejudice to the Trustee or allegation of bad faith and cites Drybrough v. Ware, 111 F.2d 548, 550 (6th Cir. 1940), where the court discussed its power to dismiss in a case where an insufficient record was designated on appeal: "[t]his power [to dismiss], however, should not be exercised generally unless the omission arose from negligence or indifference of appellant and, where good faith is shown, . . . the court, in order to avoid injustice, may, on a proper suggestion or on its motion, direct that the omission be corrected by a supplemental transcript" See also In re Smith, 119 B.R. 558 (S.D. Ohio 1989). Ozey claims he does not know why his previous attorney did not include the transcript in the designation of record.

There has been no allegation of bad faith or prejudice to the Trustee in this case and the debtor has taken action to remedy the defect in the record. The Trustee's Motion to Dismiss the Appeal of Defendant-Appellant Erhan Ozey (Docket #10) is denied.

Ozey is to complete the designation of the record within ten days of the date of this order.

Dated this 18th day of May, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

NORA BRENDA SWEENEY,
individually; as surviving spouse of
STANLEY ALLEN SWEENEY,
Deceased; and, as mother and next
friend of STANLEY JAMES SWEENEY,
JESSICA LOUISE SWEENEY,
BRENDA DEANN SWEENEY, and
MALCOLM STEVE SWEENEY,
all minors,

Plaintiffs,

vs.

CREDIT GENERAL INSURANCE
COMPANY, an Ohio Company,

Defendant.

FILED
IN OPEN COURT

MAY 18 1995

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

Case No. 94-C-339-H

ENTERED ON DOCKET

DATE MAY 19 1995

JUDGMENT

Now on this 18TH day of MAY, 1995, there comes on for hearing before this court a "Joint Motion for Approval of Settlement Agreement and Joint Stipulation of Judgment and Request for Entry of Judgment", the plaintiff Buddy Dale Apple, II being present and represented by attorney, Lawrence Taylor, the plaintiffs, Claudia LaDonne Sweeney and James Robert Sweeney, Jr. being present and represented by attorney George M. Miles, the defendant Credit General Insurance Company appearing by its attorney, William B. Selman.

The Court, having listened to the testimony of the parties, and statements of counsel, and having reviewed the "Settlement Agreement and Joint Stipulation of Judgment", finds as follows:

1. That the parties have entered into a "Settlement Agreement and Joint Stipulation of Judgment" filed herein;

2. That Plaintiffs, James Robert Sweeney, Jr. and Claudia LaDonne Sweeney, Guardians of the minor children, Stanley James Sweeney, Jessica Louise Sweeney, Brenda DeAnn Sweeney and Malcolm Steve Sweeney are authorized to settle this action pursuant to the terms of the "Settlement Agreement and Joint Stipulation of Judgment" as evidenced by the "Order Authorizing Settlement of Claim" in Case No. PG-94-148 in the District Court of Tulsa County, State of Oklahoma, copy of which is filed herein.

3. That the Plaintiff, Buddy Dale Apple II, Administrator of the Estate of Nora Brenda Sweeney, deceased is authorized to settle this action pursuant to the terms of the "Settlement Agreement and Joint Stipulation of Judgment" as evidenced by "Order Authorizing Settlement of Claim" in Case No. P-94-550 in the District Court of Tulsa County, State of Oklahoma, copy of which is filed herein.

4. That the settlement including the attorneys fees to be paid is reasonable and in the best interests of the minor children, and should be approved.

Wherefore, it is Ordered, Adjudged and Decreed as follows:

1. That the Settlement Agreement is approved.
2. Plaintiff, Buddy Dale Apple, II, Administrator of the Estate of Nora Brenda Sweeney is hereby awarded judgment of \$34,913.79 against the Defendant, Credit General Insurance Company, an Ohio Company.
3. Plaintiffs, James Robert Sweeney, Jr. and Claudia LaDonne

Sweeney, Guardians of Stanley James Sweeney, Jessica Louise Sweeney, Brenda DeAnn Sweeney, and Malcolm Steve Sweeney, are hereby awarded judgment of \$28,524.56 against the Defendant, Credit General Insurance Company, an Ohio Company.

4. Plaintiffs, Buddy Dale Apple, II, Administrator of the Estate of Nora Brenda Sweeney, James Robert Sweeney and Claudia LaDonne Sweeney, Guardians of Stanley James Sweeney, Jessica Louise Sweeney, Brenda DeAnn Sweeney, and Malcolm Steve Sweeney, minors, are hereby awarded judgment of \$47,561.65 against the Defendant, Credit General Insurance Company, an Ohio Company, which judgment may be discharged by Defendant by payment to the attorneys for Plaintiffs as follows:

- a. Lawrence Taylor, Attorney for the Estate of Nora Brenda Sweeney of the sum of Ten Thousand Eight Hundred and Sixty eight and 90/100 (\$10,868.90) Dollars;
- b. George M. Miles, Attorney for Guardians James R. Sweeney, Jr. and Claudia LaDonne Sweeney of the sum of Twenty-six Thousand six hundred ninety two (\$26,692.75) Dollars;
- c. Donald E. Smolen and Bryan L. Smith, Attorneys of the sum of Ten Thousand and No/100 (\$10,000.00) Dollars;

5. Plaintiffs, James Robert Sweeney, Jr. and Claudia LaDonne Sweeney, Guardians of Stanley James Sweeney, Jessica Louise Sweeney, Brenda DeAnn Sweeney, and Malcolm Steve Sweeney, are

hereby awarded judgment for specific performance against the Defendant, Credit General Insurance Company, an Ohio Company for the following payments:

- A. Effective and beginning as of April 8, 1995, the defendant shall pay an amount equal to the equivalent statutory worker compensation benefits for the benefit of the children of the decedent insured, Stanley A. Sweeney in accordance with the schedule of compensation described in 85 O.S. Sec. 22(8) in effect on September 2, 1992, which sum is currently \$277.00 per week, to be apportioned equally for the benefit of all four minor children, and shall continue to be paid so long as the children remain eligible under the criteria set out in 85 O.S. Sec. 22 (8)(a)(5), which provides:
- The income benefits payable for the benefit of any child...shall cease when he dies, marries or reaches the age of eighteen (18), or when the child over such age ceases to be physically or mentally incapable of self-support...or, if enrolled as a full-time student in any accredited educational institution, ceases to be so enrolled or reaches the age of twenty-three (23). A child originally qualified as a dependent by virtue of being less than eighteen (18) years of age may, upon reaching age eighteen (18) continue to qualify if he satisfies the tests of being physically or mentally incapable of self-support, actually dependent or enrolled in an accredited educational institution.
- B. Weekly payment amounts shall be reduced to \$239.68 at the time when only three children are eligible for benefits, \$184.37, when only two children are eligible for benefits and \$129.06 when only one child remains eligible for benefits.
- C. All payments may be made by Defendant every two weeks, the first payment of Five Hundred Fifty Four (\$554.00) Dollars, covering the period between April 8, 1995 through April 22, 1995, shall be mailed on or before April 22, 1995.
- D. Plaintiffs, James Robert Sweeney, Jr. and Claudia LaDonne Sweeney, Guardians, shall keep Defendant

informed, at all times, of the proper address or addresses where future payments should be mailed.

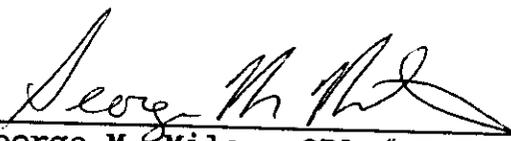
- E. The dates of birth of the minor children are as follows: Stanley James Sweeney, born June 3, 1980, Jessica Louise Sweeney, born March 24, 1982, Brenda DeAnn Sweeney, born September 12, 1983, and Malcolm Steve Sweeney, born November 27, 1985.
- F. Except for the weekly payments described herein, Defendant has no responsibility for any other benefits.
- G. Except for use in calculating equivalent weekly benefits as described herein, the Oklahoma Workers Compensation Statutes have no applicability to this settlement, and the Workers Compensation Court has no jurisdiction of any party herein.
- H. In the event any judgment, obtained pursuant to this agreement and stipulation, were to expire prior to all payments required herein, the Settlement Agreement shall continue to be constitute an enforceable agreement.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

APPROVED


Lawrence D. Taylor, OBA #8871
Attorney for Administrator
3223 East 31st Street, Suite 211
Tulsa, OK 74105-2444


George M. Miles, OBA #11433
Attorney for Guardians
406 S. Boulder, Suite 220
Tulsa, OK 74103



William B. Selman, OBA #8072
Attorney for Defendant
700 Petroleum Club Building
601 South Boulder
Tulsa, OK 74119

ENTERED ON DOCKET
MAY 19 1995

DATE
FILED

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

MAY 18 1995

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

CLEM C. RIFE,)
)
 Plaintiff,)
)
 v.)
)
 LIFE INSURANCE COMPANY OF)
 NORTH AMERICA, INC.,)
)
 Defendant.)

Case No. 94-C-872-B

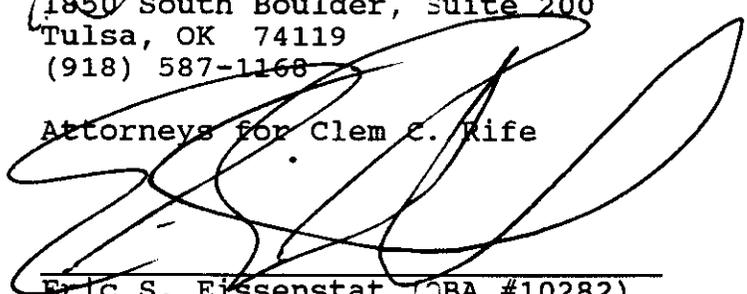
STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED pursuant to Rule 41(A)(1)(ii) that the above-entitled action may be dismissed with prejudice, with each party to bear its own costs.



Jay C. Baker (OBA #448)
BAKER & BAKER
1850 South Boulder, Suite 200
Tulsa, OK 74119
(918) 587-1168

Attorneys for Clem C. Rife



Eric S. Eissenstat (OBA #10282)
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
120 North Robinson, Suite 2400
Oklahoma City, OK 73102-7875
(405) 232-0621

Attorneys for Defendant, Life Insurance Company of North America, Inc.

ENTERED ON DOCKET

DATE MAY 19 1995

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

FILED

MAY 18 1995

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

POWER EXPRESS, INC.)
an Oklahoma corporation,)

Plaintiff,)

v.)

FERTECH ENVIRONMENTAL, INC.,)
a Missouri corporation,)

Defendant.)

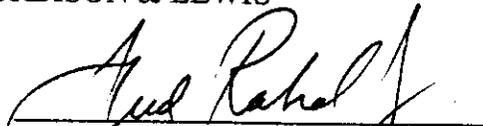
Case No. 95-C 37 *FHM*

STIPULATION OF DISMISSAL

COMES NOW Plaintiff Power Express, Inc., and Defendant FERtech Environmental, Inc., by their respective attorneys, and, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby stipulate to the dismissal of this action, the parties to each bear their own respective costs. The parties further stipulate that the dismissal as to all the claims Plaintiff Power Express, Inc., has against FERtech Environmental, Inc., shall be without prejudice, and the dismissal as to all Affirmative Defenses and Counterclaims of FERtech Environmental, Inc., against Power Express, Inc., shall be without prejudice.

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By:


Fred Rahal, Jr., OBA #007678
Stephanie J. Theban, OBA #010362
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth St.
Tulsa, OK 74119-1010
(918) 587-3161

McKINNEY, STRINGER &
WEBSTER, P. C.

By:


Gerald B. Davenport, OBA#015416
Patrick H. Kernan, OBA #004893
Mid-Continent Tower
Suite 2100
401 South Boston
Tulsa, OK 74103
(918) 582-3176

SO ORDERED:

S/Frank H. McCarthy
U.S. Magistrate
United States Magistrate Judge

Dated:

5-18-95

PHK/shg/30374.001/10008806

JCD/jo
5/12/95

copy

ENTERED ON DOCKET
DATE MAY 19 1995

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

FILED

MAY 18 1995

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

DEBRA OSWALT-BENGE and)
LINCOLN DOUGLAS BENGE,)
Individually and as Husband)
and Wife,)

Plaintiffs,)

vs.)

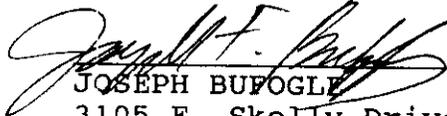
Case No.: 94-C-782-K

KMART CORPORATION, a)
Michigan Corporation,)

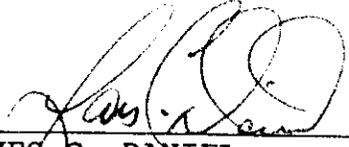
Defendant.)

DISMISSAL WITH PREJUDICE BY STIPULATION

Come now all attorneys of record, representing all parties herein, and pursuant to Rule 41 of the Federal Rules of Civil Procedure, and by stipulation, agree to the dismissal of the above styled and numbered lawsuit, with prejudice to the plaintiffs' right of refileing the same, as all issues of law and fact have been fully compromised and settled.


JOSEPH BUFOGLE
3105 E. Skelly Drive, Ste. 600
Tulsa, OK 74105

Attorney for Plaintiffs


JAMES C. DANIEL
2431 E. 51st St., Ste. 306
Tulsa, OK 74105

Attorney for Defendant

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

EDDIE BRAGG,

Plaintiff,

vs.

No. 94-C-575-K ✓

AMERICAN PIPE BENDING, INC.,
d/b/a AMERICAN PIPE BENDING
COMPANY, an Oklahoma Corp

Defendant.

FILED

MAY 18 1995

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

ORDER

Now before the Court is the Motion in Limine filed by Defendant American Pipe Bending ("APB") in the employment discrimination case brought by Plaintiff Eddie Bragg ("Plaintiff"). This Order will respond to concerns raised in that motion and during the Supplemental Pretrial Conference about expert statistical analysis, expert analysis of economic loss, the admissibility of remarks by co-workers, mention of parent-company Mohawk Steel, and evidence relating to Plaintiff's job performance prior to 1990.

A. Dr. Bonham's Statistical Analysis

Plaintiff's counsel has hired Dr. John Bonham as an expert statistician to conduct a statistical analysis of APB's employment practices. In his analysis, Bonham wrote:

I have concluded that the "z-score" for American Pipe Bending, Inc. for the year 1992 is 2.33. This statistical evidence means that there is only one chance out of 100 that the number of blacks in the terminated group in 1992 [i.e. four blacks] could have been as high as 18.18 percent when the number of blacks employed by

the company was 8.0 percent. The conclusion is that the difference is not the result of an unbiased selection process.

Pl's Resp. to Def.'s Mot. in Lim., Exh. A. The Defendant argues that Dr. Bonham's opinions lack probative value and should be excluded under Rule 403 of the Federal Rules of Evidence.

APB is a very small company. Plaintiff's expert noted that the population of APB employees ranged from a high of 29 workers in 1992 to a low of 10 workers in January 1994. APB went from 25 employees in October 1992 to 21 employees immediately after the reduction in force that resulted in Bragg's loss of employment. The results of the 1991 reduction in force constitute the heart of Plaintiff's complaint of discrimination.

In Fallis v. Kerr-McGee Corp., 944 F.2d 743 (10th Cir. 1991), the Tenth Circuit expressed its disapproval for statistical evidence of the kind offered by Plaintiff. In Fallis, the plaintiff recovered judgment in a wrongful termination case and had supported his argument with statistical evidence remarkably similar to that proffered by Plaintiff. However, the Tenth Circuit held that the trial court should have granted the defendant's motion for a directed verdict. The statistical evidence used was found to be of such little probative value that it could not permit an inference of discrimination.

To appreciate fully the similarity of the two cases, it should be noted that the numbers are very comparable. In Fallis, Kerr-McGee employed fifty-one nonmanagerial geologists, including plaintiff, at the time of the reduction in force. Of those fifty-

one geologists, forty-two were under forty, and nine were over forty. In the wake of the reduction in force, four of the forty-two geologists under forty, i.e. 10%, were laid off, while three of the nine geologists over forty, i.e. 33%, were terminated. In the case presently before the Court, Plaintiff's statistician attempts to draw conclusions from the premise that four black individuals were laid off in 1992, including Bragg, in a company of approximately 25 workers.¹

This Court holds that the Tenth Circuit's decision in Fallis precludes the statistical evidence offered by Plaintiff. Fallis found the statistical evidence insufficient for two reasons. First, the sample was too small. The Court said:

Random fluctuations regarding the retention or termination of just one or two geologists within this group during the March 1986 reduction in force would have had an enormous impact on the percentage of geologists over forty who survived the reduction in force. Consequently, such a small statistical sample carries little or no probative force to show discrimination.

Fallis, 944 F.2d at 746. Second, the Court noted that the statistics did not eliminate nondiscriminatory explanations for the disparity. The court stated:

[I]n order for statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate nondiscriminatory explanations for the disparity. In other words, a plaintiff's statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment between *comparable* individuals.

(quotation omitted) (emphasis in original). The Fallis court found

¹Defendant says that only three black individuals were laid off during this time, one of which had only been with APB for a short time.

that the probative value of the statistics would only attach if the evidence examined whether similarly situated non-minority employees were treated differently than the plaintiff.

Both of the concerns voiced in Fallis apply equally to the situation at APB involving Bragg. The sample size at APB is even smaller. Of 25 employees, four were terminated due to the reduction in force, one of whom was a black individual. In a context like this, the termination or retention of any one employee has a major impact on the results of the analysis. Moreover, the members of the jury can assess the numerical evidence of discriminatory treatment without expert statistical opinion. For instance, a statistician need not explain the significance of testimony showing that all four of the company's black employees were terminated in 1992.

Additionally, Dr. Bonham makes absolutely no effort to eliminate nondiscriminatory explanations for disparate treatment between comparable individuals. For instance, he does not compare the termination rate for white employees who have the same education and training background as Plaintiff. Therefore, the probative value of Dr. Bonham's analysis is extremely small.

Rule 403 of the Federal Rules of Evidence precludes the admission of evidence where the probative value is substantially outweighed by the danger of unfair prejudice. In this instance, Dr. Bonham's report and conclusions involve a serious danger of prejudice. Bonham states, "The conclusion is that the difference is 'highly significant' and is not the result of an unbiased

selection process." Pl's Resp. to Def.'s Mot. in Lim., Exh. A. Given the potential confusion created by statistical evidence, the risk of prejudice, and the lack of probative value of Dr. Bonham's analysis, this Court grants the Motion in Limine filed by Defendant with regard to Dr. Bonham's statistical evidence.

B. Dr. Bonham's Analysis of Economic Loss

At the Supplemental Pretrial Conference, held on May 9, 1995, the Defendant questioned the propriety of testimony by Dr. Bonham about the economic loss to Plaintiff as a result of alleged discrimination. In the opinion letter offered by Dr. Bonham, there is only one sentence relating to economic loss. The letter states in the introductory paragraph, "In addition, you have retained me to analyze the economic loss to Mr. Eddie Bragg as a result of his termination from American when the necessary information has been made available."

Fed.R.Civ.P. 26(a)(2)(B) requires the expert to provide a written report prepared and signed by the expert witness. The Rule states:

The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions. . . .

Pursuant to Fed.R.Civ.P. 26(a)(2)(C), these disclosures are supposed to be made 90 days before the trial date. This Rule is designed to ensure that the parties and the Court possess full information, well in advance of trial, regarding all proposed

expert testimony. Robinson v. Missouri Pacific Railroad Company, 16 F.3d 1083, 1089 (10th Cir. 1994).

The Report filed by Plaintiff does not provide any information or opinions as required by Rule 26 relevant to economic loss. The mere fact that Dr. Bonham mentions that he has been retained to analyze economic data does not constitute disclosure of his findings in a timely manner. Therefore, Dr. Bonham will not be allowed to testify with regard to economic damages suffered by the Plaintiff.

C. Stray Remarks

Defendant seeks to exclude comments made by employees at APB who were not part of the personnel process, arguing that they are stray remarks and without probative value. In Figures v. Board of Public Utilities, 967 F.2d 357, 360 (10th Cir. 1992), the Tenth Circuit held that isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions. 967 F.2d at 360; See also Cone v. Longmont United v. United Hospital Association, 14 F.3d 526, 531 (10th Cir. 1994) (stating that stray remarks are insufficient to create a jury issue).

Defendant objects to the admissibility of statements by co-workers such as Roy Bowline and Dale Kelly. The Court recognizes the prejudicial impact that stray remarks may have and will monitor the testimony with regard to them. However, the Plaintiff appears to allege that there was a culture of prejudice at APB's facility

that was known to and condoned by the company. While proof of a general atmosphere of discrimination is not the same as proof of discrimination against an individual, such an atmosphere may implicitly influence the decision-making process. Conway v. General Switch Corp., 825 F.2d 593, 598 (1st Cir. 1987). To the extent Plaintiff can make such a showing, evidence of constant "racial banter" at APB may be relevant. Therefore, this Court will deny the motion in limine concerning alleged stray remarks and will, instead, make rulings as necessary to deal with racial comments at APB.

D. Mohawk Steel

In the course of the Supplemental Pretrial Conference, Defendant argued that all evidence regarding Mohawk Steel should be excluded. While this Court sees little relevance in evidence pertaining to Mohawk Steel, it is premature to preclude all such evidence. For instance, if APB produced a policy statement from *Mohawk Steel* in response to questions about APB's affirmative action policies, this evidence would most likely be admissible.

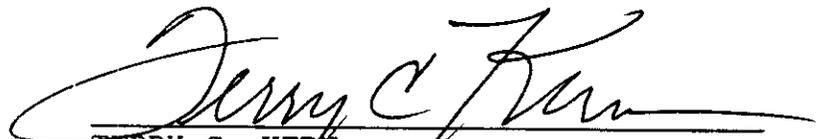
E. Incidents Before 1990

Although Plaintiff began his employment at APB in 1990, events previous to that date may demonstrate Plaintiff's ability to do his job in a satisfactory manner. Therefore, this Court will allow a limited amount of evidence regarding Plaintiff's job performance before APB acquired the business.

Conclusion

For the reasons discussed above, the Motion in Limine is granted with respect to the testimony of Dr. Bonham. The Court will deal with the other evidentiary issues raised in the motion as they arise at trial.

ORDERED this 18 day of May, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)

vs.)

LARRY D. STUART, RENE P.)
HENRY, JR., UNKNOWN SHERIFF)
AND DEPUTIES OF THE OSAGE)
COUNTY SHERIFF'S DEPARTMENT,)
THREE UNKNOWN COUNTY)
COMMISSIONERS, UNKNOWN OWNERS)
OF THE COLLINSVILLE SALES)
BARN, AN UNKNOWN VETERINARIAN,)
AND THE COUNTY OF OSAGE)
COUNTY, OKLAHOMA,)

Defendants.)

No. 92-C-269-K ✓

FILED

MAY 17 1995

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

JOSEPH ANGELO DICESARE,)
)
 Plaintiff,)

vs.)

STANLEY GLANZ, SHERIFF OF)
TULSA COUNTY, and BILL O'DELL,)
DEPUTY SHERIFF OF TULSA)
COUNTY,)

Defendants.)

