

ENTERED ON DOCKET
MAY 31 1995
DATE _____

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
VICTORIA ANN FOX pka Victoria)
McHenry aka Vicki McHenry)
aka Victoria A. Fox;)
MICHAEL MCHENRY)
aka Michael W. McHenry)
aka Michael Wayne McHenry)
aka Mike McHenry;)
UNKNOWN SPOUSE of Victoria Fox,)
if any;)
UNKNOWN SPOUSE of Michael)
McHenry, if any;)
FIDELITY FINANCIAL SERVICES, INC.)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

MAY 31 1995

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

CIVIL ACTION NO. 94-C-876-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 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, VICTORIA
ANN FOX aka Victoria A. Fox pka Victoria McHenry aka Vicki
McHenry, MICHAEL MCHENRY aka Michael W. McHenry aka Michael Wayne
McHenry aka Mike McHenry, UNKNOWN SPOUSE of Victoria Fox aka
Vitoria A. Fox pka Victoria McHenry aka Vicki McHenry, if any,

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

UNKNOWN SPOUSE OF Michael McHenry aka Michael W. McHenry aka Michael Wayne McHenry aka Mike McHenry, who is the same person as CAROLYN S. MCHENRY, and FIDELITY FINANCIAL SERVICES, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, VICTORIA ANN FOX aka Victoria A. Fox pka Victoria McHenry aka Vicki McHenry, was served with process a copy of Summons and Complaint on October 25, 1994; that the Defendant, MICHAEL MCHENRY aka Michael W. McHenry aka Michael Wayne McHenry aka Mike McHenry, was served with process a copy of Summons and Complaint on February 16, 1995; that the Defendant, UNKNOWN SPOUSE OF Michael McHenry aka Michael W. McHenry aka Michael Wayne McHenry aka Mike McHenry, CAROLYN S. MCHENRY, was served with process a copy of Summons and Complaint on February 16, 1995; and that the Defendant, FIDELITY FINANCIAL SERVICES, INC., was served a copy of Summons and Complaint on October 20, 1994, by Certified Mail.

The Court further finds that the Defendant, UNKNOWN SPOUSE OF Victoria Ann Fox aka Victoria A. Fox pka Victoria McHenry aka Vicki McHenry, if any, 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 March 16, 1995, and continuing through April 20, 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, UNKNOWN SPOUSE OF Victoria Ann Fox aka Victoria A. Fox pka Victoria McHenry aka Vicki McHenry, 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 abstractor filed herein with respect to the last known address of the Defendant, UNKNOWN SPOUSE OF Victoria Ann Fox aka Victoria A. Fox pka Victoria McHenry aka Vicki McHenry. 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 their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

The Court further finds that the Defendants, MICHAEL MCHENRY and VICTORIA ANN MCHENRY, were divorced on October 17, 1990, Case No. FD-90-4062, in Tulsa County District Court, conveying the property to Victoria Ann McHenry and restoring her to her former name "VICTORIA ANN FOX."

The Court further finds that the Defendant, VICTORIA ANN FOX, is one and the same person as Victoria A. Fox pka Victoria McHenry aka Victoria Ann McHenry aka Vicki McHenry, and will hereinafter be referred to as "VICTORIA ANN FOX."

The Court further finds that the Defendant, MICHAEL MCHENRY, is one and the same person as Michael W. McHenry aka Michael Wayne McHenry aka Mike McHenry, and will hereinafter be referred to as "MICHAEL MCHENRY."

The Court further finds that the defendant, UNKNOWN SPOUSE OF Michael McHenry, is one and the same person as CAROLYN S. MCHENRY, and will hereinafter be referred to as "CAROLYN S. MCHENRY."

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 28, 1994; and that the Defendants, VICTORIA ANN FOX, UNKNOWN SPOUSE OF Victoria Ann Fox, if any, MICHAEL MCHENRY, CAROLYN S. MCHENRY, and FIDELITY FINANCIAL SERVICES, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 10, 1993, Victoria Fox pka Victoria A. McHenry filed her voluntary petition in

bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-B-1532-C. On September 2, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

The Court further finds that on August 18, 1989, Michael McHenry and Victoria McHenry, filed their voluntary petition in bankruptcy in Chapter 7, in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-02468-C. The case was Discharged on December 11, 1989, and subsequently closed on February 20, 1990.

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), Block Sixteen (16), WESTFUL VISTA, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on August 29, 1980, John L. McHargue and Barbara McHargue, executed and delivered to American Mortgage and Investment Company, their mortgage note in the amount of \$44,650.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12½%) per annum.

The Court further finds that as security for the payment of the above-described note, John L. McHargue and Barbara McHargue, husband and wife, executed and delivered to American Mortgage and Investment Company, a mortgage dated August 29, 1980, covering the above-described property. Said mortgage was recorded on September 5, 1980, in Book 4495, Page 1408, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 23, 1980, American Mortgage and Investment Company, assigned the above-described mortgage note and mortgage to The New York Guardian Mortgagee Corporation. This Assignment of Mortgage was recorded on October 8, 1980, in Book 4502, Page 1628, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 30, 1985, The New York Guardian Mortgagee Corp., assigned the above-described mortgage note and mortgage to Equitable Mortgage Resources, Inc. This Assignment of Mortgage was recorded on October 9, 1985, in Book 4898, Page 157, in the records of Tulsa County, Oklahoma. A Corrected Assignment was filed on July 26, 1988, in Book 5117, Page 2, in the records of Tulsa County, Oklahoma, to show Attestation of Assistant Vice President.

The Court further finds that on March 1, 1989, Tari Inc., fka Equitable Mortgage Resources, Inc., assigned the above-described mortgage note and mortgage to America's Mortgage Servicing Inc, fka First Family Mortgage Corp. of Florida. This Assignment of Mortgage was recorded on March 31, 1989, in Book 5175, Page 242, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 24, 1990, America's Mortgage Servicing Inc., fka First Family Mortgage Corporation of Florida, 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 August 10, 1990, in Book 5270, Page 882, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 13, 1989, John R. McHargue and Barbara McHargue, Husband and Wife, granted a general warranty deed to Michael McHenry and Victoria McHenry, then Husband and Wife. This deed was recorded with the Tulsa County Clerk on May 16, 1989, in Book 5183 at Page 1924 and Michael McHenry and Victoria McHenry, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on August 1, 1990, the Defendant, VICTORIA ANN FOX, 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 Defendant, VICTORIA ANN FOX, 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 her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, VICTORIA ANN FOX, is indebted to the Plaintiff in the principal sum of \$74,994.17, plus interest

at the rate of 12½ percent per annum from May 19, 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 \$30.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$26.00, which became a lien on the property as of June 25, 1993; and a lien in the amount of \$26.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, VICTORIA ANN FOX, UNKNOWN SPOUSE OF Victoria Ann Fox, if any, MICHAEL MCHENRY, CAROLYN S. MCHENRY, and FIDELITY FINANCIAL SERVICES, INC., 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 Defendant, VICTORIA ANN FOX, in the principal sum of \$74,994.17, plus interest at the rate of 12½ percent per annum from May 19, 1994 until judgment, plus interest thereafter at the current legal rate of 5-88 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 \$82.00, plus costs and interest, for personal property taxes for the years, 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, VICTORIA ANN FOX, UNKNOWN SPOUSE OF Victoria Ann Fox, if any, MICHAEL MCHENRY, CAROLYN S. MCHENRY, and FIDELITY FINANCIAL SERVICES, INC., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, VICTORIA ANN FOX, 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 the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$82.00, personal property taxes which are currently due and owing.

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

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

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

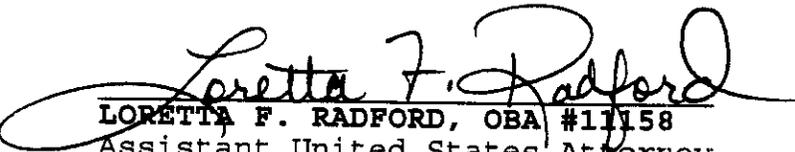
right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-876-K

LFR:flv

ENTERED ON DOCKET

DATE ~~MAY 31 1995~~

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

JULIA A. GILES,

Plaintiff,

vs.

YMCA OF GREATER TULSA and
JOHN W. SWIFT, an
individual,

Defendants.

No. 94-C-673-K

FILED

MAY 30 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal With Prejudice signed by all parties to this litigation, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal With Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the litigation captioned herein, including all complaints, counterclaims, cross-complaints and causes of action of any type by any party, should be and the same are hereby dismissed with prejudice.

IT IS SO ORDERED this 30 day of May, 1995.

s/ TERRY C. KERN

TERRY C. KERN
Judge of the U.S. District Court

JAD/bjo

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FILED

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

MAY 28 1995

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

MONSI L'GGRKE,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF TULSA, et al,)
)
 Defendants.)

Case No. 94-C-1004-B ✓

ENTERED ON DOCKET

DATE MAY 31 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This report and recommendation addresses the following motions, now before the court:

1. Plaintiff's oral Motion for Preliminary Injunction (as stated in his original Complaint (docket #1)).¹
2. Defendant City of Tulsa's, Judge Powers', and Chief Palmer's Motion to Dismiss (docket #14); and
3. Defendant Sheriff Stanley Glanz's and Sergeant Jack Seals' Motion to Dismiss (docket #18).

Each motion is addressed, in turn, below.

A. The Facts

Without delving overmuch into the facts, the issues now before the court arise as a result of the issuance of various citations to Plaintiff for alleged violations of the *Tulsa Revised Ordinances*. The various violations are adequately set forth in Defendant City of Tulsa's Brief in Support of Motion to Dismiss (docket #14), and the court hereby adopts the *Statement of the Case* as set forth therein.

¹ Plaintiff appears *pro se*. As such, the court is constrained to afford him greater latitude in the form of pleading and practice than might otherwise be afforded one who is a member of the bar, or who is so represented.

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Suffice it to say, Plaintiff, following entry of a plea to each of the listed citations, failed to pay the fines assessed. When he finally returned to court, he attempted to submit an *affidavit* indicating that he was unable, financially, to make payment. The only *transcript of Proceedings* is supplied to the court and is hereby directed to be filed herein as a supplement to Defendants' (City of Tulsa, Chief Palmer and Judge Powers') Brief in Support. At page (7.) of the *Transcript*, Plaintiff informs the Municipal Court (Judge Powers) that he is unable to make payment. Thereafter (beginning at page (8.)) Judge Powers orders:

I'm going to show you committed on the balance of these fines and costs. If you can get somebody to pay them, you'll be released, otherwise, you'll have to serve them out.

Plaintiff attempted to submit a "paupers affidavit" (at page 9. of the *Transcript*), but same was rejected by the court:

Pauperis affidavit doesn't make any difference what your condition is at the present time, Mr. L'Ggrke. All I know is you didn't come back to court when you were supposed to and that's enough for me to commit you on these cases.

On November 19, 1993, a further colloquy was had between Judge Powers and Plaintiff. In-part, the record reflects:

You can do 63 work days or 945 in jail and I'll be happy to put you in for that length of time if you don't do what I tell you to do. Do you understand? *Transcript, at p. 14.*

Plaintiff complains, in-part, that he was not afforded a hearing before being put in jail; that he was improperly detained, and, as shown above, threatened with further incarceration if he did not perform work days to "work off" the fine he owed the City of Tulsa. In sum, Plaintiff argues that he should not be committed to pay fines -- to, in effect,

be thrown into what he calls "debtor's prison", when his original punishment did not include a term of probation which was subject to being revoked. He argues that his inability to pay the assessed fines and costs does not give the court the ability to incarcerate him for non-payment, particularly, where, as here, he attempted to document his poor financial status. He now sues under §1983, seeking damages for twenty-nine (29) days incarceration.

Responsively, the individual Defendants claim qualified immunity from suit; and the municipal Defendant (City of Tulsa) argues it should be dismissed in the absence of any "policy", "custom" or "practice" which links it to the harm here complained of.

Sheriff Glanz argues a total lack of any link between the harm complained of by Plaintiff and he or his office.

Plaintiff seeks injunctive relief per *Rule 65, Federal Rules of Civil Procedure*, to prevent the City of Tulsa from arresting him on outstanding warrants which now issue for his continuing failure to pay outstanding fines.

B. *Applicable Law*

1. *Preliminary Injunction*

The law regarding the grant or denial of a preliminary injunction is well settled. Such an action is plainly within the discretionary authority of the trial court. *Smith International, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1578, 219 U.S.P.Q. (BNA) 686, 690 (Fed. Cir. 1983). To prevail in the quest for a preliminary injunction pursuant to 35 U.S.C. §283, a party must establish a right thereto in light of four factors: (1) a reasonable likelihood of succeeding on the merits; (2) irreparable harm if the injunction is not

granted; (3) the balance of hardships tipping in petitioner's favor; and (4) the impact of the injunction on the public interests. *We Care, Inc. v. Ultra-Mark International Corp.*, 930 F.2d 1567, 18 U.S.P.Q.2d (BNA) (Fed. Cir. 1991), *citing*, *Hybritech, Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1451, 7 U.S.P.Q.2d (BNA) 1191, 1195 (Fed. Cir. 1988).

2. *Immunity from Suit*

Government officials performing discretionary functions generally are shielded from liability for civil damages (applying the doctrine of "qualified immunity") insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Sawyer v. County of Creek*, 908 F.2d 663 (10th Cir. 1990); *citing*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Unlike other affirmative defenses, qualified immunity is not merely a defense to liability; it is also an immunity from suit. Qualified immunity protects a defendant from discovery, trial, and the other burdens of litigation. *Id.* For this reason, prior to filing an affirmative defense, a defendant can challenge a complaint by filing either a motion to dismiss or a motion for summary judgment if the plaintiff has failed to come forward with facts or allegations that establish that the defendant has violated clearly established law. *Id.* *See also*, *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988).

As regards judicial officers, judges are absolutely immune from civil liability when they act within the scope of their jurisdiction within their judicial role. *See*, *Stump v. Sparkman*, 435 U.S. 349, 355-57, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 18 L.Ed.2d 288, 294.

C. *Analysis*

1. Judge Powers

Defendant sues Municipal Court Judge Brad Powers for damages, alleging that Judge Powers improperly imprisoned him as a result of non-payment of fines. It is undisputed, however, that Judge Powers was, at the time of his actions, sitting as a Municipal Judge of the Tulsa Municipal Criminal Court of Record. Plaintiff was before the court, having been issued citations within the City of Tulsa, and no issue arises as to the scope of the court's jurisdiction.

While counsel aptly raises the question of *res judicata* regarding disposition of these matters on appeal before the Oklahoma Court of Criminal Appeals, the issue regarding the liability of Judge Powers is far simpler.

As a sitting Municipal Judge, acting within the scope of his jurisdictional prerequisite, Judge Powers is *absolutely immune* from suit for civil damages arising from Plaintiff's incarceration.²

Accordingly, the undersigned finds that Defendant Judge Brad Powers' Motion to Dismiss (docket #13) should be granted and such is the recommendation of the United States Magistrate Judge. Plaintiff's suit against Judge Powers should be dismissed in its entirety.

² *The court well understands Plaintiff's argument -- that Judge Powers should have received and acknowledged the in forma pauperis affidavit, and should not, having accepted that as true, proceeded to incarcerate Plaintiff. The critical question, however, is, whether or not Judge Powers was correct in his actions, does liability attach for what is arguably an error by the court? The answer is in the negative. No liability attaches where, as here, Judge Powers was acting within his official capacity and exercising the jurisdiction of the Tulsa Municipal Criminal Court of Record. If every judge were subject to civil liability for their official acts when someone believed they had erred, the business of the court would soon come to a grinding halt. Such is the rationale for the doctrine of absolute immunity. Plaintiff's remedy was to seek redress on appeal, which, in fact, he did.*

2. Chief Palmer

Defendant brings suit against Defendant Ron Palmer, in his capacity as Chief of Police of the Tulsa Police Department. Plaintiff alleges that Chief Palmer should not have incarcerated him pursuant to Judge Powers' orders. Specifically, Plaintiff alleges:

Defendants and each and all of them, had the ability and the duty to prevent the false and unlawful imprisonment of the plaintiff, but failed to do so. Defendants neglected their duty. *Complaint, at ¶(36.), p. 9 (docket #1).*

In this case, Chief Palmer, by and through the members of the Tulsa Police Department, caused Plaintiff to be incarcerated following hearing before the Tulsa Municipal Criminal Court of Record. As discussed, *supra*, the court was acting within its jurisdiction, and though Plaintiff disagrees with the result, Chief Palmer is entitled to qualified immunity from suit. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Sawyer v. County of Creek*, 908 F.2d 663 (10th Cir. 1990).

Here, Chief Palmer, by and through members of the Tulsa Police Department, were faced with an apparent lawful order of the Municipal Court, to incarcerate Plaintiff for failure to appear and pay fines and costs. Chief Palmer's actions (and those of the members of the Tulsa Police Department) did not violate Plaintiff's clearly established statutory or constitutional rights. An individual does not have the right to disobey an order of the court. If Plaintiff disagreed, his recourse was through appeal, or by filing a *writ of habeas corpus*. Indeed, Chief Palmer, faced with a lawful order of the Tulsa Municipal Criminal Court of Record, was obligated to obey.

Accordingly, the undersigned finds that Chief Palmer is entitled to qualified immunity from suit, and that his Motion to Dismiss should be granted in its entirety.

3. Sheriff Glanz and Other Sheriff's Officers (Jack Seals, Beird Dingler)

Defendant argues that Sheriff Glanz, as administrator of the Tulsa City-County Jail, was required to examine the underlying basis for his incarceration; and, should he then determine it to be in error, to seek to free Plaintiff. In effect, as above, Plaintiff sues Sheriff Glanz for following a lawful order of the Tulsa Municipal Criminal Court of Record.

As above, Sheriff Glanz is entitled to a grant of qualified immunity. He cannot be subject to civil liability in the performance of his official duties, when, as here, there was no violation of a clearly established constitutional or statutory right.³

Accordingly, the undersigned finds that Sheriff Glanz and the other members of the Tulsa County Sheriff's Office which are named herein, are entitled to a grant of qualified immunity from suit. They followed a lawful order of incarceration and did not violate a clearly established constitutional or statutory right.

The Motion to Dismiss filed by Sheriff Glanz and the other members of the Tulsa County Sheriff's Office (docket #18) should be granted in its entirety, and the action against each of them dismissed.

³ As above, the undersigned recognizes that Plaintiff's position is that there was a clearly established right which was violated -- that is, that Judge Powers did not afford him the opportunity to present his case vis-a-vis his financial ability to pay. Neither Sheriff Glanz nor Chief Palmer are required, however, to look behind what is otherwise a lawful order of the court. Other mechanisms, including habeas corpus and appeal are available to remedy an unjust or improper incarceration. The executive (law enforcement) is not required to question an otherwise apparent lawful order of the court.

4. The City of Tulsa

Is the municipality liable for the decisions of its judicial officers? The Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence Unit*, --U.S.-- (Case No. 91-1657) (1993), answers the query:

...[W]e reaffirmed in *Monell*⁴ that a "municipality cannot be held liable under §1983 on a *respondeat superior* theory." 436 U.S., at 691....These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified under §1983. In short, a municipality can be sued under §1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury. (*Emphasis added.*)

Here, while Plaintiff argues that Judge Powers ignored the plain reading of Title 22 O.S. §983(b) (*as cited by Plaintiff at p. 10 of the Transcript part of the record before the court*), the fact that a judicial officer acted does not establish the existence of a "custom or policy". Indeed, the very nature of these proceedings portend *against* a custom or policy.

A judicial officer of the Municipal Criminal Court of Record "shall have and possess such other general powers as are possessed by the District Judge." *See, O.S. Title 11 §28-104.* Judges are immune from civil liability for their official decisions. A judicial decision, as here, is *not* an expression of municipal custom or policy. The facts give life to the holding.

Here, Plaintiff failed to appear and pay fines. When he finally did appear he attempted to plead insolvency. The court declined to accept Plaintiff's excuses and ordered him incarcerated for failure to comply with the court's orders. Whether Judge Powers *should* have considered the question of Plaintiff's ability to pay is not at issue here. He did

⁴ *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

not. He made a judicial decision, interpreting the law, and applying his judgment, interpreting the statutory *schema* underlying the criminal justice system and the ability of the court to enforce its orders. Such decisions are not, *ipso facto*, expressions of *municipal policy*, but are rather expressions of judicial interpretation. The City of Tulsa cannot be held liable for Judge Powers' interpretation of the law and his ability to enforce Municipal Court orders.⁵ No evidence is otherwise before the court which links the municipality with Judge Powers' decisions.

Accordingly, the undersigned finds that the City of Tulsa's Motion to Dismiss (docket #13) should be granted in its entirety.⁶

5. Pendent Claims

To the extent that Plaintiff's *Complaint* can be interpreted to contain state-based claims against the Defendants, same should be dismissed without prejudice, as no further federal claims will pend should the court affirm the recommendation of the United States Magistrate Judge.

⁵ See, e.g., Transcript at p. 11 *et seq.*, wherein the court accelerated Plaintiff's probation (which means the period of probation was terminated). Plaintiff, represented by counsel, confessed the acceleration and requested work days "in lieu of fines and costs". When asked if that's what he wanted to do, Plaintiff replied "Yes, sir." (Transcript at p. 11). Plaintiff then gave up his right to hearing (Id.), indicating to the court that there was no reason he could not perform the ordered work days. (Transcript at p. 12). Had Plaintiff wished to pursue the question of whether he could be incarcerated when he could not pay, he should have pursued that question at the time of the hearing before the Municipal Court. Indeed, the court endeavored to avoid further incarceration by assigning work days. Though Plaintiff had already served some 29 days, he did so on a court order, which even if issued in error, does not act to create municipal custom or policy. It is the act of a single decision-maker - in this case, a municipal judge, interpreting the law.

⁶ Interestingly, had these issues been raised while Defendant was incarcerated by means of a Petition for Writ of Habeas Corpus, the court would have the ability to examine the underlying basis for the Municipal Judge's decision, determining whether Plaintiff was, at that time, being held unlawfully. However, as he is not so held, and the issues before the court are framed as damage questions under 42 U.S.C. §1983, the undersigned finds, as set forth above, that no liability attaches. This court cannot "second guess" the judicial decisions of the Municipal Court in the context of §1983 liability. See, City of Tulsa's Brief in Support re: issue preclusion.

6. Injunctive Relief

The critical issue raised by Defendant's various Motions to Dismiss intersects with a primary element necessary to the question of the grant of injunctive relief, *to-wit*: the Plaintiff's likelihood of success on the merits. *We Care, Inc. v. Ultra-Mark International Corp.*, 930 F.2d 1567, 18 U.S.P.Q.2d (BNA) (Fed. Cir. 1991), *citing, Hybritech, Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1451, 7 U.S.P.Q.2d (BNA) 1191, 1195 (Fed. Cir. 1988).