No. 92-C-905-K

ORDER

Before the Court are various motions of the plaintiff. By Order entered January 11, 1995, the Court granted the defendants' motions for summary judgment. On January 27, plaintiff filed a motion to reconsider and/or motion to stay judgment (#149). On February 6, 1995 plaintiff filed a notice of appeal from the Judgment. Simultaneously, plaintiff filed a motion for stay of proceedings (#152). Finally, on April 21, 1995, plaintiff filed a

motion for reconsideration due to newly discovered evidence (#157).

As stated, plaintiff has filed a notice of appeal in this case. However, it is established a district court may consider a Rule 60 motion despite a pending appeal. The district court may then either deny it on the merits, or notify the appellate court of the district court's intention to grant the motion upon proper remand. Aldrich Enterprises, Inc. v. United States, 938 F.2d 1134, 1143 (10th Cir.1991).

A primary basis for the granting of summary judgment was the Court's conclusion that plaintiff had failed to prove his ownership of the horses in question, resulting in a lack of standing to proceed. Accompanying his motion plaintiff attempts to present registration papers purporting to establish his ownership of the horses. Such documents should have been presented in connection with the summary judgment motion. A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all of the facts known to him that might have been useful to the court. 11 Wright & Miller, Federal Practice and Procedure, §2858 at 173 (1973 ed.); Mas Marques v. Digital Equip. Corp., 637 F.2d 24, 29-30 (1st Cir.1980). Also, plaintiff again fails to demonstrate the horses described in the registration papers were the ones seized and sold by the defendants. The first motion to reconsider is denied.

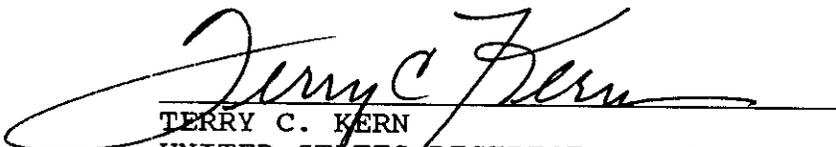
The motion of the plaintiff to stay proceedings is also denied. With the case on appeal, no activity will take place at the district court level in any event.

Plaintiff also moves the Court to reconsider based upon

allegedly newly discovered evidence pursuant to Rule 60(b)(2) F.R.Cv.P. Plaintiff states in the motion he has uncovered evidence relating to defendant O'Dell's involvement in the alleged constitutional violation, but provides no documentation of the charge apart from letters which plaintiff himself apparently wrote to the American Quarter Horse Association. Motions to reopen for newly discovered evidence are not favored and movant is required to base his motion on matter which could not reasonably have been previously adduced. Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 728 (10th Cir. 1993). If a party, through negligence or a tactical decision, fails to present evidence that was available, he may not find refuge under Rule 60(b)(2) by finding substantially similar evidence from a newly discovered source. Id. Plaintiff has not satisfied the requirements of Rule 60(b)(2). Even were the Court to consider plaintiff's presentation, it does not demonstrate sufficient involvement by O'Dell in the litigated events to warrant vacation of the Judgment.

It is the Order of the Court that the motions of the plaintiff to reconsider and/or stay judgment (#149), for stay of proceedings (#152) and for reconsideration due to newly discovered evidence (#157) are all hereby DENIED.

ORDERED this 17 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

III. On December 12, 1991, the trial judge sentenced Petitioner in accordance with the jury's verdict and accelerated Petitioner's deferred sentence in Case No. CF-90-2836 to a term of ten years imprisonment. The sentences were ordered to run consecutively. Neither Petitioner nor counsel filed a direct appeal although the trial judge had advised Petitioner of his right to an appeal and of the procedures for perfecting the same.

In May 1992, Petitioner, pro se, filed an application for post-conviction relief and requested an appeal out of time. Petitioner alleged that his attorney had abandoned his appeal without informing him. The State objected to Petitioner's application and submitted the following affidavit of Petitioner's trial counsel:

1. I am a[n] attorney engaged in the private practice of law in Tulsa County, Oklahoma, and was so engaged during 1991.

2. I represented Petitioner William Henry Jamerson when he was tried by jury, and was sentenced in Tulsa County Case No. CF-91-3429.

3. As part of my trial preparation, a witness was located which would give Mr. Jamerson an alibi for the time of the crimes involved in this case; however at the time of trial, this witness could not be located.

4. At time of sentencing, I gave notice of intent to appeal.¹ I had discussed an appeal with Mr. Jamerson, and he was aware that, in my opinion, it would be necessary to produce this alibi witness before there would be any substantial basis upon which to file a motion for a new trial and a direct appeal. Further, in my opinion, without the testimony of this alibi witness, there could not be any effective allegations of errors relating to the identification of Mr. Jamerson. Mr. Jamerson was aware of these facts and agreed with my

¹The sentencing transcript does not support this statement.

assessment of his appeal prospects unless this alibi witness is located.

5. To my knowledge, this missing alibi witness has not been located; therefore, in my opinion, there is no basis to file a motion for a new trial or a direct appeal of this conviction. I have discussed these facts with Mr. Jamerson, and [he] has agreed with this assessment.

(Ex. B attached to Respondent's Response.)

In July 1992, the district court denied post-conviction relief, finding that Petitioner had "made a conscious decision not to appeal his case." Petitioner timely appealed on the following ground:

On 12-12-91 appellant with counsel present Mr. Ed Glass was advised of the right to appeal and gave notice to appeal however thru [sic] appellant's counsel he was advised not to appeal because in defense counsel's opinion only one issue was appealable that being a witness who couldn't be found at the time of the trial. Appellant excepted [sic] the sound advise [sic] of counsel Mr. Ed Glass and [was] of the opinion that when the witnesses was found would then be able to file his appeal as proscribed by law and prove his innocence.

Appellant after several months of incarceration found out he had given up his rights to a direct appeal eventho[ugh] the witnesses had been found and filed an application for post-conviction relief May 1, 1992.

(Ex. D at 2, attached to Respondent's response.)

In September 1993, the Court of Criminal Appeals affirmed the denial of Petitioner's request for post-conviction relief. The Court adopted the state court's findings and concluded that "Petitioner ha[d] not offered sufficient reason for his failure to file a timely direct appeal." (Ex. E attached to Respondent's response.)

In the present petition for a writ of habeas corpus, Petitioner again alleges that he "was denied effective assistance

of Appellate Counsel as Counsel abandoned Petitioner without first filing his appeal." (Petition at 4, docket #1.) Respondent contends that Petitioner's claim is clearly refuted in his counsel's affidavit that Petitioner acquiesced to abandon his appeal.

II. ANALYSIS

As a preliminary matter, this Court determines that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992).

Next the Court addresses Petitioner's only contention in this case that he was denied the effective assistance of counsel when his retained counsel failed to give notice and perfect an appeal during the ten-day period following the entry of the Judgment and Sentence. It is well established that a defendant's right to effective assistance of counsel applies at trial as well as during the ten-day period for perfecting a direct appeal. Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991); Romero v. Tansy, 46 F.3d 1024, 1030 (1995), petit. for cert. filed ___ S.Ct. ___ (May 1, 1995). To establish ineffective assistance of counsel for failure to properly perfect an appeal, Petitioner must only show that Mr. Glass's conduct fell below an objective standard of

reasonableness. Romero, 46 F.3d at 1030 (citing Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that the district court erred in requiring the defendant to show prejudice); Hannon v. Maschner, 845 F.2d 1553, 1558 (10th Cir. 1988)). If Petitioner can prove that the ineffectiveness of counsel denied him the right to appeal, then this Court need not determine whether he would have had some chance of success on appeal; "prejudice is presumed." Romero, 46 F.3d at 1030 (cited case omitted).

In deciding an ineffectiveness claim, this Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. In Romero, The Tenth Circuit Court of Appeals recently restated counsel's responsibility to perfect an appeal.

[A] defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect the defendant's appeal. The Sixth Amendment's guarantee of effective counsel requires that counsel explain the advantages and disadvantages of an appeal, advise the defendant as to whether there are meritorious grounds for an appeal, and inquire whether the defendant wants to appeal his conviction. Counsel retains these obligations unless defendant executes a "voluntary, knowing, and intelligent" waiver of his right to counsel on appeal. And a defendant's failure to contact counsel "does not suggest that he knowingly and voluntarily waived his right to counsel." Because counsel in Baker "never advised [the defendant] of the pros and cons of appealing his conviction, and did not ascertain whether he wanted to appeal," his assistance was constitutionally ineffective.

Romero, 46 F.3d at 1031.

Respondent, relying on the state district court's findings, maintains that Petitioner was not denied effective assistance of

counsel since he consciously waived his right to appeal. The state district court expressly found a waiver of Petitioner's appellate rights.

[P]etitioner was advised of the right to appeal, yet, during the ten-day period following sentencing, petitioner consulted with his attorney with regard to an appeal, and after that consultation, decided that an appeal would not be successful. Thus Petitioner made a conscious decision not to appeal his case. Nor does the record reflect any attempts by petitioner to contact the court in an attempt to appeal petitioner's conviction.

(Ex. C at 3, attached to Respondent's Response.)

The state court's finding of waiver is a factual finding subject to a presumption of correctness under 28 U.S.C. § 2254(d). See Meeks v. Cabana, 845 F.2d 1319, 1323 (5th Cir. 1988); see also United States v. Gibson, 985 F.2d 212, 216 (5th Cir. 1993). Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness apply to this case, or that the factual determinations made by the state district court are not fairly supported by the evidence in the state court record. Petitioner merely contends that the trial court did not properly advise him of all of his rights in connection with his appeal--i.e. that he had the right to appointed counsel on appeal and the right to a case made at public expense, citing Copenhaver v. State, 431 P.2d 669 (Okla. Crim. App. 1967); Tate v. State, Case No. PC 92-0476; and Jewel v. Tulsa County, 450 P.2d 833 (Okla. Crim. 1967). This argument, however, is not cognizable in this habeas corpus action since it is based solely on the alleged violation of state law. See Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992) (petitioner's claim that he should have been advised by the

trial court of his right to appeal without payment was not cognizable in a federal habeas corpus case where the federal courts determine only whether a federal right was violated). Therefore, this Court must conclude that the state district court's finding of waiver of the right to appeal, adopted by the Court of Criminal Appeals, is entitled to a presumption of correctness.

Petitioner argues, however, that his counsel was ineffective for failing to perfect the appeal as set out in Abels v. Kaiser, 913 F.2d 821 (10th Cir. 1990), and Anders v. California, 383 U.S. 738 (1967). Abels and Anders, however, are inapplicable. Unlike the case at hand, the defendants in Abels and Anders instructed their counsel to appeal the conviction, but counsel refused to file the brief on appeal. In Abels, the time for perfecting the appeal expired with no brief being filed by retained counsel because Abels had failed to pay counsel for the services already performed. 913 F.2d at 822. The Tenth Circuit Court of Appeals construed the filing of the notice of intent to appeal as "an appearance sufficient to bind [counsel] to his duty" and held that "[c]ounsel's failure . . . [to file the necessary brief to perfect the appeal], when he had not been relieved of his duties through a successful withdrawal, was a violation of Abel's constitutional right to effective assistance of counsel on his appeal as of right." Id. at 823. In Anders, counsel notified the court of appeal that there was no merit to the appeal and the defendant was forced to proceed pro se. 386 U.S. at 740-41. The Supreme Court held that "if counsel finds [the appeal] to be wholly frivolous,

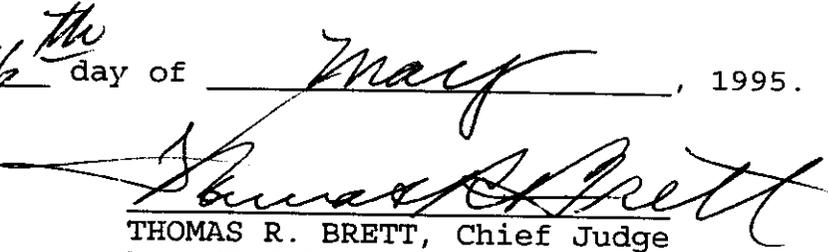
after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. at 744.

In the instant case, Petitioner does not dispute (1) that counsel explained to him that there was no substantial basis for a direct appeal unless the alibi witness could be located, and (2) that he agreed not to appeal at that time. Because the failure to file a direct appeal was not the fault of retained counsel, but due to Petitioner's decision to waive the right to appeal, the Court finds that counsel was not ineffective in the constitutional sense for failing to notice and perfect the appeal.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus (docket #1) and Petitioner's motion to expedite proceedings (docket #8) are hereby **denied**.

SO ORDERED THIS 16th day of May, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAY 16 1995

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

BUFORD RAY FREDERICK,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, Secretary of)
 Health and Human Services,)
)
 Defendant.)

Case No. 94-C-422-B

JSW

ENTERED ON DOCKET
DATE MAY 17 1995

ORDER

The Administrative Law Judge ("ALJ") denied Social Security disability benefits to Plaintiff Buford Ray Frederick, concluding that he could return to his past work as an order filler. Frederick now appeals that decision. Mr. Frederick contends that the ALJ did not properly analyze the demands of his past work and, as a result, erred in finding him to be not disabled.¹ The issues are addressed below.

I. Standard of Review

The Court's role "on review is to determine whether the Commissioner's² 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

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."

² Pursuant to P.L. No. 103-296, the Social Security and Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security cases was transferred to the Commissioner of Social Security effective March 31, 1995.

9

a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).³ A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Commissioner 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).

II. Legal Analysis

Mr. Frederick, 50 years old, applied for disability benefits under the Social Security Act on November 21, 1990, alleging disability since October 11, 1990 due to severe pain in his left side and chest. *Plaintiff's Brief at page 2 (docket #6)*. He also claims that residual effects from his heart disease and past alcoholism prevents him from working. The ALJ, however, found that Mr. Frederick could return to his past work as an order filler.

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

³ One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, 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).

any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Commissioner finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

The issue in this case focuses on step 4. Mr. Frederick contends that the ALJ did not abide by Social Security Ruling 82-62 and, as a result, the case should be remanded for further evaluation. That rule requires the ALJ to "fully investigate" and make "explicit findings" regarding: (1) The claimant's Residual Functional Capacity ("RFC"); (2) The physical and mental demands of prior jobs or occupations; and (3) the ability of the claimant to return to the past occupation given his or her residual functional capacity. *Also, see*, 20 C.F.R. §§ 404.1520(e) and 404.920(e)(1994) (*ALJ must review the claimant's RFC and the physical and mental demands of the work she has done in the past*). A *conclusory determination that the claimant can perform past work, without specific findings, does not constitute substantial evidence. Groeper v. Sullivan*, 932 F.2d 1234, 1239 (8th Cir. 1991).

In this case, the ALJ explicitly discussed Mr. Frederick's RFC on page 26 of the Record.⁴ However, the primary question before the court is whether the ALJ fully investigated and made explicit findings concerning the physical and mental demands of Mr. Frederick's past job as an order filler. On page 149 of the Record, Mr. Frederick completed a form that indicated he worked filling shipping orders to retail stores. He noted that he

⁴ That finding reads: "The claimant has the RFC to perform work-related except for work involving occasional lifting of more than 25 pounds, frequent lifting and carrying of objects weighing more than 15 pounds, frequent climbing and stooping, perform tasks requiring no limitations on reaching, handling, grasping, and pushing/pulling with the left upper extremity, performing tasks requiring no restrictions on working with moving machinery, understanding, remembering, and carrying out complex job instructions, and performing tasks requiring no more than mild limitations on following work rules, relating to co-workers, dealing with the public, using judgment, interacting with supervisors, dealing with work stresses, functioning independently, maintaining attention and concentration...and demonstrating reliability. The claimant's pain and other symptoms do not affect his concentration or prevent the performance of medium work activity with these limitations." Record at 26.

was required to walk four (4) hours a day, stand four (4) hours a day, and was further required to frequently bend and frequently lift 50 pounds. However, the ALJ did not question Mr. Frederick concerning his past job as an order filler. The Vocational Expert testified that Mr. Frederick could return to work as an order filler, but offered no detailed explanation as to the demands of Mr. Frederick's past job as an order filler. Mr. Frederick's attorney also solicited little, if any, meaningful information. The ALJ then found that Mr. Frederick could return to work as an order filler. *Record at 25.*

The issue in this case is similar to the one in *Henrie v. Department of Health and Human Services*, 13 F.3d 359 (10th Cir. 1993). In that case, the ALJ found that a claimant, who was represented by counsel, could return to her past work as a negative stripper. The claimant appealed the decision, contending that the ALJ failed to adequately develop the record concerning the mental demands of that job. The Tenth Circuit agreed with the claimant, finding that the ALJ violated Rule 82-62 because he did not inquire regarding the physical and mental demands of a negative stripper. The case was remanded. *Id. at 360-361.*

In *Jones v. Bowen*, 699 F.Supp. 693 (N.D. Ill. 1988), the court firmly adopted the rule set forth in *Henrie*, but emphasized that other factors, including the performance of the claimant's attorney, should be weighed in such cases. The court set both a well-reasoned and persuasive holding:

Where a claimant is represented by a lawyer at an ALJ hearing, the ALJ cannot fairly be saddled with the task of doing the lawyer's job for him or her. It is one thing to impose on an ALJ the duty to make sure the record is developed fully where a claimant unschooled in the law is involved...it is quite another to expect the ALJ to assume the lawyer has come unprepared to develop whatever factual issues the case appropriately calls for. If the

record appears to present all the relevant facts, with the lawyer having had the full opportunity to ask any questions and tender any evidence he or she desired, the ALJ cannot properly be second-guessed for a claimed failure to "develop" the record. (emphasis added). *Id.* at 697.⁵

The *Jones* court affirmed the Commissioner's decision, in part, because substantial evidence supported the Commissioner's decision, but this Court agrees with the proposition that the duty of a claimant's attorney is to help create a record addressing the significant issues. The role of an attorney representing a Social Security claimant is to provide, at a minimum, effective counsel. Sections 206(b) and 406(b) of the Social Security Act authorizes the Commissioner to withhold up to 25 percent of the total of past-due benefits for payment of attorney's fees if a claimant's action is successful. One reason for the statutes is obvious: Congress wanted to "encourage effective legal representation of claimants" by assuring attorneys they would receive adequate pay. *See, Hearings on H.R. 6675 Before the Com. on Finance of the Senate, 89th Cong., 1st Sess. 512-513 (1965 Hearings)*. Also, see, generally, *Smith v. Bowen*, 815 F.2d 1152 (7th Cir. 1987)(*Legislative history of Section 406(b)(1) suggests that statutes was enacted, in part, to guarantee that attorneys rendering effective services would receive reasonable compensation*).⁶

⁵ The Court also agrees with the reasoning discussed in Footnote 8 of the *Jones* decision. It reads: "This is not to suggest that SSR 82-62 always ascribes to the ALJ a mere passive role of appraising evidence. That SSR requires the agency to make every effort to secure evidence and obtain sufficient documentation and otherwise be actively involved in developing a factual inquiry. But at least as to a lawyer-represented claimant, this Court will not read into that language a directive that an ALJ must become a Sherlock Holmes-type investigator when the evidence actually tendered does not clearly call for further fleshing out. What the ALJ is obligated to do is to develop the record, not to create it." *Id.* at 697.

⁶ Little question exists that counsel is extremely important at administrative proceedings, especially given the maze of bureaucratic rules and procedures. As discussed by the United States Supreme Court, "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Goldberg v. Kelly*, 90 S.Ct. 1011, 1022 (1970).

In the case at bar, the record indicates the following. First, Mr. Frederick's attorney -- generally regarded to be the Social Security appeal expert in this District⁷ -- had ample opportunity to question his client and/or the Vocational Expert concerning the demands of his past work and, in effect, assist the ALJ in developing a full record in fulfillment of Social Security Ruling 82-62. He did not do so. Instead, he inquired only as to his client's reading ability as it applied to the order filler job. Record at 95.

The attorney asked no specific questions to the Vocational Expert concerning the demands of Mr. Frederick's job as an order filler nor did he otherwise make inquiry in support of his client's position.

The undersigned finds that this conduct does not meet the requirements of effective counsel.

The attorney must be accountable for his actions. He cannot simply avoid developing the record on significant issues and then complain on appeal about the ALJ's conduct. All parties, including the ALJ and the claimant's attorney, must bear responsibility for their actions.

The question remains whether Mr. Frederick, a 50-year-old claimant with a ninth grade education, should take responsibility for his counsel's omission. While case law is well-settled that a client must bear the consequences of the attorney he hires, the issue need not be reached here.

Because no bright line can be drawn by which to distinguish the point when the ALJ's responsibility ends and the attorney's begins, the undersigned finds that this case

⁷ Computer records from the this Court's docketing system show that Mr. McTighe is counsel of record in 213 of the 427 Social Security appeal cases. These cases include "pending" and the "terminated" as defined by the Court Clerk's office.

should be remanded for further inquiry. In point of fact, an appropriate interpretation of the roles of the ALJ and Claimant's attorney is best said to be co-extensive. If the presence of counsel had no effect on hearing, then the ALJ's duty would continue unabated. However, the presence of counsel does count for something, substantively. Counsel has a concomitant duty to his client, to develop the record, and cannot, as here, complain that the record was not so developed, when he did not take steps to fill the gap. In short, the ALJ's duty of inquiry varies with the presence of counsel. It is heightened when a claimant appears *pro se*, and lessened (but not eliminated) when counsel is present.⁸

Accordingly, the undersigned finds that this case shall be remanded, at which time the ALJ and Plaintiff's counsel shall fully develop the record as regards Plaintiff's claims, and particularly as to the question of whether he can perform his past relevant work.⁹

IT IS SO ORDERED THIS 16th day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁸The Court is aware that the *Henric* case merely reprimanded the attorney in a footnote, but remanded the case because of the ALJ's violation of SSR 82-62. The facts in this case can be distinguished. First, the Appeals Council remanded the case for a second hearing so the ALJ could determine the extent of Mr. Frederick's limitations and how they would affect his return to work. Mr. Frederick was not represented by counsel for the first hearing, but Mr. Paul McTighe represented him in the July 29, 1993 hearing. At one point in that hearing, the ALJ asked Mr. McTighe if he had any additional issues to raise. Mr. McTighe said "no." However, given the limited questions Mr. McTighe asked of his client concerning his reading ability, the record suggests that Mr. McTighe, an attorney who has handled hundreds if not thousands of Social Security appeals in this District, was aware of SSR 82-62 and its implications to his client. The Court also notes that the ALJ should have done a more thorough job of developing the Record.

⁹The ALJ's opinion and Commissioner's brief offer an overview of the medical evidence, which the Court adopts in this Order.

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

RUSSELL McINTOSH,

Plaintiff,

v.

BANCOKLAHOMA MORTGAGE CO.;
HARRY MORTGAGE CO.;
BRUMBAUGH & FULTON; BANK
UNITED OF TEXAS, FSB;
MORTGAGE CLEARING CORP.;
FIRST MORTGAGE CO.; NORWEST
MORTGAGE CO.; WOODLAND
BANK; FLEET MORTGAGE CO.;
LIBERTY MORTGAGE CO.; LOCAL
AMERICAN BANK;

Defendants.