Here, as discussed, *supra*, the undersigned has determined that Plaintiff will *not* succeed on the merits. Accordingly, and as the undersigned has recommended dismissal of the action, the undersigned further recommends that Plaintiff's oral Motion for Preliminary Injunction be denied.⁷

D. *Summary*

The United States Magistrate Judge makes the following recommendation:

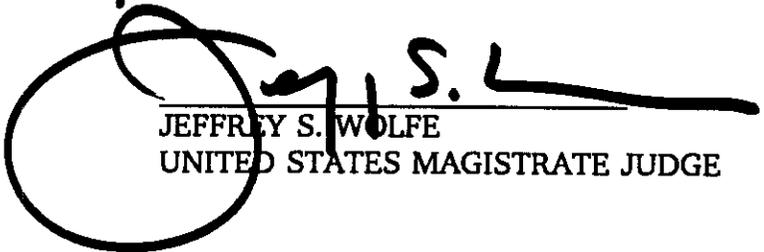
1. Defendants City of Tulsa's, Chief Palmer's and Judge Powers' Motion to Dismiss (docket #13) should be **granted in its entirety**. All pendent state claims should be dismissed without prejudice. All federal §1983 claims should be dismissed **with prejudice**.
2. Defendants Sheriff Glanz's, Jack Seals' Motion to Dismiss (docket #18) should be **granted in its entirety**. All pendent state claims should be dismissed without prejudice. All federal §1983 claims should be dismissed **with prejudice**.
3. Plaintiff's oral Motion for Preliminary Injunction should be **denied** for failure to demonstrate a likelihood of success on the merits.

Any objections to this Report and Recommendation must be filed with the Clerk of

⁷ *No question exists, however, that had Plaintiff been able to demonstrate likelihood of success on the merits, that he would have suffered irreparable harm -- incarceration on the outstanding warrants. Given this court's findings, it behooves the Plaintiff to secure counsel, and carefully consider whether he should surrender himself to Municipal authorities to satisfy the outstanding warrants.*

Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁸

Dated this 28th day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁸ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

9. Defendants Waylan and Wiford and City of Miami's Motion to Dismiss (docket #36);
10. Defendants Mazingo, Pritchett and Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #39);
11. Defendants Poindexter and Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #51); and
12. Defendants Payne, Guthrie and Boards of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #63).

Oral argument was heard February 16, 1995 on each of the foregoing Motions.

Following hearing, the undersigned makes the following report and recommendation. Each Motion is addressed separately, below.

1. Defendant Board of County Commissioners of Mayes County, Motion to Dismiss (docket #2);
 - a. Facts

Brief overview of the facts of this case is important. Plaintiffs worked full time for Grand Gateway Economic Association ("Gateway"). Gateway is a non-profit association whose membership is composed of public entities, including city and county governments. The purpose of the association is to organize and coordinate planning for administration of public funding. The association of these various entities acts to conserve resources, bringing together under one "roof" specialists whose services are utilized by each member. Such an arrangement avoids duplication of effort (and scarce resources) among the member governmental entities.

Gateway's Board of Directors is composed of representatives from each of the participating governmental entities. The individual Defendants named in the instant action are alleged to be County Commissioners of their respective counties, serving also a

members of Gateway's Board. Thus, in most, if not all cases, the representatives of county governments are elected members of the respective Boards of County Commissioners. In other instances, non-elected government employees represent the governmental entity (*eg., Port of Catoosa and City of Tulsa*). Notable, is the fact that Gateway's Board is not comprised of the entire membership of any single governmental entity.

Plaintiffs allege the existence of a "hostile and/or abusive work environment" (§[17] First Cause of Action), in violation of Title VII; retaliatory discharge, also in violation of Title VII; violation of 42 U.S.C. §1983 for violation of their First and Fourteenth Amendment rights; and wrongful discharge (a state-based claim) in violation of the public policy of the State of Oklahoma. In support of their claims, Plaintiffs allege harassing treatment by various individual co-employees/supervisors at Gateway. Plaintiff was terminated from employment at Gateway on October 31, 1992.

b. Legal Issues

The Board of County Commissioners of Mayes County ("BCC") and the individual Defendants Mozingo and Pritchett ask the court to dismiss the Complaint against them on the grounds that:

1. Neither BCC nor the individual Defendants are "employers" under Title VII of the Civil Rights Act of 1964, amended 1991.
2. Plaintiff has not alleged sufficient facts to render BCC and the individual Defendants liable under Title VII of the 1964 Civil Rights Act for "retaliatory action";
3. The individual Defendants Mozingo and Pritchett are entitled to "qualified immunity";
4. Plaintiff has not alleged sufficient facts to show any "custom or policy" of BCC as the cause of any alleged deprivation under Title 42 U.S.C. §1983;

and

4. Plaintiff has not alleged sufficient facts to render BCC liable for wrongful discharged in violation of Oklahoma public policy.

Each of Plaintiffs' allegations ultimately rest upon the premise that BCC, the individual Defendants and Plaintiffs stand in the relationship of "employer - employee". No liability attaches to BCC or the individual Defendants for Title VII liability for retaliatory discharge; or, indeed, for wrongful discharge under state law, should it not be found to be Plaintiffs "employer".

Plaintiff urges the court to adopt the four-pronged test outlined by the Tenth Circuit in *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980), ultimately finding that the BCC and individual Defendants, though an unnamed party before the EEOC, is nevertheless liable for the actions of the named party, in this case, GGEDA.

The issues are resolved below.

c. Analysis

1. Title VII Claims Against BCC, Mozingo and Pritchett

The success or failure of Defendants BCC's, Mozingo's and Pritchett's Motion to Dismiss depends upon whether they are "employers" under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e through 2000e-17). That Grand Gateway Economic Association was Plaintiffs' "immediate" employer, is not in dispute. The question becomes whether the Board of County Commissioners of Mayes County and the individually named Commissioners, Mozingo and Pritchett are, in some derivative fashion, also to be considered "employers" for purposes of Title VII liability. (*"...Defendants here are employers in that they act for the benefit of GGEDA, which entity through its services provides benefits to*

the Defendants' direct constituents.") Plaintiff's Brief in Response (docket #17) at p. 4.

Plaintiffs argue that the Board of Directors of GGEDA (Gateway) "are charged with the responsibility to staff GGEDA", having "established a personnel committee to oversee that responsibility." See, Plaintiff's Brief in Response (docket #17), at p. 4. So saying, Plaintiff argues that the BCC "exercises control over some aspect of the Plaintiff's compensation, terms, conditions, or privileges and employment." (citations omitted.) As a result, Plaintiff urges the court to find that the BCC and the individual Defendants Mazingo and Pritchett are "employers".

Courts have struggled with the scope of Title VII, and more particularly as regards the definition of "employer" under the Act. In *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) the Tenth Circuit held:

The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act. We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.

...

The County may be liable without necessarily knowing of Cannon's actions. "The term 'employer' means a person engaged in an industry affecting commerce...and any agent of such a person." 42 U.S.C. §20003(b). Unfortunately, "[n]owhere in Title VII is the term 'agent' defined." *Barger v. Kansas*, 630 F.Supp. 88, 89 (D.Kan. 1985). We agree with the Fourth Circuit that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment."...In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of the individual's conduct. (*Emphasis added.*) *Sauers*, *supra* at 1 F.3d 1125.

In *Evans v. McDonalds Corp.*, 936 F.2d 1087 (10th Cir. 1991),¹ the court considered the question whether McDonalds Corporation, the franchisor, was an "employer" for purposes of the Act, concluding that it was not. Evans was employed by a McDonalds franchisee, and alleged sexual harassment by another co-employee of the franchisee. The court held:

We hold that under no plausible legal theory are defendants Evans' employers. Evans essentially concedes that, under either common law or the "economic realities" test, defendants are not her immediate employers.

...
In these and other cases, courts struggling with the definition of "employer" under Title VII have turned for guidance to a test promulgated by the Nation Labor Relations Board. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930. 933 (11th Cir. 1987). Under this test, the factors to be considered are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

...
In this case McDonald's did not exert the type of control that would make it liable as an employer under Title VII. McDonald's may have stringently controlled the manner of its franchisee's operations, conducted frequent inspections, and provided training for franchise employees. The record also indicates, however, that McDonald's did not have control over Everett Allen's labor relations with his franchise employees. See, *Armbruster*, 711 F.2d at 1337-38 (control over elements of labor relations is a central concern)...McDonald's did not have financial control over Everett Allen's franchises. Outside of the necessary control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over Everett Allen was its power to terminate his franchises. (*Emphasis added.*) *Evans, supra*, at 936 F.2d 1089-90.

Similar factual circumstances obtain here as were present in *Evans*. Individual members of the BCC (Mozingo and Pritchett) served as Directors of the Gateway Board. Gateway's functions are related to overall coordination and planning for use of public monies, shared between various local governmental entities. Gateway is not, however, an

¹ *Evans* was originally tried before the United States District Court for the Northern District of Oklahoma, U.S. District Judge James O. Ellison presiding. The case applied Oklahoma law, and is thus particularly persuasive in this instance.

extension of BCC or any other governmental unit, instead being a separately created entity, described by Plaintiff as a "political subdivision". Neither BCC nor any other individual governmental entity controls the activities of Gateway; nor does BCC or any other individual governmental entity have control of Gateway's labor relations with its employees. Plaintiff's own Response (docket #17) admits that "Defendants here are not the "immediate" employers of Plaintiffs...", further acknowledging that Gateway's "Board of Directors...have established a personnel committee to oversee that responsibility." Response (docket #17) at p. 4.

Thus, it is Gateway, and *not* BCC which controls the hiring and firing of Gateway's employees. BCC sent two representatives of itself to serve on Gateway's Board of Directors (Mozingo and Pritchett). That fact, standing alone, or, even considered together with the fact that Gateway's purpose is to coordinate planning among the various governmental units whose representatives sit on Gateway's Board, does not confer the necessary "control over the plaintiff's hiring, firing or conditions of employment..." such that it may be said to "operate as the alter ego of the employer..." *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993).

In sum, *Gateway's* Board of Directors are the decision-makers in the operation of Gateway, functioning much like any other Board of Directors. The fact that the individual members of the Board are also representatives of various governmental entities served by Gateway in no way leads to the conclusion that the individual governmental entities are "employers" and have control over, among other things, Gateway's labor relations function. To so find would require a finding that an individual governmental unit, such as BCC has

the ability to unilaterally act -- to "reach in" and control Gateway's activities, in effect bypassing the control of Gateway's Board.

Such is not the case.

There is no support for the proposition that simply because Gateway serves the interests of the governmental units whose representatives sit on its Board, that each individual governmental unit has "control" thus rendering it an "employer" for purposes of Title VII. In point of fact, Plaintiffs were actually employed by Gateway, not by any other governmental unit.

Accordingly, the undersigned finds that BCC's, Mozingo's and Pritchett's Motion to Dismiss (docket #2) should be granted. Specifically, the undersigned finds that neither BCC or Mozingo and Pritchett are Plaintiffs' employers for purposes of Title VII liability. Given the foregoing determination, Plaintiffs' other claims against BCC, Mozingo and Pritchett also fail.²

2. Plaintiffs' Claims under 42 U.S.C. §1983

Plaintiffs claim that "all Defendants intentionally and willfully violated...[their]...right to freedom of speech under the First Amendment to the Constitution..." Complaint at ¶(27.), p. 10 (docket #1). Specifically, Plaintiffs assert they "were punished for speaking out against and otherwise opposing the actions of Baker and Defendant Mullin, and for opposing, or supporting opposition to, the other illegal or wrongful practices of Mullin that brought discredit to GGEDA and Adversely affected the

² Plaintiff argues that the CRA (Civil Rights Act of 1991) changes the analysis vis-a-vis "employers". The undersigned disagrees. See Gallegos v. City and County of Denver, --F.2d-- (10th Cir. 1993), wherein the court noted that Sections 1983 and 1985(3) of the Civil Rights Acts do not create substantive rights, citing Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973, 977 (10th Cir. 1991).

public interest." *Id.*

a. **Mozingo and Pritchett**

The individual Defendants Mozingo and Pritchett must be addressed separately from the BCC. Setting aside the fact that Mozingo and Pritchett are not, individually, *employers*, and addressing them in the context of their roles as members of the Gateway Board of Directors, the question becomes first whether they are sued in their individual or official capacities. If sued in their "official capacities", the suit is, in essence, a suit against the entity, in this case, Gateway. In *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985), the Supreme Court held:

Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law...official capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent...as official-capacity suit is, in all respects, other than name, to be treated as a suit against the entity... *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985).

In *Sapp v. Cunningham*, 847 F.Supp. 893 (U.S.D.C. Wyom.1994), the District Court noted:

Thus, an individual-capacity suit under §1983 simply requires proof of a deprivation of a federally protected right by an individual acting under color of state law. *See, Graham*, 473 U.S. at 166 (discussing §1983).

Further observing:

An official capacity suit, however, is one where "the real party in interest...is the governmental entity and not the named official..." *Hafer v. Melo*, --U.S.--, 112 S.Ct. 358, 361 (1991). In order to prevail in an official capacity suit, the plaintiff must prove the two elements necessary in an individual capacity suit and a third element. That additional burden requires the plaintiff to prove that the governmental entity itself was the "moving force" behind the deprivation such that it would be proper to impose liability on the municipality itself. *Sapp v. Cunningham*, 847 F.Supp. 893 (U.S.D.C. Wyom.1994).

Review of the *Complaint* does not reveal any allegation distinguishing the claims

against Mazingo and Pritchett from that of Gateway. More to the point, at no time within the four corners of the *Complaint* do Plaintiffs identify either Mazingo or Pritchett individually as actors, *individually* promoting the conduct about which Plaintiff complains.

At ¶(6.) of the *Complaint* Defendants Mazingo and Pritchett are identified as "members of the Board of County Commissioners of Mayes County, Oklahoma." (*Complaint* at p. 4.) At ¶(16.) of the *Complaint* appears a general allegation that "Board members have the responsibility under state law and as representatives of the various local and municipal government members of GGEDA, to control and supervise GGEDA operations..."

Finally, at ¶(17.) Plaintiffs allege:

Plaintiffs attempted to take their complaints to the Board (including the individual defendants named herein), but were denied the opportunity to pursue remedies to the harassment. *Complaint, at p.7 (docket #1).*

At no point, then, are any specific allegations made regarding Mazingo and Pritchett which do any more than identify them as members of the Gateway Board of Directors, *acting in that capacity*. Accordingly, the undersigned finds that the purported individual-capacity suits against Mazingo and Pritchett are, in reality, suits against them in their *official capacities* as members of the Gateway Board of Directors.

Plaintiffs' claims against Mazingo and Pritchett, insofar as they may be said to be claims against them in their *individual-capacities* should be dismissed. Plaintiffs otherwise name both Gateway (the governmental entity) and its Board of Directors generally, and as such sues the employing entity, and not the individual agents or actors.

Alternately, should the court determine that Mazingo and Pritchett *are* named in their named individual capacities, the court must determine whether the defense of

qualified immunity applies. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sawyer v. County of Creek*, 908 F.2d 663 (10th Cir. 1990); *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Because qualified immunity "is not merely a defense to liability", but "also immunity from suit...it protects a defendant from discovery, trial, and the other burdens of litigation. For this reason, prior to filing an affirmative defense, a defendant can challenge a complaint by filing either a motion to dismiss or a motion for summary judgment if the plaintiff has failed to come forward with facts or allegations that establish that the defendant has violated clearly established law. *Id.*, *citing, Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988).

Here, the allegation is that Plaintiffs First Amendment rights were violated, *to-wit* they were fired for exercising their rights of free speech and for petitioning to redress grievances. Both rights are embraced by the First Amendment. *See, Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990). No question exists, but "that a State may not fire an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Hicks v. City of Watonga*, 942 F.2d 737 (10th Cir., 1991); *citing Rankin v. McPherson*, 438 U.S. 378, 383, 97 L.Ed.2d 315, 107 S.Ct. 2891 (1987).

The question becomes whether the facts, as here alleged, give rise to that allegation. It is well-settled, that "no constitutional deprivation...[occurs]...unless that speech was constitutionally protected." *Hicks*, at 942 F.2d 744. Constitutionally protected speech is

that which "may be fairly characterized as constituting speech on a matter of public concern." *Hicks, supra*, at 744, citing *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983). "Bringing to light actual or potential wrongdoing or breach of public trust is, indeed a matter of public concern." *Connick*, 461 U.S. at 148. Here, Plaintiffs allege a continuing use of vulgarity, "intimidating, crude and offensive language on almost a daily basis..." *Complaint*, at p. 5 (¶(10.)). They allege "...many incidents of harassment..." *Complaint*, at p. 6 (¶¶(13-14.)). Plaintiffs then allege they "attempted to take their complaints to the Board (including the individual defendants named herein), but were denied the opportunity to pursue remedies to the harassment." *Complaint*, at p. 7 (¶(17.)). In *Connick, supra*, the court noted that the context within which the dispute arises is important. There, though a survey was conducted by an employee, the court determined that "her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy." *Connick, supra* at 461 U.S. 153-54. In analyzing whether speech constitutes a matter of public concern, the focus is on the motive of the speaker..." *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987). *Was the employee's point to bring wrongdoing to light, or was the point to further some purely private interest? Hicks v. City of Watonga*, 942 F.2d 737, 745 (10th Cir., 1991).

Careful review of the pleadings, the briefs and other materials now, *in toto* before the court shows that Plaintiffs' complaint against the individual defendants is that "these Defendants deliberately and recklessly chose to distance themselves from the complaints, and their responsibilities." *Plaintiff's Brief in Response*, at p. 8 (docket #17). In effect, Plaintiffs sue, seeking individual liability because the Defendants (members of the Board

of Directors) did not act in response to Plaintiffs' complaints, evidently, leaving the handling of day-to-day labor-relations to the Executive Director, Mr. Mullin. He, in turn, evidently treated the matter as an employee grievance.

The undersigned finds that here, as in *Hicks, supra*, Plaintiffs' complaints "took place in the course of an extended personal grievance." *Hicks* at 942 F.2d 737, 745. In so finding, the undersigned finds that the "First Amendment interests were insufficient to outweigh...[Gateway]'s...interest in responding to the charges..." *Id.*

Accordingly, Defendants Mozingo and Pritchett are, in the alternative (should the court not dismiss them as non-employers or otherwise find that their presence in the suit is in their *official* capacity), entitled to qualified immunity from suit *in their individual capacities* against Plaintiffs' §1983 First Amendment claims, as no constitutional deprivation occurred. The incidents complained of are, on balance, part of an on-going grievance, and are not matters of public concern giving rise to speech which is constitutionally protected. (*See, p. 11, supra.*) Plaintiffs' desire to conduct further discovery (as evidenced in their *Response Brief*, at p. 9, should be denied, as qualified immunity from suit would prevent their being so subject.

Plaintiffs' claims against Defendants in their *individual capacities*, arising under the "Fourth Cause of Action -- Section 1983 Violation of Fourteenth Amendment Rights" are also subject to the defense of qualified immunity. The essential complaint is that Mozingo and Pritchett, as individual Board Members, failed to act "in refusing to exercise their authority over personnel-related matters of GGEDA, and instead authoriz[ed] Mullin as the sole arbiter of any and all employment-related matters, in spite of their knowledge of

allegations of wrongdoing within GGEDA..." *Complaint*, at p. 11 (¶(32.)).

Monzingo's and Pritchett's failure to act, asserts Plaintiffs, "constitutes an intentional and willful violation of Plaintiffs' right to equal protection under the Fourteenth Amendment." *Id.*

Though difficult to ascertain the precise claim made, Plaintiffs claim constitutional deprivation of their protected Fourteenth Amendment rights of "equal protection under the laws". They claim they should not have been subject to discriminatory acts, presumably as outlined in their "First and Second Causes of Action".

For the reasons set forth above, the undersigned finds that these individual defendants are entitled to qualified immunity from suit as regards Plaintiff's Fourteenth Amendment Claims. Their actions were entirely within their *official capacities* as members of the Gateway Board. No facts are pled, and no law has been discovered which will extend *individual liability* to these Board Members.

b. The Board of County Commissioners

Having determined that the individual members of the Mayes County Board of Commissioners (Mozingo and Pritchett) are shielded from individual liability by reason of qualified immunity, the question becomes whether liability attaches to the BCC. Having already determined that BCC is *not* Plaintiffs' employer, the question extends to whether BCC maintained a "policy or custom" which operated to produce the injury complained of. *See, City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Here, the allegation is that "all Defendants" including BCC, violated Plaintiffs' rights under both the First and Fourteenth Amendments. No allegation is made, however, of the

existence of any "policy". "practice" or "custom" of the BCC which would subject it to liability as alleged.

Accordingly, the undersigned adopts the citations and analysis as set forth in Defendants' Brief in Support of Motion to Dismiss (docket #3), at pp. 10-11, and recommends that BCC's Motion to Dismiss the Third and Fourth Causes of Action be **granted**.

d. Summary

The undersigned finds, and so recommends as follows:

- a. Individual Defendants Mazingo and Pritchett's Motion to Dismiss (docket #2) Plaintiff's First and Second Causes of Action (under Title VII) on the grounds that they are not "employers" should be **granted**;
- b. Individual Defendants Mazingo and Pritchett's Motion to Dismiss (docket #2) Plaintiff's Third and Fourth Causes of Action on the grounds of qualified immunity should be **granted**;
- c. BCC's Motion to Dismiss (docket #2) the First and Second Causes of Action (under Title VII) on the grounds that it is not an "employer" should be **granted**;
- d. BCC's Motion to Dismiss (docket #2) the Third and Fourth Causes of Action for failure to state a claim upon which relief can be granted (failure to allege any policy, custom or practice by BCC) should also be **granted**.
- e. All Defendants' Motion to Dismiss (docket #2) the state-based wrongful discharge claim (Fifth Cause of Action) should be **dismissed without prejudice**, the court, in the interests of judicial economy declining to hear pendent state claims in the absence of related federal claims.

2. Defendant Robert Portiss' Motion to Dismiss (docket #19)

Defendant Robert Portiss is alleged to be "an officer of the Port of Catoosa, Oklahoma" (*Complaint*, at p. 4 (¶(6.)). This is the only verbatim mention of Mr. Portiss

throughout the balance of the *Complaint*. Like the individually named Defendants Mozingo and Pritchett, Portiss sat as a member of Gateway's Board of Directors, and is now sued individually, as an "employer" under Title VII, and under §1983.

Mr. Portiss adopts the Brief of Mayes County Board of County Commissioners and Defendants Mozingo and Pritchett. (*See, Defendants' Brief in Support* (docket #21)).

Adopting the holding set forth above, in reference to Defendants Mozingo and Pritchett, the undersigned finds that Defendant Portiss's Motion to Dismiss (docket #19) should be granted in its entirety and Defendant Portiss should be dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

3. Defendant City of Tulsa - Rogers County Port of Catoosa Motion to Dismiss (docket #20)

Defendant City of Tulsa-Rogers County Port of Catoosa ("Port of Catoosa") adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in its Motion to Dismiss (docket #20) to dismiss the case against it on the same grounds as set forth by the Board of County Commissioners of Mayes County, *to-wit*: that the Port of Catoosa is not Plaintiff's "employer" for purposes of Title VII liability; and that no custom, policy or practice has been pled so as to make it liable under §1983, as alleged.

Adopting the holding set forth above as regards the Board of County Commissioners of Mayes County, the undersigned finds that Defendant Port of Catoosa's Motion to Dismiss (docket #20) should be granted in its entirety and Defendant Port of Catoosa dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

4. Defendants James Leake and Board of County Commissioners of Ottawa County, Motion to Dismiss (docket #23)

Defendants James Leake and Board of County Commissioners of Ottawa County adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in its Motion to Dismiss (docket #23) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners for Mayes County and Defendants Mazingo and Pritchett, *to-wit*: that the Board of County Commissioners of Ottawa County and James Leake are not Plaintiff's "employer" for purposes of Title VII liability; that James Leake is entitled to qualified immunity as regards the §1983 claims; and that no custom, policy or practice has been alleged as against the Board of County Commissioners.