ENTERED ON DOCKET
DATE MAY 17 1995

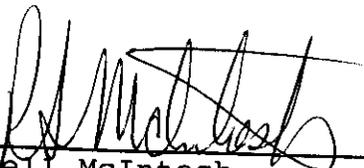
Case No. 94-C-929-B

FILED

MAY 16 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO NORWEST MORTGAGE, INC.**

Come now the Plaintiff, Russell McIntosh and the Defendant Norwest Mortgage, Inc. and hereby enter into a stipulation of dismissal with prejudice, pursuant to Rule 41 (a) (1), Federal Rules of Civil Procedure. The Court shall retain jurisdiction over Plaintiff and Norwest Mortgage, Inc. to supervise the settlement until February 28, 1996.



Russell McIntosh

Respectfully submitted,



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



Marilyn M. Wagner, OBA #6292
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
P. O. Box 1046
Tulsa, Oklahoma 74101
Attorney for Norwest Mortgage, Inc.
(918) 587-3161

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of May, 1995, a true and correct copy of the above and foregoing document was mailed, with full and sufficient postage affixed thereon, to:

Jack I. Gaither, Esq.
701 Beacon Building
406 South Boulder
Tulsa, OK 74103-3825

Larry D. Henry, Esq.
Arrington, Kihle, Gaberino & Dunn
1000 ONEOK Plaza, 100 W. 5th St.
Tulsa, OK 74103

Mike Brogan, Esq.
Brogan & Brogan
2809 N.W. Expressway, Suite 380
Oklahoma City, OK 73112

Ronald Main, Esq.
P. O. Box 521150
Tulsa, OK 74152-1150

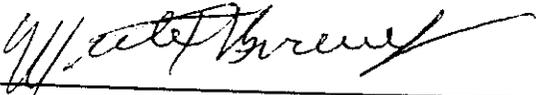
F. Thomas Cordell, Esq.
John D. Marble, Esq.
Huckaby, Fleming, Frailey,
Chaffin & Darrah
P. O. Box 533
Chickasha, OK 73023

A. Martin Wickliff, Jr., Esq.
Wickliff & Hall
1st Interstate Bank Plaza
1000 Louisiana Street, Suite 5400
Houston, TX 77002

Mona Lambird
Robert J. Troester
Andrews Davis
500 W. Main
Oklahoma City, OK 731023

Paul D. Brunton
610 S. Main Street, Suite 312
Tulsa, OK 74119-1258

Kenneth G.M. Mather
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172-0141


Michael Braswell

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

FILED

MAY 16 1995

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

RUSSELL McINTOSH,
Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE CO.,
et al.,

Defendants.

No. 94-C-929-B

ENTERED ON DOCKET
DATE MAY 17 1995

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

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



F. Thomas Cordell, Jr.
201 N. 4th, P.O. Box 533
Chickasha, OK 73023
Attorney for Fleet Mortg.
(405) 224-0237



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


Russell McIntosh, Plaintiff

ENTERED ON DOCKET
DATE MAY 17 1995

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

FILED

MAY 16 1995

Richard M. Lawrence
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
[Signature]

HAZEL J. HURST,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

93-C-⁸85-E

JUDGMENT

This action having come before the court for consideration, IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered as follows: The case is remanded for further hearing by the Administrative Law Judge.

The case is remanded per the Order of April 25, 1995.

DATED THIS 16th day of May, 1995.

[Signature]
JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

21

ENTERED ON DOCKET

DATE ~~MAY 17 1995~~

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

FILED

MAY 16 1995

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

OSCAR DURANT,

Plaintiff,

vs.

DONNA E. SHALALA, Secretary
Health and Human Services,

Defendants.

Case No. 92-C-942-C

ORDER

The Administrative Law Judge denied Social Security disability benefits to Plaintiff Oscar Durant, finding that he could return to work as a mechanic, spray paint machine operator, grinding machine operator or assembly person. Mr. Durant, a 50-year-old with a seventh-grade education, now appeals that decision.¹ For the reasons discussed below, the Court **remands** the case to the Commissioner of the Social Security Administration for further consideration.

I. Procedural History/Summary of Evidence

Durant was born on December 2, 1940. He has a seventh grade education and has previously worked as a laborer, aircraft cleaner, parts washer, sand blaster and fiberglass painter. He stopped working in September of 1988.

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."

23

Mr. Durant has filed two applications for Social Security disability benefits. He first applied for Social Security disability benefits on December 9, 1988. His application was denied initially and again on reconsideration. The ALJ denied benefits on November 7, 1989 and the Appeals Council declined to review that decision. Mr. Durant did not appeal that decision to any federal court. Mr. Durant filed his second application on May 10, 1990 and claim, claiming he could no longer work due to his back injury.²

The pertinent evidence can be summarized as follows. From November 8, 1989 to August 19, 1991, the reports of four doctors are relevant. Dr. Paul Krautter examined Mr. Durant several times in 1990 and found that his neck hurt and that he was attempting to do back exercises. Dr. Dan Calhoun, a consulting physician, examined Mr. Durant on July 26, 1990 and found that he had chronic low back pain and status post lumbar diskectomy. Dr. Calhoun did not test Durant for his levels of strength or standing and/or walking, but noted "tenderness to palpation over the lumbar spine and lumbar paraspinus muscles." *Record at 263.*

Extensive examinations were undertaken by Dr. David Hicks, a treating physician who performed surgery and examined Mr. Durant 34 times from 1987 to 1992. In October of 1988, Dr. Hicks noted that Mr. Durant should lift no more than five pounds.³ On September 10, 1990, Dr. Hicks opined that Mr. Durant was doing well, but 11 days later he indicated that his patient "should not return to work at this time." *Record at 262.* In

² The Court affirms the ALJ's decision that the doctrine of *res judicata* precludes this Court from reviewing that application. As a result, any evidence pertaining to the time frame (September 8, 1988- November 7, 1989) of the first application will not be considered unless it has relevance to a review of the second application. The question on review, therefore, is whether the ALJ properly decided that Durant was not disabled between November 8, 1989 and August 19, 1993.

³ This is the only medical evidence found in the *Record* at specifically addresses Durant's strength capabilities. *Record at 119.*

addition, following an April 29, 1991 examination, Dr. Hicks wrote the following:

Mr. Durant has been on long term disability because of problems originating with his injuries while working at American Airlines. He underwent a right sided L5-S1 disectomy and his medical condition remains essentially unchanged from the past. He has tried previously to participate in work hardening but has not been able to reach a level so that he could safely return to work in the job in which he was previously employed...I think his prognosis for returning to work is poor at this time, in any capacity. *Id.* at 275.⁴

Dr. Lawrence Reed, another treating physician, wrote a June 8, 1991 letter in which he said he could not approve Mr. Durant returning to work without a functional capacity evaluation. *Id.* at 276. He also wrote that he knew of "no occupation" that Mr. Durant could perform based on his education, training and experience and indicated that he would not allow his patient to work until released to do so by Dr. Hicks. *Id.* at 277.

Mr. Durant and the vocational expert testified at his June 20, 1991 hearing. Durant testified that he had five work-related injuries to his back, beginning in the 1970s. He testified that he had back surgery in 1988 and that no doctor had yet released him to work. He said he can no longer work because of "sharp" pain in his back, legs and neck. *Id.* at 284-294.

In response to the ALJ's hypothetical questions, the Vocational Expert testified that Mr. Durant could not return to his past work. However, she testified that Mr. Durant could work as an industry machinery mechanic, spray-painting machine operator, assembler and grinding machine operator. Each of these jobs were either classified as "light" or "sedentary" work. *Id.* at 288-289.

⁴On August 12, 1991, Dr. Hicks also diagnosed Durant with "Cervical facet syndrome." *Record* at 10. This evidence was not before the ALJ prior to his August 19, 1991 decision, but was considered by the Appeals Council.

II. Legal Analysis

The standard of review for this Court consists of two levels. First, the Court must determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987).⁵ A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

The other level focuses on legal errors. Grounds for reversal 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).⁶

The procedure used by the Secretary in examining claims consists of 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

⁵ One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, 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).

⁶ In this case, the ALJ found, at step 5, that Plaintiff could return to work.

claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the case at bar, the ALJ proceeded to step 5 where he found that Durant could return to work. It should be noted that, unlike the first four steps, the fifth step places the burden of proof on the Secretary. *Bowen v. Yuckert*, 107 S.Ct. 2287 (1987). That means the Secretary must prove that the claimant retains the capacity to perform an "alternative work activity" and that this specific type of job exists in the national economy. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984).

Mr. Durant questions the ALJ's decision for three reasons. First, he contends that the ALJ violated the "treating physician" rule. Second, he argues that the ALJ improperly analyzed his complaints of pain. Finally, Mr. Durant maintains that substantial evidence does not support the ALJ's decision to deny disability benefits.

The first issue is whether the ALJ violated the "*treating physician*" rule. That rule requires the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).⁷

⁷ The treating physician rule governs the weight to be accorded the medical opinion of the physician who treated the claimant...relevant to other medical evidence before the fact-finder, including opinions of other physicians. The rule...provides that a treating physician's opinion on the subject of medical disability, i.e., diagnosis and nature and degree of impairment is (i) binding on the fact-finder unless contradicted by substantial evidence; and (ii) entitled to some extra weight because the treating physician is usually more familiar with a claimant's medical condition than are other physicians, although resolution of genuine conflicts between the opinion of the treating physician, with its extra weight, and any substantial evidence to the contrary remains the responsibility of the fact-finder. *Kemp v. Bowen*, 816 F.2d 1469, 1476 (10th Cir. 1987).

In this case, Dr. Hicks and Reed, both treating physicians, concluded that Mr. Durant was unable to return to work due to his back problems. The ALJ discounted Dr. Hicks' conclusions because he failed to provide "objective medical criteria" for his assessment. In addition, the ALJ disregarded the findings of Dr. Hicks because he had no "medical foundation." *Record at 24.*

The question, therefore, boils down to whether the ALJ had "good cause" to disregard Dr. Hicks' findings. The law clearly states that a treating physician's report may be discounted when it is not accompanied by "objective medical evidence or is wholly conclusory." *Edwards v. Sullivan*, 937 F.2d 580, 583 (11th Cir. 1991). However, Dr. Hicks' records indicate that he saw Mr. Durant more than 30 times in his office and, in addition, he conducted back surgery on the claimant. Unlike the situation where a claimant only sees a physician once or twice, the facts here show that Dr. Hicks was much more intimately familiar with Mr. Durant's medical history than any other doctor -- including the consulting physician.⁸ It would seem logical that Dr. Hicks' opinions are based on objective data, but no such evidence appears in the Record. Therefore, questions exist on this issue.

The Court makes the same finding in regard to the ALJ's treatment of Dr. Reed, although it appears that Dr. Reed is, in effect, basing his opinion on Dr. Hicks' findings. The ALJ disregarded Dr. Reed's conclusions because he had not examined Mr. Durant since November 7, 1987. *Record at 24.* However, in a June 8, 1991 letter, Dr. Reed indicates

⁸ *The reasoning of a Second Circuit case, while not mandatory authority, is persuasive on this issue. That court suggests that, even if the treating physician's opinion is not supported by objective clinical or laboratory findings, the ALJ may still give it substantial weight. See, Cruz v. Sullivan*, 912 F.2d 8 (2nd Cir. 1990) (If a treating physician's opinion is not supported by such findings, the ALJ may not be required to accept it uncritically and without evaluation, particularly where the record contains substantial contrary evidence.)

(although it is not clear) that he has examined Mr. Durant sometime after June 1, 1990. *Record at 277*. Therefore, questions also remain on this issue.

Entwined with the "treating physician" issue is the ALJ's weighing of the consulting physician's report. It appears that the ALJ placed substantial weight on the July 26, 1990 examination by Dr. Calhoun. While the law allows the ALJ latitude in weighing the evidence, a one-time examination by a consulting physician is often suspect. Writes one court:

The ALJ should not baldly accept consulting physicians' evaluations which are disputed and formulated after they examined claimant only once. This is justified because consultative exams are often brief, are generally performed without benefit or review of claimant's medical history, and, at best, only give a glimpse of the claimant on a single day. *Cruz v. Sullivan*, 912 F.2d 8 (2nd Cir. 1990).

Obviously, the weight given a consultative examination must be judged on a case-by-case basis. Some consulting physicians do a more thorough examination and, as a result, help the ALJ and any reviewing court determine whether a claimant is disabled.

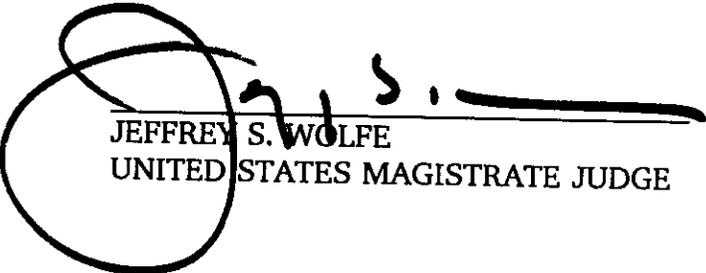
However, in this case, it is unclear as to whether Dr. Calhoun adequately reviewed the medical history and, in any regard, his report does not help the Court determine Mr. Durant's disability status. Dr. Calhoun writes that Mr. Durant had "tenderness to palpation" on his lumbar spine (a statement the Secretary suggests is contrary substantial evidence to the treating physician's report), but that tells the Court, little, if anything, about whether MR. Durant is disabled.

Finally, given the fact that the Secretary bears the burden at step 5, the Court questions the ALJ's finding that Mr. Durant can lift 10 pounds. The only evidence found in the Record is a 1988 letter by Dr. Hicks, who limits lifting to no more than five (5)

pounds. *Record at 119.* As a result, it is unclear as to what weight Mr. Durant could lift during the applicable time frame.

Therefore, for the reasons discussed above, the Court **REVERSES and REMANDS** the case for further evaluation by the Secretary. A remand is necessary because the record is unclear as to whether Mr. Durant can return to work in the national economy. To clarify the record, the ALJ, on remand, is ordered to: (1) Obtain the objective medical evidence used by Dr. Hicks in his assessment of Mr. Durant's ability to work; (2) Determine how many times Dr. Reed examined Mr. Durant after November 8, 1989 and obtain any objective medical evidence considered by Dr. Reed in drawing his conclusions; (3) order that Mr. Durant undergo another consultative examination where his Residual Functional Capacity is evaluated (including his strength capabilities); and (4) conduct a supplemental hearing with a Vocational Expert and a Medical Consultant. The ALJ must then re-evaluate the evidence and reach a decision as to whether Mr. Durant is disabled. This analysis should include re-evaluating Mr. Durant's complaints of pain and his problem with his cervical spine as discussed on page 10 of the Record.

IT IS SO ORDERED THIS 16th day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET
MAY 17 1995
DATE ~~MAY 17 1995~~

ROBERT C. BATES,
Plaintiff,

vs.

EAGLE GAMING, L.P., a Colorado
limited partnership; and
WILD WEST DEVELOPMENT CORPORATION,

Defendant.

No. 95-129-K

FILED

MAY 16 1995

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

O R D E R

Now before the Court is the Motion for Summary Judgment of Plaintiff Robert Bates ("Plaintiff"). The case arises out of Plaintiff's loan to Defendant Eagle Gaming ("Defendant") for the sum of \$150,000. Plaintiff alleges that, under the terms of the promissory note evidencing the loan, Defendant is in default.

Plaintiff filed a Motion for Summary Judgment on March 30, 1995. Defendants filed an Application for Extension of Time on April 14, 1995, the day their Response was due, for leave to file a Response on May 3, 1995.

No Response has yet been filed despite the fact that the Defendants are more than 30 days past due. Defendants' application for an extension does not serve to toll the time period for the response to the motion for summary judgment. Even if the extension had been granted, the Response would have been due almost two weeks ago.

Therefore, the Response is out of time according to Local Rule 7.1 of the United States District Court for the Northern District

of Oklahoma. Local Rule 7.1(C) authorizes this Court to deem the matter confessed in these circumstances and enter the relief requested.

Additionally, the Court has reviewed the contents of the summary judgment motion and the exhibits attached thereto. These materials reflect that the Motion is well-supported and persuasive.

For the reasons discussed above, Plaintiff's Motion for Summary Judgment is GRANTED. The Defendants' Application for Extension of Time is denied as MOOT.

ORDERED this 16 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 17 1995

ROBERT C. BATES,
Plaintiff,

vs.

EAGLE GAMING, L.P., a Colorado
limited partnership; and
WILD WEST DEVELOPMENT CORPORATION,

Defendant.

No. 95-C-129-K

FILED

MAY 16 1995

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

JUDGMENT

This matter came before the Court for consideration of the Plaintiff'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 Plaintiff, Robert C. Bates, and against the Defendant Eagle Gaming in the amount of \$150,000.00 plus interest as set forth in the Note at issue.

ORDERED this 16 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
MAY 17 1995
DATE _____

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JEFFERY L. OWENS; SARAH L.)
OWENS; COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)

Defendants.)

Civil Case No. 95-C 81K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of May,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Jeffery L. Owens and Sarah L. Owens**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Jeffery L. Owens and Sarah L. Owens are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, **Jeffery L. Owens and Sarah L. Owens**, were each served with process on March 22, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

February 9, 1995; and that the Defendants, **Jeffery L. Owens and Sarah L. Owens**, 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 Five (5), Block One (1), OAK PARK EXTENDED ADDITION to the City of Sand Springs, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 7, 1986, Glenn A. Pope and Mary.V. Pope, executed and delivered to OKLAHOMA MORTGAGE COMPANY, INC. their mortgage note in the amount of \$43,336.00, payable in monthly installments, with interest thereon at the rate of nine and one-half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Glenn A. Pope and Mary V. Pope, Husband and Wife, executed and delivered to OKLAHOMA MORTGAGE COMPANY, INC. a mortgage dated August 7, 1986, covering the above-described property. Said mortgage was recorded on August 8, 1986, in Book 4961, Page 1306, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 28, 1989, OKLAHOMA MORTGAGE COMPANY, INC. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on December 29, 1989, in Book 5227, Page 2614, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Jeffery L. Owens and Sarah L. Owens, currently hold record title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on August 23, 1991, the Defendants, Jeffery L. Owens and Sarah L. Owens, 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 May 20, 1991 and December 1, 1989.

The Court further finds that the Defendants, Jeffery L. Owens and Sarah L. Owens, 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, **Jeffery L. Owens and Sarah L. Owens**, are indebted to the Plaintiff in the principal sum of \$64,705.47, plus interest at the rate of 9.5 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$22.00 which became a lien on the property as of June 23, 1994; a lien in the amount of \$20.00 which became a lien as of June 25, 1993; a lien in the amount of \$21.00 which became a lien as of June 26, 1992; and a lien in the amount of \$3.00 which became a lien as of June 20, 1991. Said liens are inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Jeffery L. Owens and Sarah L. Owens**, 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 against the Defendants, **Jeffery L. Owens and Sarah L. Owens**, in the principal sum of \$64,705.47, plus interest at the rate of 9.5 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 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 \$66.00 for personal property taxes for the years 1990-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Jeffery L. Owens, Sarah L. Owens 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, **Jeffery L. Owens and Sarah L. Owens**, 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 the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$66.00, 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.

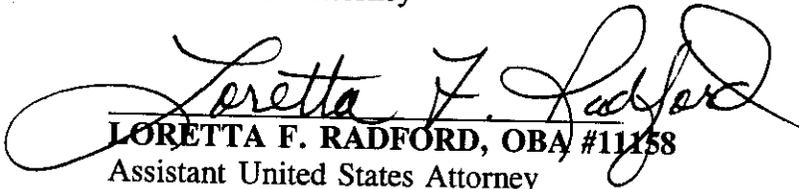
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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.

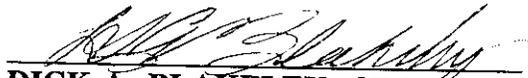
& TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



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

Judgment of Foreclosure
Civil Action No. 95-C 81K

LFR:lg

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

NATHANIEL MCKINNEY,
Plaintiff,
vs.
CITY OF TULSA,
Defendant.

Case No. 94-C-122-K

FILED

MAY 16 1995

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

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

The above-styled action for discrimination on account of race is predicated on 42 U.S.C. § 2000e-2 et seq., Title VII of the Civil Rights Act of 1964 and came on for nonjury trial on March 20, 1995. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Parties

1. Plaintiff Nathaniel McKinney ("McKinney"), an African-American individual, is a citizen and resident of Tulsa County, Oklahoma, and at all times material to this action resided in the jurisdiction of this Court.

2. Defendant, City of Tulsa ("City of Tulsa") or ("Defendant"), is an Oklahoma municipal corporation. The Defendant

is alleged to have committed discriminatory and retaliatory practices within this judicial district.

3. The City of Tulsa is an employer engaged in an industry affecting commerce within the meaning 42 U.S.C. §2000(e) and has employed fifteen or more persons for each working day and each of twenty or more calendar weeks in the current or preceding year.

Plaintiff's Employment

4. Plaintiff began his employment with the City of Tulsa on November 3, 1976 as a maintenance worker. In June of 1981, Plaintiff was promoted to what is commonly known as "leadman" or "leadperson" in District II of the Parks and Recreation Department over Building Maintenance. This position includes supervisory and managerial functions. Plaintiff's position of leadman was reclassified as an LT-26 position in 1984.

5. A leadman acts as a working lead person in performing a variety of unskilled, semi-skilled and skilled tasks of average difficulty. The leadman performs as a member of a work group or oversees several workers on individual job assignments dealing with general maintenance or renovation activities involving City of Tulsa properties and facilities. A leadman directs, participates in, and trains others in semi-skilled carpentry, plumbing, asphalt, masonry and electrical work.

6. A leadman must be able to understand and follow verbal and written instructions; lead a group of workers performing manual labor for extended periods of time; use and instruct others in the

use of mechanical tools and equipment; and plan and oversee the work of semi-skilled and skilled workers.

Plaintiff's Performance Record with Ray Bowers and Susan Westbrook

7. Between 1981 and 1986, Plaintiff's work was evaluated favorably by his supervisor, Ray Bowers, as a qualified leadman. Plaintiff's work performance for the years of 1987-1989 met and/or exceeded expected standards of an LT-26. Pl.'s Exh. 9, 10, 11.

8. Subsequently, Plaintiff received two "below" ratings in the areas of planning work tasks and completing assigned reports as reflected in his March 1990 performance review by his then supervisor, Susan Westbrook. Overall, he received a rating of "Meets, Needs Slight improvement." Def.'s Exh. 1. Westbrook made this determination after her first year of supervising Plaintiff. These ratings largely implicated Plaintiff's supervisory and managerial capabilities.

9. On November 20, 1990, Susan Westbrook provided Plaintiff with a detailed description of problems she noted in his work habits. The inter-office correspondence is styled as a memo from Westbrook as Public Works Supervisor to Plaintiff as Building Leadperson. The heading states that the subject of the memo is "Counseling Session." Westbrook wrote:

Nate we have discussed ways to help improve your leadership and organizational skills on several occasions. On 5/24/90 we went over your planning and review. On 7/20/90 we did a special review and discussed problems you were having in organizing your work schedules, ordering materials, doing ballfield and building safety checks, following up on unfinished projects without having to be reminded, keeping accurate

records, and maintaining accurate maintenance and inventory records. On 10/01/90, we discussed these problems during your regular scheduled review.

The following examples show you still need to work on the above items.

Westbrook specified three examples that reflected continuing failings of Plaintiff. She then listed in detail twelve tasks that Plaintiff needed to complete. She concluded the correspondence by stating:

If you are unable to comply with any of the previous assignments, I want an explanation in writing to either Ken [Idleman] or myself immediately.

On December 18, 1990, we will discuss your progress. If you have not made significant progress at this time, disciplinary action may occur.

You are a capable worker but you must show improvement in your organizational and leadership abilities.

During the trial, Plaintiff characterized the evaluations made by Westbrook as fair and did not challenge them as evidencing any discriminatory bias.

10. Plaintiff received a "below" rating for his overall performance evaluation for the April 1990-April 1991 year by Westbrook. This rating was lower than the one Plaintiff received the year before. Ken Idleman changed Plaintiff's "below" rating to a slightly higher level. Overall, Idleman gave Plaintiff a "MEETS -- Needs Slight Improvement" rating for the year of 1991.

Relationship with Rick Melton

11. Rick Melton became District II Supervisor on or about April of 1991. Melton directly supervised Plaintiff. From

December 1991 to May 1993, Melton submitted eight written reports detailing counseling sessions that Melton gave to Plaintiff. Exhibits 27-35. Melton frequently criticized Plaintiff for inattentiveness, incomplete paperwork, and failure to complete assignments.

12. Plaintiff faced a work situation that partly contributed to the difficulties he faced on the job. While Plaintiff was given a substantial amount of work, he did not enjoy support from a full crew to assist him in executing his responsibilities. Kenneth Crawford, the worker in charge of litter control was assigned to Plaintiff's crew in building maintenance. Therefore, Plaintiff received assistance from Crawford only on a limited basis. In contrast, the testimony indicated that other leadpersons, such as Benny Parnell and Tim Longley, were able to utilize crews whose members were not responsible for the additional obligations faced by members of Plaintiff's crew.

13. Benny Parnell was employed as "Acting LT-26" over Grounds Maintenance on October 10, 1990 and, subsequently, was employed as a permanent "LT-26" on or about January 2, 1992. Tim Longley was employed as "Acting LT-26" over Horticulture on December 2, 1988 and subsequently as permanent LT-26 on January 17, 1992. Tam Mai was employed as a permanent LT-26 over Building Maintenance in January of 1994. At time of trial, Mai was still employed in that position.

14. According to Crawford, Plaintiff had less support than other leadpersons and was responsible for just as much, if not

more, work. On the other hand, the testimony from the Assistant Director of the Parks and Recreation Department, Max Wiens, showed that all supervisors faced excessive workloads. While the arrangement faced by Plaintiff made his job difficult, Plaintiff could have won additional cooperation from other employees or more successfully communicated the limitations he faced to his supervisors. For instance, Benny Parnell recruited pool workers to assist him while he served as a leadman over grounds.

15. Although Plaintiff received support and encouragement from Bowers, Westbrook and Idleman, Melton was more demanding and less forgiving of Plaintiff's mistakes. The two men did not get along well, fueled in part by inadequacies in Plaintiff's work performance but also by shortcomings in Melton's leadership style. Plaintiff was joined by other employees who testified that Melton could be a difficult person with whom to get along.

16. Plaintiff believed he was discriminated against for not being allowed to serve as supervisor when Melton was out of the office. Plaintiff had assumed this role frequently when Bowers was the supervisor. Nevertheless, the decision by Melton to ask Benny Parnell to serve as supervisor in Melton's absence did not reflect any illegitimate motive. Parnell was a supervisor or foreman for three different companies before coming to work for the City of Tulsa and was capable of handling the additional supervisory responsibilities. Moreover, it was clear that Melton enjoyed a much closer personal and professional relationship with Parnell than with Plaintiff.

17. Plaintiff complained to the Oklahoma Human Rights Commission ("OHRC") on February 28, 1992 alleging that Melton discriminated against him by: not permitting him to fill in as acting Public Works Supervisor in Melton's absence; requiring him to turn in weekly documentation that the other leadpersons were not required to submit; ensuring that he was the only leadman that did not get a full crew to direct and assign work orders; rating him unequally and unfairly compared to other leadpersons; and reprimanding him for minor and insignificant infractions.

18. Melton was notified of Plaintiff's OHRC complaint by interoffice memorandum from Richard Walker on April 8, 1992. Plaintiff alleges that this Complaint precipitated a campaign of retaliation from Melton. Indeed, Melton counselled Plaintiff for an alleged violation of a work order on April 13, 1992. According to Plaintiff, Melton unfairly and inaccurately evaluated Plaintiff's work performance in his evaluation dated April 23, 1992. Plaintiff claims that the coaching and counseling sessions increased dramatically after that point and that his performance evaluations became worse. Plaintiff claimed that after learning of the complaint to the OHRC, Melton gave him below ratings in all areas.

19. However, the documentation of Plaintiff's poor job performance began over two years prior to Plaintiff's filing of the discrimination complaint with the OHRC. Melton and the City of Tulsa took many steps to help correct problems experienced by Plaintiff. Over a three-year period, the Defendant disciplined

Plaintiff in a progressive manner to correct perceived deficiencies in performance, including counseling sessions, written reprimands, suspensions without pay, and eventually a demotion.

20. Defendant recommended Plaintiff's demotion on or about December 6, 1993 and, after a pre-action hearing was held, Defendant demoted Plaintiff from a LT-26 to an LT-24 position. Plaintiff appealed the demotion to the Civil Service Commission in January of 1994. The Civil Service Commission is a governmental entity created by the City of Tulsa to review employment and labor decisions made by the City and to review appeals from parties concerning labor disputes. The Civil Service Commission heard Plaintiff's appeal of his demotion over a period of approximately nine months in 1994. After reviewing the evidence presented by both parties, the Civil Service Commission voted to reinstate Plaintiff to his prior position of LT-26 and pay all back wages due and owing.

21. Although the previous disciplinary action of demotion was withdrawn on August 11, 1993, Plaintiff received a five-day suspension without pay and was placed on probation for 60 days. The Determination contained a note at the end which stated:

It is my suggestion that you make a concerted effort in carrying out your role as a supervisory type. Should you feel there is a need for special training (Employee Assistance Program), that decision will be yours to make, however, your continual negligence of duties and responsibilities must improve or a stronger discipline, not limited to dismissal will be the next step taken.

Def.'s Exh. 9.

22. During Plaintiff's period of probation, Melton was one of

the Defendant's employees responsible for measuring Plaintiff's progress. Given the nature of the relationship between the two men, this arrangement exacerbated tensions between them. The Court discounts the evidentiary weight of Melton's evaluations during the probationary period. To put such discretion in Melton's hands despite the tense relationship he had with Plaintiff reflects flaws in the City of Tulsa's process for objectively monitoring employees on probation.

23. Plaintiff pointed to a handful of specific incidents to argue that he was treated unfairly and in a discriminatory manner by Melton. These incidents provide the basis for Plaintiff's complaints that he was continually humiliated and degraded by Melton.

24. Plaintiff said that Melton raised his voice during a disagreement they had about a slide scheduled to be installed in a Tulsa park in January of 1993. Plaintiff believed the slide to be dangerous and was hesitant to install it due to an apparent crack in it. However, Melton ordered the slide installed, and a confrontation erupted. Given the circumstances, the heated nature of the exchange was not unusual. During the trial, other witnesses to the discussion did not find it to be an example of degradation or humiliation of the Plaintiff at the hands of Melton.

25. Plaintiff also testified about an incident where he and Melton disagreed about using a water tank to remove graffiti. The City of Tulsa placed a high priority on graffiti removal, since graffiti was often tied to gang-related activity. Plaintiff

testified that the 1000-pound tank had to be hauled with a winch to the park, and that he therefore needed to find some additional parts before attempting to do the job. According to Melton, Plaintiff refused to use this tank and was acting in an insubordinate manner. Melton castigated Plaintiff for not following his orders and asked another employee of the City "to witness" the dispute. Later, other employees of the City--Kenneth Crawford and Billy Stevenson---loaded the tank, went to the park, and completed the job satisfactorily.

26. The incidents and arguments surrounding the slide and the graffiti do not reflect racial bias or unfair treatment by Melton or the City of Tulsa. Instead, they appear more to be the product of a personality conflict between Melton and Plaintiff. Although Melton may have lost his temper and acted unprofessionally, his actions were not completely without basis.

27. Plaintiff admitted during cross-examination that no employee of the City, other than Rick Melton, ever treated him differently as a result of his race. Moreover, Plaintiff could point to no instances of overt racism by Melton. For instance, Plaintiff never heard Melton make derogatory remarks based on race.

Changing Nature of Work at City of Tulsa

28. The amount of work required of Plaintiff and other leadpersons of the City of Tulsa's Parks Department has increased substantially since 1981. The level of paperwork and documentation required has risen sharply. The nature of the job has changed, and

the evidence indicated that Plaintiff did not make sufficient adjustments to meet these new challenges.

29. Plaintiff did not adjust to increased demands on his time nor to changes in personnel. While Plaintiff received high marks from Bowers, who was supervisor when Plaintiff became a leadman, Bowers was a different type of supervisor than those who would succeed him. Bowers was described as a "hands-on" supervisor who frequently worked in the field with staff members such as Plaintiff. Westbrook and Melton were not "hands on" supervisors. They delegated more work and required more documentation than Bowers demanded. These changes in leadership style put additional strains on Plaintiff.

30. Idleman enjoyed a strong personal relationship with Plaintiff but reiterated many of the criticisms made by Melton. Idleman, like Melton, believed that Plaintiff was deficient in following instructions, his ability to lead, and in planning. In the view of Idleman, these skills were critical to serving as an effective leadman.

CONCLUSIONS OF LAW

Jurisdiction and Venue

1. Plaintiff has properly brought this suit pursuant to 42 U.S.C. 2000e-2 seeking redress in this Court for discrimination and illegal retaliation in the work place.

Disparate Treatment

2. In order to prove disparate treatment in violation of Title VII, the Plaintiff must prove by a preponderance of the evidence a prima facie case of employment discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981). A prima facie case raises the inference that discriminatory intent motivated the challenged action against the employee. The employer may rebut the presumption of discrimination by clearly articulating a legitimate non-discriminatory reason for the employment decision. Finally, the Plaintiff must then establish that the employer's articulated reason is a pretext for discrimination. Id.

3. This case is unlike the typical Title VII case in that it does not involve a discharge, failure to promote, failure to compensate equally, or failure to transfer. Instead, the gravamen of the complaint is that Plaintiff continually suffered discipline, humiliation and degradation from his supervisor, Melton, as a result of Plaintiff's race. In the standard prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Plaintiff must show: 1) that he belongs to a racial minority; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

4. In this case, the essence of the claim is of discriminatory discipline, as evidenced by poor performance

reviews, suspension, humiliation and degradation. However, the same basic principles apply as in cases where plaintiffs allege failure to hire or discriminatory discharge. Courts have adopted the model used in McDonnell Douglas and Burdine to this context of discriminatory discipline. In the Eleventh Circuit, the appeals court molded the prima facie requirements to fit a case where the plaintiff, a black police officer, claimed that he was treated in a discriminatory fashion as a result of discipline received for unauthorized use of a police vehicle and related transgressions.

Although the *McDonnell Douglas* prima facie model was initially developed in the context of a discriminatory hiring claim, the purpose underlying that method of analysis--to focus the inquiry by eliminating "the most common nondiscriminatory reasons" for the employer's action--retains equal validity where discriminatory discipline is alleged.

Jones v. Gerwens, 874 F.2d 1534, 1539 (11th Cir. 1989).

5. The Eleventh and Fourth Circuits have determined that the most important variables in the disciplinary context are the nature of the offenses committed and of the punishments imposed. Jones; Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985), cert. denied, 472 U.S. 1021 (1985). Therefore, these courts have modified the elements of the prima facie case to meet this different context. In short, the courts have held:

[I]n cases involving alleged racial bias in the application of discipline, the plaintiff must, in addition to being a member of a protected class, must show either (a) that he did not violate the work rule, or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar conduct.

Jones, 874 F.2d at 1540. While there appears to be no Tenth Circuit case directly on point, other courts have adopted a similar approach. See Wilmington v. J.I. Case Co., 793 F.2d 909, 915 (8th Cir. 1986); Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980), cert. denied, 449 U.S. 879 (1980).

6. Plaintiff admitted freely that many of the criticisms listed in the reviews by Westbrook and Melton were accurate. He complained, however, that Melton would only focus on the negative aspects of his job performance and that he could never get Melton to give him the needed support to get his job done properly. Benny Parnell, the only other leadperson who testified at trial, also stated that he occasionally fell behind in his paperwork or did not complete a work order on time. He testified that he did not get "written up" for these occasional failings. Based on this evidence, the Court is prepared to say that Plaintiff has met the requirements for a prima facie case of discriminatory discipline under Title VII.

7. In response, the Defendant articulated a legitimate nondiscriminatory reason for the actions taken against Plaintiff. The Defendant attempted to demonstrate that while the demands of the job changed, Plaintiff simply could not maintain the standards necessary to remain in his position. The Defendant argued persuasively that the work of park personnel had changed substantially over the last decade, requiring much more emphasis by supervisors on paperwork, documentation, delegation, and organization. The changed emphasis was designed to assist the City

of Tulsa in avoiding liability and meeting increasing demands with limited resources.

8. Defendant pointed to the poor reviews continually received by Plaintiff, starting from the time Westbrook became his supervisor and reiterated by Idleman who had known Plaintiff over the course of several years. Subsequent to Bowers' tenure as Plaintiff's supervisor, the reviews steadily declined. In addition, the Defendant distinguished Plaintiff's situation by focusing on the continuing and constant nature of his deficiencies. To prevail, Plaintiff must show that the reviews given by Melton and the actions taken by the City of Tulsa actually constituted a pretext for discrimination. However, this is a burden that the Plaintiff did not meet at trial.

9. Plaintiff never stated to any of Defendant's representatives that any specific factual criticisms of his work were inaccurate. Similarly, Plaintiff testified at trial that the factual nature of the complaints made against him were true. Thus, Plaintiff faces great difficulty in demonstrating that Defendant's proffered reasons for the actions taken were false or unworthy of credence. See Lex A. Larson, 1 Employment Discrimination, § 8.04 (stating that pretext may usually be established by demonstrating falsity of employer's proffered reasons for action); EEOC v. Gaddis 733 F.2d 1373 (10th Cir. 1984). The accuracy of many of the complaints are beyond dispute.

10. The most commonly employed method of demonstrating that an employer's explanation is pretextual is to show that similarly

situated persons of a different race received more favorable treatment. Rucker v. Frito-Lay, Inc., 54 FEP 1302, 1307 (D.Kan. 1990). It was uncontradicted that the problems with Plaintiff's work were more long-standing and repetitive than other similarly situated employees. Plaintiff presented no evidence to show that a worker with a performance record as poor as Plaintiff's was not disciplined in a similar manner.

11. At a more fundamental level, however, Plaintiff argued that Melton sabotaged Plaintiff by placing him in a position such that he could not have helped but fail. An employer's proffered justification for its action may also be shown to be pretextual if the respect in which the employee is allegedly deficient is of the employer's own making. Larson, *Employment Discrimination*, § 8.04; See Powell v. Board of Pub. Utils., 57 FEP 1399 (D. Kan. 1991). However, Plaintiff never clarified the demands faced by other leadpersons employed by the City of Tulsa nor established that he faced an appreciably more difficult situation than other leadpersons. The evidence indicated that the work was evenly distributed among leadpersons.

12. The deficiencies noted by those who supervised Plaintiff cannot be explained solely by the pressing nature of his workload and the lack of assistance provided to him. Although the testimony reflected that Plaintiff's supervisors liked him personally, they were essentially unanimous in the type and breadth of their criticisms regarding Plaintiff's lack of managerial, supervisory, and organizational skills. The performance reviews and evaluation

records of Westbrook and Melton demonstrated a willingness to develop with Plaintiff a more manageable work regimen to assist him in meeting the demands he faced.

13. Although it was clear that Crawford could only help Plaintiff in a limited fashion as a result of his trash route responsibilities, Plaintiff did not demonstrate that this burden necessarily caused his poor ratings. In addition, Plaintiff could have utilized other workers, such as pool workers, to assist him when the workload became too overwhelming. Parnell testified, for instance, that he occasionally pulled workers from other areas to assist him. Plaintiff never showed that he was prevented from taking similar steps and therefore treated discriminatorily in this regard.

Retaliation

14. Plaintiff has also claimed that he experienced retaliation for the civil rights complaint he made to the OHRC in February of 1992 in which he alleged discrimination based on race. To establish a prima facie case of retaliation, Plaintiff must show (1) he engaged in opposition to Title VII discrimination; (2) he was subject to adverse employment action subsequent to or contemporaneous with protected activity; and (3) a causal connection exists between the protected activity and the adverse employment action. Murray v. City of Sapulpa, 45 F.3d 1417, 1420 (10th Cir. 1995).

15. While Plaintiff meets the first two prongs of the prima

facie case for retaliation, he failed to show a causal connection between the protected activity and the adverse employment action. Employees at the City of Tulsa became aware of Plaintiff's OHRC complaint in April of 1992. Before that time, Plaintiff had already received numerous counseling sessions, and there is no evidence that subsequent action taken by Melton came in response to Plaintiff's complaint.

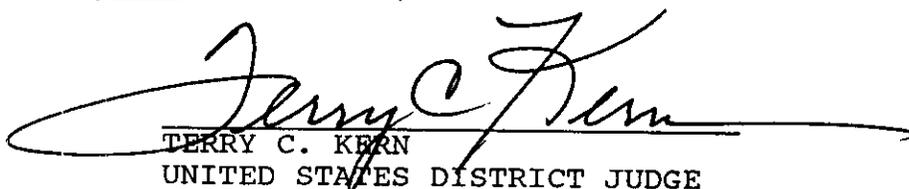
16. However, even if this Court decided that a prima facie case of retaliation existed, a similar burden shifting approach as described in the discriminatory discipline context would negate any liability on the part of the Defendant. If a prima facie case is established, the Defendant may produce evidence to dispel the inference of retaliation by establishing a legitimate, nondiscriminatory reason for the adverse action. Burrus v. United Telephone Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982), cert. denied, 459 U.S. 1071 (1982). If such evidence is presented, the Plaintiff may only prevail if he demonstrates that the articulated reasons were a mere pretext for discrimination. Id. As discussed in the above analysis regarding discriminatory discipline, the Defendant articulated several legitimate reasons for the disciplinary actions taken against the Plaintiff. In sum, testimony at trial revealed: Plaintiff's continued organizational and management difficulties; increasing conflicts with his supervisor; and unwillingness to take the necessary steps to improve effectiveness at work.

17. With regard to both claims, discriminatory discipline and

retaliation, the Plaintiff retains the overall burden of persuasion. Texas Department of Community Affairs, 450 U.S. 255-260. In this case, Plaintiff faced many difficult obstacles at work, including an increased workload, ever-shrinking resources, and a personality conflict with his supervisor who often made a tough situation even worse. Nevertheless, Plaintiff did not meet the burden required to demonstrate discrimination at the workplace.

Therefore, it is the Order of the Court that judgment be entered in favor of the Defendant, the City of Tulsa, and against the Plaintiff, Nathaniel McKinney.

IT IS SO ORDERED THIS 16 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

5-5-10

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 15 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 FRANK ESPINOSA aka)
 Frank M. Espinosa;)
 KATHRYN E. ESPINOSA fka)
 Kathryn E. Brown;)
 STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 OSTEOPATHIC FOUNDERS ASSOCIATION,)
 a Corporation dba Tulsa Regional)
 Medical Center, Formerly)
 Oklahoma Osteopathic Hospital;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
 DATE 5-16-95

CIVIL ACTION NO. 94-C-741-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15th day
 of May, 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 a Disclaimer; and the Defendants, FRANK ESPINOSA
 aka Frank M. Espinosa, KATHRYN E. ESPINOSA fka Kathryn E. Brown,
 and OSTEOPATHIC FOUNDERS ASSOCIATION, a Corporation dba Tulsa

Regional Medical Center formerly Oklahoma Osteopathic Hospital, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, KATHRYN E. ESPINOSA fka Kathryn E. Brown, was served with process a copy of Summons and Complaint on November 3, 1994; that the Defendant, OSTEOPATHIC FOUNDERS ASSOCIATION a Corporation dba Tulsa Regional Medical Center, formerly Oklahoma Osteopathic Hospital, signed a Waiver of Summons on August 10, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on August 2, 1994, by Certified Mail.

The Court further finds that the Defendant, FRANK ESPINOSA aka Frank M. Espinosa, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 8, 1995, and continuing through March 15, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, FRANK ESPINOSA aka Frank M. Espinosa, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary

affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, FRANK ESPINOSA aka Frank M. Espinosa. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 23, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on August 29, 1994; and that the Defendants, FRANK ESPINOSA aka Frank M. Espinosa, KATHRYN E. ESPINOSA fka Kathryn E. Brown, and OSTEOPATHIC FOUNDERS ASSOCIATION a Corporation dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, FRANK ESPINOSA, is one and the same person as Frank M. Espinosa, and will hereinafter be referred to as "FRANK ESPINOSA." The Defendant, KATHRYN E. ESPINOSA is and the same person formerly referred to as Kathryn E. Brown, and will hereinafter be referred to as "KATHRYN E. ESPINOSA." The Defendants, FRANK ESPINOSA and KATHRYN E. ESPINOSA, filed a Petition for Divorce on March 29, 1994, a Decree of Divorce has not been filed.

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 Seven (7), in Block Three (3), FITTS ADDITION, an Addition to Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 27, 1985, the Defendant, KATHRYN E. BROWN, executed and delivered to MORTGAGE CLEARING CORPORATION, AN OKLAHOMA CORPORATION, her mortgage note in the amount of \$35,136.00, payable in monthly installments, with interest thereon at the rate of Eleven percent (11%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, KATHRYN E. BROWN, a single person, executed and delivered to MORTGAGE CLEARING CORPORATION, AN OKLAHOMA CORPORATION, a mortgage dated September 27, 1985, covering the above-described property. Said

mortgage was recorded on October 1, 1985, in Book 4896, Page 499, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 2, 1988, Mortgage Clearing Corporation, assigned the above-described mortgage note and 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 21, 1988, in Book 5108, Page 1602, in the records of Tulsa County, Oklahoma.

The Court further find that on March 17, 1986, KATHRYN E. BROWN now Kathryn E. Espinosa, granted a general warranty deed to FRANK ESPINOSA and KATHRYN E. ESPINOSA, husband and wife, with the right of survivorship as joint tenants, and not as tenants in common. This deed was recorded with the Tulsa County Clerk on March 17, 1986, in Book 4930 at Page 1150 and FRANK ESPINOSA and KATHRYN E. ESPINOSA, husband and wife, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on July 1, 1988, the Defendants, FRANK ESPINOSA and KATHRYN E. ESPINOSA, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on April 1, 1989, November 1, 1989, and November 1, 1990.