Adopting the holding set forth above by the Board of County Commissioners of Mayes County and Defendants Mazingo and Pritchett, the undersigned finds that Defendant Board of County Commissioner's Motion to Dismiss (docket #21) should be granted in its entirety and Defendants James Leake and Board of County Commissioners of Ottawa County dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

5. Defendants Poindexter and Board of County Commissioners of Delaware County, Motion to Dismiss (docket #25)

Defendants Poindexter and Board of County Commissioners of Delaware County in effect adopt the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners and Commissioners Mazingo and Pritchett, and urges the court, in their Motion to Dismiss (docket #25) to dismiss the case against them on the same

grounds as set forth by the Board of County Commissioners for Mayes County and Commissioners Mozingo and Pritchett, *to-wit*: that the Board of County Commissioners of Delaware County and Bruce Poindexter are not Plaintiffs' "employers" for purposes of Title VII liability; that Bruce Poindexter is entitled to qualified immunity as regards the §1983 claims; and that no custom, policy or practice has been alleged as against the Board of County Commissioners.

Adopting the holding set forth above, the undersigned finds that Defendant Board of County Commissioner's and Bruce Poindexter's Motion to Dismiss (docket #25) should be granted in its entirety and Defendant Board of County Commissioners of Delaware County and Bruce Poindexter dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

6. Defendant Jimmie Mullin's Motion to Dismiss (docket #27)

a. The Facts

Mullin was the Executive Director of Gateway during the time of Plaintiffs' employ. Mullin served as both Plaintiffs' immediate supervisor, and was so acting on the date Plaintiffs were terminated from employment (March 1, 1993). One (1) month later, Mullin resigned (April 26, 1993). Plaintiffs allege that Mullin created a "hostile work environment" in which "many incidents of harassment" took place.

Mullin moves to dismiss the Title VII claims as a matter of law, as he is not Plaintiffs' "employer", and further moves to dismiss the §1983 claims for lack of "state action".

Upon review, the undersigned finds as follows.

1. Title VII Claims

The undersigned hereby adopts the rationale and holdings as set forth in the holding regarding the Motion to Dismiss (docket #2) brought by the Board of County Commissioners of Mayes County, *supra*, as applied to Plaintiffs' Title VII claims. Mullin is *not* an "employer" under Title VII, and thus has no liability as such. Plaintiffs' Title VII claims should, therefore, be dismissed, and such is the recommendation of the United States Magistrate Judge.

2. 42 U.S.C. §1983 Claims

Mullins moves the court to dismiss the §1983 claims brought by Plaintiffs, arguing that discharge of Plaintiffs does not rise to "state action" "since the decisions to discharge the plaintiffs were not compelled or even influenced by any state regulation." *Defendant Mullin's Brief in Support, at p.4 (docket #28)*.

Upon review, the undersigned agrees. While Gateway is alleged to be a "non-profit agency formed by Defendant local/municipal government/governmental entities named herein" *Complaint* at p. 4 (¶(6.)), its status as a recipient of state-funding, does not *de facto* make it an arm of the state.

The undersigned adopts the reasoning of *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) to the effect that Gateway's pooled activities on behalf of various local and municipal governments (as pled) do not make its hiring/firing decisions acts of the state; and, that in this case, the decision to terminate, was not one brought about by or influenced by any state regulation.

Accordingly, the undersigned finds that Mullin's Motion to Dismiss (docket #27) should be **granted**. As regards the Title VII claims, Mullins is not an "employer" for purposes of that Act. As regards the §1983 claims, the undersigned finds that insufficient allegation has been made so as to find that the termination decision of Gateway, by and through its Executive Director, Mullin, constituted "state action". Such is the recommendation of the United States Magistrate Judge.

7. Defendant Grand Gateway Economic Development Association's Motion for Summary Judgment (docket #30)

a. The Facts

Grand Gateway Economic Development Association ("Gateway") files its Motion for Summary Judgment (docket #30) arguing that as regards the Title VII claims that it undertook "prompt investigation and remedial action under the circumstances..." such that it is exonerated from liability. *See, Defendant's Brief In Support of Motion for Summary Judgment* (docket #31) at p.1. As regards the §1983 claims, Defendant argues that state action is lacking; or, alternately, that Gateway has "qualified immunity" from suit. *Id.*

b. The Summary Judgment Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rule 56(c), Federal Rules of Civil Procedure*. Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any", which demonstrate the absence of a genuine issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986).

The non-moving party may oppose the motion with any of the evidentiary materials listed in *Rule 56(c)*, but reliance on the pleadings alone is not sufficient to withstand summary judgment. In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 402, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, at 106 S.Ct. at 2512.

c. **Analysis**

Analysis of any dispositive motion begins with marshalling of the facts before the court.

1. **State Action**

Defendant has submitted the *Affidavit of Ed Crone*, Executive Director of Gateway (as of the date of the *Affidavit* - April 20, 1994), setting forth Gateway's status and the character of its actions *vis-a-vis* personnel actions:

All decisions regarding discharge...of any GGEDA employee are made solely by GGEDA personnel without the need or requirement that GGEDA seek authorization, approval, confirmation or ratification from an State of Oklahoma agency concerning such discharge from employment. *Affidavit of Ed Crone*, at p.2 (Exhibit "A"),

Defendant's Brief in Support (docket #31).

Responsively, Plaintiff attaches no factual averments, but relies upon those facts as set forth in the *Complaint*. Taken together, Plaintiff's *Complaint* and Defendant's averment of facts as regards Gateway's status and activity, do not conflict. What remains, therefore, is a question of law. Is Gateway, for purposes of liability under §1983, acting in such a way as the alleged infringement of protected rights can be said to be attributable to the State?

Upon review, the undersigned finds as follows.

Gateway is funded almost exclusively and primarily by public funds; e.g., grants from federal and state government programs, with nominal funding provided by membership dues of its members. *Defendant's Brief in Support*, at p. 2 (docket #31). Gateway, however, creates its own personnel policies, and administers them without approval, authorization or input from the State of Oklahoma. All personnel decisions are made entirely by Gateway, without reference to the State of Oklahoma or any State agency or authority.

Given the foregoing, the undersigned finds the holding in *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) persuasive. While the members of Gateway's Board are "primarily" members of other public agencies, they do not apply the same policies and procedures as apply in their "parent" organizations when acting in the venue of Gateway's Board. Gateway has a separate and distinct existence from any of the organizations/governmental entities which provide leadership. It is this separate character

which distinguishes Gateway from the various Boards of County Commissioners, municipalities and other governmental entities which benefit from Gateway's services.

Accordingly, the undersigned finds that Gateway's action do not evoke "state action", and as a matter of law, Defendant Gateway is entitled to summary judgement.

The United States Magistrate Judge, therefore, recommends that Gateway's Motion for Summary Judgment (docket #30) be granted insofar as Plaintiff's §1983 claims, there being, as a matter of law, no state action.

2. Gateway's Remedial Action

Defendant submitted the *Affidavit of Glen Wiford*, Chairman of the Gateway's Board of Directors. Mr. Wiford avers, in-part that he was on of a three-member *ad hoc* investigating committee charged with investigating Plaintiffs' complaints "concerning sexual harassment by the supervisor and co-employees..." *Affidavit of Glen Wiford*, Exhibit "B" at p.1, Defendant's Brief in Support (docket #31). He further avers that a "lengthy and expensive investigation was undertaken, resulting in publication of "Reported Findings", attached to the *Affidavit*.

Wiford avers that the "Reported Findings" do *not* show the existence of "a hostile work environment" and that the claims of "sexual harassment" "were untrue or unsubstantiated". *Id.* at p.2. He further avers that Plaintiffs did not cooperate with the investigation, and were terminated "for insubordination, disloyalty, breach of confidentiality and disruption of work".*Id.*

Responsively, both Plaintiffs attach *Affidavits* (though each is a photocopy and not an original, the court will, for purposes of this undertaking, treat them as if they were

originals). Plaintiffs' responsive arguments make little, if any reference, to the attached *Affidavits*, being instead conclusory statements, broadly characterizing Defendant's evidence, without pointing to anything specific, e.g.,: "*The "report" of the investigating committee was more in the nature of a "defense" document than an objective assessment of the evidence presented.*") *Plaintiffs' Response Brief*, at p. 3 (docket #58).

However, after careful review of the attached *Affidavits*, the undersigned finds that there yet remains a genuine issue of material fact concerning the fundamental question posed by this lawsuit: *did the Gateway Board take appropriate action, once it became aware of the situation, to attempt to remedy/investigate/respond to it?* A sub-category of inquiry is when did the Board know of the situation? Genuine issues remain as to both issues.

Accordingly, the undersigned finds that Plaintiffs have met their Rule 56 burden, by demonstrating the existence of material facts, giving rise to a genuine issue to be resolved at of trial.

It is, therefore, the recommendation of the United States Magistrate Judge that Defendant Gateway's Motion for Summary Judgment (docket #30) as to the Title VII claims be denied, as genuine issues of material fact yet remain.

3. Qualified Immunity

Though the undersigned has determined that no state action is found in Gateway's activities, sufficient to render it liable under §1983, the question also remains whether Gateway and its Board is immune from liability under §1983, applying the doctrine of qualified immunity.

For the reasons set forth above, in the holding addressing the individual County

Commissioners, the undersigned finds that the doctrine of qualified immunity would apply to shield the Board from §1983 liability. This does not, however, shield from liability under Title VII, as set forth above. Accordingly, the undersigned recommends that Defendant's Motion for Summary Judgment (docket #31) on the issue of qualified immunity as regards Plaintiffs' §1983 claims be granted.

4. State Pendent Claims

As the undersigned has recommended that the Title VII claims remain, the State pendent claims should also continue to pend in this action, insofar as they are brought against the employer, Gateway. Defendant's Motion for Summary Judgment (docket #31) should be denied as regards the pendent state claims.

8. **Defendants, Payne, Guthrie and the Boards of Commissioners of Rogers and Craig Counties, Motion to Dismiss (docket #34)**

Defendants Gerry Payne, Charles Guthrie and the Boards of County Commissioners of Rogers and Craig Counties adopts the Motion to Dismiss and Brief in Support as filed by Defendants Mozingo, Pritchett and the Mayes County Board of County Commissioners, and urges the court, in their Motion to Dismiss (docket #34) to dismiss the case against on the same grounds as set forth by Mozingo, Pritchett and the Board of County Commissioners for Mayes County, *to-wit*: that the Board of County Commissioners of Rogers and Craig Counties are not Plaintiffs' "employers" for purposes of Title VII liability, and that no custom, policy or practice has been pled so as to make the Boards of County Commissioners liable under §1983, as alleged. Payne, Guthrie and the Boards of County Commissioners further argue that there is not "state action", thus necessitating dismissal of the §1983 claims, in effect adopting the position of Defendant Mullin in his Motion to

Dismiss (docket #27).

Upon review, the undersigned finds as follows.

Adopting the holding set forth above (addressing both the Defendants Mayes County Board of County Commissioner's, Mozingo', and Pritchett's Motion to Dismiss, and that of Defendant Mullin), the undersigned finds that Defendants Payne's, Guthrie's and Boards of County Commissioner's Motion to Dismiss (docket #34) should be granted in its entirety and Defendants Payne, Guthrie and the Boards of County Commissioners of Rogers and Craig Counties dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

9. **Defendants Waylan, Wiford and City of Miami's Motion to Dismiss (docket #36)**

Defendants Waylan, Wiford and City of Miami files essentially the same motion as that filed by the Defendants Mozingo, Pritchett and the Mayes County Board of County Commissioners, Motion to Dismiss (docket #2) and Brief in Support, and urges the court, in its Motion to Dismiss (docket #37) to dismiss the case against them on the same grounds as set forth by Defendants Mozingo, Pritchett and the Board of County Commissioners for Mayes County, *to-wit*: that the City of Miami are not Plaintiff's "employer" for purposes of Title VII liability; and that no "custom", "policy" or "practice" has been pled which renders the municipality liable under §1983.

Additionally, Defendants argue that failure to name the Defendants in the originally E.E.O.C. *Charge* is fatal to maintenance of the instant suit.

Each issue is addressed, in turn.

a. **Title VII Liability as "Employer"**

Adopting the holding set forth above (addressing Defendants Mazingo, Pritchett and the Mayes County Board of County Commissioners' Motion to Dismiss (docket #2)), the undersigned finds that Defendants Waylan's, Wiford's and City of Miami's Motion to Dismiss (docket #36) should be granted as regards the question of whether the Defendants are "employers" under Title VII. Waylan, Wiford and the City of Miami should be dismissed from this action, not being "employers" under Title VII; and such is the recommendation of the United States Magistrate Judge.

b. Title VII Liability for Failure to Charge Before the EEOC

Upon review of the *Affidavit of Joyce Hinse* (Exhibits "A-1" and "A-2", to Defendant's Brief in Support) the undersigned finds that none of these Defendants (Waylan, Wiford or the City of Miami) were named as parties before the E.E.O.C. The undersigned concurs with Defendants argument that no equitable factors obtain to toll the requirement that Defendants be named before the E.E.O.C. *See, Defendant's Brief* (docket #37) at pp. 5-6, which the undersigned here adopts.

Notably, the Tenth Circuit has recently held:

Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. The relief granted under Title VII is against the *employer* not individual employees whose action would constitute a violation of the Act. We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993). *See also, Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987).

Examination of the instant Complaint reveals that Waylan and Wiford, with the other named individual Defendants are charged with violation of Title VII (claims I and II) and for wrongful discharge in violation of Oklahoma public policy. The claim against

Waylan and Wiford is evidently brought against them individually, as Gateway is named separately from him. Thus, no issues of fact arise. What remains is a question of law.

Applying the holding in *Sauer*, the undersigned finds that Waylan and Wiford are improperly named as an individual defendants in a Title VII claim. They were *not* Plaintiffs' employer and cannot, therefore, be held individually liable for damages under Title VII.³ Similarly, the City of Miami is not an "employer" and cannot be so named.

Accordingly, Plaintiff's Title VII claims should be dismissed as against Waylan, Wiford and the City of Miami.

c. §1983 Liability

No "policy", "custom" or "practice" is pled by Plaintiffs as against the Defendant, City of Miami, or as relates to the individual Defendants. It is well-settled that a governmental entity, such as a municipality or school district "cannot be held liable solely because it employs a tortfeasor" -- applying the doctrine of *respondeat superior*. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See, Defendant's Brief at p. 7 (docket #37)*.

Here, Defendants aptly suggest that there no "affirmative link" pled between the harm claimed and a "policy or custom" of the City of Miami, Oklahoma. As discussed, supra, the mere fact that governmental units jointly benefitted by Gateway's efforts, and that individual representatives from such units sat on Gateway's Board, does not, without more, operate to tie those units to Gateway's actions for purposes of assessing liability.

³ *The same analysis would follow had he been named in the EEOC Complaint. As he was not, he has not received notice of the claim, and suit will not obtain in any case.*

The undersigned finds as a matter of law, that §1983 liability does not attach either to the City of Miami, or to Defendants Waylan and Wiford. No state action is alleged, nor are any facts pled which give rise to any *individual* action undertaken by these individuals which would otherwise render them liable. As discussed above, in regards to the other named individual defendants (Mozingo, Pritchett, Mullin, Payne and Guthrie), Waylan and Wiford are entitled to qualified immunity, for the reasons set forth more fully above.

Accordingly, the United States Magistrate Judge recommends that Defendants City of Miami's, Waylan's, and Wiford's Motion to Dismiss (docket #36) both the Title VII and the §1983 claims be **granted** in its entirety, and the action against them be dismissed with prejudice. The pendent state claims should be dismissed **without prejudice**, as no further federal claims pend.

10. Defendants Mozingo, Pritchett and the Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #39)

Defendants Mozingo, Pritchett and the Board of County Commissioners of Mayes County ("BCC") moves for summary judgment, arguing that as a matter of law that they are entitled to judgment as Plaintiffs failed to name them in her March 15, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that Mozingo's, Pritchett's and BCC's Motion to Dismiss (docket #2) be **granted**. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #35) be **denied as moot**.

In the event the court declines to adopt the earlier recommendation regarding Mozingo's, Pritchett's and BCC's Motion to Dismiss (docket #2), the undersigned finds as follows.

The undersigned finds that Mozingo's, Pritchett's and BCC's arguments are persuasive. Plaintiffs did not name BCC in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #40). The defect is fatal. Title 42 U.S.C. §2000e(5)(b) & (e) requires that administrative remedies be exhausted prior to instituting suit. *See, Defendant's Brief in Support of Motion for Summary Judgment at p. 2 (docket #40).*

Accordingly, should the court decline to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #2), the undersigned recommends that Defendant BCC's Motion for Summary Judgment (docket #39) be granted.

11. Defendants Poindexter and the Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #51)

Defendants Poindexter and Board of County Commissioners of Delaware County ("BCC") move for summary judgment, arguing that as a matter of law that they are entitled to judgment as Plaintiffs failed to name them in her March 15, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that Poindexter's and BCC's Motion to Dismiss (docket #25) be granted. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #51) be denied as moot.

In the event the court declines to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #25), the undersigned finds as follows.

The undersigned finds that Poindexter's and BCC's argument is persuasive. Plaintiff did not name BCC and Poindexter in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #52). The defect

is fatal. Title 42 U.S.C. §2000e(5)(b) & (e) requires that administrative remedies be exhausted prior to instituting suit. See, Defendant's Brief in Support of Motion for Summary Judgment at p. 2 (docket #52).

Accordingly, should the court decline to adopt the earlier recommendation regarding Poindexter's and BCC's Motion to Dismiss (docket #25), the undersigned recommends that Defendant Poindexter's and BCC's Motion for Summary Judgment (docket #51) be granted.

12. **Defendants Payne, Guthrie and the Boards of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #63).**

Defendants Payne, Guthrie and the Boards of County Commissioners of Rogers and Craig Counties ("BCC") move for summary judgment, arguing that as a matter of law that they are entitled to judgment as Plaintiff failed to name them in her March 15, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that Guthrie's, Payne's and BCC's Motion to Dismiss (docket #34) be granted. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #63) be denied as moot.

In the event the court declines to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #34), the undersigned finds as follows.

a. The Title VII Claims

The undersigned finds that Guthrie's, Payne's and BCC's argument is persuasive. Plaintiff did not name Guthrie, Payne or BCC in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #64). The defect is fatal. Title 42 U.S.C. §2000e(5)(b) & (e) requires that administrative remedies be exhausted prior to instituting suit. See, Defendant's Brief in Support of Motion

for Summary Judgment at p. 2 (docket #64).

Accordingly, should the court decline to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #34), the undersigned recommends that Defendant BCC's Motion for Summary Judgment (docket #63) be granted as regards the Title VII claims.

b. Section 1983

Defendants move for summary judgment on Plaintiffs' §1983 claims, arguing that there is no "custom", "practice" or "policy" established which would render them liable as actors akin to the City of New York, as set forth in the benchmark case, *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *See, Defendants' Brief at pp. 4-5 (docket #64).*

Review of the pleadings, the affidavits and other materials now of record fail to reveal the "policy", "custom" or "practice" necessary to establish liability. Examination of Plaintiffs' Response (docket #70) offers little assistance:

Plaintiffs believe they have, or can, establish that the Counties had a policy, custom or practice which adversely affected Plaintiffs, such that the Counties can be held liable under Section 1983 on a basis other than respondeat superior. *Plaintiffs' Response Brief at p. 8 (docket #70).*

It is well settled that "the non-moving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Here, Plaintiffs do nothing more than point to their pleadings, offering no evidence, affidavit or other material sufficient to create a genuine issue of material fact for trial. Rule 56(g), *Federal Rules of Civil Procedure* provides an opportunity for the non-moving party to file an affidavit, effectively delaying a summary judgment response pending further discovery. No such

action was taken here.

Given the paucity of pleading and evidence, the undersigned finds as a matter of law, that Defendants' Motion for Summary Judgment (docket #63) should be **granted** as regards Plaintiffs' §1983 claims against Defendants Payne, Guthrie and the Boards of County Commissioners of Rogers and Craig Counties, and such is the recommendation of the United States Magistrate Judge.

12. Summary

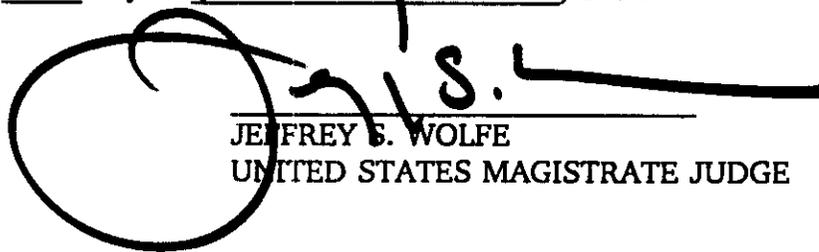
Following is a summary of the recommendations of the United States Magistrate Judge, outlined per motion:

1. Defendants Mazingo, Pritchett and Board of County Commissioners of Mayes County, Motion to Dismiss (docket #2). **Recommended: granted, as set forth above.**
2. Defendant Portiss' Motion to Dismiss (docket #19). **Recommended: granted, as set forth above.**
3. Defendant Port of Catoosa's Motion to Dismiss (docket #20). **Recommended: granted, as set forth above.**
4. Defendants Leake and Board of County Commissioners of Ottawa County, Motion to Dismiss (docket #23). **Recommended: granted, as set forth above.**
5. Defendants Poindexter and Board of County Commissioners of Delaware County, Motion to Dismiss (docket #25). **Recommended: granted, as set forth above.**
6. Defendant Jimmie Mullin's Motion to Dismiss (docket #27). **Recommended: granted, as set forth above.**
7. Defendant Grand Gateway Economic Development Association's Motion for Summary Judgment (docket #30). **Recommended: granted insofar as §1983 claims (qualified immunity and no "state action"); denied as regards the Title VII claims; and denied as regards the pendent claims.**

8. Defendants Payne and Guthrie and Boards of Commissioners of Rogers and Craig Counties, Motion to Dismiss (docket #34). Recommended: granted, as set forth above.
9. Defendants Waylan and Wiford and City of Miami's Motion to Dismiss (docket #36). Recommended: granted, as set forth above.
10. Defendants Mozingo, Pritchett and Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #39). Recommended: denied as moot, if Motion to Dismiss affirmed; granted, otherwise, as set forth above.
11. Defendants Poindexter and Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #51). Recommended: denied as moot, if Motion to Dismiss affirmed; granted, otherwise, as set forth above.
12. Defendants Payne, Guthrie and Boards of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #63). Recommended: denied as moot, if Motion to Dismiss affirmed, granted, otherwise, as set forth above.

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

Dated this 20th day of May, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

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

FILED

MAY 25 1995

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

LEONARD RENAL ROBERTS,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ,)
)
 Defendant.)

Case No. 92-C-497-H

ENTERED ON DOCKET

DATE MAY 30 1995

J U D G M E N T

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on May 25, 1995.

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

IT IS SO ORDERED.

This 25TH day of MAY, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

MAY 25 1995

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

LEONARD RENAL ROBERTS,)
)
Plaintiff,)
)
v.)
)
STANLEY GLANZ,)
)
Defendant.)

Case No. 92-C-497-H

ENTERED ON FILE

DATE MAY 30 1995

ORDER

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket #46)¹ and the Objection and Response to Report and Recommendation by Plaintiff (Docket #49).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

The Report and Recommendation recommends the denial of Defendant's Motion to Dismiss. The Motion to Dismiss is based on Plaintiff's failure to comply with the Court's discovery deadlines.

¹ The Report and Recommendation pertains to Defendant's Combined Motion to Dismiss or in the Alternative Motion to Stay Proceedings (Docket #29), Defendant's Motion for Summary Judgment (Docket #40), Plaintiff's Traverse to Defendant's Motion for Summary Judgment (Docket #43), Defendant's Objection to Plaintiff's Response Filed Ten Days Out of Time (Docket #44), and Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (Docket #45).

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However, as the Magistrate Judge noted, Plaintiff participated in his deposition and provided Defendant with a list of witness and copies of exhibits. This cooperation precludes the granting of Defendant's Motion to Dismiss.

The Report and Recommendation recommends the granting of Defendant's Motion for Summary Judgment because there are no disputed material questions of fact and Defendant is entitled to judgment as a matter of law on Plaintiff's claims of denial of exercise privileges, unsanitary kitchen procedures, denial of medical care, and denial of access to the court. Plaintiff's Objection neither raises a dispute concerning a material issue of fact nor refers to case law stating that he is entitled to judgment.

Based upon a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge denying Defendant's Combined Motion to Dismiss or in the Alternative Motion to Stay Proceedings (Docket #29). The Court further adopts and affirms the Report and Recommendation of the Magistrate Judge granting Defendant's Motion for Summary Judgment (Docket #40).

IT IS SO ORDERED.

This 25TH day of MAY, 1995.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR **F I L E D**
THE NORTHERN DISTRICT OF OKLAHOMA

MAY 26 1995

DEANNE LINN,)
)
 Plaintiffs,)
)
 v.)
)
 GRAND GATEWAY ECONOMIC)
 DEVELOPMENT ASSOCIATION,)
 et al.,)
)
 Defendants.)

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

Case No. 94-C-190-BU ✓

ENTERED ON DOCKET

DATE MAY 30 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This report and recommendation addresses the following motions, now before the court:

1. Defendant Board of County Commissioners of Mayes County, Motion to Dismiss (docket #2);
2. Defendant Port of Catoosa's Motion to Dismiss (docket #16);
3. Defendant Board of County Commissioners of Ottawa County, Motion to Dismiss (docket #21);
4. Defendant Board of County Commissioners of Delaware County, Motion to Dismiss (docket #19);
5. Defendant Jimmie Mullin's Motion for Summary Judgment (docket #24);
6. Defendant Grand Gateway Economic Development Association's Motion for Summary Judgment (docket #27);
7. Defendants, Boards of Commissioners of Rogers and Craig Counties, Motion to Dismiss (docket #30);
8. Defendant City of Miami's Motion to Dismiss (docket #32);

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9. Defendant Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #35);
10. Defendant Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #55); and
11. Defendant Board of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #59).

Oral argument was heard February 16, 1995 on each of the foregoing Motions.

Following hearing, the undersigned makes the following report and recommendation. Each Motion is addressed separately, below.

1. Defendant Board of County Commissioners of Mayes County, Motion to Dismiss (docket #2);

- a. *Facts*

Brief overview of the facts of this case is important. Plaintiff, Deanne Linn worked as a Planner for the Grand Gateway Economic Association ("Gateway"). Gateway is a non-profit association whose membership is composed of public entities, including city and county governments. The purpose of the association is to organize and coordinate planning for administration of public funding. The association of these various entities acts to conserve resources, bringing together under one "roof" specialists whose services are utilized by each member. Such an arrangement avoids duplication of effort (and scarce resources) among the member governmental entities.

Gateway's Board of Directors is composed of representatives from each of the participating governmental entities. In most cases, the representatives of county governments are elected members of the respective Boards of County Commissioners. In other instances, non-elected government employees represent the governmental entity (*eg.*,

Port of Catoosa and City of Tulsa). Notable, is the fact that Gateway's Board is not comprised of the entire membership of any single governmental entity.

Plaintiff alleges the existence of a "hostile and/or abusive work environment" (§[17] First Cause of Action), in violation of Title VII; retaliatory discharge, also in violation of Title VII; and wrongful discharge (a state-based claim) in violation of the public policy of the State of Oklahoma. In support of her claims, Plaintiff alleges harassing treatment by various individual co-employees/supervisors at Gateway. Plaintiff was terminated from employment at Gateway on October 31, 1992.

b. *Legal Issues*

The Board of County Commissioners of Mayes County ("BCC") ask the court to dismiss the Complaint against them on the grounds that:

1. It is not an "employer" under Title VII of the Civil Rights Act of 1964, amended 1991.
2. Plaintiff has not alleged sufficient facts to render BCC liable under Title VII of the 1964 Civil Rights Act for creation of a "hostile work environment";
3. Plaintiff has not alleged sufficient facts to render BCC liable for retaliatory discharge (i.e., there was no retaliatory action by the BCC); and
4. Plaintiff has not alleged sufficient facts to render BCC liable for wrongful discharged in violation of Oklahoma public policy.

Each of Plaintiff's allegations rest upon the premise that BCC and Plaintiff stand in the relationship of "employer - employee". No liability attaches to BCC for Title VII liability for a "hostile work environment"; for retaliatory discharge; or, indeed, for wrongful discharge under state law, should it not be found to be Plaintiff's "employer".

Plaintiff urges the court to adopt the four-pronged test outlined by the Tenth Circuit

in *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980), ultimately finding that the BCC, though an unnamed party before the EEOC, is nevertheless liable for the actions of the named party, in this case, GGEDA.

The issues are resolved below.

c. **Analysis**

The success or failure of Defendant BCC's Motion to Dismiss depends upon whether BCC is an "employer" under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e through 2000e-17). That Grand Gateway Economic Association is Plaintiff's "immediate" employer, is not in dispute. The question becomes whether the Board of County Commissioners of Mayes County is, in some derivative fashion, also to be considered an "employer" for purposes of Title VII liability.

Plaintiff argues that the Board of Directors of GGEDA (Gateway) "are charged with the responsibility to staff GGEDA", having "established a personnel committee to oversee that responsibility." *See, Plaintiff's Brief in Response (docket #15), at p. 3.* So saying, Plaintiff argues that the BCC "exercises control over some aspect of the Plaintiff's compensation, terms, conditions, or privileges and employment." (citations omitted.) As a result, Plaintiff urges the court to find that the BCC is an "employer".

Courts have struggled with the scope of Title VII, and more particularly as regards the definition of "employer" under the Act. In *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) the Tenth Circuit held:

The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act. We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer

directly.

...
The County may be liable without necessarily knowing of Cannon's actions. "The term 'employer' means a person engaged in an industry affecting commerce...and any agent of such a person." 42 U.S.C. §20003(b). Unfortunately, "[n]owhere in Title VII is the term 'agent' defined." *Barger v. Kansas*, 630 F.Supp. 88, 89 (D.Kan. 1985). We agree with the Fourth Circuit that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." ...In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual without regard to whether the employer knew of the individual's conduct. (Emphasis added.) *Sauers, supra* at 1 F.3d 1125.

In *Evans v. McDonalds Corp.*, 936 F.2d 1087 (10th Cir. 1991),¹ the court considered the question whether McDonalds Corporation, the franchisor, was an "employer" for purposes of the Act, concluding that it was not. Evans was employed by a McDonalds franchisee, and alleged sexual harassment by another co-employee of the franchisee. The court held:

We hold that under no plausible legal theory are defendants Evans' employers. Evans essentially concedes that, under either common law or the "economic realities" test, defendants are not her immediate employers.

...
In these and other cases, courts struggling with the definition of "employer" under Title VII have turned for guidance to a test promulgated by the Nation Labor Relations Board. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930. 933 (11th Cir. 1987). Under this test, the factors to be considered are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

...
In this case McDonald's did not exert the type of control that would make it liable as an employer under Title VII. McDonald's may have stringently controlled the manner of its franchisee's operations, conducted frequent inspections, and provided training for franchise employees. The record also indicates, however, that McDonald's did not have control over Everett Allen's labor relations with his franchise employees. See, *Armbruster*, 711 F.2d at 1337-38 (control over elements

¹ *Evans* was originally tried before the United States District Court for the Northern District of Oklahoma, U.S. District Judge James O. Ellison presiding. The case applied Oklahoma law, and is thus particularly persuasive in this instance.

of labor relations is a central concern)...McDonald's did not have financial control over Everett Allen's franchises. Outside of the necessary control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over Everett Allen was its power to terminate his franchises. (*Emphasis added.*) *Evans, supra*, at 936 F.2d 1089-90.

Similar factual circumstances obtain here as were present in *Evans*. A member of the BCC served as a Director of the Gateway Board. Gateway's functions are related to overall coordination and planning for use of public monies, shared between various local governmental entities. Gateway is not, however, an extension of BCC or any other governmental unit, instead being a separately created entity, described by Plaintiff as a "political subdivision". Neither BCC nor any other individual governmental entity controls the activities of Gateway; nor does BCC or any other individual governmental entity have control of Gateway's labor relations with its employees. Plaintiff's own Response (docket #15) admits that "Defendant here is not the "immediate" employer of Plaintiffs...", further acknowledging that Gateway's "Board of Directors...have established a personnel committee to oversee that responsibility." Response (docket #15) at p. 3.

Thus it is Gateway, and *not* BCC which controls the hiring and firing of Gateway's employees. BCC sent a representative of itself to serve on Gateway's Board of Directors. That fact, standing alone, or, even considered together with the fact that Gateway's purpose is to coordinate planning among the various governmental units whose representatives sit on Gateway's Board, does not confer the necessary "control over the plaintiff's hiring, firing or conditions of employment..." such that it may be said to "operate as the alter ego of the employer..." *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993).

In sum, Gateway's Board of Directors are the decision-makers in the operation of Gateway, functioning much like any other Board of Directors. The fact that the individual members of the Board are also representatives of various governmental entities served by Gateway in no way leads to the conclusion that the individual governmental entities are "employers" and have control over, among other things, Gateway's labor relations function. To so find would require a finding that an individual governmental unit, such as BCC has the ability to unilaterally act -- to "reach in" and control Gateway's activities, in effect by-passing the control of Gateway's Board.

Such is not the case.

There is no support for the proposition that simply because Gateway serves the interests of the governmental units whose representatives sit on its Board, that each individual governmental unit has "control" thus rendering it an "employer" for purposes of Title VII. In point of fact, Plaintiff was actually employed by Gateway, not by any other governmental unit.

Accordingly, the undersigned finds that BCC's Motion to Dismiss should be granted. Specifically, the undersigned finds that BCC is *not* Plaintiff's employer for purposes of Title VII liability. Given the foregoing determination, Plaintiff's other claims against BCC also fail. The court should not retain the state pendent claims as no independent basis for federal jurisdiction exists.

d. **Conclusion**

It is the recommendation of the United States Magistrate Judge that BCC's Motion to Dismiss (docket #2) be granted in its entirety, that the federal claims be dismissed with

prejudice, that the state pendent claims be dismissed without prejudice; and that, as a result, BCC be dismissed from this action altogether.

2. Defendant Port of Catoosa's Motion to Dismiss (docket #16)

Defendant City of Tulsa-Rogers County Port of Catoosa ("Port of Catoosa") adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in its Motion to Dismiss (docket #16) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners, *to-wit*: that the Port of Catoosa is not Plaintiff's "employer" for purposes of Title VII liability.

Adopting the holding set forth above, the undersigned finds that Defendant Port of Catoosa's Motion to Dismiss (docket #16) should be **granted** in its entirety and Defendant Port of Catoosa dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

3. Defendant Board of County Commissioners of Ottawa County, Motion to Dismiss (docket #21)

Defendant Board of County Commissioners of Ottawa County adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in its Motion to Dismiss (docket #21) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners for Mayes County, *to-wit*: that the Board of County Commissioners of Ottawa County are not Plaintiff's "employer" for purposes of Title VII liability.

Adopting the holding set forth above, the undersigned finds that Defendant Board of County Commissioner's Motion to Dismiss (docket #21) should be **granted** in its entirety and Defendant Board of County Commissioners of Ottawa County dismissed from this

action; and such is the recommendation of the United States Magistrate Judge.

4. Defendant Board of County Commissioners of Delaware County, Motion to Dismiss (docket #19)

Defendant Board of County Commissioners of Delaware County adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in its Motion to Dismiss (docket #19) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners for Mayes County, *to-wit*: that the Board of County Commissioners of Delaware County are not Plaintiff's "employer" for purposes of Title VII liability.

Adopting the holding set forth above, the undersigned finds that Defendant Board of County Commissioner's Motion to Dismiss (docket #19) should be **granted** in its entirety and Defendant Board of County Commissioners of Delaware County dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

5. Defendant Jimmie Mullin's Motion for Summary Judgment (docket #24)

a. The Facts

Mullin was the Executive Director of Gateway during the time of Plaintiff's employ. Mullin served as Plaintiff's immediate supervisor, and was so acting on the date she left her employment (October 31, 1992). Some four (4) months later, Mullin resigned (April 26, 1993).

Plaintiff filed her EEOC charge on May 4, 1993, naming Gateway, but not Mullin.

b. The Summary Judgment Standard

Defendant Jimmie Mullin ("Mullin") seeks summary judgment under Rule 56, *Federal Rules of Civil Procedure*. Summary judgment is proper if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rule 56(c), Federal Rules of Civil Procedure*. Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any", which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986).

The non-moving party may oppose the motion with any of the evidentiary materials listed in *Rule 56(c)*, but reliance on the pleadings alone is not sufficient to withstand summary judgment. In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 402, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, at 106 S.Ct. at 2512.

c. **Analysis**

Here, the initial question is similar to that posed by the governmental entities. Mullin asserts he is immune from suit under Title VII as he is an individual, and not an

"employer" under that act. The Tenth Circuit has recently held:

Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. The relief granted under Title VII is against the *employer* not individual employees whose action would constitute a violation of the Act. We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993). See also, *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987).

Examination of the instant Complaint reveals that Mullin, with the other named Defendants is charged with violation of Title VII (claims I and II) for wrongful discharge in violation of Oklahoma public policy. The claim against Mullin is evidently brought against him individually, as Gateway is named separately from him. Thus, no issues of fact arise. What remains is a question of law.

Applying the holding in *Sauer*, the undersigned finds that Mullin is improperly named as an individual defendant in a Title VII claim. He was *not* Plaintiff's employer and cannot, therefore, be held individually liable for damages under Title VII.² Accordingly, Plaintiff's Title VII claims should be dismissed as against him.

d. Conclusion

It is the report and recommendation of the United States Magistrate Judge that Defendant's Motion for Summary Judgment (docket #24) be granted as follows:

- a) Judgment be granted against Plaintiff and in favor of Defendant Mullins on Plaintiff's First and Second Causes of Action (her Title VII claims); and
- b) That Plaintiff's Third Cause of Action (her state-based wrongful discharge claim) be dismissed without prejudice, as pendent to the federal claims.

² *The same analysis would follow had he been named in the EEOC Complaint. As he was not, he has not received notice of the claim, and suit will not obtain in any case.*

6. Defendant Grand Gateway Economic Development Association's Motion for Summary Judgment (docket #27)

a. The Facts

Grand Gateway Economic Development Association ("Gateway") files its Motion for Summary Judgment arguing that Plaintiff is time-barred from suing under Title VII for failure to file her EEOC charge within 180 days of the last act of discrimination occurred, citing Title 42 U.S.C. §2000e-5(e). In support of its Motion it offers the *Affidavit of Joyce R. Hinse*, Supervisor with the EEOC (attached as "Exhibit A"). Ms. Hinse's *Affidavit* authenticates the appended "Form 5 - Charge of Discrimination" as "a true and correct copy" of the charge filed by Plaintiff.

Undisputed is the fact that Plaintiff left Defendant's employ on October 31, 1992. Defendant, accepting Plaintiff's claim as true for purposes of its Motion, concedes "that this is the last act of discrimination claimed by Plaintiff". (See, Defendant's Brief in Support of Motion for Summary Judgment (docket #28) at p.1). The date of the Charge of Discrimination (Exhibit "A") is May 4, 1993. Defendant notes that the time elapsed between Plaintiff's date of last employ and the date of the Charge is "more than 180 days after the last act of discrimination..." (See, Defendant's Brief in Support of Motion for Summary Judgment (docket #28) at p.1).

These facts, contend Defendant, entitle it to summary judgment.

Responsively, Plaintiff attaches her *Affidavit* authenticating a "Mail In Information Sheet For Filing a Charge of Discrimination". The "Sheet" was completed as a precursor to filing the actual *Charge of Discrimination*, and is dated January 25, 1993. Plaintiff also attaches further submission to the EEOC by way of her attorney by correspondence dated

March 26, 1993. Both dates -- January 25, 1993 and March 26, 1993 -- are within the 180 day time frame set forth in Title 42 U.S.C. §2000e-5(e). A further *Affidavit of Joyce R. Hinse*, EEOC Supervisor, is also provided by Plaintiff, acknowledging receipt of the March 26, 1993 submission on March 29, 1993 -- also within the 180 day period. Finally, Plaintiff attaches copies of a "Notice of Claim Under the Governmental Tort Claims Act", sent out on October 27, 1992 to various Gateway Board Members.

With the foregoing, Plaintiff asserts she has successfully overcome Defendant's Motion for Summary Judgment.

b. **The Summary Judgment Standard**

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Rule 56(c), Federal Rules of Civil Procedure*. Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any", which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986).

The non-moving party may oppose the motion with any of the evidentiary materials listed in *Rule 56(c)*, but reliance on the pleadings alone is not sufficient to withstand summary judgment. In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 402, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, at 106 S.Ct. at 2512.

c. **Analysis**

Defendant has submitted the *Affidavit of Joyce R. Hinse*, establishing *prima facie*, that there is no genuine issue of material fact as to the question of Plaintiff's compliance with the 180-day rule. Plaintiff, as non-moving party, bears the burden of going beyond the pleadings and submitting responsive evidence rebutting that of Defendant, and demonstrating that there yet remains a genuine issue of material fact for trial.

Upon review of the affidavits submitted by both parties, together with the documentary submissions attached thereto, the undersigned finds as follows.

While Plaintiff's formal *Charge of Discrimination* was dated May 4, 1993, and thus outside the 180-day window prescribed by statute, she initiated the process well before that time *and within the allotted 180-day time frame*. The Tenth Circuit has addressed this issue:

The time limit for filing a discrimination charge may be equitably tolled "where a plaintiff has been lulled into inaction by her past employer, state or federal agencies or the courts" *Purrington v. University of Utah*, 996 F.2d 1025, 1030 (10th Cir. 1993), citing *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984). (*Emphasis added.*)

The court further noted:

[T]he application of equitable doctrines rests in the sound discretion of the district court; absent a showing of abuse of discretion, the district court's exercise thereof will not be disturbed on appeal. *Purrington v. University of Utah*, 996 F.2d 1025, 1030 (10th Cir. 1993), citing *E.E.O.C. v. General Lines, Inc.*, 865 F.2d 1555, 1558 (10th Cir. 1989).

The undersigned finds that Plaintiff's submission of the "Mail In Information Sheet For Filing a Charge of Discrimination" on January 25, 1993 and the submission of materials subsequent to that, received on March 29, 1993 by the E.E.O.C. acted to equitably toll the 180-day time period. Plaintiff was complying with E.E.O.C. procedures in filing the precursor documents. The fact that the actual *Charge of Discrimination* was not filed until May 4, 1993 should not imperil her right to proceed, when she had, in fact, followed agency procedure in initiating the process. In effect, Plaintiff was "lulled into inaction" by the agency; though in reality, the agency was following its procedures, which understandably often require more time than anticipated.

Accordingly, the undersigned finds that Plaintiff timely initiated the charging process before the E.E.O.C.; and that the court should exercise its discretion in so finding. Given the precursor documents, and the fact that the E.E.O.C. itself has verified Plaintiff's timely contact (*see, Plaintiff's Exhibit "2", (docket #54)*) it is not an abuse of discretion for the court to find that the time period under 42 U.S.C. §2000e-5(e) has been equitably tolled.

Defendant's Motion for Summary Judgment should be denied.

d. **Conclusion**

The United States Magistrate Judge recommends that the court determine the 180-day time period has been equitably tolled by Plaintiff's earlier submissions to the E.E.O.C.

(docket #27) be denied.

7. Defendants, Boards of Commissioners of Rogers and Craig Counties, Motion to Dismiss (docket #30)

Defendant Board of County Commissioners of Rogers and Craig Counties adopts the Motion to Dismiss and Brief in Support as filed by the Mayes County Board of County Commissioners, and urges the court, in their Motion to Dismiss (docket #30) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners for Mayes County, *to-wit*: that the Board of County Commissioners of Rogers and Craig Counties are not Plaintiff's "employer" for purposes of Title VII liability.

Adopting the holding set forth above (addressing Defendant Mayes County Motion to Dismiss), the undersigned finds that Defendant Board of County Commissioner's Motion to Dismiss (docket #30) should be granted in its entirety and Defendant Board of County Commissioners of Rogers and Craig Counties dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

8. Defendant City of Miami's Motion to Dismiss (docket #33)

Defendant City of Miami files essentially the same motion as that filed by the Mayes County Board of County Commissioners, Motion to Dismiss (docket #2) and Brief in Support, and urges the court, in its Motion to Dismiss (docket #32) to dismiss the case against on the same grounds as set forth by the Board of County Commissioners for Mayes County, *to-wit*: that the City of Miami are not Plaintiff's "employer" for purposes of Title VII liability.

Adopting the holding set forth above (addressing Defendant Mayes County Motion to Dismiss), the undersigned finds that Defendant City of Miami's Motion to Dismiss

(docket #33) should be granted in its entirety and Defendant City of Miami be dismissed from this action; and such is the recommendation of the United States Magistrate Judge.

9. Defendant Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #35)

Defendant Board of County Commissioners of Mayes County ("BCC") moves for summary judgment, arguing that as a matter of law that it is entitled to judgment as Plaintiff failed to name it in her May 4, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that BCC's Motion to Dismiss (docket #2) be granted. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #35) be denied as moot.

In the event the court declines to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #2), the undersigned finds as follows.

The undersigned finds that BCC's argument is persuasive. Plaintiff did not name BCC in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #36). The defect is jurisdictionally fatal. *See, Defendant's Brief in Support of Motion for Summary Judgment at p. 2 (docket #36)*.

Accordingly, should the court decline to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #2), the undersigned recommends that Defendant BCC's Motion for Summary Judgment (docket #35) be granted.

10. Defendant Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #55)

Defendant Board of County Commissioners of Delaware County ("BCC") moves for

summary judgment, arguing that as a matter of law that it is entitled to judgment as Plaintiff failed to name it in her May 4, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that BCC's Motion to Dismiss (docket #2) be **granted**. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #55) be **denied as moot**.

In the event the court declines to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #19), the undersigned finds as follows.

The undersigned finds that BCC's argument is persuasive. Plaintiff did not name BCC in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #56). The defect is jurisdictionally fatal. *See Defendant's Brief in Support of Motion for Summary Judgment at p. 2 (docket #56)*.

Accordingly, should the court decline to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #19), the undersigned recommends that Defendant BCC's Motion for Summary Judgment (docket #55) be **granted**.

11. **Defendant Board of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #59).**

Defendant Board of County Commissioners of Rogers and Craig Counties ("BCC") moves for summary judgment, arguing that as a matter of law that they are entitled to judgment as Plaintiff failed to name it in her May 4, 1993 *Charge of Discrimination*. The undersigned has earlier recommended that BCC's Motion to Dismiss (docket #30) be **granted**. Should the court uphold the earlier recommendation, the undersigned recommends that BCC's Motion for Summary Judgment (docket #59) be **denied as moot**.