The Court further finds that the Defendants, FRANK ESPINOSA and KATHRYN E. ESPINOSA, 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, FRANK ESPINOSA and KATHRYN E. ESPINOSA, are indebted to the Plaintiff in the principal sum of \$60,335.14, plus interest at the rate of 11 percent per annum from June 14, 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 \$2.00, plus accruing costs and interest, which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, FRANK ESPINOSA, KATHRYN E. ESPINOSA, and OSTEOPATHIC FOUNDERS ASSOCIATION a Corporation dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, 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 the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, disclaims any right, title or interest it may have 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 Defendants, FRANK ESPINOSA and KATHRYN E. ESPINOSA, in the principal sum of \$60,335.14, plus interest at the rate of 11 percent per annum from June 14, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 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 \$2.00, plus accruing costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, FRANK ESPINOSA, KATHRYN E. ESPINOSA, and OSTEOPATHIC FOUNDERS ASSOCIATION a Corporation dba Tulsa Regional Medical Center

formerly Oklahoma Osteopathic Hospital, 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, FRANK ESPINOSA and KATHRYN E. ESPINOSA, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$2.00, plus accruing costs and interest, 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.

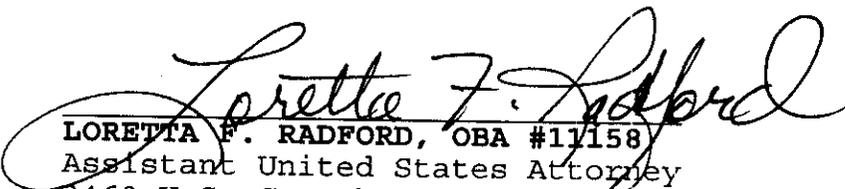
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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
3460 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) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-741-BU

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA **MAY 15 1995**

WALTER WILLIAMS,)
)
 Plaintiff,)
)
 vs.)
)
 TOGO D. WEST, JR., Secretary)
 of the Army,)
)
 Defendant.)

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

Case No. 94-C-944-BU

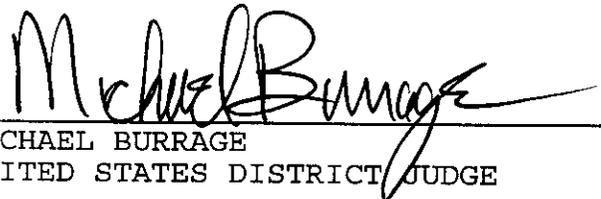
ENTERED ON DOCKET
DATE 5-16-95

ORDER

This matter comes before the Court upon the Notice of Settlement and Joint Application to Suspend the Scheduling Order and Strike the Trial Setting filed on May 9, 1995. Upon due consideration, the Court DENIES the joint application. Instead, the Court DIRECTS the Clerk of the Court to administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding 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 the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 15th day of May, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 15 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM R. WENDT aka Bill Wendt;)
 EVELYN K. WENDT; STATE OF)
 OKLAHOMA, ex rel. OKLAHOMA TAX)
 COMMISSION; CITY OF PRYOR,)
 Oklahoma; COUNTY TREASURER,)
 Mayes County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Mayes)
 County, Oklahoma; R.R. (JACK))
 MERRILL, JR.)
)
 Defendants.)

ENTERED ON DOCKET
DATE 5-16-95

Civil Case No. 95-C-0061-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of May,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF
COUNTY COMMISSIONERS, Mayes County, Oklahoma, appear by Charles A. Ramsey,
Assistant District Attorney, Mayes County, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley,
Assistant General Counsel; the Defendant, CITY OF PRYOR, Oklahoma, appears not having
previously filed a Disclaimer; the Defendant, R.R. (JACK) MERRELL, JR., appears not
having previously filed a Disclaimer; and the Defendants, WILLIAM R. WENDT and
EVELYN K. WENDT, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM R. WENDT, signed a Waiver of Summons on February 9, 1995; that the Defendant, EVELYN K. WENDT, signed a Waiver of Summons on February 9, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on January 20, 1995, by Certified Mail; the Defendant, CITY OF PRYOR, Oklahoma, was served a copy Summons and Complaint on January 20, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Mayes County, Oklahoma, was served a copy of Summons and Complaint on January 23, 1995, by Certified Mail; that Defendant, BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, was served a copy of Summons and Complaint on January 23, 1995, by Certified Mail; and that Defendant, R.R. (JACK) MERRILL, JR., was served a copy of Summons and Complaint on March 10, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, filed their Answer on January 27, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 7, 1995; that the Defendant, CITY OF PRYOR, Oklahoma, filed its Disclaimer on February 23, 1995; that the Defendant, R.R. (JACK) MERRILL, JR., filed his Disclaimer on March 23, 1995; and that the Defendants, WILLIAM R. WENDT, and EVELYN K. WENDT, 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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Numbered Eleven (11), Block Numbered Two (2), of SOUTHRIDGE FOURTH ADDITION to the incorporated Town of PRYOR CREEK, Mayes County, State of Oklahoma, according to the Official Survey and Plat thereof, filed for record in the office of the County Clerk of said County and State.

The Court further finds that on November 5, 1982, Philip J. Mauldin and Paula E. Mauldin, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC., their mortgage note in the amount of \$46,950.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Philip J. Mauldin and Paula E. Mauldin, Husband and Wife, executed and delivered to TURNER CORPORATION OF OKLAHOMA, INC., a mortgage dated November 5, 1982, covering the above-described property. Said mortgage was recorded on November 9, 1982, in Book 605, Page 176, in the records of Mayes County, Oklahoma.

The Court further finds that on May 9, 1983, TURNER CORPORATION OF OKLAHOMA, INC., assigned the above-described mortgage note and mortgage to FEDERAL NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on May 10, 1983, in Book 611, Page 12, in the records of Mayes County, Oklahoma. A Corrected Assignment was re-recorded on May 21, 1984, in Book 627, Page 478, in the records of Mayes County, Oklahoma, to show correct mortgage amount.

The Court further finds that on June 7, 1991, Federal National Mortgage Association, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on June 24, 1991, in Book 729, Page 510, in the records of Mayes County, Oklahoma.

The Court further finds that Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, husband and wife, became the current record title holders by virtue of a Joint Tenancy Warranty Deed, dated November 20, 1989, recorded on November 27, 1989, in Book 708, Page 297, in the records of Mayes County, Oklahoma. The Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, husband and wife are the current assumptors of the subject indebtedness.

The Court further finds that on March 12, 1991, the Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 19, 1991, April 20, 1992, April 20, 1993, and November 17, 1993.

The Court further finds that the Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, 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, WILLIAM R. WENDT and EVELYN K. WENDT, are indebted to the Plaintiff in the principal sum of \$65,786.10, plus interest at the rate of 12.5 percent per annum from August 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (\$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, has a claim against the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$30.45, plus accrued and accruing

interest and costs. Said claim 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 \$91.79, plus accrued and accruing interest, which became a lien on the property as of July 22, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, CITY OF PRYOR, Oklahoma and R.R. (JACK) MERRILL, JR., disclaim any 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 Defendants, WILLIAM R. WENDT and EVELYN K. WENDT, in the principal sum of \$65,786.10, plus interest at the rate of 12.5 percent per annum from August 18, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 percent per annum until paid, plus the costs of this action in the amount of \$8.00 (\$8.00 fee for recording Notice of Lis Pendens), plus any additional

sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, have and recover judgment in the amount of \$30.45, plus accrued and accruing interest and costs, for personal property taxes for the year 1994, 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 \$91.79, plus accrued and accruing interest, for state income taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, WILLIAM R. WENDT, EVELYN K. WENDT, CITY OF PRYOR, Oklahoma, and R.R. (JACK) MERRILL, JR., 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, WILLIAM R. WENDT and EVELYN K. WENDT, to satisfy the 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, STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION, in the amount of \$91.79, plus
accrued and accruing interest, and costs.

Fourth:

In payment of Defendant, COUNTY TREASURER, Mayes County,
Oklahoma, in the amount of \$30.45, plus accrued and accruing
interest and costs, 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.

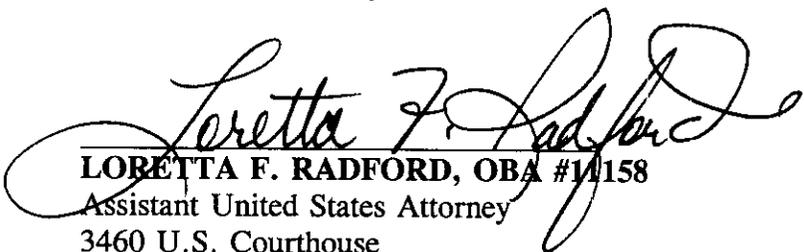
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant
to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any
right to possession based upon any right of redemption) in the mortgagor or any other person
subsequent to the foreclosure sale.

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:

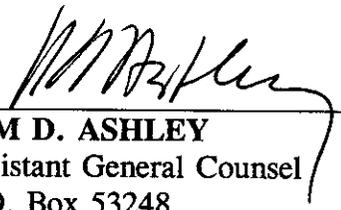
STEPHEN C. LEWIS
United States Attorney



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



CHARLES A. RAMSEY OBA #10116
Assistant District Attorney
P.O. Box 845
Pryor, OK 74362
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma



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

Judgment of Foreclosure
Civil Action No. 95-C-0061-BU

LFR:flv

ENTERED ON DOCKET
DATE MAY 16 1995

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

CHRIS COLUMBUS BRUNER,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA DEPARTMENT OF HUMAN)
 SERVICES,)
)
 Defendant.)

No. 95-C-1-K

FILED

MAY 15 1995

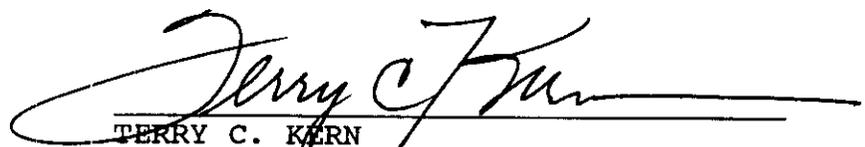
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion of the plaintiff to reconsider the Court's Order of January 25, 1995 which denied plaintiff leave to proceed in forma pauperis. The primary basis for the Court's initial denial of the motion was plaintiff's listing of monthly income of \$2019.00 in his affidavit of financial status. Plaintiff has submitted a new affidavit in which the entry for monthly income is left blank. On the new affidavit, plaintiff also lists ownership of one vacant lot in Boley, Oklahoma and forty acres north of Boley, but does not state their estimated value, as required. In short, the new affidavit submitted by plaintiff contains insufficient information.

It is the Order of the Court that the motion of the plaintiff to reconsider is hereby DENIED.

ORDERED this 15 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a). The preemptive power functions with regard to state statutory, regulatory, and/or common law causes of action. 29 U.S.C. 1144(c)(1).

Before preemption may be found, three requirements must be met. "There must be a state law, an employee benefit plan, and the state law must "relate to" the employee benefit plan. Airparts Company, Inc. v. Custom Benefit Services of Austin, Inc., 28 F.3d 1062, 1064 (10th Cir. 1994). The Plaintiff does not dispute the existence of state law issues and an employee benefit plan dealing with severance pay. Although not stated in his brief, the key question is whether the state law relates to the plan in a manner sufficient to require preemption. ERISA preemption is triggered when state actions have an effect on "the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." Airparts, 28 F.3d at 1064, quoting Monarch Cement Co. v. Lone Star Indus., Inc., 982 F.2d 1448, 1452 (10th Cir. 1992).

When Plaintiff was discharged from employment, it is undisputed that PSO had announced and was administering a severance pay plan and program. Def.'s Resp. to Pl.'s Mot. to Rem., Aff. of Debra Williams. Under the terms of that plan and program, PSO determined that Plaintiff was not entitled to severance pay.

It is true that "ERISA does not preempt claims that are only tangentially involved with a benefit plan." Settles v. Golden Rule Ins. Co., 927 F.2d 505, 509 (10th Cir.1991). Yet the same decision

states "common law tort and breach of contract claims are preempted by ERISA if the factual basis for the cause of action involves an employee benefit plan." Id. (emphasis added). Despite the reliance on state law in the Petition, removal is appropriate where the litigation is preempted by federal law. Calhoon v. Bonnabel, 560 F. Supp. 101 (S.D.N.Y. 1982).

Several courts in varying jurisdictions have decided that plaintiffs seeking recovery of severance benefits from an employer have stated causes of action under ERISA. Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 324-326 (2nd Cir. 1985), aff'd, 477 U.S. 901 (1986); Holland v. Burlington Industries, Inc., 772 F.2d 1140, 144-46 (4th Cir. 1985), aff'd, 477 U.S. 901 (1986); Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1985), cert. denied, 474 U.S. 865 (1985).

Upon review, the Court concludes the Plaintiff's negligence and breach of contract claims relate to the primary administrative functions of the Defendant's employee benefit plan, namely the determination of eligibility for severance pay. Therefore, the state law claims are preempted by ERISA and the action has been properly removed to federal court.

Plaintiff's request for remand, styled as Objection to Removal and Motion to Dismiss, is DENIED.

ORDERED this 15 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAY 16 1995

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

ALBERT R. DEAL,
Plaintiff,
vs.
DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Defendant.

No. 93-C-640-K

FILED

MAY 16 1995

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

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Albert R. Deal, to the Secretary's denial of Supplemental Security Income disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered February 9, 1995, reversing and remanding the decision of the Secretary,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered as stated above.

SO ORDERED THIS 12 DAY OF MAY, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAY 16 1995

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

GLENN W. PARKER,
Plaintiff,

vs.

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

Defendant.

No. 93-C-0626-K ✓

FILED

MAY 16 1995

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

J U D G M E N T

This matter came before the Court for consideration of the appeal of Glenn W. Parker, Plaintiff, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered February 9, 1995, reversing and remanding the decision of the Secretary,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered as stated above.

SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAY 16 1995

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

JOHN R. LEWIS,

Plaintiff,

vs.

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

Defendant.

No. 94-C-368-K

FILED
MAY 16 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, John R. Lewis, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered April 28, 1995, affirming the Secretary's decision,

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

IT IS SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 16 1995

BOBBY R. ASHER,

Plaintiff,

vs.

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

Defendant.

No. 92-C-1174-K

FILED

MAY 15 1995

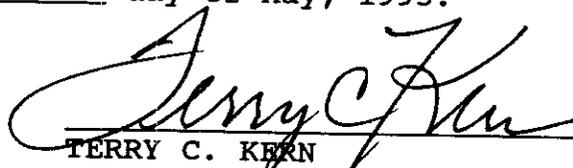
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Bobby R. Asher, to the Secretary's denial of disability benefits under Title II of the Social Security Act. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered November 3, 1994, reversing and remanding for payment of benefits,

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

SO ORDERED this 12 day of May, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 16 1995

FLORENCE P. JENKS,
Plaintiff,
vs.
DONNA SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Defendant.

No. 93-C-117-K

FILED

MAY 15 1995

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

J U D G M E N T

THIS matter came before the Court for consideration of the appeal of Plaintiff, Florence P. Jenks, to the Secretary's denial of disability benefits under Title II of the Social Security Act. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered November 28, 1994, affirming the decision of the Secretary,

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

IT IS SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

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

DATE MAY 16 1995

JEANNINE WAND,
SSN: 334-64-4745

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES,

Defendant.

No. 93-C-511-K

FILED

MAY 15 1995

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

J U D G M E N T

This matter came before the Court for consideration of the appeal of Jeannine Wand, Plaintiff, to the Secretary's denial of Social Security benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered February 13, 1995, affirming the Secretary's decision,

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

SO ORDERED THIS 12 DAY OF MAY, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ROGER D. WARD, JR.,
Plaintiff,

vs.

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

No. 93-C-558-K

FILED

MAY 16 1995

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

J U D G M E N T

This matter came before the Court for consideration of the appeal of Roger D. Ward, Jr. ("Plaintiff") to the Secretary's denial of disability benefits under the Social Security Act. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered February 21, 1995, affirming the decision of the Secretary,

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

SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

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

DATE MAY 16 1995

LAVENIA MORRIS,
Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS
Defendant.

No. 93-C-500-K

FILED

MAY 15 1995

J U D G M E N T

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

THIS matter came before the Court for consideration of the appeal of Plaintiff, Lavenia Morris, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered October 11, 1994, affirming the Secretary's decision,

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

IT IS SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE MAY 16 1995

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

KATHRYN A. VALOT,
Plaintiff,
vs.
DONNA SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Defendant.

No. 91-C-961-K ✓

FILED

MAY 15 1995

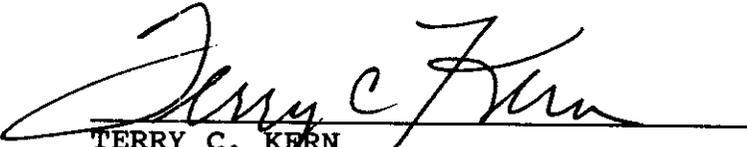
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of the appeal of Kathryn A. Valot ("Plaintiff") to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered December 20, 1994, affirming the Secretary's decision,

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

SO ORDERED this 12 day of MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
MAY 16 1995
DATE _____

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

DANIEL E. DELO,
Plaintiff,

vs.

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

Defendant.

No. 93-C-0762-K

FILED

MAY 16 1995

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

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Daniel E. Delo, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered April 7, 1995, reversing and remanding the decision of the Secretary,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered.

SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

CARLTON RIGGINS,
Plaintiff,

vs.

DONNA E. SHALALA,
Secretary of HHS

Defendant.

No. 93-C-0041-K

FILED

MAY 15 1995

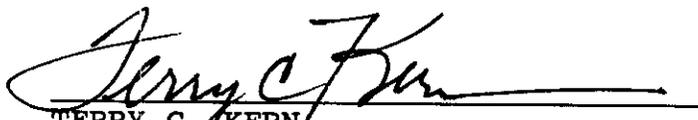
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of the appeal of Plaintiff, Carlton Riggins, to the Secretary's denial of Social Security disability benefits. The issues having been duly considered, a decision having been rendered, and in accordance with the Order entered November 9, 1994, affirming the Secretary's decision,

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

IT IS SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED

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

MAY 12 1995

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

REUBEN C. CORNELIUS,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Shirley Chater, Secretary,)
)
 Defendant.)

Case No. 94-C-624-18

JSW

ENTERED ON DOCKET
DATE MAY 15 1995

JUDGMENT

This action having come before the court for consideration, IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered as follows: The case is REMANDED for further hearing by the Administrative Law Judge to properly assess Plaintiff's ability to perform work-related activities, including a consultative orthopedic examination and a supplemental hearing in accord with the earlier order.

The case is remanded per the Order of May 1, 1995.

DATED THIS 12th day of May, 1995.


JEFFREY E. WOLFE, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

20

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

RAYMOND SNYDER, individually and on
behalf of all those similarly
situated,

v.

ONEOK, INC., et al.

Civil No. 88-C-1500E

ENTERED ON DOCKET

DATE 5/15/95

FILED
IN OPEN COURT

MAY 12 1995

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

**ORDER APPROVING DISTRIBUTION
OF SETTLEMENT FUNDS, ACCEPTANCE
OF UNTIMELY-FILED AUTHORIZED CLAIMS,
FILING OF TAX RETURNS AND APPROVAL OF
PAYMENT OF TAXES, ADMINISTRATION EXPENSES AND FEES**

AND NOW, this 12TH day of May, 1995 upon
plaintiff's Motion for an Order Approving Distribution of Settle-
ment Funds, Acceptance of Untimely-Filed Authorized Claims,
Rejecting Improper Claims, Filing of Tax Returns, Approval of
Payment of Taxes, Administration Expenses and Fees, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for an Order approving distribu-
tion of settlement funds, acceptance of untimely-filed authorized
claims, rejecting improper claims, filing of tax returns, and
approval of payment of taxes, administration expenses and fees is
hereby granted.

2. The Settlement Funds shall be distributed to Members
of the Class whose claims, both timely and untimely, have been
approved as set forth in the Final List and Report of the Claims
Administrator previously filed with the Court, and in accordance
with the Settlement Agreement and the Court's Order approving the

settlement. The Claims Administrator may at any time, prior to distribution, approve a previously rejected claim if missing information or documentation is provided.

3. Following the Date of Distribution, the Claims Administrator shall retain all Proofs of Claim and other related documents for a period of one (1) year, at which time all Proofs of Claim and other related documents may be destroyed.

4. The claims submitted to the Claims Administrator which have been rejected in whole or in part as set forth in the Claimant Listing Report of the Claims Administrator are rejected. Persons who submitted Rejected Claims shall not receive any portion of the Settlement Fund.

5. The Recognized Loss of Stone and Webster shall be in the amount of \$ 2,395,2500.

6. The fees and expenses of the Claims Administrator in the amount of \$22,104.93 shall be paid out of the Settlement Fund.

Dated:


United States District Judge

Copies furnished:

All Counsel of Record

s:\oncok3.ord

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

F
MAY 12 1995

JAMEY STRUBLE,
Petitioner,
vs.
JACK COWLEY,
Respondent.

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

No. 92-C-953-C

ENTERED ON DOCKET
DATE MAY 15 1995

ORDER

This matter comes before the Court on Petitioner's Motion to Dismiss this habeas corpus action (docket #18). Petitioner alleges that he has presented a mixed petition containing exhausted and unexhausted claims and, therefore, that his petition should be dismissed without prejudice pursuant to Harris v. Champion, 48 F.3d 1127 (10th Cir. 1995).

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's Motion to Dismiss (docket #18) is **granted** and that this petition for a writ of habeas corpus is hereby **dismissed without prejudice**.

SO ORDERED THIS 12 day of May, 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

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

BLUE CIRCLE CEMENT, INC.,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF ROGERS,

Defendant.

) ENTERED ON DOCKET

) DATE MAY 15 1995

) Case No. 91-C-635-E *H*

) **FILED**

) MAY 12 1995 *RC*

J U D G M E N T

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

This matter came before the Court on a motion for summary judgment by Plaintiff. The Court duly considered the issues and rendered a decision in accordance with the order filed on May 12, 1995.

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

IT IS SO ORDERED.

This 12TH day of MAY, 1995.

Sven Erik Holmes

Sven Erik Holmes
United States District Judge

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

BLUE CIRCLE CEMENT, INC.,)
)
 Plaintiff,)
)
 v.)
)
 BOARD OF COUNTY COMMISSIONERS)
 OF THE COUNTY OF ROGERS,)
)
 Defendant.)

Case No. 91-C-635-~~E~~H ✓

FILED

MAY 12 1995



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

ENTERED ON DOCKET

DATE MAY 15 1995

O R D E R

This matter comes before the Court for consideration on the Motion for Summary Judgment of Plaintiff Blue Circle Cement, Inc. ("Blue Circle").