In the event the court declines to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #30), the undersigned finds as follows.

The undersigned finds that BCC's argument is persuasive. Plaintiff did not name BCC in the original *Charge*, as shown at Exhibit "1" to the Defendant's Brief in Support of Motion for Summary Judgment (docket #60). The defect is jurisdictionally fatal. *See Defendant's Brief in Support of Motion for Summary Judgment at p. 2 (docket #60)*.

Accordingly, should the court decline to adopt the earlier recommendation regarding BCC's Motion to Dismiss (docket #30), the undersigned recommends that Defendant BCC's Motion for Summary Judgment (docket #59) be **granted**.

12. Summary

Following is a summary of the recommendations of the United States Magistrate Judge, outlined per motion:

1. Defendant Board of County Commissioners of Mayes County, Motion to Dismiss (docket #2) - Recommended: **granted, as set forth above.**
2. Defendant Port of Catoosa's Motion to Dismiss (docket #16) - Recommended: **granted, as set forth above.**
3. Defendant Board of County Commissioners of Ottawa County, Motion to Dismiss (docket #21) - Recommended: **granted, as set forth above.**
4. Defendant Board of County Commissioners of Delaware County, Motion to Dismiss (docket #19) - Recommended: **granted, as set forth above.**
5. Defendant Jimmie Mullin's Motion for Summary Judgment (docket #24) - Recommended: **granted, as set forth above.**
6. Defendant Grand Gateway Economic Development Association's Motion for Summary Judgment (docket #27) - Recommended: **denied, as set forth above.**
7. Defendants, Boards of Commissioners of Rogers and Craig Counties, Motion

to Dismiss (docket #30) - Recommended: granted, as set forth above.

8. Defendant City of Miami's Motion to Dismiss (docket #32) - Recommended: granted, as set forth above.
9. Defendant Board of County Commissioners of Mayes County, Motion for Summary Judgment (docket #35) - Recommended: granted, as set forth above.
10. Defendant Board of County Commissioners of Delaware County, Motion for Summary Judgment (docket #55) - Recommended: granted, as set forth above.
11. Defendant Board of County Commissioners of Rogers and Craig Counties, Motion for Summary Judgment (docket #59) - Recommended: granted, as set forth above.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.³

Dated this 25th day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

³ See Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991).

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

LOUISE PLAISTED,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES, Donna Shalala, Secretary,)
)
Defendant.)

FILED
MAY 26 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
89-C-0005-EH

ENTERED ON DOCKET
DATE MAY 30 1995

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Now before the United States Magistrate Judge is Defendant's Motion To Dismiss For Lack Of Subject Matter Jurisdiction (docket #38) together with resolution of the underlying appeal. The issue is whether the court has jurisdiction over a case where the Commissioner of Social Security ("Commissioner") denied widows' benefits to Plaintiff Louise Plaisted. If the court has jurisdiction, a second issue is whether Ms. Plaisted should be awarded widows' benefits for the period 1987 to 1990. For the reasons discussed below, the Magistrate Judge finds that the court has jurisdiction and further concludes that Ms. Plaisted should be awarded benefits for the three-year period in question.

I. Procedural History

Since 1984, Ms. Plaisted has applied for widow's benefits under the Social Security Act three (3) times. The Commissioner denied the first two applications and Ms. Plaisted failed to appeal to a federal court. Her third application, which was partially granted, has literally bounced back and forth between the agency and the courts for the past eight (8) years.

The trail of the bureaucratic/legal maze began January 25, 1984 when Ms. Plaisted applied for widow's disability benefits. The application came after Ms. Plaisted's husband died during a 1984 boating accident. The Commissioner, then the Secretary of Health and Human Services, denied the application. Ms. Plaisted did not appeal that decision.

She applied a second time on February 8, 1985 and was again denied. She exhausted her administrative remedies by seeking review from the Administrative Law Judge ("ALJ") and thence the Appeals Council. However, she did not appeal to a federal court.

On January 20, 1987, Ms. Plaisted filed her third application. The application was again denied by the Commissioner, including the Administrative Law Judge ("ALJ"). This time Ms. appealed to the court and the United States Magistrate Judge recommended the Commissioner's decision be reversed. *Report and Recommendation, page 6 (docket #9)*. However, the District Court declined to adopt the recommendation and affirmed the Commissioner's decision. Ms. Plaisted then appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit remanded the case on October 31, 1990, writing:

Appellee's motion for a remand is granted. This matter is remanded to the district court to remand for further administrative proceedings before the Secretary. If plaintiff is dissatisfied with the decision of the Secretary, new proceedings must be initiated. Order (docket #20).

The District Court, in turn, issued a January 29, 1991 Order. It read: "In accordance with the Order of the United States Court of Appeals For the Tenth Circuit filed on October 31, 1990, this matter is remanded to the Secretary for further administrative proceedings." *Order (docket #21)*.

On March 21, 1991, the Appeals Council remanded the case to the ALJ. The Appeals Council noted that a new statutory standard for widow's benefits that was implemented by the Omnibus Budget Reconciliation Act of 1990 ("OBRA") became effective January 1, 1991. The Appeals Council also instructed the ALJ to conduct further proceedings "consistent with the order of the court, including the opportunity for a hearing and a new decision." *Record at 228.*

Pursuant to the Appeals Council order, the ALJ held another hearing where Ms. Plaisted testified. He incorporated this new evidence into his analysis in addition to reviewing evidence already in the record. The ALJ found that, while Ms. Plaisted had a residual functional capacity ("RFC") to perform light exertional work, the Medical Vocational Guidelines ("Grids") mandated a finding of disability. He wrote:

It is the decision of the Administrative Law Judge that, based upon the application filed on January 12, 1987, the claimant is entitled to a period of disability or widow insurance benefits under section 202E and 223, respectively, of the Social Security Act, as amended, commencing March 13, 1987.

According to the Commissioner, the *Payment Center* did not abide by the ALJ's decision because the ALJ misinterpreted the OBRA provision. Consequently, the *Payment Center* decided that Ms. Plaisted should receive disability benefits as of February 28, 1990 - her 60th birthday. In making that decision, the *Payment Center*, in effect, overruled the ALJ's decision and declined to pay any benefits between March 17, 1987 (the date the ALJ ruled Ms. Plaisted was disabled) and February 28, 1990, notwithstanding the ALJ's determination.

Ms. Plaisted, admittedly baffled over the Commissioner's (or *Payment Center's*) decision, filed a Motion To Reopen (*docket #22*) on January 19, 1993. Eight months later, without any objection from the Commissioner, this court granted the motion (see docket #24). Then, nearly two years after Ms. Plaisted filed the Motion to Reopen, the Commissioner filed the instant Motion To Dismiss on February 27, 1995. Prior to filing the Motion To Dismiss, on February 25, 1995, the Commissioner filed a Supplemental Brief (*docket #36*) which mentioned nothing about the jurisdictional question, now raised for the first time.

II. Legal Analysis

Resolution of this case appears to be more about attempting to inject some common sense into what has become a seemingly endless bureaucratic maze. Delays by the agency, the parties and the court have contributed to what is an 11-year dispute over Ms. Plaisted's benefits. However, at this writing, the parties are still quarreling over the meaning of the ALJ's ruling and whether Ms. Plaisted should receive widow's benefits from March 17, 1989 until January 28, 1990. Common sense dictates that the process should come to an end. More effort has been expended by the government (including the courts) than perhaps Ms. Plaisted's limited benefits are actually, dollar-for-dollar worth. The following analysis embraces a common sense approach to end this 11-year long bureaucratic tail-twisting.

Before discussing the specific issues, the undersigned emphasizes that he is placing a great deal of emphasis on resolving this dispute. Remanding the case for additional proceedings or requiring Ms. Plaisted to file yet another civil suit to resolve the dispute only further expends judicial and government resources. Therefore, judicial economy

should be seen as the primary objective behind this decision.¹

With this in mind, the first issue for consideration is whether the Court has subject matter jurisdiction over the case. When a court remands a case, it can do so in one of two ways under 42 U.S.C. §405(g).² The first is what is described as a "sentence four" remand, which terminates a the court's jurisdiction of the action. *Shalala v. Schaefer*, 113 S.Ct. 2625, 2630 (1993). The second, commonly called a sentence six remand, allows the court to retain jurisdiction. *Id.* at 2631, *fn. 4*, citing *Sullivan v. Hudson*, 109 S.Ct. 2248, 2255 (1989)("In many remand situations, the court will retain jurisdiction over the action pending the Secretary's decision and its filing with the court".) At least one reason why a court should retain jurisdiction over a Social Security case has been explained by the Supreme Court:

The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by the ALJs and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence. *Hudson*, 109 S.Ct. at 2247, citing *J. Mashaw, Social Security Hearings and Appeals 133 (1978)*.

In the case at bar, the remand orders from both the Tenth Circuit and from this Court do not specifically state whether they are derived from **sentence four** or **sentence six**.

¹ Rule 1 of the Fed.R.Civ.P. reads in part: "They [rules of civil procedure] shall be construed and administered to secure the just, speedy and inexpensive determination of every action." *emphasis added*.

² Sentences four and six of §405(g) provide: [4] The court shall have power to enter, upon the pleadings and the transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary [Commissioner], with or without remanding the case for a rehearing...[6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based."

One reason for not labeling the remand as a "sentence four" or a "sentence six" is that the *Schaefer, supra*, decision did not take place until 1993 -- well after the remand orders were filed. Prior to *Schaefer*, the Tenth Circuit had concluded that a court could retain jurisdiction, depending on the circumstances, in both "sentence four" and "sentence six" remands. *Gutierrez v. Sullivan*, 953 F.2d 579, 584 (10th Cir. 1992). **As a result, at the time the Tenth Circuit filed its remand order in the case at bar, the distinction between the types of remand was not as significant as it is today.**

The question, therefore, is whether the remand orders should now be categorized as "sentence four" or "sentence six". The specific language in the orders is of little help and the record is sparse concerning the reasons for the Tenth Circuit action. The Commissioner argues that the Tenth Circuit order was a "sentence four" remand because it noted that plaintiff should begin "new proceedings" if dissatisfied with the Secretary's decision. That, language, however, without more, is not convincing. New proceedings could be interpreted as filing a new lawsuit, or, may be interpreted as meaning that additional proceedings should take place -- which arguably resembles a "sentence six" remand.

One purpose for the remand order involved an interpretation of the then recently passed OBRA provision. The earlier ALJ decision did not apply that standard and so the appellate court apparently wanted to give the ALJ that opportunity. But the record also suggests that the Tenth Circuit wanted to give the ALJ the opportunity to hear additional evidence (i.e., Ms. Plaisted's testimony) and to re-examine all of the evidence in light of the OBRA provision. It also should be noted that the ALJ, after the remand, considered

several new pieces of medical evidence prior to making his decision.³

The undersigned cannot be certain as to what type of remand the Tenth Circuit had in mind, but the October 31, 1990 remand should be categorized as a "sentence six" remand: good cause existed for the ALJ to examine "new" and "material" evidence that was not previously incorporated into the record. This means the court retained jurisdiction over the dispute.

Since the Court has subject matter jurisdiction, the next issue is the more substantive one: Did the Commissioner err by denying widow's benefits between March 17, 1987 and February 28, 1990?⁴ The law to be applied during that time is outlined in Social Security Ruling 91-3p. *Also, see, generally, Davidson v. Secretary Health and Human Services*, 912 F.2d 1246 (10th Cir. 1990). Part of Ruling 91-3p reads:

If the application of the five-step sequential evaluation process results, at step five, in a finding that the widow is unable to engage in substantial gainful activity, an additional determination will be needed regarding the widow's entitlement to disability benefits for months prior to January 1991, i.e., her ability to engage in any gainful activity. SSA will make this determination utilizing the residual functional capacity assessment used in conjunction with steps four and five of the sequential evaluation process, but without considering age, education, and work experience.

One reason for the remand was to allow the ALJ to examine the evidence in light of Social Security Ruling 91-3p. However, some of his findings suggest that he either did not apply the Ruling or did not apprehend its full import. The ALJ clearly found that Ms. Plaisted was disabled as of March as of March 13, 1987, but, in reaching that decision, he

³ See Exhibits B-28 (consultative examination) and B-30 (report by treating physician Douglas Cox).

⁴ The Commissioner's decision to award benefits to Ms. Plaisted since February 28, 1990 is not in dispute. That decision is based on the usual sequential analysis used in most Social Security disability cases. Ms. Plaisted, in effect, was found to be disabled at step 5.

considered Ms. Plaisted's *age, education and work experience* -- something 91-3p prohibits. The ALJ also found that Ms. Plaisted could perform light work, which, in effect, means she can engage in gainful activity. As a result, the ALJ's decision was a "Catch 22" for Ms. Plaisted: **The decision was favorable but it appeared to be based on incorrect legal reasoning.**

To complicate matters further, the Record suggests that communication problems existed between the Commissioner and Ms. Plaisted. Ms. Plaisted believed the decision by the ALJ was a favorable one and, as a result, did not appeal the decision. The Commissioner, on the other hand, maintains that clear notice was sent to Ms. Plaisted indicating she would not receive benefits from 1987 to 1990 and, if she did not like this decision, she could appeal. In reviewing the Record, however, the undersigned finds no clear and specific notice that adequately explained what transpired (i.e., the *Payment Center*, in effect, overturned the part of the ALJ's finding, resulting in a loss of benefits from 1987 to 1990).⁵ On the other hand, the undersigned also questions why Mr. Paul McTighe, a veteran Social Security attorney, did not take further steps to protect his client's rights, if indeed they were imperiled, as the Commissioner now urges.

One brightline emerges from these circumstances. Form should not override substance and mechanical analysis should not outweigh common sense. Simply put, the dispute mushroomed because the Commissioner and the ALJ did not adequately

⁵ The facts concerning how the Commissioner notified Ms. Plaisted of the *Payment Center's* decision are sparse. The Commissioner's Brief (docket #39) explains that notice was given to Ms. Plaisted. One such notice appears on page 207 of the Record. It is a form letter form indicating that the claimant should carefully read the ALJ decision and then appeal if she disagrees with it. The other "notice" cited by the Commissioner is Exhibit A (docket #39). It, too, is a form letter that includes no specifics concerning Ms. Plaisted's case. Neither letter explains that the *Payment Center* had, in effect, overturned part of the ALJ's disability award. As a result, it seems logical that Ms. Plaisted -- once she read the ALJ's decision -- believed that the decision was favorable and there was no reason to appeal.

communicate with Ms. Plaisted and her counsel.

First, the ALJ issued an ambiguous order⁶, which clearly awarded benefits to Ms. Plaisted from 1987 forward. It is unclear, however, why the ALJ -- who was specifically instructed to follow Ruling 91-3p -- either did not do so or improperly analyzed the ruling.

The end result was a decision that was baffling to both the claimant and the Commissioner.

Second, the *Payment Center's* attempt to remedy the situation was equally poor as the aforementioned notices did not clearly inform Ms. Plaisted of the decision to deny disability benefits from 1987 to 1990. Under these circumstances, the undersigned does not believe justice would be served by "pinning" the blame on Ms. Plaisted when the "culprit" is the Commissioner, acting through the bureaucratic armor of the *Payment Center*.⁷

Therefore, the United States Magistrate Judge recommends that the ALJ's decision to award benefits from March 13, 1987 through January 28, 1990 be **reinstated**. The Magistrate Judge thus recommends that the Commissioner's decision concerning entitlement to Plaintiff's benefits for the period March 13, 1987 through January 28, 1990 be **REVERSED** and that Ms. Plaisted be awarded widow's benefits from March 13, 1987 until January 28, 1990. Given the length of this litigation and the need for closure, the

⁶ In addition to the ambiguous ALJ decision and the unclear notice, the Commissioner's failure to file a Motion to Dismiss until two years after the Court granted Ms. Plaisted's Motion To Reopen should be noted. While the issue of subject matter jurisdiction can be raised at any time in a proceeding, the eleventh-hour Motion To Dismiss smacks either of a delay tactic or a lack of preparation by the Commissioner's attorney.

⁷ It is interesting, with all of the resources, both administratively and judicially, dedicated to neutral adjudication of entitlement to benefits, within the various mechanisms of the agency and of the court dedicated to eligibility determination based upon due process, that the Payment Center could unilaterally void the ALJ's determination, without any due process whatsoever. Something is awry in a system which on its face appears to afford due process, but which effectively denies it after the fact.

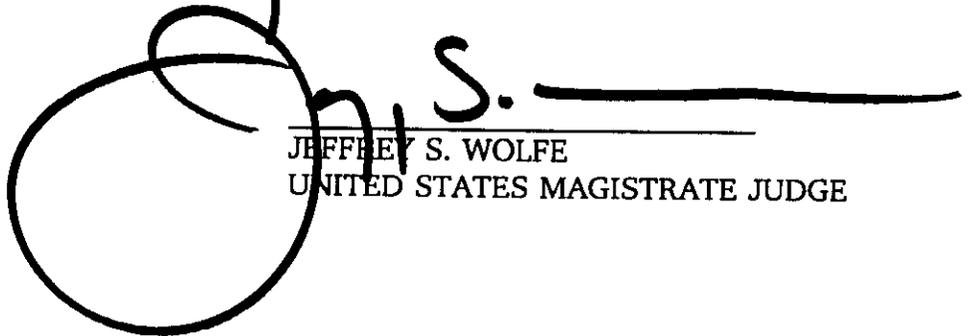
United States Magistrate Judge recommends that widow's disability benefits be awarded Ms. Plaisted for the stated period.

Therefore, the Magistrate Judge recommends the Commissioner's decision to deny benefits for the stated period be **REVERSED** and benefits awarded. *See, Broadbent v. Harris, 698 F.2d 407 (10th Cir. 1983).*

The Magistrate Judge also recommends that Defendant's Motion to Dismiss (docket #38) be **DENIED**.

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of the receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁸

Dated this 26th day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

⁸ See *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
LESLIE JOE HEARD; CRYSTAL JANE)
HEARD; RHONDA JEAN MATTHEWS)
formerly RHONDA JEAN HEARD)
formerly LYNDA LEE HEARD;)
SERVICE COLLECTION ASSOCIATION,)
INC.; STATE OF OKLAHOMA, ex rel)
OKLAHOMA TAX COMMISSION; STATE)
OF OKLAHOMA, ex rel. DEPARTMENT)
OF HUMAN SERVICES; CITY OF)
GLENPOOL, Oklahoma; COUNTY)
TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

MAY 25 1995

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

ENTERED MAY 30 1995
DATE _____

CIVIL ACTION NO. 94-C-525-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 25th 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, SERVICE
COLLECTION ASSOCIATION, INC., appears by its attorney, Daniel M.
Webb, esq.; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA
TAX COMMISSION, appears by Kim D. Ashley, Assistant General
Counsel; the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF
HUMAN SERVICES, appears by Sheila A. Condren, OBA Firm #44; and
the Defendants, LESLIE JOE HEARD; CRYSTAL JANE HEARD, RHONDA JEAN

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

MATTHEWS, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LESLIE JOE HEARD, was served a copy of Summons and Complaint on November 2, 1994, by Certified Mail; that the Defendant, CRYSTAL JANE HEARD, was served with process a copy of Summons and Complaint on October 25, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on May 23, 1994, by Certified Mail; that Defendant, CITY OF GLENPOOL, Oklahoma, was served a copy of Summons and Complaint on May 23, 1994, by Certified Mail; and that Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on September 9, 1994, by Certified Mail.

The Court further finds that the Defendant, RHONDA JEAN MATTHEWS formerly Rhonda Jean Heard formerly Lynda Lee Heard, 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 November 18, 1994, and continuing through December 23, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, RHONDA JEAN MATTHEWS formerly Rhonda Jean Heard formerly Lynda Lee Heard, 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, RHONDA JEAN MATTHEWS formerly Rhonda Jean Heard formerly Lynda Lee Heard. 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 her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 9, 1994; that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., filed its Answer on June 15, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on June 9, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN

SERVICES, filed its Answer on September 23, 1994; and that the Defendants, LESLIE JOE HEARD; CRYSTAL JANE HEARD; RHONDA JEAN MATTHEWS; and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, RHONDA JEAN MATTHEWS is one and the same person formerly referred to as Rhonda Jean Heard and Lynda Lee Heard. The Defendants, RHONDA J. HEARD and LESLIE JOE HEARD were divorced in Tulsa District Court on June 14, 1990, Case No. FD-90-2283, recorded on June 14, 1990, Book 5259, Page 123, in the records of Tulsa County, Oklahoma. The Defendants, LESLIE JOE HEARD and CRYSTAL JANE HEARD are now married, and are husband and wife.

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 Eleven (11), Block Four (4), BRENTWOOD II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Amended plat thereof.

The Court further finds that on May 5, 1983, Mark Wayne Johnson, executed and delivered to MIDLAND MORTGAGE CO., his mortgage note in the amount of \$53,150.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, Mark Wayne Johnson, a single

person, executed and delivered to MIDLAND MORTGAGE CO., a mortgage dated May 5, 1983, covering the above-described property. Said mortgage was recorded on May 9, 1983, in Book 4689, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 28, 1989, Midland Mortgage Co., 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 March 7, 1989, in Book 5170, Page 766, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, LESLIE JOE HEARD and LYNDA LEE HEARD, became holders of the record title of the property by virtue of General Warranty Deed dated July 11, 1988, and recorded on July 14, 1989, in Book 5114, Page 1300, in the records of Tulsa County, Oklahoma. The Defendants, LESLIE JOE HEARD and LYNDA LEE HEARD, are the current assumptors of the subject indebtedness.

The Court further finds that on March 1, 1989, the Defendants, LESLIE JOE HEARD and LYNDA LEE HEARD, 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 February 1, 1990, June 1, 1991, and March 1, 1992.

The Court further finds that the Defendant, LESLIE JOE HEARD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof the Defendant, LESLIE JOE HEARD, is indebted to the Plaintiff in the principal sum of \$98,884.03, plus interest at the rate of 12 percent per annum from May 12, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$352.79 (\$2.40 fees for service of Summons and Complaint, \$350.39 publication fees).

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 \$39.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$34.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of \$33.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., has a lien on the property which is the subject matter of this action by virtue of a Judgment, in the amount of \$7,027.65, plus interest and costs, which became a lien on the property as of March 28, 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of a Tax Warrant, in the amount of \$92.52, plus accrued and accruing interest and penalties and costs, which became a lien on the

property as of December 16, 1987. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$8,363.52, which became a lien on the property as of February 25, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, LESLIE JOE HEARD; CRYSTAL JANE HEARD; RHONDA JEAN MATTHEWS; and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, LESLIE JOE HEARD, in the principal sum of \$98,884.03, plus interest at the rate of 12 percent per annum from May 12, 1994 until judgment, plus interest thereafter at the current legal rate of 6.287 percent per annum until paid, plus the costs of this action in the amount of

\$352.79 (\$2.40 fees for service of Summons and Complaint, \$350.39 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$106.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of \$92.52, plus accrued and accruing interest, costs and penalties, for state taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., have and recover judgment in the amount of \$7,027.65, plus accrued and accruing interest and attorney fees, and costs, for Judgment lien.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have and recover judgment in the amount of \$8,363.52, for its Judgment lien, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, LESLIE JOE HEARD; CRYSTAL JANE HEARD; RHONDA JEAN MATTHEWS; and CITY OF GLENPOOL, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, 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, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of 92.52, state taxes which are currently due and owing, plus accrued and accruing interest.

Fourth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, INC., in the amount of \$7,027.65, plus accrued and accruing interest and attorney fees, and costs, for a judgment lien.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of

\$73.00, personal property taxes which are currently due and owing.

Sixth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, in the amount of \$8,363.52, for a judgment.

Seventh:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$33.00, personal property taxes which are currently due and owing.

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

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

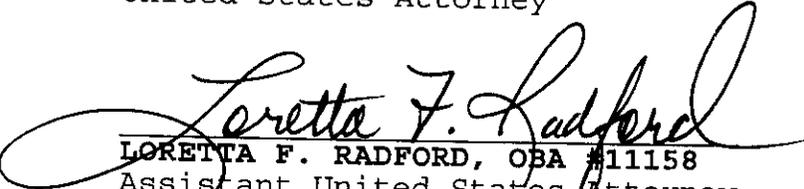
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

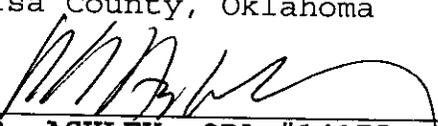
UNITED STATES DISTRICT JUDGE

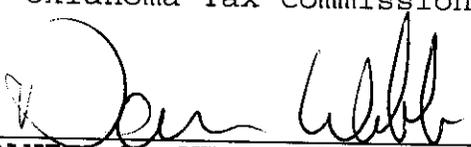
APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
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Department of Humans Services

Judgment of Foreclosure
Civil Action No. 93-C-525-B

LFR:flv

ENTERED ON DOCKET
DATE MAY 30 1995

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

FILED

MAY 26 1995

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

ELIZABETH WARREN BLANKENSHIP)
TRUST A, PATRICIA WARREN)
SWINDLE TRUST A, JEAN WARREN)
YOUNG TRUST A, MARILYN WARREN)
COWART TRUST A, DOROTHY WARREN)
KING TRUST A, NATALIE O. WARREN)
LIVING TRUST (JOHN GABERINO,)
TRUSTEE),)
)
Plaintiff,)
)
vs.)
)
UNION PACIFIC RESOURCES COMPANY)
)
Defendant.)

No. 94-C-911-K

ORDER

Now before the Court is the motion to stay filed by Defendant Union Pacific Resources Company ("UPRC"). The Plaintiffs in the captioned action, hereinafter referred to as the "Warren Group," are overriding royalty interest owners in certain oil and gas leases located in Texas.

I. Facts

The Warren Group filed this action, hereinafter the "Federal Action" on September 26, 1994, asserting various claims against UPRC. However, at that time, the Warren Group was joined by another party, Warren American Oil Company ("Warren American"), a Texas Corporation. Since the principal place of business of UPRC is Texas, there was a lack of diversity among the parties caused by the inclusion of Plaintiff Warren American. Therefore, this Court granted Plaintiffs' Application to dismiss Warren American from the

Complaint on December 8, 1994 and thereby retained jurisdiction over the case.

UPRC filed an action on October 20, 1994 in Texas state court, hereinafter referred to as the "Texas Action." In addition to the Warren Group, the Defendants in the Texas Action include Warren American, Southwest Royalties, Inc. ("Southwest Royalties"), and Adelle Ann McGloin ("McGloin"), hereinafter referred to as the "Texas Group." The Texas Action includes all of the claims asserted in this case, and additionally, other claims and defenses brought by the parties in the Texas Action that are not included in this lawsuit. The Federal Action and the Texas Action are extensions of earlier Texas state court litigation originally commenced in 1992 by other royalty interest owners in the subject oil and gas leases. See James Lawrence Sheerin, Independent Executor of the Estate of Irene Sheerin v. Union Pacific Resources Company, No. 92-11-31299 (Jim Wells County (79th Judicial District) Texas). The plaintiffs, intervenors, and UPRC entered into a settlement, and the litigation in Sheerin was dismissed.

The Texas Group owns the balance of overriding royalty interests in the subject oil and gas leases. The other overriding royalty interest owners have resolved their disputes with UPRC.

II. Discussion

Based on considerations of wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation, the Supreme Court has authorized federal district

courts under exceptional circumstances to stay or dismiss a federal action during the pendency of an action in state court. Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). Nevertheless, in light of the traditional obligation of federal courts to exercise jurisdiction when appropriate, a federal court's evaluation of whether to proceed with the case must be heavily weighted towards doing so. Moses H. Cone v. Mercury Construction Co., 460 U.S. 1, 16 (1983). In other words, the argument for the stay must be particularly strong in order for the Court to grant it. The argument for a stay in this case is not sufficiently compelling to justify surrender of federal jurisdiction.

Initially, a federal court must determine whether the state and federal proceedings are parallel. Fox v. Maulding, 16 F.3d 1079, 1081 (10th Cir. 1994). Suits are parallel if substantially the same parties litigate substantially the same claims. Id, quoting New Beckley Mining Corp. v. International Union, UMWA, 946 F.2d 1072, 1073, (4th Cir. 1991). Once it is clear that the two actions are parallel, the Supreme Court has set forth a number of factors for a federal court to consider in determining whether "exceptional circumstances" justify a stay or dismissal under Colorado River. Fox, 16 F.3d at 1081.

The Federal Action and the Texas Action are clearly parallel cases. Indeed, this issue appears not to be disputed by the parties. The Warren Group and UPRC are parties to both actions. The claims in both cases arise out of the same facts and

circumstances. Def.'s Mot. to Stay, Exh. B. The legal issues in both cases are nearly identical, and the Texas Action includes all of the claims asserted by the Warren Group in this case along with additional claims and parties. Therefore, under Colorado River, the two actions are parallel.

In addition to finding the two actions to be parallel, the Court must still balance the factors set forth in Colorado River and Moses H. Cone in deciding whether or not to stay the action. As listed by the Tenth Circuit in Fox v. Maulding, the factors to be considered are:

- (1) whether either court has assumed jurisdiction over property;
- (2) the inconvenience of the federal forum;
- (3) the desirability of avoiding piecemeal litigation;
- (4) the order in which the courts obtained jurisdiction;
- (5) the vexatious or reactive nature of either the federal or state action;
- (6) whether federal law provides the rule of decision and;
- (7) the adequacy of the state court action to protect the federal plaintiffs' rights.

16 F.3d at 1082.

No single factor is dispositive. Id. Depending on the setting of the case, the weight given to any one factor may vary significantly. Id. Ultimately, however, any doubt should be resolved in favor of exercising federal jurisdiction. Id.

The first factor is mainly concerned with in rem proceedings. Neither court has acquired in rem jurisdiction, making this factor largely inapplicable to the Court's analysis.

It is no more convenient if the action is heard in Texas than in the Northern District of Oklahoma. Midland, the site of the Texas Action, is just as far from UPRC's offices in Fort Worth as is Tulsa. Therefore, this factor cannot be said to favor surrender of jurisdiction by this Court.

The strongest reason for staying this action is the interest in avoiding piecemeal litigation. The Texas Action is comprehensive in that it includes parties, such as Warren American, that cannot be added to this litigation without divesting the Court of subject-matter jurisdiction. If UPRC prevails in this case, parties in the Texas Action such as Warren American and Southwest Royalties may not be bound by this Court's judgment. As the third Circuit has said, "it makes more sense to resolve common issues in a setting which will dispose of the most claims." Trent v. Dial Medical of Florida, Inc., 33 F.3d 217, 225 (3rd Cir. 1994). In response, the Warren Group says that UPRC is not truly concerned with this issue, since it could have joined the Warren Group and the parties in the Texas Action as parties to prior litigation concerning these same leases.

The next two factors, involving the order in which jurisdiction was obtained and the issue of vexatiousness, are related. These factors weigh against the motion to stay, since the filing of the state court action followed the filing of the federal court case. There is no evidence that the filing of the federal action was done in a vexatious manner. It would be more reasonable to assume vexatiousness on the part of UPRC, rather than the Warren

Group, since UPRC filed the Texas Action shortly after the Federal Action and then moved for a stay in this forum.

There are no substantive federal law issues in this case. Texas law governs all the claims. However, the state law issues do not appear to be particularly novel or complex. With respect to the role of state law, this action is no different than any other garden variety diversity case. American Bankers Ins. v. First State Ins., 891 F.2d 882, 886 (11th Cir. 1990) (holding that only in rare instances would presence of state law issues weigh in favor of dismissal). Thus, the federal law factor is, at best, neutral in this instance.

Lastly, there is no discernible harm that could jeopardize the federal rights owed to the Warren Group if their claims are heard in Texas, since the action depends completely on state law.

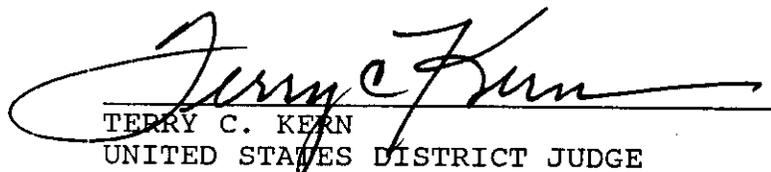
The factors do not weigh strongly in favor of abstention by this Court in this case. The Texas Action has been stayed pending the outcome of the Court's ruling on the instant motion. Supp. of Record of Mot. to Stay. Exh. A. Since the parties have only just begun to litigate their dispute in the state forum, they will not be burdened by proceeding in federal court. While some factors weigh towards granting the stay, the balance has not been sufficiently tipped for this Court to surrender federal jurisdiction.

III. Conclusion

For the reasons discussed above, the Defendant's Motion to

Stay is denied.

ORDERED this 26 day of May, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

COPY

ENTERED ON DOCKET

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

DATE ~~MAY 30 1995~~

CASSONDRA SMITH, a minor, by and
through her parents and next of
kin, CONNIE and DOUGLAS SMITH,

Plaintiffs,

vs.

LERNER NEW YORK, INC, a foreign
corporation, SIMON PROPERTY
GROUP, INC., a foreign
corporation and SIMON
PROPERTY GROUP, LP, a foreign
corporation,

Defendants.

Case No. 94-C-804-K *W*

FILED

MAY 26 1995
Richard A. Lawrence, Clerk
U.S. District Court
Northern District of Oklahoma

STIPULATION OF DISMISSAL

COMES NOW, all parties of record in the above action, by and
through their respective attorneys of record, and in accordance
with Rule 41 of the Federal Rules of Civil Procedure, hereby
stipulate to dismissal of the above action with prejudice to
refiling of same.

Respectfully submitted,

John R. Paul
John R. Paul, OBA #6971
John G. Barnhart, #15721
RICHARDS, PAUL, RICHARDS
& SIEGEL
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ATTORNEYS FOR DEFENDANT SIMON
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PROPERTY GROUP, LP

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(918) 587-2424
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF MAILING

I hereby certify that a true, correct and complete copy of the above and foregoing was mailed on the 2ⁿ day of May, 1995, proper postage prepaid thereon to:

Mr. Jay B. White, Esq.
P.O. Box 449
Tulsa, OK 74101-0449

Mr. John R. Paul, Esq.
Mr. John G. Barnhart
Nine East Fourth Street
Suite 400
Tulsa, OK 74103-5118



COPY

ENTERED ON DOCKET
DATE MAY 25 1995

IN THE UNITED STATES DISTRICT COURT **F I L E D**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAY 25 1995

JULIA A. GILES,)
)
Plaintiff,)
)
vs.)
)
YMCA OF GREATER TULSA and)
JOHN W. SWIFT, an)
individual,)
)
Defendants.)

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

No. 94-C-673-K

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his, its, or her own costs, expenses, and attorney fees without assessment against any other party.

Executed the respective dates shown adjacent to each signature.

HOWARD & WIDDOWS

5/18/95
Date

P. Gae Widdows
P. Gae Widdows (#8595)
2021 S. Lewis, Suite 470
Tulsa, OK 74104
(918) 744-7440

and

5/18/95
Date

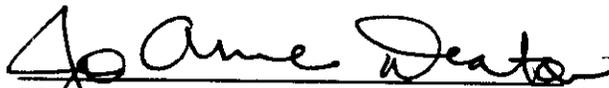


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(918) 592-1383

Attorneys for Plaintiff

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE - OBA #36

5/25/95
Date



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Attorneys for Defendants YMCA of Greater Tulsa
and John R. Swift

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

ENTERED **MAN DOCKET**
MAY 25 1995

DATE _____

MAY 25 1995

GARY MCCULLOUGH,)
)
Plaintiff,)
)
v.)
)
LINDBERG HEAT TREATING CO.,)
)
Defendant.)

Case No. 93-C-790-K

FILED

MAY 25 1995

ORDER OF DISMISSAL WITH PREJUDICE

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

This matter came on before the Court this 24 day of May, 1995, upon the parties' Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against Defendant is hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

FILED
DATE _____
MAY 23 1995

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

JOANNE LYONS,)
)
 Plaintiff,)
)
 v.)
)
 AMERADA HESS CORPORATION,)
)
 Defendant.)

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

Case No. 94-C-683-K

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 24 day of May, 1995, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against Defendant is hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

The situation here focuses on the second circumstance. Three pieces of evidence -- a Residual Functional Capacity ("RFC") assessment and two psychological examinations of Ms. Brown -- were submitted as evidence after the ALJ's June 24, 1993 denial decision. The Appeals Council reviewed the evidence but declined to remand the case to the ALJ. *Record at 4.*

In a motion to remand under Section 405(g), the Plaintiff has the burden to show that the evidence relates to the relevant time period, that the evidence is not merely cumulative and that good cause exists for such a remand. *Watson v. Califano*, 618 F.2d 18, 19 (8th Cir. 1980). To show good cause, Plaintiff must show the existence of the new evidence, that such evidence is relevant and, if made part of the record, the decision of the Commissioner may be different. *Bradley v. Califano*, 573 F.2d 28 (10th Cir. 1978).² This analysis is applied to the circumstances now before the court.

In regard to the August 23, 1994 RFC (attached to Ms. Brown's brief), the Court finds that Ms. Brown has not met her burden. The primary reason for this finding is that the RFC took place two months after the ALJ issued his denial decision and presumatively does not address her physical condition between June 6, 1990 and June 24, 1993. In addition, review of the RFC, in and of itself, does not lead to the conclusion that the ALJ would change his decision because of this piece of evidence.³

² This is similar to the Eleventh Circuit test, which reads: "The claimant must establish that: (1) there is new, noncumulative evidence; (2) the evidence is material [relevant and probative so that there is a reasonable probability that it would change the administrative result, and (3) there is good cause for failure to submit the evidence at the administrative level." *Caulder v. Bowers*, 791 F.2d 872, 877 (11th Cir. 1986).

³ The ALJ may place Dr. Cox's evaluation in the Record on remand if he so desires. It appears that Ms. Brown's attorney asked for additional time to submit Cox's evaluation at the hearing. Apparently, Dr. Cox did not timely submit his report.

A different conclusion is reached in regards to the August 2, 1993 Psychological Evaluations by Dr. Robert L. Spray. Although Dr. Spray's examination occurred six weeks after the ALJ's denial decision, the undersigned finds it relevant and probative as to her mental impairments between June 6, 1990 and June 24, 1993. The evidence is critical, as no other significant medical evidence is in the Record on this issue. The undersigned thus also finds the evidence to be non-cumulative.

The next question is whether Dr. Spray's report could change the ALJ's decision to deny disability benefits. Dr. Spray, a clinical psychologist, found that Ms. Brown met Listing 12.08. He also found that she had "marked" restrictions on her daily activities and "marked" restrictions in maintaining social functioning. In his assessment of her ability to do other work-related activities, Dr. Spray rated her "poor" in four categories: relate to co-workers, dealing with the public, interacting with supervisors and dealing with work stresses. Dr. Spray rated Ms. Brown only "fair" in her ability to follow work rules, her judgment with the public, her ability to function independently and her attention and concentration. *Record at 13-34.¹ These findings, if given sufficient weight, may change the outcome of the ALJ's decision.*

The Commissioner argues that the evidence submitted by Dr. Spray would not (or could not) change the outcome of the ALJ's decision. The undersigned disagrees for two reasons. First, to answer the ultimate questions, the ALJ must first determine what weight should be accorded Dr. Spray's opinions. Weighing the evidence is within the province of

¹Dr. Douglas Brown, also a clinical psychologist, examined Ms. Brown on May 24, 1994. Dr. Brown agreed with Dr. Spray that Ms. Brown met Listing 12.08 and also opined that she met Listing 12.04. The examination came eleven months after the ALJ's denial decision and arguably is not probative on whether she was disabled prior to the ALJ's decision. Browning v. Sullivan, 958 F.2d 817 (8th Cir. 1992). However, the evidence bears some weight as it supports the findings of Dr. Spray.

the ALJ and, as a result, *he* should have the opportunity to examine the whole of the evidence and then make his determination. Second, the ALJ had little, if any, evidence concerning Ms. Brown's psychological status, and as a result, should have the opportunity to examine Dr. Spray's findings and then make his determination. The ALJ had little, if any, evidence concerning Ms. Brown's alleged mental impairments when he made his decision to deny disability benefits at step 5 (where the Commissioner has the burden of proof).² While Dr. Spray's report does not automatically mean that Ms. Brown has met Listing 12.08 at step 3 of the sequential analysis, it does suggest she has a severe mental impairment that may keep her from returning to work in the jobs listed by the ALJ. Such evidence also suggests that the ALJ may include additional limitations in his hypothetical to the Vocational Expert. Consequently, Dr. Spray's report could change the ALJ's decision.³

Given the foregoing, the undersigned finds that the case should be remanded for further hearing.

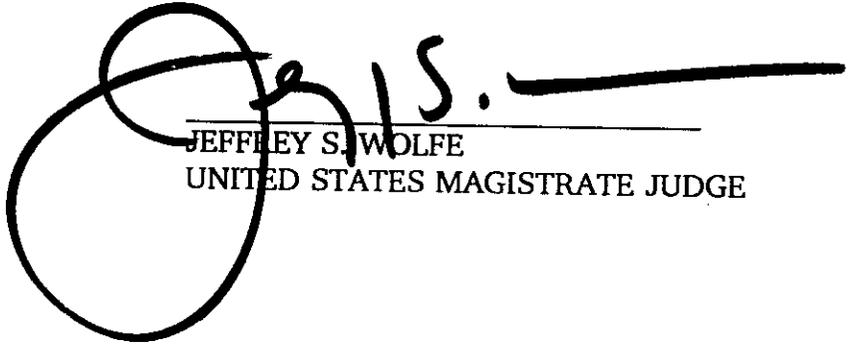
On remand, the ALJ shall evaluate the evidence discussed above and then make a determination in light of the entire Record as to Ms. Brown's disability claim. This Court makes no finding as to whether Ms. Brown is disabled. That is the decision of the ALJ on remand. Therefore, the case is **REMANDED** pursuant to 42 U.S.C. §405(g), in accord with

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

³ The Court finds that substantial evidence supports the ALJ's finding as they related to Ms. Brown's exertional impairments. The question on remand is whether her nonexertional impairments (by themselves or in combination with the physical impairments) prevent her from working.

the foregoing.

SO ORDERED THIS 25TH day of May, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

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

FILED

MAY 24 1995

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

FREMONT FINANCIAL,)
)
)
)
v.)
)
MID-AMERICAS PROCESS, ETAL.,)
)
)

Case No. 91-CV-231-C

ENTERED ON DOCKET

DATE MAY 25 1995

O R D E R

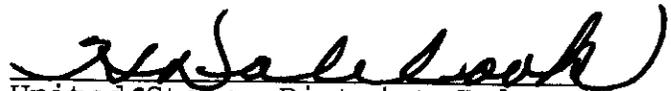
Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on **NOVEMBER 17, 1994**. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 23rd day of May, 1995.


United States District Judge

27

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

FILED

MAY 24 1995

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

RL

MISSOURI PACIFIC RAILROAD,)
)
)
v.)
)
CRAIG TWEEDY, ETAL.,)
)
)

Case No. 90-CV-1008-C

ENTERED ON DOCKET

DATE ~~MAY 9 1995~~

ORDER

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on **APRIL 5, 1995**. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 23rd day of May, 1995.


United States District Judge

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

ENTERED ON DOCKET
MAY 25 1995

INTRUST BANK, N.A., OF WICHITA,
KANSAS, CONSERVATOR OF IAN ANGUS
UPCHURCH, A MINOR, AND
GEORGE F. UPCHURCH AND LORI
UPCHURCH, INDIVIDUALLY AND AS
FATHER AND MOTHER OF IAN
ANGUS UPCHURCH,

PLAINTIFFS,

VS.

ROBERT D. OLIVER, M.D.; ROBERT
D. OLIVER, M.D., INC., AN OKLAHOMA
CORPORATION; AND JANE PHILLIPS
EPISCOPAL HOSPITAL, INC., AN
OKLAHOMA CORPORATION,

DEFENDANTS.

FILED

MAY 24 1995

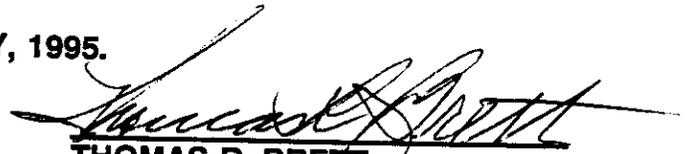
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 93-C-533-B

J U D G M E N T

IN ACCORD WITH THE JURY VERDICT RENDERED THIS DATE IN FAVOR OF DEFENDANTS, ROBERT D. OLIVER, M.D.; ROBERT D. OLIVER, M.D., INC., AN OKLAHOMA CORPORATION; AND JANE PHILLIPS EPISCOPAL HOSPITAL, INC., AN OKLAHOMA CORPORATION, AND AGAINST THE PLAINTIFFS INTRUST BANK, N.A., OF WICHITA, KANSAS, CONSERVATOR OF IAN ANGUS UPCHURCH, A MINOR, AND GEORGE F. UPCHURCH AND LORI UPCHURCH, INDIVIDUALLY, JUDGMENT IS HEREWITH ENTERED IN FAVOR OF DEFENDANTS, ROBERT D. OLIVER, M.D.; ROBERT D. OLIVER, M.D., INC., AN OKLAHOMA CORPORATION; AND JANE PHILLIPS EPISCOPAL HOSPITAL, INC., AN OKLAHOMA CORPORATION, AND AGAINST THE PLAINTIFFS INTRUST BANK, N.A., OF WICHITA, KANSAS, CONSERVATOR OF IAN ANGUS UPCHURCH, A MINOR, AND GEORGE F. UPCHURCH AND LORI UPCHURCH, INDIVIDUALLY ON ALL CLAIMS. COSTS ARE ASSESSED AGAINST THE PLAINTIFFS IF TIMELY APPLIED FOR PURSUANT TO LOCAL RULE 54.1. EACH PARTY IS TO BEAR THEIR OWN ATTORNEYS FEES.

DATED THIS 24th DAY OF MAY, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 24 1995

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

MOHAMMED AJAZ,)
)
 Plaintiff,)
)
 vs.)
)
 MAXWELL/TEMPS, INC., an Oklahoma)
 corporation,)
)
 Defendant.)

Case No. 95-C-210-B

ENTERED ON DOCKET
DATE MAY 25 1995

O R D E R

Before the Court is a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), filed by Defendant Maxwell/Temps ("Maxwell"). Maxwell alleges that Oklahoma law does not recognize two of Plaintiff Mohammed Ajaz's claims: negligent infliction of emotional distress and a public policy violation for failure to hire.