This case arises from a municipality's exercise of its zoning authority to regulate hazardous waste disposal, recycling, and treatment within its borders. In its motion, Blue Circle raises constitutional challenges to the hazardous waste zoning ordinance enacted by the Defendant, the Board of County Commissioners of Rogers County (the "Board").

On August 4, 1992, the District Court granted summary judgment sua sponte in favor of the Board. Blue Circle appealed the decision to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals reversed the grant of summary judgment and remanded the action to the District Court for consideration of Blue Circle's federal preemption and Commerce Clause challenges to Section 3.13.2 of the Rogers County ordinance, consistent with the Tenth Circuit opinion of June 22, 1994. Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1499 (10th

Cir. 1994) (the "Opinion"). The case was transferred to this Court on March 7, 1995.

The Tenth Circuit comprehensively outlined the background of the dispute as follows:

Blue Circle, an Alabama corporation with its principal place of business in Georgia, operates a quarry and cement manufacturing plant in Rogers County, Oklahoma. Since opening this facility in 1960, Blue Circle has used coal and natural gas as fuel in its cement kilns. To reduce the cost of heating its kilns, Blue Circle sought to convert to Hazardous Waste Fuels ("HWFs"), which are derived from the blending of various industrial wastes and possess high British Thermal Unit ("BTU") value.¹ The Board's regulatory actions in direct response to Blue Circle's proposed fuel conversion project gave rise to this dispute.

Initially, Blue Circle concluded that the Board's approval to use HWFs was unnecessary. The zoning ordinance in effect when Blue Circle commenced its fuel conversion project in the early 1980s required industrial operators to obtain a conditional use permit to establish an "industrial waste disposal" site. See § 3.13.2 of the City of Claremore-Rogers County Metropolitan Planning Commission Zoning Ordinance (the "Ordinance"). Blue Circle contended that burning HWFs in its cement kilns constituted "recycling" or "burning for energy recovery," not disposal. Because the Ordinance made no mention of recycling operations, Blue Circle argued that it was free to purchase, store, and burn HWFs at its site without first obtaining a conditional use permit. To accomplish the conversion, Blue Circle incurred design, engineering, and planning expenses in preparation for the switch to HWFs. The company entered into an agreement with CemTech, Inc., contingent upon obtaining the necessary governmental approval, to construct a storage area for HWFs and to supply HWFs to its Rogers County facility.

¹ By one estimate, at least twenty-three cement manufacturing plants in the United States and Canada operate with HWFs. Aplt. App. at 134. See LaFarge Corp. v. Campbell, 813 F. Supp. 501, 504 n.5 (W.D. Tex. 1993) (noting that HWFs are used in cement kilns, blast furnaces, coke ovens, sulfur recovery furnaces, and industrial boilers). Pursuant to 42 U.S.C. 6924(q)(1), Congress directed the Environmental Protection Agency ("EPA") to promulgate regulations to establish national standards for owners and operators of industrial furnaces that burn HWFs. See 40 C.F.R. § 266.100 Subpart H (entitled "Hazardous Waste Burned in Boilers and Industrial Furnaces").

However, the Board disagreed with Blue Circle's interpretation of the Ordinance and informed company officials that burning HWFs in the cement kilns required a conditional use permit. On August 12, 1991, the Board adopted an advisory resolution stating that "there is no distinction between a hazardous waste alternative fuel burning facility as a recycling facility or an industrial waste disposal site or hazardous waste incinerator." The regulatory force of this advisory resolution remains uncertain, but the Board explained its action as an effort to thwart Blue Circle's attempt to circumvent the conditional use permit requirement under the original terms of § 3.13.2.

On August 21, 1991, rather than apply for a conditional use permit to burn HWFs at its cement plant, Blue Circle filed suit in the United States District Court for the Northern District of Oklahoma, seeking a declaratory judgment under 28 U.S.C. § 2201 that the use of HWFs did not constitute industrial "disposal." On December 2, 1991, while Blue Circle's suit was pending, the Board ended any ambiguity about the characterization of Blue Circle's use of HWFs by amending the Ordinance to include "recycling" and "treatment" sites among those facilities for which the Ordinance requires a conditional use permit. By this express language, the Board unequivocally subjected hazardous waste recycling and treatment to the same regulatory and permit scheme that was applicable to industrial waste disposal.

Opinion at 1501-02.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F. 2d 342, 345 (10th cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56 (e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

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

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The Court has two issues before it: (1) whether the Resource Conservation and Recovery Act ("RCRA") preempts the Ordinance's restrictions on hazardous waste treatment and recycling, and (2) whether the Ordinance imposes an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

Section 3.13.2 of the Ordinance, as amended and retitled "Industrial Waste Disposal/Recycling/Treatment," provides in pertinent part:

An Industrial Waste Disposal/Recycling/Treatment Site shall not be less than one hundred sixty (160) acres in size and no other industrial waste disposal/recycling/treatment site shall be nearer than one (1) mile (5,280 feet) in any direction from the proposed industrial waste disposal/recycling/treatment site. The site will be as nearly square as possible.

All operation of actual disposal/recycling/treatment site shall be confined to as near the center of the site as practical and in no case in violation of any Oklahoma State Department of Health Rules and Regulations or in violation of

any other regulatory requirements. The operator of the . . . site shall own in fee both the land (surface) and the minerals.

The operator shall file with the Planning Commission a comprehensive drainage spill protection plan which will clearly and specifically detail the permanent and emergency measures and permanent structures to be installed to protect the drainage area and all adjacent drainage areas from any contamination by industrial waste. . . .

All industrial waste disposal/recycling/treatment sites shall be located at least one (1) mile from any platted residential subdivision.

The first question before the Court is whether the Ordinance is preempted by the provisions of RCRA. The doctrine of federal preemption, based on the Supremacy Clause of the United States Constitution,² is comprised of both express and implied forms of preemption. Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2383 (1992). The Court in Gade explained that at least two types of implied preemption exist:

field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)] . . . and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (other citations omitted).

Id.

² The Supremacy Clause mandates that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

Because the provisions of the Ordinance are more restrictive than those of RCRA, the only type of preemption which is arguably applicable here is implied conflict preemption. Application of the RCRA "savings clause," 42 U.S.C. § 6929, empowering local governments to adopt regulations that are "more stringent" than those on the federal level, ensures that neither express nor implied field preemption bars the Ordinance. Opinion at 1504-05; See Old Bridge Chems., Inc. v. New Jersey Dep't of Env'tl. Protection, 965 F.2d 1287, 1292 (3d Cir.) ("[A]lthough waste management may be an area of overriding national importance, in legislating in this field Congress has set only a floor, and not a ceiling, beyond which states may go in regulating the treatment, storage, and disposal of solid and hazardous wastes."), cert. denied, 113 S. Ct. 602 (1992).

However, RCRA may preempt the Ordinance on the basis of implied conflict preemption if the Ordinance is inconsistent "with the structure and purpose of [RCRA] as a whole." Gade, 112 S. Ct. at 2383. The Tenth Circuit outlined an "objective" three-pronged test for the Court to utilize in determining whether the Ordinance passes muster. First, under this test, "ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA." Opinion at 1508. Second, "an ordinance that falls short of imposing a total ban on encouraged activity will ordinarily be upheld so long as it is supported by a record establishing that it is a reasonable

response to a legitimate local concern for safety or welfare." Id.

The Tenth Circuit declared that:

if the ordinance is not addressed to a legitimate local concern, or if it is not reasonably related to that concern, then it may be regarded as a sham and nothing more than a naked attempt to sabotage federal RCRA policy of encouraging the safe and efficient disposition of hazardous waste materials.

Id. Finally, before the Court may rule that the ordinance is preempted, the Court must make a finding that the "impact of the local ordinance on the objectives of the federal statute . . . thwarts the federal policy in a material way." Id. at 1508-09.

Before applying this three-part test, the Court must consider the purpose of RCRA. The Tenth Circuit articulated RCRA's purpose as follows:

RCRA is the comprehensive federal hazardous waste management statute governing the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment. Enacted in 1976, RCRA authorized a multifaceted federal regulatory, permit, and enforcement regime to address the "overriding concern of . . . the effect on the population and the environment of the disposal of discarded hazardous wastes -- those which by virtue of their composition or longevity are harmful, toxic or lethal." H.R. Rep. 94-1491, 94th Cong., 2d Sess. at 3 (1976), reprinted in, 1976 U.S.C.C.A.N. 6238, 6241.

One of RCRA's stated purposes is to assist states and localities in the development of improved solid waste management techniques to facilitate resource recovery and conservation. 42 U.S.C. § 6902(a)(1). "[D]iscarded materials have value in that energy or materials can be recovered from them. In the recovery of such energy or materials, a number of environmental dangers can be avoided. Scarce land supply can be protected. The balance of trade deficit can be reduced. The nation's reliance on foreign energy and materials can be reduced" 1976 U.S.C.C.A.N. at 6241.

The Hazardous and Solid Waste Amendments of 1984 increased RCRA's emphasis on recovery and recycling of hazardous wastes. In those amendments, Congress sought to "minimiz[e] the generation of hazardous waste and the land disposal of

hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6). Moreover, Congress articulated as an objective "promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems." 42 U.S.C. § 6902(a)(10). Indeed, the Conference Report for the 1984 amendments underscored Congress' goal to replace land disposal with advanced treatment, recycling, and incineration:

[T]he Conferees intend that through vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for all others, and that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal.

Conference Report No. 98-1133, 98th Cong., 2d Sess. at 80, reprinted in 1984 U.S.C.C.A.N. at 5651; ENSCO, 807 F.2d at 744 (noting Congressional intent to encourage treatment in preference to land disposal of hazardous waste).

Opinion at 1505-06. Based upon the stated objectives of RCRA, it is clear that the burning of HWFs by Blue Circle, which qualifies as a "disposal" of "hazardous waste", is "an activity that is otherwise encouraged by RCRA".

The Court must next determine whether the Ordinance amounts to an "explicit or de facto total ban" on the burning of HWFs. An examination of the language of the Ordinance reveals that it is not an explicit total ban on the proposed Blue Circle disposal. Blue Circle, however, contends that the Ordinance effectively bans the burning of HWFs because no property located in Rogers County can meet the locational requirements of the Ordinance. Affidavit of Wayne Alberty ("Alberty Aff.") ¶¶ 3-6.

In response, the Board appears to make two arguments in its supplemental brief: first, that three tracts of property, in Rogers County, currently zoned floodplain, might meet the

requirements of the Ordinance if Blue Circle were to apply for, and the Board were to grant, a zoning variance and, second, that other property within the County might meet the requirements of the Ordinance if Blue Circle were to apply for, and the Board were to grant, a conditional use permit. The Board has presented no evidence in support of its arguments, despite the Tenth Circuit's statement that the Board must develop the record on the preemption question.

In short, the arguments offered by the Board do not controvert Blue Circle's contention that no property in Rogers County can currently meet the locational requirements of the Ordinance. Presented with a similar lack of evidence, the Tenth Circuit found that:

the Board merely rests on a hypothetical, standardless possibility that, notwithstanding the Ordinance's specific site requirements, the Board might relent and allow such activity in the future, either by rezoning flood plain land or by granting a variance. This is not a sufficient response. (Emphasis added).

Opinion at 1510; see also Ogden Env'tl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1446-47 (S.D. Cal. 1988) (a standardless permit scheme amounted to a de facto ban). The Ogden court stated:

allowing a locality to completely evade judicial review simply by requiring a conditional use permit, which is then granted or denied at the discretion of local decision-makers, creates the potential for . . . "sham" and "subterfuge"

687 F. Supp. at 1446. The Court agrees with the reasoning of the Tenth Circuit and of the Ogden court and holds that the Ordinance effects a de facto ban on the burning of HWFs within that portion of Rogers County subject to the Ordinance.

Consistent with the test articulated by the Tenth Circuit, to conclude that the Ordinance is preempted, the Court must determine whether the impact of the Ordinance on the objectives of RCRA "thwarts the federal policy in a material way." Opinion at 1508-09. As noted by the Tenth Circuit, among RCRA's primary purposes are that:

through vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for all others, and that advanced treatment, recycling, incineration and other hazardous waste control technologies should replace land disposal.

Conference Report No. 98-1133, 98th Cong., 2d Sess. at 80, reprinted in 1984 U.S.C.C.A.N. at 5651; ENSCO, 807 F.2d at 744 (noting Congressional intent to encourage treatment in preference to land disposal of hazardous waste).

Opinion at 1505-06. Clearly, the impact of the Ordinance, to ban the burning of HWFs, undermines the primary stated objectives of RCRA and thus "thwarts the federal policy in a material way." Therefore, the Court concludes that RCRA preempts the Ordinance. Because Blue Circle is entitled to judgment as a matter of law and the Board has not raised a genuine issue of material fact, the Court hereby grants Blue Circle's motion for summary judgment on the grounds that RCRA preempts the Ordinance.

It should be noted that, even if the Board were to prevail under the first part of the preemption analysis, the Board has not presented any evidence which demonstrates that the Ordinance is addressed to a legitimate local concern for safety or welfare or that it is a reasonable response to such a concern.

Blue Circle has introduced evidence that, during the cement kiln combustion process, organic hazardous wastes are detoxified.

Affidavit of Ronald Gebhardt ("Gebhardt Aff.") ¶ 7. In addition, Gebhardt states that:

[o]verall air quality from the manufacturing process is improved due to the lower sulfur content of HWFs compared to coal. Society benefits because hazardous wastes are used for a beneficial purpose rather than being disposed by underground injection or landfilling or some illegal activity, and because hazardous waste management costs for the nation are reduced.

Gebhardt Aff. ¶ 8.

In response, the Board attempts to identify the pertinent local concern for safety or welfare in three ways. First, without any supporting evidence, the Board asserts that:

[p]otential costs associated with burning of hazardous waste in cement kilns not originally built to burn hazardous waste include monetary physical and emotional costs of birth defects, immune system depression and associated diseases, behavioral and nervous system effects and/or effects upon non-human species that are known to accompany exposure to emissions from waste burning facilities.

Supplemental Brief of Board at 11-12. A motion for summary judgment, however, cannot be defeated by bare assertions in the brief of the party opposing the motion. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1382 (10th Cir. 1994). "[D]ocuments of this character are self-serving and are not probative evidence of the existence or nonexistence of any factual issues." 10A Charles Alan Wright et al., Federal Practice and Procedure § 2723, at 65 (2d ed. 1983). Thus, such a conclusory assertion does not suffice as an identification of what specific safety and health hazards are presented by the burning of HWFs in Blue Circle's cement facility. See Opinion at 1510.

Second, the Board appended a portion of a law review article to its brief entitled "Burning Mad: The Controversy Over Treatment

of Hazardous Waste in Incinerators, Boilers and Industrial Furnaces." It is clear that the contentions of a law review article are not evidence sufficient to defeat a motion for summary judgment. "[T]he court may not take cognizance of positions regarding the facts based on exhibits that are merely a part of the brief and have not been otherwise verified or supported." 10A Wright, Federal Practice and Procedure § 2723, at 65. Moreover, it should be noted that the article does not unequivocally support the Board's contentions. The only scientific study of cement kiln recycling referenced in the article -- an 18 month study at a cement kiln in Texas -- concluded that, of the 1,000 samples taken, only one exceeded Texas standards and the standard exceeded involved nuisance odors rather than health effects.

Finally, the Board offers the deposition testimony of Douglas Pardee, the Operations Manager of Blue Circle, claiming that Pardee indicates "that cement kilns currently operating through burning of HWF's have yet to meet emission standards promulgated by the EPA." Board's Response to Blue Circle's Supplemental Brief at 5. The Court has reviewed this deposition testimony and does not believe that it supports the Board's claim. But even if it did, and even allowing the Board "significant latitude", Opinion at 1508, as the Court must, the fact that some cement kilns currently burning HWFs have not met EPA's emission standards is not sufficient to identify what specific health and safety concerns are presented by Blue Circle's proposed recycling.

Further, the Board has not adduced any evidence suggesting that the limits imposed by the Ordinance bear any reasonable relation to any legitimate, local concern. In support of Blue Circle's contention that the Ordinance is not reasonably related to a legitimate, local concern, Blue Circle states:

[t]he Ordinance was amended without any formal study (i) of the necessity or reasonableness of regulating recycling facilities under the same standards as disposal facilities, or (ii) of the impact of such regulation on recycling. Defendant's Response to Request for Admission No. 4 at 5-6.

Other activities that are more substantial and potentially harmful than recycling are allowed in I-4 zoned areas as of right without locational prohibitions. *Alberty Aff.* ¶¶ 8-9.

In response, the Board asserts that:

consideration of scholarly and scientific conclusion that "safe" incineration of HWF's in cement kilns has yet to be attained may reasonably result in restriction of location of such facilities.

Board's Response to Blue Circle's Supplemental Brief at 8. This conclusory statement fails for the same reason as the Board's assertion of the health hazards presented by the proposed recycling discussed above.

The Board also refers to the statements of Glenn Sweet, Kenneth Crutchfield, and Gerry Payne, County Commissioners in and for Rogers County, that the December 2, 1991 amendment to the Ordinance was "enacted to continue the purpose of the Comprehensive County-wide Zoning Plan which is intended, in part to insure the health and safety of Rogers County Citizens." Affidavit of Glenn Sweet ¶ 3; Affidavit of Kenneth Crutchfield ¶ 3; Affidavit of Gerry Payne ¶ 3. However, rather than explaining how the limits of the Ordinance bear a reasonable relation to a local concern, the

affidavits merely recite the intent of three County Commissioners in enacting the Ordinance. The Tenth Circuit flatly rejected this argument when it stated:

it seems to us that the evaluation of the local ordinance should be conducted on an objective, rather than a subjective, basis. It is, after all, very difficult to determine the bona-fides of a collective legislative body where motivation may vary among the members of that body and where, in most cases, the motivations may be complex and easily disguised. Rather, we are on firmer footing if we utilize an objective approach

Opinion at 1508 (holding that a "good faith adaptation of federal policy to local conditions" is not the correct standard).

The Court, therefore, holds that the Ordinance effectively bans the recycling of HWFs within the regulated area of Rogers County, the Ordinance materially conflicts with the federal policy of RCRA, the Board has not shown a legitimate health and safety interest, and the Board has not demonstrated that the criteria of the Ordinance are reasonably related to a legitimate local interest. The Ordinance is preempted by RCRA, and Blue Circle is entitled to judgment as a matter of law on its preemption claim.

The second question facing the Court is whether the Ordinance imposes an excessive burden on interstate commerce by effectively barring the use of HWFs within Rogers County.³ When the statute at issue discriminates on its face between local and interstate commerce, courts have erected a near per se rule of invalidity. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). The

³ It is well settled that hazardous waste is an article of commerce. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023 (1992); Opinion at 1510 n.12.

Commerce Clause also prohibits a state or local "statute [that] regulates evenhandedly to effectuate a legitimate local public interest if it imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Opinion at 1511. "The extent of the burden on interstate commerce that will be tolerated will depend on the 'nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" Pike, 397 U.S. at 142; Opinion at 1511.

The Tenth Circuit stated that:

[t]he Rogers County hazardous waste zoning ordinance operates evenhandedly because it does not distinguish between hazardous waste generated within the County and hazardous waste generated outside the county. Its site conditions apply equally, regardless of the origin of the HWFs being burned and it confers no advantages on in-state entities seeking to store, treat, recycle, or dispose of HWFs as against out-of-state firms.

Opinion at 1511-12. Because the Ordinance is not facially discriminatory, the Court must apply the Pike balancing test to determine whether the Ordinance unduly burdens interstate commerce. The Tenth Circuit advised that this broader analysis requires the court to scrutinize:

(1) the nature of the putative local benefits advanced by the Ordinance; (2) the burden the Ordinance imposes on interstate commerce; (3) whether the burden is "clearly excessive in relation to" the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce.

Opinion at 1512.

The party challenging the statute bears the burden of showing the undue imposition on interstate commerce. Opinion at 1511 (quoting Dorrance v. McCarthy, 957 F.2d 761, 763 (10th Cir. 1992)). The Court first examines the nature of the local benefits advanced by the Ordinance. Blue Circle asserts that the actual benefit of the Ordinance is minimal at best, and cites evidence that the burning of HWFs instead of coal in its cement kilns will improve the air quality. Gebhardt Aff. ¶¶ 7-8. Blue Circle also claims that the provisions of the Ordinance do not add to the protection of health and welfare because the environmental arena is already heavily regulated by both state and federal government. Id. ¶¶ 9-15. In response, as stated above, the Board offers no evidence that the burning of the HWFs would present any significant health or safety hazard. For example, the Board does not attempt to explain the reasoning behind the 160 acre requirement or the restriction that the site be "as nearly square as possible" or the provision that the site operator must own both the land and the minerals. "The mere 'incantation of a purpose to promote the public health or safety does not insulate a state from Commerce Clause attack.'" Opinion at 1512 (quoting Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (plurality opinion)). Thus, Blue Circle prevails under the first prong of the test.

Next, the Court looks to the burden imposed by the Ordinance on interstate commerce. Blue Circle alleges, and the Court agrees, that the burden on interstate commerce is great because the strict site requirements of the Ordinance effectively prevent the flow of

hazardous waste to the Blue Circle facility and to the area within Rogers County subject to the Ordinance. As discussed above, there is nothing in the record that contravenes this allegation. Blue Circle prevails on this point as well.

Third, the Court weighs whether the burden imposed is "clearly excessive in relation to" the local benefits. Because the Ordinance imposes a grave burden on interstate commerce and no specific safety and health benefits have been identified by the Board, in weighing the two interests, the Court finds that the burden imposed by the Ordinance is "clearly excessive in relation to" the local benefits.

Finally, the Court analyzes whether the benefits could be achieved as well by less intrusive measures. Blue Circle has presented evidence that the restrictions of the Ordinance are "irrational, overbroad, unreasonable and unnecessary with respect to the regulation of recycling activities." Gebhardt Aff. ¶¶ 15-18; Alberty Aff. ¶¶ 8-10. There is no evidence in the record which controverts these contentions.

The Court, thus, holds that the Ordinance imposes an undue burden on interstate commerce, violating the Commerce Clause. Therefore, because Blue Circle is entitled to judgment as a matter of law on the basis of uncontravened material facts, the Court grants summary judgment to Blue Circle on the Commerce Clause claim as well.

For the foregoing reasons, Plaintiff Blue Circle's Motion for Summary Judgment is hereby granted.

IT IS SO ORDERED.

This 11TH day of MAY, 1995.



Sven Erik Holmes
United States District Judge

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

AMY SKIFF,
Plaintiff,
vs.
CITY OF BIXBY, JIM BENNETT,
VICKIE ROBINSON, ED STONE,
CHERYL POWELL, and WENDELL
TENISON,
Defendants.

)
)
)
)
) Case No. 94-C-100-K ✓
)
)
) ENTERED ON DOCKET
) MAY 15 1995
) DATE _____
)

FILED

MAY 12 1995

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

JOINT DISMISSAL WITHOUT PREJUDICE

COMES now the Plaintiff, Amy Skiff, by and through her attorney Pat Malloy, Jr., and the Defendants City of Bixby, Jim Bennett, Vickie Robinson, Ed Stone, Cheryl Powell, and Wendell Tenison, by and through their attorney Ann C. Fries, and represents to the Court that by this pleading the Plaintiff dismisses the above entitled cause without prejudice to which Dismissal Defendants have no objection.

Pat Malloy

Pat Malloy, Jr., O.B.A. #
MALLOY & MALLOY, INC.
1924 South Utica, #810
Tulsa, Oklahoma 74104
(918) 747-3491
Attorney for Plaintiff, Amy
Skiff

Ann C. Fries

Ann C. Fries O.B.A. #
2504-D East 71st Street
Tulsa, Oklahoma 74136-5574
Attorney for Defendants,
City of Bixby, Jim Bennett,
Vicki Robinson, Ed Stone,
Cheryl Powell, and Wendell
Tenison

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

FILED

MAY 12 1995 *LC*

Richard M. Lawrence, Clerk
U. S. District Court
Northern District of Oklahoma

RICHARD STEPHEN BALCH &)
MARY ALICE VALENTINE, dba/)
AMERICAN ENDANGERED SPECIES)
FOUNDATION,)

Plaintiffs,)

v.)

Case No. 95-C-369-H ✓

WANDA WRIGHT, individually)
and as TRUSTEE of THE)
MARY MCLENDON TRUST,)

Defendant(s).)

ENTERED ON DOCKET
DATE MAY 15 1995

O R D E R

This matter comes before the Court on Plaintiff's request for clarification of order dismissing lawsuit and Plaintiff's application to set aside dismissal and application to reopen action under the Endangered Species Act.

The Court will treat Plaintiff's request for clarification as a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) "provides a mechanism by which a trial judge may alter, amend, or vacate a judgment." Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1249 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). By order dated May 10, 1995, the Court dismissed Plaintiff's lawsuit for lack of subject matter jurisdiction. Without subject matter jurisdiction, the Court is not empowered to make any ruling upon Plaintiff's claims. Plaintiff's motion to alter or amend the judgment is hereby denied.

Also before the Court is Plaintiff's application to set aside the dismissal. The Court will treat this application as a motion

for relief from the Court's order dated May 10, 1995. Under Rule 60(b) of the Federal Rules of Civil Procedure, the Court has discretion to grant the "extraordinary procedure" of relief from a final judgment or order. Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp., 837 F.2d 423, 426 (10th Cir. 1988); Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc., 715 F.2d 1442, 1444 (10th Cir. 1983). The Court declines to grant this relief.

Plaintiff's lawsuit is predicated on the Endangered Species Act, 15 U.S.C. §§ 1531 et seq. (the "Act"). The Act permits a person to commence a civil suit on his or her own behalf "to enjoin any person . . . who is alleged to be in violation of any provision" 15 U.S.C. 1540(g)(1)(A). The Act, however, contains a jurisdictional requirement which does not allow an action to be commenced under the subsection "prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator" Id. at § 1540(g)(2)(A)(i).¹

In response to Plaintiff's first request for emergency relief, the Court held a hearing on April 27, 1995. At the hearing, Plaintiff stated that she had not provided notice of the alleged violations of the Act that are the subject of this action sixty (60) days prior to filing suit to the Secretary or to any other federal governmental entity. At that time, the Court expressly

¹ The Act defines the "Secretary" responsible for enforcement of this chapter as the Secretary of Agriculture. 16 U.S.C. § 1532(15).

declined to enter any order in this matter and instead took Plaintiff's application for emergency relief under advisement.

The Court's order dated May 11, 1995 dismissing this action was based upon Plaintiff's own failure to give the notice required by the Endangered Species Act. Plaintiff has appended to her motion for relief a copy of a letter which she alleges satisfies the notice requirements. Even if the letter were sufficient to satisfy those requirements, by Plaintiff's own admission, the letter is dated March 1, 1995, and she filed her lawsuit on April 26, 1995. Therefore, she did not give the requisite sixty days notice to the Secretary of Agriculture. Further, Plaintiff did not give sixty days notice to Defendant of her alleged violations of the Act and of Plaintiff's intent to sue. Failure to comply with the notice requirement is an absolute bar to bringing an action under the Act. Lone Rock Timber Co. v. United States Dep't of Interior, 842 F. Supp. 433, 440 (D. Or. 1994); Building Indus. Assoc., Inc. v. Lujan, 785 F. Supp. 1020, 1021-22 (D. D.C. 1992). Based upon this clear principle of law, Plaintiff's motion for relief must be and is hereby denied.

IT IS SO ORDERED.

This 11th day of May, 1995.


Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET
MAY 15 1995
~~FILED~~

MAY 15 1995

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

CHERYL J. MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 FARRIS EXPRESS FUELS, INC., a)
 corporation; and DAVID FARRIS,)
)
 Defendants.)

Case No. 93-C-711-K

O R D E R

Plaintiff, Cheryl Martin, claimed that Defendant Farris Express Fuels and David Farris failed to pay her overtime while she was an employee, in violation of the Fair Labor Standards Act (FLSA). On September 21, 1994, the jury entered a verdict in favor of the Defendants.

I. Discussion

Plaintiff now moves the Court for a judgment notwithstanding the verdict under Fed.R.Civ.P. 50, or, alternatively, for a new trial under Fed.R.Civ.P. 59. A motion under Rule 50 is properly granted "only if, viewing the evidence in the light most favorable to the non-moving party, all the evidence and 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). Plaintiff also moves for a new trial under Fed.R.Civ.P. 59. 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).

A. The Executive Exemption

In this case, Defendants raised the executive exemption as a defense pursuant to 29 U.S.C § 213. An employee is exempt from the requirements of overtime pay if the employee is employed "in a bona fide executive, administrative, or professional capacity. . . ."

29 U.S.C. §213(a)(1). Under 29 CFR § 541.1(f), an executive is:

an employee who is compensated on a salary basis of not less than \$250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein

Whether management is the employee's primary duty is determined by the amount of time spent on managerial duties, the relative importance of managerial duties compared with other duties, the frequency with which the employee exercises discretionary powers, the employee's freedom from supervision, and the relationship between his salary and the wages paid other employees. 29 CFR §541.103.

An executive must also be salaried, which is defined by the regulations, to be incorporated within the exemption. "Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 CFR §541.118(a). An employee is not salaried if deductions are made from the employee's pay for personal reasons or sicknesses of a day or less. Id.

Plaintiff argues that no reasonable juror could have found that Plaintiff was paid on a salary basis in light of the deductions made in her salary. The Court's instruction stated:

AN EMPLOYEE IS PAID ON A SALARY BASIS IF SHE REGULARLY RECEIVES ON A WEEKLY BASIS A PREDETERMINED AMOUNT CONSTITUTING HER COMPENSATION, WHICH AMOUNT IS NOT SUBJECT TO REDUCTION BECAUSE OF THE VARIATIONS IN THE QUALITY OR QUANTITY OF THE WORK PERFORMED.

THE AMOUNT MAY BE SUBJECT TO DEDUCTION WHEN THE EMPLOYEE ABSENTS HERSELF FROM WORK FOR A FULL DAY OR MORE FOR PERSONAL REASONS, OTHER THAN SICKNESS OR ACCIDENT.

DEDUCTIONS MAY ALSO BE MADE FOR ABSENCES OF A FULL DAY OR MORE OCCASIONED BY SICKNESS AND DISABILITY (INCLUDING WORK-RELATED ACCIDENTS) IF THE DEDUCTION IS MADE IN ACCORDANCE WITH A BONA FIDE PLAN, POLICY OR PRACTICE OF PROVIDING COMPENSATION FOR LOSS OF SALARY OCCASIONED BY BOTH SICKNESS AND DISABILITY.

IF YOU FIND THAT A DEDUCTION WAS MADE FROM PLAINTIFF'S PAY, AND THAT SUCH DEDUCTION WAS INADVERTENT, OR MADE FOR REASONS OTHER THAN LACK OF WORK, AND THE EMPLOYER REIMBURSES THE EMPLOYEE FOR SUCH DEDUCTIONS AND PROMISES TO COMPLY IN THE FUTURE, YOU ARE INSTRUCTED, DESPITE SUCH DEDUCTION, PLAINTIFF WAS PAID ON A SALARY BASIS.

This instruction was based on the regulations interpreting the executive exemption provided for in the statute. 29 CFR §541.118(a)(6).

Plaintiff argues that Defendants could not have shown that Plaintiff was paid on a salary basis because Plaintiff's pay was deducted in January of 1993. A deduction can only be made for an employee paid on a salary basis if the deduction was inadvertent according to the regulations. Plaintiff states that it is impossible for Defendants to argue that the deduction was inadvertent, since Defendant did not reimburse Plaintiff for the deduction made in January of 1993 until after the trial.

Nevertheless, the verdict in this case should not be disturbed

based on the timing of the reimbursement for the January deduction. Defendants claim they were only put on notice of this issue when the Plaintiff raised it in her Supplemental Response to the Motion for Summary Judgment (Docket #18). Defendants indicated in their Supplemental Reply Brief to their motion for summary judgment that they would tender payment for January as soon as the Court determined the Plaintiff's status.

In the view of this Court, the jury could reasonably have interpreted the instructions to justify a judgment for the Defendants despite their failure to reimburse for the January deduction. Sufficient evidence was presented regarding the inadvertence of the December deduction that the jury could reasonably have inferred that the January deduction was also made inadvertently. Testimony at trial showed that Defendants deducted from Plaintiff's December salary because they did not realize that the law now required a worker to miss seven days rather than three days before deductions could be made. Since Defendants may not have known of the January deduction issue until litigation was proceeding, the jurors may reasonably have decided that the deduction was inadvertent even though the Defendants had not yet reimbursed Plaintiff for the January deduction. In fact, there was evidence at trial specifically addressed to the January deduction and Defendants' intent to reimburse subsequent to the litigation. The inadvertence of the January deduction was a question fully before the jury in this case, and this Court will not reverse the jury's determination of this matter.

Alternatively, Plaintiff says that the tender of money by Defendants is an admission of liability. The issue of the January deduction was raised in the pleadings during the course of the litigation. Defendants promised to resolve this question as soon as the trial established whether or not Plaintiff deserved overtime compensation. The jury determined that Plaintiff was exempt from the FLSA. This Court does not interpret the tender to Court as an admission of liability. Instead, it was simply an effort to bring the dispute to a conclusion.

Finally, Plaintiff believes the instruction defining "primary duty" was defective. The Court stated:

A DETERMINATION OF WHETHER AN EMPLOYEE HAS MANAGEMENT AS HER PRIMARY DUTY MUST BE BASED ON ALL THE FACTS IN A PARTICULAR CASE. THE AMOUNT OF TIME SPENT IN THE PERFORMANCE OF THE MANAGERIAL DUTIES IS A USEFUL GUIDE IN DETERMINING WHETHER MANAGEMENT IS THE PRIMARY DUTY OF AN EMPLOYEE. IN THE ORDINARY CASE IT MAY BE TAKEN AS A GOOD RULE OF THUMB THAT PRIMARY DUTY MEANS THE MAJOR PART, OR OVER 50% OF THE EMPLOYEE'S TIME. THUS AN EMPLOYEE WHO SPENDS OVER 50% OF HER TIME IN MANAGEMENT WOULD HAVE MANAGEMENT AS HER PRIMARY DUTY. TIME ALONE, HOWEVER IS NOT THE SOLE TEST, AND IN SITUATIONS WHERE THE EMPLOYEE DOES NOT SPEND 50% OF HER TIME IN MANAGERIAL DUTIES, SHE MIGHT NEVERTHELESS HAVE MANAGEMENT AS HER PRIMARY DUTY IF THE OTHER PERTINENT FACTORS SUPPORT SUCH A CONCLUSION. SOME OF THESE PERTINENT FACTORS ARE THE RELATIVE IMPORTANCE OF THE MANAGERIAL DUTIES AS COMPARED WITH OTHER TYPES OF DUTIES, THE FREQUENCY WITH WHICH THE EMPLOYEE EXERCISES DISCRETIONARY POWERS, HER RELATIVE FREEDOM FROM SUPERVISION, AND THE RELATIONSHIP BETWEEN HER SALARY AND THE WAGES PAID OTHER EMPLOYEES FOR THE KIND OF NON-EXEMPT WORK PERFORMED BY THE SUPERVISOR. THUS, A MANAGER CAN OVERSEE OPERATIONS WHILE SIMULTANEOUSLY PERFORMING NON-EXEMPT WORK AND NOT LOSE HER EXEMPTION.

HOWEVER, THE FAIR LABOR STANDARDS ACT DISTINGUISHES BETWEEN AN EXEMPT EMPLOYEE AND THE "WORKING SUPERVISOR" WHO REGULARLY PERFORMS PRODUCTION WORK OR OTHER WORK WHICH IS UNRELATED OR ONLY REMOTELY RELATED TO HER SUPERVISORY ACTIVITIES.

ONE TYPE OF WORKING SUPERVISOR MOST COMMONLY FOUND

IN THE LABOR FORCE WORKS ALONGSIDE HIS/HER SUBORDINATES. SUCH EMPLOYEES, PERFORM THE SAME KIND OF WORK AS THAT PERFORMED BY THEIR SUBORDINATES, AND CAN ALSO CARRY ON SUPERVISORY FUNCTIONS. WORK OF THE SAME NATURE AS THAT PERFORMED BY THE EMPLOYEE'S SUBORDINATES MUST BE COUNTED AS NON-EXEMPT WORK AND IF THE AMOUNT OF SUCH WORK PERFORMED IS SUBSTANTIAL THE EMPLOYEE IS NOT AN EXEMPT EMPLOYEE.

(emphasis added). 29 CFR §541.103.

In particular, Plaintiff objects to the underlined sentence. That sentence states, "Thus, a manager can oversee operations while simultaneously performing non-exempt work and not lose her exemption." Viewing the instruction as a whole, this sentence was a fair statement of the law and not in error. The instruction merely attempted to make the regulations more understandable to the jurors and was not inconsistent with the Fair Labor Standards Act and the regulations governing its interpretation.

B. Admissibility of Conviction

In her argument for a new trial, Plaintiff challenges the Court's decision to admit her prior criminal conviction as a result of the prejudice that the admission may have caused. The Court finds that Plaintiff's credibility was an important factor at trial in light of her testimony regarding the nature of her work responsibilities. For the purpose of attacking a witness' credibility, evidence that the witness has been convicted of a crime is admitted if it involved dishonesty or false statement. F.R.E. 609. Plaintiff and her husband pled guilty to uttering forged instruments. A judgment was entered on the plea of guilty. Even though Plaintiff's judgment was eventually deferred, the

admission was supported under the rules as well as case law. United States v. Turner, 497 F.2d 406, 407, cert. denied, 96 S.Ct. 90 (1975) (holding that a guilty plea is confession of guilt and amounts to a conviction).

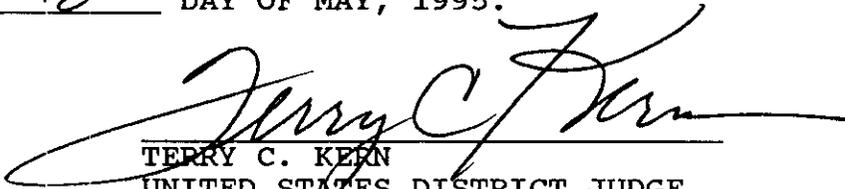
C. Costs

On December 1, 1994, the Clerk of the Court determined that Defendants had incurred costs in the amount of \$700.70 that should be paid to the Defendants as the prevailing party. Plaintiff now cites a Seventh Circuit case and argues that she is the prevailing party in view of the tender to the Court offered by Defendants. However, this case is quite different than Zinn v. Shalala, 35 F.3d 273, 274 (7th Cir. 1994), because Plaintiff cannot claim that the payment by Defendants constitutes relief from her claim. The fact that Defendants have tendered money to reimburse Plaintiff for deductions is perfectly consistent with the determination that Plaintiff is exempt from the FLSA.

II. **Conclusion**

This Court affirms the \$700.70 taxed as costs by the Clerk of the Court. Furthermore, for the reasons discussed above, the Plaintiff's Rule 50 Motion and Rule 59 Motion are DENIED.

IT IS SO ORDERED THIS 12 DAY OF MAY, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAY 15 1995

FILED

MAY 12 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

ALFRED W. LUMPKIN,
Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner,
Social Security Administration,

Defendant.

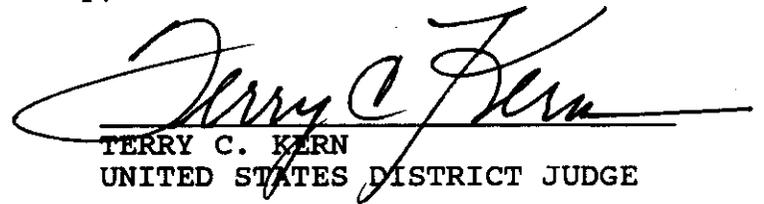
No. 92-C-707-K

J U D G M E N T

THIS matter came before the Court for consideration of the appeal of Alfred W. Lumpkin ("Plaintiff") to the Secretary's denial of Social Security disability benefits. The issues having been duly considered and a decision having been rendered in accordance with the Order of the Court entered in this matter on October 17, 1994,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Secretary is hereby reversed and remanded for a supplemental hearing consistent with the Order entered herein.

ORDERED this 12 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAY 15 1995 **FILED**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA **MAY 12 1995**

PATTY BRUMLEY,)
)
 Plaintiff,)
)
 v.)
)
 PARKER DRILLING COMPANY,)
 a Delaware corporation,)
)
 Defendant.)

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

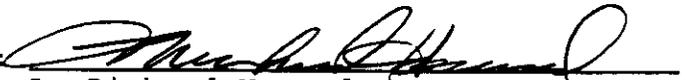
Case No. 94-C-230-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, hereby jointly inform the Court that they have reached a mutually satisfactory private settlement regarding Plaintiff's claims herein, and all of Plaintiff's claims should, therefore, be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

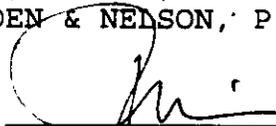
DATED this 3rd day of May, 1995.

Respectfully submitted,

By: 
L. Richard Howard, Esq.
DANIEL, BAKER & HOWARD
2431 East 51st Street, Suite 306
Tulsa, Oklahoma 74105

ATTORNEYS FOR PLAINTIFF

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

By: 
J. Patrick Cremin, OBA #2013
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT

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

ALFRED W. LUMPKIN,
Plaintiff,

vs.

SHIRLEY S. CHATER,
Commissioner,
Social Security Administration,
Defendant.

No. 92-C-707-K

FILED

MAY 12 1995

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

ORDER

Before the Court is the motion of Plaintiff for attorney fees and costs (Docket #10) pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d)(1)(A).

On October 18, 1994, the Court reversed and remanded the denial decision of the Secretary with instructions to conduct a supplemental administrative hearing in accordance with the Court's order. Plaintiff filed the present motion on April 17, 1995, contending he is entitled to an award of attorney fees and costs. In response, the Government has no objection to the Court approving attorney fees and costs.

Under Section 2412(d)(1)(A), the Court shall award attorney fees and recoverable costs to a prevailing party unless the position of the United States was substantially justified or that special circumstances make an award unjust. When a district court remands a matter to the Secretary, it necessarily does so pursuant either to "sentence four" or "sentence six" of 42 U.S.C. §405(g). The remand in this case was pursuant to sentence four, which is a

final judgment, and therefore, Plaintiff is a prevailing party under 28 U.S.C. §2412(d)(1)(B). Shalala v. Schaefer, 113 S.Ct. 2625, 2632 (1993). The position of the Government has not been shown by it to be substantially justified. In fact, the Government has stated it has no objection to an award of fees (Docket #12). Therefore, an award of attorney fees and costs is appropriate.

The only remaining issue is Plaintiff's request for an upward adjustment of fees. Plaintiff has presented documentation of his attorney's expertise in Social Security litigation. The EAJA provides, in relevant part, "attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor ... justifies a higher fee." 28 U.S.C. §2412(d)(2)(A)(ii). The decision whether to exceed the \$75 per hour rate is within the discretion of the district court. Chynoweth v. Sullivan, 920 F.2d 648 (10th Cir. 1990). The "special factor" exception

refers to attorneys having some distinctive knowledge or specialized skill needed for the litigation in question -- as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

Id. at 650. Although Plaintiff argues that the requested enhanced fee is reasonable for an attorney experienced in the field of Social Security benefits law, the Tenth Circuit dealt with this exact issue in Chynoweth, stating that "incomparable expertise, standing alone, will not justify the higher rate." Id. at 650.

The expertise of Plaintiff's counsel does not command an enhanced fee under the exceptions cited in Chynoweth.

Plaintiff has also presented statistics from the Consumer Price Index relating to increased cost of living. However, such presentation does not mandate a fee enhancement. "Congress is quite capable of requiring mandatory fee increases to account for changes in the Consumer Price Index and, ... this it has not done." May v. Sullivan, 936 F.2d 176, 178 (4th Cir. 1991), cert. denied, 502 U.S. 1038 (1992). Therefore, the statutory rate of \$75 per hour will be used.

Plaintiff's counsel presents a fee request reflecting 17.0 hours at \$75 per hour, resulting in a fee of \$1,275.00. Plaintiff also requests .5 hour clerk time at the rate of \$20.00 per hour. Time spent by law clerks and paralegals is compensable under the EAJA. Harris v. Railroad Retirement Board, 990 F.2d 519 (10th Cir. 1993); see also Jean v. Nelson, 863 F.2d 759, 778 (11th Cir. 1988), aff'd, 496 U.S. 154 (1990). Costs in the amount of \$120.00 for the filing fee and \$7.10 for certified mail fees are also requested. While the filing fee is recoverable, costs for postage fees are not. Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). The total award for fees and costs is as follows:

Attorney fees 17.0 hrs @ \$75.00	\$1,275.00
Clerk .50 hrs @ \$20	10.00
Costs for filing	<u>120.00</u>
Total	\$1,405.00

It is the Order of the Court that the motion of the Plaintiff for attorney fees is hereby GRANTED in the amount of \$1,405.00.

ORDERED this 12 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 12 1995

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
 vs.)
)
) HAROLD WILLIAMS; RITA M.)
) WILLIAMS; COUNTY TREASURER,)
) Tulsa County, Oklahoma;)
) BOARD OF COUNTY COMMISSIONERS,)
) Tulsa County, Oklahoma,)
)
) Defendants.)

FILED

MAY 9 1995

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

CIVIL ACTION NO. 94-C 603 *VB*

ORDER

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

Dated this 11th day of May, 1995.

[Signature]
UNITED STATES DISTRICT JUDGE

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

[Signature]
LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

NOTE: THIS ORDER IS TO BE MAILED
BY MAIL TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

5

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 HAROLD WILLIAMS; RITA M.)
 WILLIAMS; COUNTY TREASURER,)
 Tulsa County, Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

MAY - 2 1995

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

CIVIL ACTION NO. 94-C 603E

**MOTION WITH MEMORANDUM BRIEF
OF THE UNITED STATES TO DISMISS**

The Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, pursuant to Rule 41(a)(2) moves the Court to dismiss this action without prejudice.