Ajaz, a citizen of Pakistan, is a Muslim. Maxwell was responsible for placing employees at Kwikset, a company that manufactures locks and other hardware. Ajaz alleges that Maxwell refused to place him at Kwikset based on his religion and/or national origin. He claims a denial of employment opportunities in violation of Title VII, 25 O.S. § 1201, and Oklahoma public policy; violation of 42 U.S.C. § 1981; negligent/intentional infliction of emotional distress; and estoppel/reliance. Maxwell's Motion to Dismiss addresses only the Oklahoma public policy claim and the negligent infliction of emotional distress claim.

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

Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b)(6) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

The Court first considers Ajaz's claim that Maxwell's failure to hire him violates Oklahoma's public policy. Oklahoma law recognizes a tort cause of action for wrongful discharge when an employee's termination violates a clear mandate of public policy. See Burk v. K-Mart, 770 P.2d 24 (Okla. 1989), and Tate v. Browning-Ferris, 833 P.2d 1218 (Okla. 1992). In Sanchez v. Philip Morris Inc., 992 F.2d 244 (10th Cir. 1993), the Tenth Circuit Court of Appeals concluded that the Burk and Tate public policy tort exception is limited to wrongful terminations. Sanchez states:

A careful reading of Tate reveals that it was limited to wrongful terminations motivated by race or retaliation, which is closely related to the Burk wrongful discharge exception. The Tate decision simply does not make all Title VII cases actionable under the public policy tort exception enunciated in Burk. We note that the Oklahoma Supreme Court has been very precise in carving out narrow exceptions to the employment-at-will doctrine, and we are unwilling to unnecessarily expand those exceptions. Therefore, the district court properly dismissed Appellee's public policy tort claim as Oklahoma has yet to create an exception to the employment-at-will doctrine in the failure to hire context.

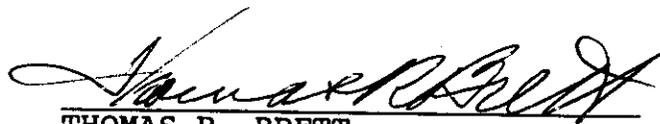
Ajaz argues that the Court should refuse to follow Sanchez because the Tenth Circuit has not always been right when it predicts what the Oklahoma Supreme Court will do. The Oklahoma Supreme Court has not determined whether Burk would apply to failure to hire cases. However, since Oklahoma has not addressed this issue, there is no indication that Sanchez is erroneous and should not be followed. Therefore, because Ajaz was not terminated by Maxwell, his claim does not constitute a public policy tort claim under Oklahoma law and is hereby dismissed.

The Court next considers Ajaz's claim for negligent infliction of emotional distress. In Oklahoma, recovery has been allowed for mental distress connected to some manifestation of physical suffering to the plaintiff. See McMeakin v. Roofing and Sheet Metal Supply Co., 807 P.2d 288 (Okla. App. Ct. 1990) and citations therein. In Ellington v. Coca Cola Bottling Co. of Tulsa, 717 P.2d 109 (Okla. 1986), the court recognized the right to recover when mental anguish inflicts physical suffering, as well as when physical suffering inflicts mental anguish. However, the mandatory requirement is that there be some physical suffering to the plaintiff. See Richardson v. J.C. Penney Co., Inc., 649 P.2d 565 (Okla. App. Ct. 1982) ("[D]oes Oklahoma allow recovery for negligent infliction of mental distress in the absence of tangible physical injury? Oklahoma cases prohibit such recovery."). The Oklahoma Supreme Court repeatedly has denied recovery for negligently inflicted mental distress alone. Id. at 566. Because Ajaz's Complaint does not allege physical suffering, his claim for

Negligent Infliction of Emotional Distress is hereby dismissed.

Maxwell's Motion to Dismiss is hereby granted. Remaining for disposition in the case at this time are Ajaz's claims of denial of employment opportunities in violation of Title VII and 25 O.S. § 1201; violation of 42 U.S.C. § 1981; intentional infliction of emotional distress; and estoppel/reliance.

IT IS SO ORDERED THIS 24 DAY OF MAY, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE MAY 25 1995

FILED

MAY 24 1995

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

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

DELVIN LEWIS RHODES,)
)
Plaintiff,)
)
v.)
)
TULSA COUNTY, sued as State)
of Oklahoma, Tulsa County)
Oklahoma, Officers of the)
State of Oklahoma, and ROBERT)
E. MARTIN,)
)
Defendants.)

Case No. 95-C-406-B

ORDER

Plaintiff has filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a pro-se civil rights complaint pursuant to 42 U.S.C. § 1983. In reliance upon the representations set forth in the motion, the Court concludes that Plaintiff should be granted leave to proceed in forma pauperis. The Court concludes, however, that Plaintiff's claims should be dismissed as frivolous under 28 U.S.C. § 1915(d).

Plaintiff is a criminal defendant in a pending prosecution in Tulsa County District Court. The defendants are the State of Oklahoma, the Tulsa County District Court, and Don E. Martin, an attorney appointed to represent Plaintiff in his state criminal proceedings.

Essentially, Plaintiff alleges that Martin has ineffectively represented him throughout the pending state criminal proceedings in violation of his right to effective assistance of counsel and to a speedy trial. He alleges that he has been ready to select a jury since November of 1994, but that the trial has been continued on

numerous occasions and is now set to start on October 2, 1995. He alleges that Martin "had no intention of properly representing me as it's evidence[d] with the motion he filed on my behalf and h[e] is constantly attempting to get me to cop-out for the DA's office notwithstanding my quest for . . . freedom." (Doc. #1 at 3.) Plaintiff seeks \$100.00 damages for everyday he has been detained in jail waiting for a jury trial.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows an in forma pauperis suit to be dismissed if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. The State of Oklahoma has eleventh amendment immunity, see Puerto Rico Aqueduct and Sewer Auth. v. Metcalf Eddy, Inc., 113 S. Ct. 684, 687-88

(1993), and the state district judge, assigned to Plaintiff's criminal case, is absolutely immune from Plaintiff's suit for any delay in the jury trial. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). While Plaintiff may be able to state a malpractice claim under Oklahoma law against Martin that claim does not constitute a federal case.¹ See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); see also Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15; see also Lemmons, 39 F.3d at 266. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.²

Accordingly, as this case lacks an arguable claim in law, it

¹This comment should not be construed as this court in any way indicating such claim has merit.

²To the extent Plaintiff requests the appointment of new counsel, the Court notes that such request would be an impermissible attempt to interfere with a pending state criminal proceeding. Any problems Plaintiff has with his defense counsel should be raised first in the state courts. See Younger v. Harris, 401 U.S. 37 (1971).

must be dismissed as frivolous under section 1915(d).²

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Plaintiff's motion to proceed in forma pauperis is granted;
- (2) Plaintiff's complaint is **dismissed as frivolous** under 28 U.S.C. § 1915(d); and
- (3) The Clerk shall **mail** a copy of the complaint to Plaintiff.

SO ORDERED THIS 24 day of May, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

²In the event Plaintiff may have intended to seek habeas corpus type relief by the filing of this action, the Court concludes that request should be dismissed without prejudice to it being refiled as a pre-trial petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. While pre-trial habeas relief is not available to consider a claim that the state is barred from trying petitioner because it violated his Sixth Amendment right to a speedy trial, see Dickerson v. Louisiana, 816 F.2d 220, 226 (5th Cir.), cert. denied, 484 U.S. 956 (1987), pre-trial habeas relief may be available to a criminal defendant to "demand enforcement of the [State's] affirmative constitutional obligation to bring him promptly to trial," Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 489-90 (1973). See also Capps v. Sullivan, 13 F.3d 350, 354 (10th Cir. 1993).

ENTERED ON DOCKET
MAY 24 1995
DATE _____

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

FILED

MAY 23 1995

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

NOISE REDUCTION INC.,)
)
 Plaintiff,)
)
 v.)
)
 NORDAM CORPORATION, et al.,)
)
 Defendants.)

92-C-913

~~94-C-0431-B~~

DISCOVERY ORDER

This order is a final assessment of fees and costs, originating with the court's Order of November 25, 1992 (docket #10). At issue is F&M Bank's Application for Attorney's Fees and Reimbursement of Expense (docket #30) and its Supplemental Application for Attorney's Fees and Reimbursement of Expense (docket #59). The facts surrounding F&M's request are straightforward.

F&M Bank, a non-party to litigation pending before the United States District Court for the Northern District of Illinois, was subject of multiple subpoenas for the production of documents. On November 25, 1992, following extensive inquiry, the undersigned entered an order allowing F&M Bank its "costs of production" of \$1,500.00. That Order recited, in-part, as follows:

Noise Reduction is to pay a minimum of \$1,500.00 as costs of production to F&M. Nothing herein prevents F&M from requesting further reimbursement for costs...(Order, November 25, 1992 (docket #10) at ¶(7.)).

F&M Bank now asks the court to reimburse it for its costs of production as well as attorney's fees associated with production. The amount claimed is set forth in Exhibits "A"

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and "B", in F&M Bank's Exhibits: \$22,160.88 (Exhibit "A"); and \$26,167.09 (Exhibit "B").

Plaintiffs object, arguing that F&M Bank and Trust Company ("the Bank") is not a disinterested third party, and that it did not act in an expeditious manner, causing unnecessary redactions, which increased the ultimate cost of production. *See, Plaintiff's Response, at pp. 3-5.*

Rule 26(c), *Federal Rules of Civil Procedure* provides (in-part) "that the disclosure of discovery may be had only on specified terms and conditions, including a designation of the time or place."¹ The undersigned has previously determined that discovery in this case was conditioned upon payment of the "costs of production". Actual costs to \$1,500.00 were paid per the earlier November 1992 Order. Supplemental applications are now before the court.

The only issue to be decided at this juncture is the amount of further payment to be made for "costs of review and production". The issue of entitlement has been previously determined and is not now at issue. More to the point, the court's Discovery Order of May 11, 1993 (docket #28) puts to rest the issue. The remainder, as 'they say', is just a matter of numbers. The May 11, 1993 Discovery Order holds, in-part, as follows:

It would be unjust to require F&M to bear the burden of Plaintiff's discovery by requiring less than full payment of the bill submitted. Plaintiff chose to proceed in the manner that it did; and in so acting, committed itself to pay the "actual cost". There is no dispute over the hourly rate or time spent. Plaintiff attempts to inject a question of "reasonableness" into the billing, but there is no room for such a characterization in the absence of a challenge to the hours spent and rates billed. However, the April 2, 1993 Discovery Order required payment for

¹ *See also, Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458 (10th Cir. 1988), to the effect that a magistrate judge may enter orders in discovery matters, as same are non-dispositive, including the award of monetary sanctions. It is also well-settled that the federal discovery rules are to be accorded a broad and liberal treatment. *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

"review...and...production" of the documents, and not for time spent in court or in teleconferences. Accordingly, all such time shall not be compensable as part of the cost of review and production, and shall be excluded from the amount paid by Plaintiff. (*Discovery Order, May 11, 1993, at pp. 2-3*).

Essentially, the undersigned here, as earlier, determines that attorney's fees are an allowable element of the "costs of review and production". Redaction of customer names, as well as review of documents to ensure compliance with the court's discovery orders mandated involvement of counsel. The only remaining question is that of "allowable hours per *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983).

Having determined that attorney's fees are to be paid as part of the cost of production the court must determine the "lodestar figure" (reasonable hours times reasonable rates). *Id. See also, Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). No issue is raised as regards "reasonable hourly rates". The only question voiced in Plaintiff's objection is generally that of time spent, or "reasonable hours".

Here, Plaintiff objects to counsel's time, arguing that F&M is not really a disinterested third party, and as a result should not allowed to bill time for its attorneys, who are committed to help Defendants prevail in their action against Plaintiff. Such argument, while generally unsupported, does not defeat assessment of attorney fees as part of the "cost of review and production" calculation. F&M was required to hire counsel and in effect, litigate that question of document production. It was required to retain counsel to superintend document production and compliance with court orders. Its costs are what the court has determined are compensable. Those costs include payment for counsel.

Plaintiff otherwise argues that F&M has "needlessly multiplied a simple request...into colossal wastefulness" *Plaintiff's Response at p. 5 (docket #65)*. This is, in effect, a

challenge to the reasonableness of the hours claimed. Specifically, Plaintiff asserts that additional time was unnecessarily spent on production as a result of 1) unnecessary resistance by F&M to the subpoenas; and 2) unnecessary redaction (or "over-redaction") which required the same files be reviewed multiple times for compliance with court ordered production.

As regards Plaintiff's first objection, the undersigned finds that the level of cooperation between counsel in this effort was less than it could have been. In a very real sense, both Plaintiff *and* F&M contributed to the litigiousness of the discovery scenario which ultimately unfolded. Without delving into specific instances or details, suffice it to say, the undersigned was directly involved in the ensuing collateral litigation over production, and finds that *both* parties contributed to the overall cost. More to the point, the overall cost was more than it reasonably should have been. As a result, the undersigned will generally reduce the amount claimed by F&M "in order to achieve...a reasonable number..."¹² The percentage reduction is set forth in each application, discussed below.

As regards Plaintiff's claims that it should not have to pay for correcting redactions which should not have originally been undertaken, the undersigned agrees in-part, and disagrees in-part. In-part, the amount claimed for correction of redactions should not be fully borne by Plaintiff. Plaintiff should, however, be required to pay for the billing in-part,

² See, Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986), wherein the court noted:

A general reduction of hours claimed in order to achieve what the court determines to be a reasonable number is not an erroneous method, so long as there is sufficient reason for its use. citing Hensley, at 461 U.S. at 424, 103 S.Ct. 1933.

as the issue of which items to redact was subject of on-going disputation between the parties. It is difficult, in the midst of on-going litigation, to assess a brightline course of action. F&M undertook a conservative approach, faced with Plaintiff's counsel who were unwilling to cooperatively engage in a mutual dialogue designed to minimize discovery costs. F&M later determined that it had redacted too many names, and undertook to correct its actions. F&M's actions were undertaken, in-part, as a result of the litigious climate created by Plaintiff. This being the case, the undersigned finds that the fees claimed for "correction of redactions" should be borne equally by both parties. Accordingly, the sum of **\$7,545.00** as set forth in Exhibit "A", is reduced by 50%, to **\$3,772.50**.

Applying these standards to F&M's instant applications yields the following result:

1. Application at Exhibit "A" (the "first production").
 - a. Bank Personnel Time. All bank personnel time is compensable, including copy costs, for a total of **\$2,809.35**.
 - b. Attorney Time. The following attorneys billed time to this matter: J. Schaad Titus; Jill E. Lingle; Pam W. Hare and Jeweldean Lowery. The total amount claimed for attorney time is: **\$16,430.00** less **\$7,545.00** (for correction of redactions, treated separately below), or a net **\$8,885.00**. Reducing this net amount by 10%, to compensate for "time spent in court or in teleconferences", the undersigned finds that **\$7,997.00** is compensable.

The "courtesy reduction" of **\$6,000.00** was not paid by F&M Bank and is not, therefore, compensable.

The sum of **\$7,545.00**, detailed as "the maximum amount spent correcting redactions" is reduced in accord with the foregoing finding by 50% to **\$3,772.50**.

The total allowable attorney fee is thus **\$11,769.00**.

- c. Expenses. A total of **\$2,921.53** is claimed by counsel for F&M as "expenses". This amount is compensable in its entirety, being virtually

composed of copy charges.

- d. Summary of Allowed Charges - Exhibit "A". The following claims are allowed as "costs of review and production", per the November 25, 1992 Discovery Order:

1. \$ 2,809.35
2. \$11,769.00
3. \$ 2,921.53

2. Application at Exhibit "B" (the "second production").

- a. Bank Personnel Time. No time claimed.
- b. Attorney Time. F&M's Supplemental Application (docket #59) recites a claim for \$24,939.31 in attorneys fees and costs (including copy costs and postage and courier fees). The time billed is to and inclusive of April, 1994. Exhibit "B" adds May, 1994 (\$2,329.20), bringing the total claim for attorneys fees and costs to \$27, 268.51.

Examination of F&M's attorney's billing records indicates a greater number of hours dedicated to preparation of witnesses, in-court hearings and preparation for same. In sum, the amount of time billed is dedicated both to "review and production" as well as litigation related to production. As above, there is no brightline by which one can be distinguished from the other. "Review and production" are intertwined with litigation, one both complementing and detracting from the other. Plaintiff should not shoulder the entire burden of the litigiousness which has surrounded this discovery. Nevertheless, as Plaintiff has clearly contributed to the litigious character of its dealings with F&M, it should not be free from bearing the consequences of such actions. In other words, the amount claimed by F&M should be reduced to compensate for unnecessary litigiousness between the parties, but not entirely eliminated. Indeed, given the intertwined nature of the proceedings, it would be difficult, if not impossible, to determine what fees might be solely attributable to "costs of review and production" and what are solely related to "litigation". Given the nature of the parties' dealings with one another, the two are virtually inseparable in terms of the ultimate outcome of production.

Accordingly, the undersigned finds that F&M's claimed fees should be reduced by 20%. Costs should be paid in their entirety. The calculation is set forth below:

1. Expenses. Expenses of \$1,043.69 are to be paid in their entirety.
2. Fees. Fees of \$26,224.82 are reduced by 20% to \$20,976.82.

c. Summary of Allowed Charges - Exhibit "B". The following claims are allowed as "costs of review and production", per the November 25, 1992 Discovery Order:

1. \$ 1,043.69
2. \$20,976.82

3. Fees and Costs relating to Depositions of Messrs. Mote, Davis and York (August 1994)

The undersigned finds that both parties shall bear the burden of their own expenses as related to the depositions of Messrs. Mote, Davis and York.

4. Fees and Costs relating to Application for Fees and Costs.

The undersigned finds that both parties shall bear the burden of their fees and costs related to pursuit and opposition to the instant applications.

5. Total Amount Allowed.

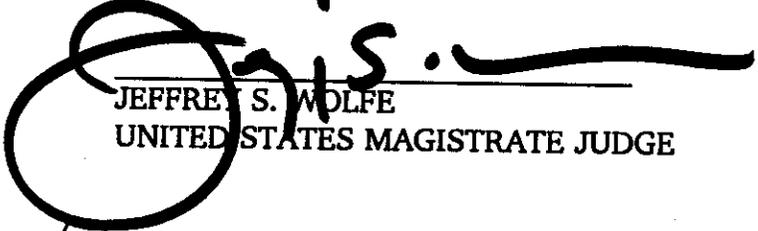
The total amount allowed for "costs of review and production" (excluding the amount already paid -- assuming that those amounts are not part of the sums set forth in F&M's applications) is set forth as follows:

- | | | |
|----|-----------------|-------------|
| a. | Bank Personnel: | \$ 2,809.35 |
| b. | Expenses: | \$ 3,965.22 |
| c. | Attorneys fees: | \$32,745.82 |

The total allowed is: \$39,520.39

6. The foregoing amount shall be paid in its entirety within eleven (11) days, or an appeal perfected to the District Judge assigned to this case within that same time.

SO ORDERED THIS 23rd day of May, 1995.


JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
MAY 24 1995
~~FILED~~

MAY 23 1995

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



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

GARY E. GREGORY,)
)
 Plaintiff,)
)
 v.)
)
 DONNA SHALALA, SECRETARY OF)
 HEALTH AND HUMAN SERVICES,)
)
 Defendant.)

Case No. 94-C-496-B ✓

ORDER

The Administrative Law Judge denied Social Security disability benefits to Plaintiff Gary E. Gregory, finding that he could return to work as a bench worker, line packer or assembler. Plaintiff now appeals that decision¹, raising four issues: (1) Whether the Administrative Law Judge ("ALJ") properly invoked the doctrine of *res judicata* to his previous applications; (2) Whether Gregory's lack of representation at the hearing before the ALJ prejudiced his disability claim; (3) Whether the ALJ adequately developed the record concerning the effects of Gregory's medication; and (4) Whether substantial evidence supports the Commissioner's decision.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is

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."

9

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

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

II. Legal Analysis

Four issues are raised. First, does the doctrine of *res judicata* preclude this Court's review of Gregory's previously filed applications? Second, did Gregory's lack of representation prejudice his disability claim? Third, did the ALJ fulfill his duty to develop the record? Finally, does substantial evidence support the Commissioner's decision to deny benefits?

² 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).

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

The Commissioner may invoke the doctrine of *res judicata* under certain circumstances. For example, an earlier administrative decision at any level in the adjudicative process may be final and therefore properly treated as preclusive of the subsequent claim either because the decision has been judicially affirmed or because administrative reconsideration, hearing, or review, or judicial review has not been timely sought. *Mc Gowen v. Harris*, 666 F.2d 60, 65 (4th Cir. 1981).⁴ If the Commissioner properly applies administrative *res judicata*, federal courts, as a general rule, lack jurisdiction to review the denial of the claim. *Teague v. Califano*, 560 F.2d 615, 618 (4th Cir. 1977).

In this case, Gregory previously filed two applications for benefits on June 5, 1990 and on September 16, 1991. The applications were denied initially and again, on reconsideration. Gregory did not timely request a hearing before the ALJ and, as a result, *res judicata* to the first two applications should apply. The record does not suggest, as Gregory contends, that the ALJ reopened the claims *de facto*. *Taylor For Peck v. Heckler*, 738 F.2d 112 (10th Cir.1987). In addition, Gregory has not raised a colorable constitutional objection to the application of *res judicata*. *See, Nelson v. Secretary of Health & Human Services*, 927 F.2d 1109, 1111 (10th Cir.1991) ("Absent a colorable constitutional claim, a district court does not have jurisdiction in the Secretary's discretionary decision not to

⁴ The procedural steps that must be taken by the claimant are explained in *Tucker v. Sullivan*, 779 F.Supp. 1290, 1295 (D. Kan. 1991). Claimant must first file a claim with the Commissioner of Social Security Administration. If the claim for disability benefits is denied initially, the claimant must ask the Commissioner to reconsider its decision within 60 days. If that request is denied, claimant has 60 days to request an evidentiary hearing with an ALJ. Should such a hearing take place, claimant, if the ALJ denies benefits, may seek relief with the Appeals Council. Finally, after seeking relief with the Appeals Council, claimant may elect to challenge the Commissioner's decision in federal court under 42 U.S.C. §405(g).

reopen an earlier adjudication.")⁵

The second issue focuses on the fact that Gregory did not have an attorney present at the evidentiary hearing before the ALJ. Gregory contends that the ALJ did not properly inform him of his right to counsel and, as a result, the handling of his disability claim was prejudiced. The question for review is whether Gregory's lack of representation reveals unfair "evidentiary gaps" or clear prejudice to his case. *Edwards v. Sullivan*, 937 F.2d 580, 585-586 (11th Cir. 1991). This question also involves the ALJ's duty to fully and fairly develop the record. *Dixon v. Heckler*, 811 F.2d 506, 510 (10th Cir. 1987). One court writes:

The ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised. This is true despite the presence of counsel, although the duty is heightened when the claimant is unrepresented. The duty is one of inquiry, ensuring that the ALJ is informed about facts relevant to his decision and learns the claimant's own version of those facts. *Henrie v. Department of Health and Human Services*, 13 F.3d 359, 361 (10th Cir. 1993).

Case law does not offer a mechanical analysis to determine whether an ALJ has fulfilled his duty of inquiry for a unrepresented claimant. However, courts have discussed several factors that should be considered. In *Musgrave v. Sullivan*, 966 F.2d 1371, 1374-75 (10th Cir. 1992), the court inquired as to whether the ALJ asked sufficient questions concerning (1) the nature of a claimant's alleged impairments, (2) what on-going treatment and medication the claimant is receiving, and (3) the impact of the alleged impairment on a claimant's daily routine activities. In addition, the claimant's educational level and the

⁵ The Court does not find *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983) or *Dealy v. Heckler*, 616 F.Supp. 880 (D.C.Mo. 1984) persuasive on this issue and does not read Tenth Circuit law to apply *res judicata* only if an evidentiary hearing is held before the ALJ. In addition, even assuming *arguendo* the applications should be reopened, the Court would still reach the same decision.

length of the hearing are addition factors to consider as to whether the ALJ has properly done his job. See *Dixon*, 811 F.2d at 510 (claimant was deemed illiterate) and *Musgrave*, 966 F.2d at 1374 (length or brevity of hearing not dispositive of whether ALJ has met his heightened obligation).

In this case, Gregory had received a GED and attended Tulsa Junior College for a year. The hearing, which included testimony from Gregory and the Vocational Expert, lasted 29 minutes. More importantly, the Court finds that the ALJ's questioning was insufficient. The ALJ did not sufficiently attempt to get Gregory's version of why he believed he was disabled. The ALJ did not sufficiently inquire into Gregory's knee problems, despite the fact he has had multiple surgeries. The ALJ did not sufficiently inquire into the side effects of Gregory's medication. The ALJ did ask sufficient questions concerning Gregory's epilepsy and, at one point, asked Gregory about his lifting, walking or standing restrictions. Nevertheless, further inquiry should have taken place.

Gregory's testimony, especially as related to his impairments, required better development to allow the ALJ to properly evaluate his (Gregory's) subjective complaints of pain. *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987).⁶

Therefore, taking all of these factors (i.e., Gregory's education, length of hearing, substantive questions asked), the undersigned finds the ALJ erred on this issue.⁷

However, given the fact that Gregory was not represented and that the ALJ did not

⁶The ALJ's questions of the vocational expert also poses problems for the Court. First, it is difficult to determine whether the ALJ actually gave the vocational expert a hypothetical question. Second, the vocational expert apparently did not evaluate Gregory's problems with his knees. It also should be noted that the ALJ's opinion lacks specifics, especially as it relates to the Luna analysis.

⁷The undersigned further finds, for purposes of determining whether attorney's fees should be allowed under the EAJA, that the Commissioner's argument against Gregory's disability claim was substantially justified.

adequately develop the Record, the facts suggest that **REVERSING** and **REMANDING** the case is the most prudent decision, and such is the decision of the court.

This will allow Gregory (and his counsel) the opportunity to adequately develop the record during a supplemental hearing. The ALJ must then re-examine the evidence and determine whether Gregory's alleged impairments prevent him from working. It also should be noted that the Commissioner must prove, at step 5 of the sequential analysis, that Gregory can return to work elsewhere in the national economy.

IT IS SO ORDERED THIS 23rd day of May, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE MAY 24 1995

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

PATRICIA VUOCOLO,

Plaintiff,

vs.

WESTERN BUSINESS PRODUCTS,
INC., an Oklahoma Corporation,
and LESTER SCARBROUGH, a/k/a
LES SCARBROUGH, individually,

Defendants.

Case No. 94-C-1099-K

FILED

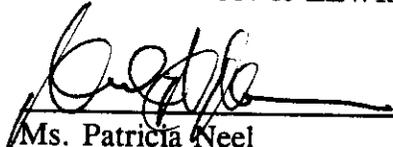
MAY 23 1995

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

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Patricia Vuocolo, and the Defendants, Western Business Products, Inc., and Les Scarbrough, and by and through their respective attorneys stipulate that this action is dismissed with prejudice. Each party is to bear, his or her, or its own costs and expenses, including attorney's fees.

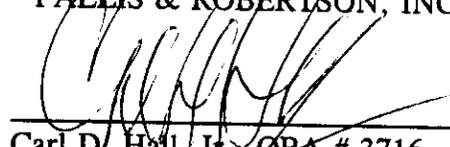
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS



Ms. Patricia Vuocolo
Mr. Richard P. Poormon
502 West 6th Street
Tulsa, OK 74119-1010
(918)587-3161

ATTORNEYS FOR PLAINTIFF
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NICHOLS, WOLFE, STAMPER, NALLY,
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Suite 400 Old City Hall
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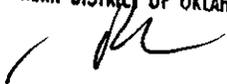
ATTORNEYS FOR DEFENDANTS
WESTERN BUSINESS PRODUCTS, INC.
AND LES SCARBROUGH

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

FILED

MAY 22 1995

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



UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHRISTOPHER C. WREN, et al.,)
)
Defendants.)

Case No. 95-C-95-BU

ENTERED ON DOCKET

DATE MAY 23 1995

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Notice of Bankruptcy filed by Plaintiff, United States of America, on May 22, 1995. Having done so, the Court concludes that this matter should be administratively closed during the pendency of the bankruptcy proceedings before the United States Bankruptcy Court for the Northern District of Oklahoma. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the bankruptcy proceedings.

The parties are DIRECTED to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 22 day of May, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 22 1995 *PL*

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

JULIA CAROLINE UMBARGER,)
)
Plaintiff,)
)
vs.)
)
GRACE ELIZABETH WILSON,)
)
Defendant.)

Case No. 94-C-742-BU ✓

ENTERED ON DOCKET
MAY 23 1995

DATE _____

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 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 22 day of May, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

MAY 22 1995

RODNEY "NICK" ROBERTS and)
BRENDA ROBERTS,)
)
Plaintiffs,)
)
vs.)
)
SHEFFIELD STEEL CORPORATION,)
)
Defendant.)

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

Case No. 94-C-1087-BU
ENTERED ON DOCKET

DATE MAY 23 1995
~~BY MICHAEL BURRAGE~~

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 plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 22 day of May, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

DATE MAY 23 1995

FILED

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

MAY 22 1995

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

BONDING COMPUTER)
SYSTEMS, INC.,)
)
Plaintiff,)
)
v.)
)
JOE PAUL ELLIOTT,)
)
Defendant.)

Case No. 95-C-184-K

ORDER

This order pertains to Plaintiff's Application for Entry of Order Referring Case to Bankruptcy Court (Docket #2)¹, the Statement of Tillmin Welch Denying Bonding Computer System's Allegation of the Removed Action as a "Core" Proceeding (Docket #3), and Defendant's Motion in Opposition to Referring Case to the Bankruptcy Court (Docket #8). A hearing was held on May 16, 1995 and oral arguments were heard.

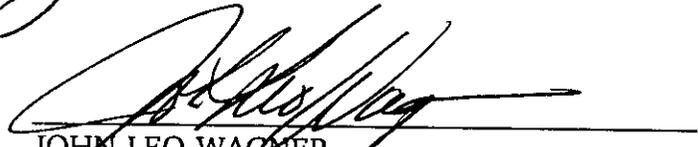
Plaintiff's Application for Entry of Order Referring Case to Bankruptcy Court (Docket #2) is granted. This case involves a major asset of the bankruptcy estate, and the bankruptcy court is familiar with the underlying facts. A jury trial may not be required, as the pending threshold question involving issue preclusion arising from a Texas default judgment may be dispositive, and is clearly a matter of law that the bankruptcy court can properly address. If the bankruptcy court finds the issue is not precluded, it can then address the right to jury trial.

This case is transferred to the United States Bankruptcy Court for the Northern

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.

District of Oklahoma.

Dated this 22nd day of May, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: bonding

Ellison, RONALD D. MORRISON, CITY OF SAND SPRINGS, Oklahoma. UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY, and UNKNOWN SPOUSE OF MARLENE ANN MORRISON, IF ANY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RICK L. ELLISON aka Ricky Lee Ellison aka Ricky L. Ellison, signed Waiver of Summons on July 28, 1994, filed on August 26, 1994; that the Defendant, LISA G. ELLISON aka Lisa Gail Ellison, signed Waiver of Summons on July 28, 1994, filed on August 26, 1994; that the Defendant, MARLENE ANN MORRISON, was served a copy of Summons and Complaint on September 13, 1994, by Certified Mail; and that the Defendant, CITY OF SAND SPRINGS, Oklahoma, was served a copy of Summons and Complaint on June 29, 1994, by Certified Mail;

The Court further finds that the Defendants, RONALD D. MORRISON, UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY and UNKNOWN SPOUSE OF MARLENE ANN MORRISON, IF ANY, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 6, 1994, and continuing through November 10, 1994, also 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 Defendants, RONALD D. MORRISON, UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY and UNKNOWN SPOUSE OF MARLENE ANN MORRISON, IF

ANY, 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 abstractor filed herein with respect to the last known addresses of the Defendants, RONALD D. MORRISON, UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY and UNKNOWN SPOUSE OF MARJ ENE ANN MORRISON, IF ANY. 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 place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on July 26, 1994; that the Defendant, MARLENE ANN MORRISON, filed her Disclaimer on September 26, 1994; and that the Defendants, RICK L. ELLISON aka Ricky Lee Ellison aka Ricky L. Ellison, LISA G. ELLISON aka Lisa Gail Ellison, RONALD D. MORRISON, and CITY OF SAND SPRINGS, Oklahoma, UNKNOWN SPOUSE OF

RONALD D. MORRISON, IF ANY, and MARLENE ANN MORRISON, IF ANY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, RICK L. ELLISON, is one and the same and sometimes referred to as Ricky Lee Ellison, and Ricky L. Ellison, and will hereinafter be referred to as "RICK L. ELLISON." The Defendant, LISA G. ELLISON, is one and the same and sometimes referred to as Lisa Gail Ellison, will hereinafter be referred to as "LISA G. ELLISON." The Defendants, RICK L. ELLISON and LISA G. ELLISON, are husband and wife.

The Court further finds that on June 2, 1988, Ricky Lee Ellison and Lisa Gail Ellison, filed their voluntary petition in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 88-01566-W. On September 23, 1988, the United States Bankruptcy Court for the Northern District of Oklahoma entered its Discharge of Debtor, and the case was subsequently closed on October 19, 1989.

The Court further finds that on February 5, 1992, Ricky L. Ellison and Lisa Ellison filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 92-00349-W. On December 15, 1992, the United States Bankruptcy Court for the Northern District dismissed the case, the case was subsequently closed on April 27, 1993.

The Court further finds that on November 9, 1994, RICKY LEE ELLISON and LISA GAIL ELLISON filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 94-03358-W. On January 9, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and

directing abandonment of the real property subject to this foreclosure action and which is described below.

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

**Lot Ten (10), Block Three (3), GARDEN SPOT ACRES
ADDITION an Addition to the County of Tulsa, State of
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on March 12, 1986, the Defendants, RONALD D. MORRISON and MARLENE A. MORRISON, executed and delivered to First Security Mortgage Company, their mortgage note in the amount of \$58,205.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RONALD D. MORRISON and MARLENE A. MORRISON, then husband and wife, executed and delivered to First Security Mortgage Company, a mortgage dated March 12, 1986, covering the above-described property. Said mortgage was recorded on March 20, 1986, in Book 4931, Page 565, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 25, 1986, First Security Mortgage, Company, assigned the above-described mortgage note and mortgage to Mortgage Clearing Corporation. This Assignment of Mortgage was recorded on December 30, 1986, in Book 4991, Page 2564, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 4, 1989, 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 August 7, 1989, in Book 5199, Page 1387, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 12, 1988, the Defendant, RONALD D. MORRISON, granted a general warranty deed to the Defendants, RICK L. ELLISON and LISA G. ELLISON. This deed was recorded with the Tulsa County Clerk on March 14, 1988, in Book 5086, Page 2489 and the Defendants, RICK L. ELLISON and LISA G. ELLISON, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on September 1, 1989, the Defendants, RICK L. ELLISON and LISA G. ELLISON, 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, RICK L. ELLISON and LISA G. ELLISON, 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, RICK L. ELLISON and LISA G. ELLISON, are indebted to the Plaintiff in the principal sum of \$94,009.80, plus interest at the rate of 10 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 \$4.00 which became a lien on the property as of June 30, 1987, a lien in the amount of \$38.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$43.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$41.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RICK L. ELLISON, LISA G. ELLISON, RONALD D. MORRISON, CITY OF SAND SPRINGS, Oklahoma, UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY and UNKNOWN SPOUSE OF MARLENE ANN MORRISON, IF ANY, 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, MARLENE ANN MORRISON, Disclaims any right, title or interest in the 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, RICK L. ELLISON and LISA G. ELLISON, in the principal sum of \$94,009.80, plus interest at the

rate of 10 percent per annum from June 14, 1994 until judgment, plus interest thereafter at the current legal rate of 12.27 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 \$126.00 for personal property taxes for the years 1986, and 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RICK L. ELLISON, LISA G. ELLISON, RONALD D. MORRISON, CITY OF SAND SPRINGS, Oklahoma, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, MARLENE ANN MORRISON, UNKNOWN SPOUSE OF RONALD D. MORRISON, IF ANY and UNKNOWN SPOUSE OF MARLENE ANN MORRISON, IF ANY, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RICK L. ELLISON and LISA G. ELLISON, 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 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 \$126.00, personal property taxes which are currently due and owing.

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

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

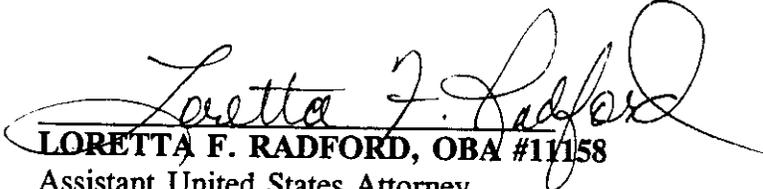
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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-646-B

LFR:flv

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

FILED

MAY 22 1995

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

SUSAN THOMASON,)
)
 Plaintiff,)
)
 vs.)
)
 CORVEL HEALTHCARE CORPORATION,)
)
 Defendant.)

Case No. 94-C-662K H

ENTERED ON DOCKET
DATE MAY 23 1995

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 22nd day of May, 1995.

S/ SVEN ERIK HOLMES

JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 23 1995

F I L E D

MAY 22 1995

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
TERRY E. WARD; UNKNOWN SPOUSE)
OF TERRY E. WARD, IF ANY; LORI)
R. WARD aka LORI PERKINS;)
DAVID WAYNE PERKINS; STATE OF)
OKLAHOMA ex rel OKLAHOMA TAX)
COMMISSION; SNOWCREST)
CONDOMINIUM ASSOCIATION, INC.;)
COUNTY TREASURER, Tulsa)
County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
)
Defendants.)

Civil Case No. 94-C 891B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd 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 by Assistant
General Counsel Kim D. Ashley; and the Defendants, **Terry E. Ward,
Unknown Spouse of Terry E. Ward, if any, Lori R. Ward aka Lori
Perkins, David Wayne Perkins, and Snowcrest Condominium
Association, Inc.**, appear not, but make default.

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

The Court being fully advised and having examined the court file finds that the Defendant, Lori R. Ward aka Lori Perkins will hereinafter referred to as "(Lori R. Ward)"; and the Defendant, Lori R. Ward and Terry E. Ward were granted a Decree of Divorce on December 11, 1989, case number FD 89-6147, in Tulsa County District Court, Tulsa County, Oklahoma.

The Court being fully advised and having examined the court file finds that the Defendant, **Terry E. Ward**, acknowledged receipt of Summons and Complaint via Certified Mail on October 21, 1994; and that the Defendant, **Snowcrest Condominium Association, Inc.**, waived service Summons on October 17, 1994.

The Court further finds that the Defendants, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**, 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 16, 1995, and continuing through March 23, 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 Defendants, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or

the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, and David Wayne Perkins**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on September 28, 1994; that the Defendant, **States of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on October 19, 1994; and that the Defendants, **Terry E. Ward, Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, David Wayne Perkins, and Snowcrest Condominium Association**,

Inc., 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 TWENTY-FIVE (25), BLOCK EIGHT (8),
ROSEWOOD ADDITION TO THE CITY OF TULSA,
COUNTY OF TULSA, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.**

The Court further finds that on September 23, 1986, the Defendants, Terry E. Ward and Lori R. Ward, executed and delivered to FIRSTIER MORTGAGE CO. their mortgage note in the amount of \$49,400.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Terry E. Ward and Lori R. Ward, then husband and wife, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated September 23, 1986, covering the above-described property. Said mortgage was recorded on September 26, 1986, in Book 4972, Page 1294, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was

recorded on September 20, 1988, in Book 5129, Page 450, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 2, 1990, LEADER FEDERAL BANK FOR SAVINGS assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON D.C. 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on March 7, 1990, in Book 5239, Page 2488, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 1, 1990, the Defendants, Terry E. Ward and Lori R. Ward, then husband and wife, 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 February 1, 1991.

The Court further finds that the Defendants, Terry E. Ward and Lori R. Ward, 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, **Terry E. Ward and Lori R. Ward**, are indebted to the Plaintiff in the principal sum of \$68,747.32, plus interest at the rate of 8.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$16.00 which became a lien on the property as of June 23, 1994; and a lien in the amount of \$21.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **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 a tax warrant dated March 1, 1984, filed on March 28, 1984 in the records of Tulsa County, Oklahoma, in the amount of \$653.76. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, **Terry E. Ward, Unknown Spouse of Terry E. Ward, Lori R. Ward, David Wayne Perkins, and Snowcrest Condominium Association, Inc.**, are in default, and have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, Terry E. Ward and Lori R. Ward, in the principal sum of \$68,747.32, plus interest at the rate of 8.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.287 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 \$37.00 for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$653.76, plus penalties and interest, for a tax warrant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Terry E. Ward, Unknown Spouse of Terry E. Ward, if any, Lori R. Ward, David Wayne Perkins, Snowcrest Condominium Association, Inc. and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

In payment of Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, in the amount of \$653.76, plus accrued and accruing interest, for a tax warrant.

Fourth:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$37.00, personal property taxes which are currently due and owing.

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

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

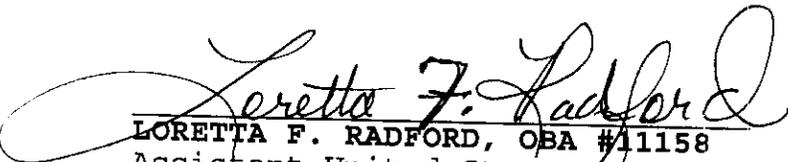
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma ex rel
Oklahoma Tax Commission


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

Judgment of Foreclosure
Civil Action No. 94-C 891B

LFR:lg

DATE MAY 22 1995

FILED

MAY 19 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

DOROTHY M. JENKINS,)
)
Plaintiff,)
)
vs.)
)
SHIRLEY CHATER, Commissioner of Social Security Administration,)
)
Defendant.)

Case No. 93-C-217

ORDER

Now before the Court is Plaintiff's Motion For Award Of Attorney Fees Under the Equal Access To Justice Act (docket #20). The motion comes after this Court remanded the instant case for additional consideration in regards to Plaintiff's application for Social Security disability benefits.

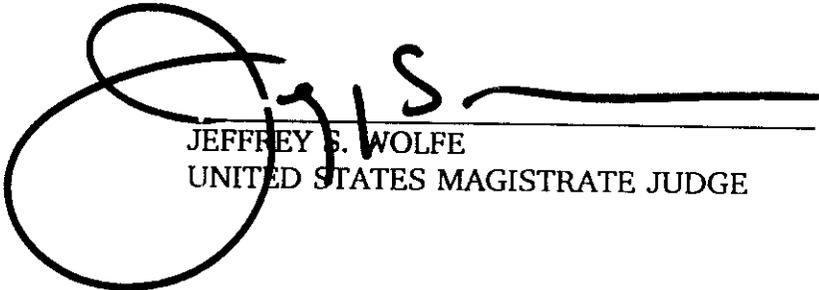
The Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d) permits a court to award attorney fees to a prevailing party unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. *Fulton v. Heckler*, 784 F.2d 348,349 (10th Cir. 1986). The test for "substantial justification" is essentially one of "reasonableness in both law and fact." *Id.*

After examining the record, the Court finds that the Secretary's position in Plaintiff's appeal was "substantially justified." The Court remanded the case for two reasons: (1) re-evaluate a letter from the treating physician and (2) further evaluate the claimant's mental

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impairments. However, the Commissioner's argument on appeal was reasonable in both law and fact. Therefore, Plaintiff's Motion For Award Of Attorney Fees Under the Equal Access To Justice Act (docket #20) is **DENIED**.

IT IS SO ORDERED THIS 19th day of May, 1995.



JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE MAY 22 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY W. SMITH aka Larry Wayne)
 Smith; DONNA J. SMITH aka Donna)
 Smith; STATE OF OKLAHOMA, ex rel.)
 DEPARTMENT OF HUMAN)
 SERVICES; STATE OF OKLAHOMA,)
 ex rel. OKLAHOMA TAX)
 COMMISSION; CITY OF BROKEN)
 ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma; NATIONAL CHECK)
 CASHERS,)
)
 Defendants.)

Civil Case No. 95-C 0109K

FILED
MAY 10 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 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, appears not previously claiming no interest;
the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R.
Vanderburg, City Attorney, Broken Arrow, Oklahoma; the Defendant, STATE OF
OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously
filed a Disclaimer; and the Defendants, LARRY W. SMITH aka Larry Wayne Smith,
DONNA J. SMITH aka Donna Smith, STATE OF OKLAHOMA, ex rel. DEPARTMENT

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

OF HUMAN SERVICES, and NATIONAL CHECK CASHERS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LARRY W. SMITH aka Larry Wayne Smith, signed a Waiver of Summons on February 24, 1995; that the Defendant, DONNA J. SMITH aka Donna Smith, signed a Waiver of Summons on February 24, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, was served a copy of Summons and Complaint on February 3, 1995, by Certified Mail; that Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, was served a copy of Summons and Complaint on February 9, 1995, by Certified Mail; that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on February 3, 1995, by Certified Mail; that Defendant, NATIONAL CHECK CASHERS, was served a copy of Summons and Complaint, on March 20, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on February 21, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on March 22, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer to Amended Complaint and Cross Petition on March 17, 1995; and that the Defendants, LARRY W. SMITH aka Larry Wayne Smith, DONNA J. SMITH aka Donna Smith, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, and NATIONAL CHECK CASHERS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 31, 1987, Firstier Mortgage Co., assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan Association. This Assignment of Mortgage was recorded on September 22, 1987, in Book 5053, Page 279, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 16, 1988, Leader Federal Savings & Loan 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 September 16, 1988, in Book 5128, Page 1852, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, LARRY W. SMITH and DONNA J. SMITH, currently hold the title to the property via General Warranty Deed, dated July 29, 1987, recorded on August 4, 1987, in Book 5043, Page 575, in the records of Tulsa County, Oklahoma and are the current assumptors of the subject indebtedness.

The Court further finds that on August 17, 1988, the Defendants, LARRY W. SMITH and DONNA J. SMITH, 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 June 7, 1989, July 18, 1990, and July 2, 1991.

The Court further finds that the Defendants, LARRY W. SMITH and DONNA J. SMITH, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LARRY W. SMITH and DONNA J. SMITH, are indebted to the Plaintiff in the principal sum of \$111,880.42, plus interest at the rate of 9.5 percent per

annum from November 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 Defendants, LARRY W. SMITH, DONNA J. SMITH, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, and NATIONAL CHECK CASHERS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, disclaims any right, title or interest in the subject property.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has a claim in the amount of \$24.57, plus costs and attorney's fees, and is the lawful holder of certain easements as shown on the duly recorded plat of.

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, LARRY W. SMITH and DONNA J. SMITH, in the principal sum of \$111,880.42, plus interest at the rate of 9.5 percent per annum from November 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, CITY OF BROKEN ARROW, Oklahoma, have and