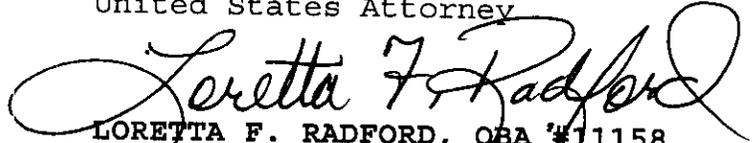
In support of this Motion the Plaintiff, United States of America, shows to the Court that the Defendants, HAROLD WILLIAMS and RITA M. WILLIAMS, are currently in a Chapter 13 bankruptcy and are making payments both within and outside of the plan to the Secretary of Housing and Urban Development.

Counsel for answering Defendants does not object to the granting of this motion.

WHEREFORE, the Plaintiff, United States of America, requests the Court to enter its Order dismissing this action without prejudice. A proposed Order is submitted for the Court's consideration.

UNITED STATES OF AMERICA

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

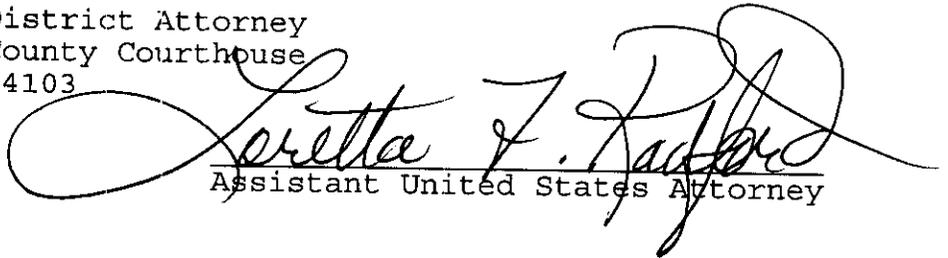
CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of May, 1995,
a true and correct copy of the foregoing was mailed, postage
prepaid thereon, to:

Harold Williams
1230 N. Detroit
Tulsa, OK 74106

Rita M. Williams
1230 N. Detroit
Tulsa, OK 74106

DICK BLAKELEY
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, OK 74103



Assistant United States Attorney

LFR:lg

ENTERED ON DOCKET
DATE MAY 12 1995
FILED

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

MAY 12 1995
Richard M. Law
U.S. District Court Clerk
NORTHERN DISTRICT OF OKLAHOMA

DAVID LUTHER SLOCUM,)
)
 Plaintiff,)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

Case No. 94-C-833E
consolidated with
Case No. 94-C-829K

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 12 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

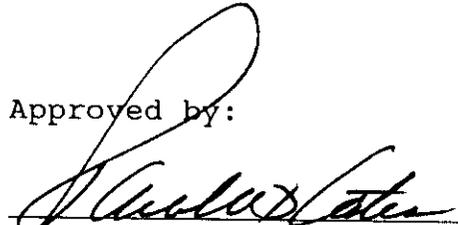
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

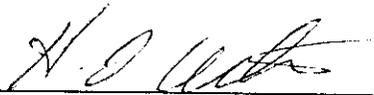
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

ENTERED ON DOCKET
DATE MAY 12 1995

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

FILED
MAY 17 1995

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

ROBERT EUGENE WILLIAMS,)
)
 Plaintiff,)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

Case No. 94-C-832B
consolidated with
Case No. 94-C-829K

ORDER TO DISMISS WITH PREJUDICE

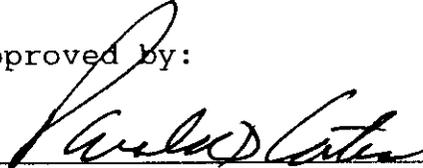
NOW, on this 12 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

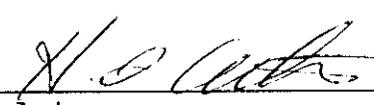
SO ORDERED

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

ENTERED ON DOCKET
MAY 12 1995
DATE _____

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

MAY 12 1995

RONNIE ROY,)
)
 Plaintiff,)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

Case No. 94-C-829K

FILED
MAY 12 1995

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

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 12 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

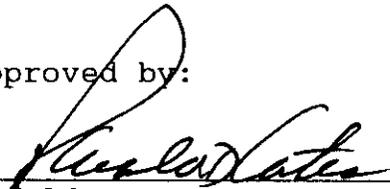
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

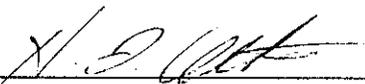
/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

ENTERED ON DOCKET

DATE MAY 12 1995

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

ROY LEON SCRIVER,)
)
 Plaintiff,)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

Case No. 94-C-831BU
consolidated with
Case No. 94-C-829K

FILED

MAY 12 1995

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

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 12 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

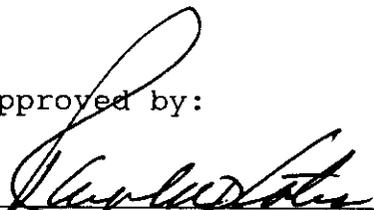
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

ENTERED ON DOCKET
DATE MAY 12 1995

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

SCOTT PATRICK QUINN,)
)
 Plaintiff,)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

Case No. 94-C-1048B
consolidated with
Case No. 94-C-829K

FILED
MAY 12 1995
Richard M. Law
U.S. District Court
Northern District of Oklahoma
Clerk

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 12 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

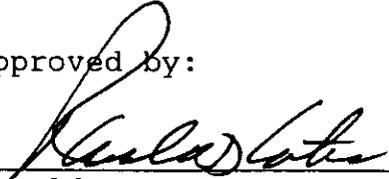
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

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

ENTERED ON DOCKET
DATE MAY 12 1995

TOM BIRDSONG,)
)
Plaintiff,)
)
vs.)
)
KIMBALL'S PRODUCE, INC.,)
an Oklahoma Corporation,)
)
Defendant.)

Case No. 94-C-1049B
consolidated with
Case No. 94-C-129*

FILED

MAY 12 1995

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

ORDER TO DISMISS WITH PREJUDICE

NOW, on this 10 day of May, 1995, there comes before the Court the Application for Dismissal with Prejudice presented by the Plaintiff and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein the Plaintiff and said Defendant stipulate that the complaint should be dismissed as to such Defendant.

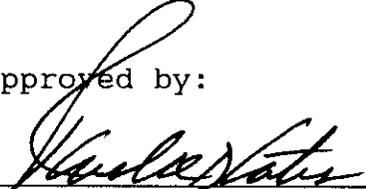
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiff's complaint is hereby dismissed with prejudice, as to the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, with each party to bear and pay his own costs herein incurred.

SO ORDERED

s/ TERRY C. KENN

UNITED STATES DISTRICT JUDGE

Approved by:

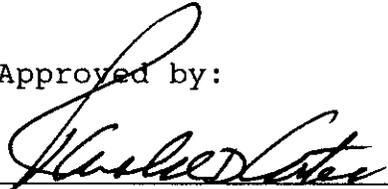


Ronald D. Cates
Attorney for Defendant

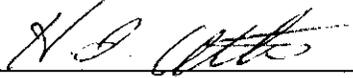


H.I. Aston
Attorney for Plaintiff

Approved by:



Ronald D. Cates
Attorney for Defendant



H.I. Aston
Attorney for Plaintiff

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

ENTERED ON DOCKET
DATE MAY 12 1995

EUGENE T. FOUST,
Petitioner,
vs.
RON J. CHAMPION, et al.,
Respondents.

No. 94-C-936-K

FILED

MAY 1995

Richard M. [Signature] Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

At issue before the Court is Respondents' motion to dismiss this petition for a writ of habeas corpus as a mixed petition pursuant to Rose v. Lundy, 455 U.S. 509 (1982). Respondent argues that Petitioner has not presented to the Oklahoma Court of Criminal Appeals all of his claims of ineffective assistance of trial and appellate counsel. Petitioner has objected. He argues that the Tulsa County District Court refused to consider his claims of denial of conflict-free counsel in August and September of 1992, and that in December of 1992, the Oklahoma Court of Criminal Appeals denied his "Petition for Writ of Habeas Corpus/Mandamus," seeking the appointment of conflict-free counsel, because he had failed to attach a transcript of the hearing or the district court's order.

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

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district

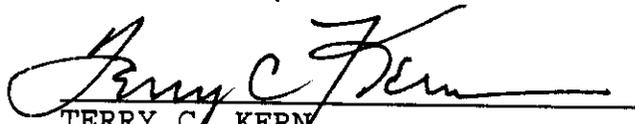
court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

After reviewing the extensive state court record attached to the motion to dismiss and Petitioner's response, the Court concludes that Petitioner has not exhausted his state remedies as to all of his claims of ineffective assistance of trial and appellate counsel. While Petitioner may have presented his conflict of interest argument to the Court of Criminal Appeals by "Petition for Writ of Habeas Corpus/Mandamus," he has clearly not presented to that Court his claim that appellate counsel failed to raise "several fundamental issues on his direct appeal." (Petition, doc. #1, at 11.) Accordingly, Petitioner's application for a writ of habeas corpus must be dismissed as mixed petition. See Rose, 455 U.S. at 510.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss (doc. #6) is **granted**, and the petition for a writ of habeas corpus is hereby **dismissed without prejudice** as a mixed petition.

SO ORDERED THIS 12 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

TAYLOR NORTH,

Plaintiff,

vs.

DOWELL SCHLUMBERGER CORP.
and DOWELL SCHLUMBERGER
INCORPORATED,

Defendants.

No. 95-C-278-K

FILED

MAY 1 1995

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

ORDER

Before the Court is the motion of defendant Dowell Schlumberger Incorporated to dismiss and for sanctions. Plaintiff commenced this action in the District Court of Tulsa County, alleging defendants had employed plaintiff and failed to pay him severance benefits to which he was entitled. Defendant Dowell Schlumberger Incorporated moves to dismiss, asserting plaintiff was never its employee and requesting sanctions pursuant to Rule 11 F.R.Cv.P. Plaintiff responds by confessing the motion to dismiss but objecting to imposition of sanctions, contending plaintiff was not certain who his corporate employer was until defendant presented an affidavit in connection with its present motion.

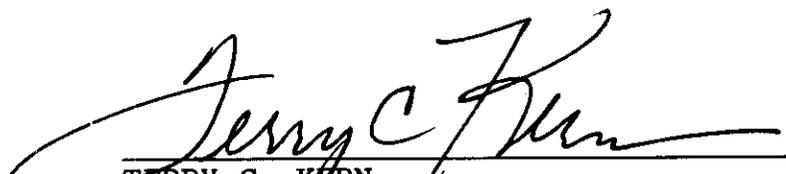
The 1993 amendments to Rule 11 make imposition of sanctions for a Rule 11 violation discretionary rather than mandatory. Knipe v. Skinner, 19 F.3d 72, 78 (2nd Cir.1994). Rule 11 sanctions should be imposed with caution. Id. However, in this instance the Court notes a procedural bar to defendant's request under Rule 11 as amended. It is does not appear that defendant complied with the

6

21-day "safe harbor" provision of Rule 11(c)(1)(A). That is, a motion for sanctions separate from other motions was not preliminarily served upon plaintiffs prior to its filing in this Court, so that plaintiffs would have the opportunity to withdraw or correct the challenged contentions. A letter dated March 8, 1995 was sent from defense counsel to plaintiffs' counsel, warning that sanctions would be sought if DSI were not dismissed as a defendant (Exhibit D to Defendant's notice of removal). Such a letter does not comply with the provisions of Rule 11. Accordingly, the request for sanctions is not properly before the Court. Rule 11(c)(1)(B) permits the Court to raise possible sanctionable conduct on its own motion. Upon review, the Court is not persuaded sanctions are appropriate.

It is the Order of the Court that the motion of the defendant Dowell Schlumberger Incorporated to dismiss is hereby GRANTED. The same defendant's motion for sanctions is hereby DENIED.

ORDERED this 11 day of May, 1995.


PERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 12 1995

DELMA STAFFORD,

Plaintiff,

vs.

ALERT CABLE TV OF OKLAHOMA,
INC., d/b/a CABLEVISION
INDUSTRIES CORPORATION,

Defendant.

Case No. 94-C-552-K

FILED

MAY 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

Upon Joint Motion by the parties, this Court hereby dismisses the captioned action with prejudice.

IT IS SO ORDERED.

Dated this 11 day of May, 1995.

s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 12 1995

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

ALEXANDER & ALEXANDER, INC.,)
)
Plaintiff,)
)
-vs-)
)
COBURN INSURANCE AGENCY, INC.,)
)
Defendant/Third Party)
Plaintiff,)
)
v.)
)
ST. LAWRENCE FREIGHTWAYS, INC.,)
)
Third Party Defendant.)

No. 94-C-270-K

F I L M D

MAY 1995

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

ORDER

NOW on this 11 day of May, 1995,
defendant/third party plaintiff's Application to Dismiss with
Prejudice came on for hearing. The Court being fully advised in
the premises finds that said Application should be sustained and
the third party defendant, should be dismissed from the above
entitled action with prejudice.

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

s/ TERRY C. KERN
HONORABLE TERRY KERN, JUDGE
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT

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

FILED

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

MAY 10 1995

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

HAMSTEIN MUSIC CO., et al)
)
Plaintiffs,)
)
vs.)
)
JOE C. COOK,)
)
Defendant.)

Case No. 93-C-428-B

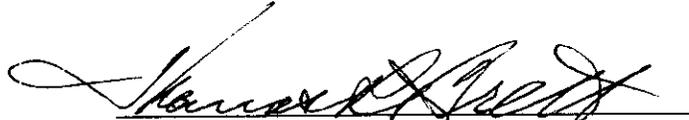
ENTERED & DOCKETED
DATE MAY 11 1995

ADMINISTRATIVE CLOSING ORDER

The Defendant having filed its 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 purpose required to obtain a final determination of the litigation.

IF, within 60 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.

IT IS SO ORDERED this 10th day of May, 1995.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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

RICHARD STEPHEN BALCH &)
MARY ALICE VALENTINE, dba/)
AMERICAN ENDANGERED SPECIES)
FOUNDATION,)
)
)
Plaintiffs,)
)
v.)
)
WANDA WRIGHT, individually)
and as TRUSTEE of THE)
MARY MCLENDON TRUST,)
)
)
Defendant(s).)

MAY 10 1995

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

Case No. 95-C-369-H ✓

ENTERED ON DOCKET

DATE MAY 11 1995

ORDER

This matter comes before the Court on Plaintiff's application for emergency order to seize Eastern timber wolves under the Endangered Species Act, Plaintiff's modified application for the same, Plaintiff's request for the Court's permission to feed those wolves not yet retrieved and modified request for appointment of pro bono counsel, and Plaintiff's application for contempt citation.

Plaintiff's lawsuit is predicated on the Endangered Species Act, 15 U.S.C. §§ 1531 et seq. (the "Act"). The Act permits a person to commence a civil suit on his or her own behalf "to enjoin any person . . . who is alleged to be in violation of any provision" 15 U.S.C. 1540(g)(1)(A). The Act, however, contains a jurisdictional requirement which does not allow an action to be commenced under the subsection "prior to sixty days after written

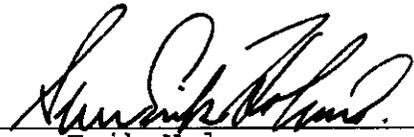
7

notice of the violation has been given to the Secretary, and to any alleged violator" Id. at § 1540(g) (2) (A) (i).¹

In response to Plaintiff's first request for emergency relief, the Court held a hearing on April 27, 1995. At the hearing, Plaintiff stated that she had not provided notice of the alleged violations of the Act that are the subject of this action sixty days prior to filing suit to the Secretary or to any other federal governmental entity. Failure to comply with the notice requirement is an absolute bar to bringing an action under the Act. Lone Rock Timber Co. v. United States Dep't of Interior, 842 F. Supp. 433, 440 (D. Or. 1994); Building Indus. Assoc., Inc. v. Lujan, 785 F. Supp. 1020, 1021-22 (D. D.C. 1992). Therefore, Plaintiff's lawsuit must be and is hereby dismissed.

IT IS SO ORDERED.

This 10th day of May, 1995.



Sven Erik Holmes
United States District Judge

¹ The Act defines the "Secretary" responsible for enforcement of this chapter as the Secretary of Agriculture. 16 U.S.C. § 1532(15).

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

FILED

MAY 10 1995

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

RL

NANCY L. TRENERRY,)
)
 Plaintiff,)
)
 v.)
)
 INTERNAL REVENUE SERVICE,)
)
 Defendant.)

Case No. 94-C-0092-H

ENTERED ON DOCKET

DATE MAY 11 1995

O R D E R

This matter comes before the Court on a motion to alter or amend the Court's order of September 13, 1994 by Plaintiff Nancy L. Trenerry.

Rule 59(e) of the Federal Rules of Civil Procedure "provides a mechanism by which a trial judge may alter, amend, or vacate a judgment." Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1249 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983). By order dated September 13, 1992, the Court found that Plaintiff had not exhausted her administrative remedies and, pursuant to that finding, dismissed Plaintiff's lawsuit for lack of subject matter jurisdiction. Based upon a review of Plaintiff's motion to alter or amend, Defendant's opposition, and Plaintiff's response, the Court declines to alter or amend the Court's order.

It is the Order of the Court that the motion of Plaintiff Nancy L. Trenerry to alter or amend the Court's order of September 13, 1994 (Docket # 15) is hereby DENIED.

IT IS SO ORDERED.

This 10TH day of May, 1995.



Sven Erik Holmes
United States District Judge

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

MAY 10 1995 *PL*

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

ANITA MCMANN,)
)
Plaintiff,)
)
vs.)
)
DOUBLETREE HOTEL, et al.,)
)
Defendants.)

Case No. 94-C-558-BU ✓

ENTERED ON DOCKET

DATE MAY 11 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding 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 the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 9th day of May, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 10 1995

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

ANITA MCMANN,

Plaintiff,

vs.

DOUBLETREE HOTEL, et al.,

Defendants.

Case No. 94-C-558-BU

ENTERED ON DOCKET

MAY 11 1995

DATE

ORDER

In light of the fact that the parties have reached a settlement and compromise of this matter, the Court hereby declares MOOT the defendants' Motion for Summary Judgment (Docket No. 16).

Entered this 9th day of May, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RONALD A. WATSON aka Ronald)
Watson;)
SANDRA L. WATSON;)
SHEILA K. RILEY;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED

MAY 11 1995

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

Civil Case No. 94-C-1149-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of May,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, RONALD A. WATSON aka Ronald Watson, SANDRA L. WATSON and SHEILA K. RILEY, appear not, but make default.

The Court further finds that the Defendants, RONALD A. WATSON aka Ronald Watson, SANDRA L. WATSON and SHEILA K. RILEY, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 8, 1995, and continuing through March 15, 1995, as more fully appears from the

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RONALD A. WATSON aka Ronald Watson, SANDRA L. WATSON and SHEILA K. RILEY, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, RONALD A. WATSON aka Ronald Watson, SANDRA L. WATSON and SHEILA K. RILEY. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on December 29, 1994; and that the Defendants, RONALD A. WATSON aka

Ronald Watson, SANDRA L. WATSON and SHEILA K. RILEY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, RONALD A. WATSON, is one and the same and sometimes referred to as Ronald Watson, will hereinafter be referred to as "RONALD A. WATSON." The Defendants, RONALD A. WATSON and SANDRA L. WATSON were granted a Divorce on April 27, 1994, Case No. FD-92-7434, in Tulsa County, Oklahoma.

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 Two (2), Block Ten (10), LAKE-VIEW HEIGHTS
AMENDED ADDITION, to the City of Tulsa, Tulsa County,
State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on May 17, 1990, the Defendants, RONALD A. WATSON and SANDRA L. WATSON, executed and delivered to MERCURY MORTGAGE CO., INC., a Corporation, their mortgage note in the amount of \$12,185.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10½%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RONALD A. WATSON and SANDRA L. WATSON, then husband and wife, executed and delivered to MERCURY MORTGAGE CO., INC., a mortgage dated May 17, 1990, covering the above-described property. Said mortgage was recorded on May 22, 1990, in Book 5254, Page 1575, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 12, 1993, MERCURY MORTGAGE CO., INC., a Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 14, 1993, in Book 5493, Page 0130, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1993, the Defendants, RONALD WATSON and SHEILA RILEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, RONALD A. WATSON and SANDRA L. WATSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RONALD A. WATSON and SANDRA L. WATSON, are indebted to the Plaintiff in the principal sum of \$11,853.10, plus interest at the rate of 10½ percent per annum from August 18, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$95.00, 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 Defendants, RONALD A. WATSON, SANDRA L. WATSON and SHEILA K. RILEY, 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 In Rem against the Defendants, RONALD A. WATSON and SANDRA L. WATSON, in the principal sum of \$11,853.10, plus interest at the rate of 10½ percent per annum from August 18, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 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 \$95.00, 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 Defendants, RONALD A. WATSON, SANDRA L. WATSON, SHEILA K. RILEY 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, RONALD A. WATSON and SANDRA L. WATSON, to satisfy the judgment In Rem 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 \$95.00, 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;

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

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

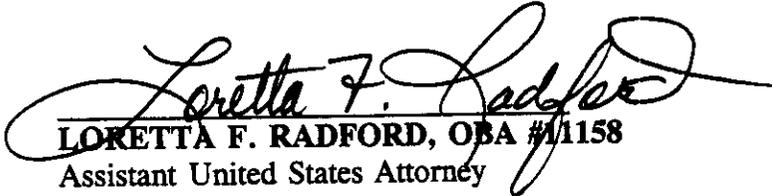
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



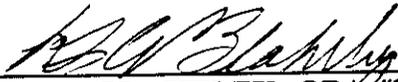
LORETTA F. RADFORD, OBA #1158

Assistant United States Attorney

3460 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) 596-4842

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-1149K

LFR:flv

CLESTER BILLS,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 94-C-1168-K ✓

FILED

MAY 11 1995

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

ORDER

This matter comes before the Court on the motions to dismiss of Defendants Roger Randall, Drew Diamond, the City of Tulsa, and Stanley Glanz (docket #4 and #7). Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.¹ In any event, the Court concludes that Plaintiff's claims against Defendants Roger Randall, Drew Diamond, and the City of Tulsa are barred by the two-year statute of limitations and that his claims of denial of medical care against Defendant Stanley Glanz fail to state a claim upon which relief can be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motions to dismiss (docket #4 and #7) are **granted** and the above captioned case

¹Local Rule 7.1.C reads as follows:

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

is hereby dismissed with prejudice.

SO ORDERED THIS 10 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 11 1995

RONNIE LEE ARCHER,
Plaintiff,

vs.

BW/IP INTERNATIONAL, INC.,
a Delaware Corporation,

Defendant and Third-
Party Plaintiff,

vs.

SEBASTIAN EQUIPMENT COMPANY,
a Missouri Corporation,

Third-Party Defendant

No. 94-C-553-K

FILED

MAY 1995

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

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment by Third-Party Defendant, Sebastian Equipment Company, against Defendant and Third-Party Plaintiff, BW/IP International. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on May 4, 1995,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Third-Party Defendant and against the Third-Party Plaintiff.

ORDERED this 10 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE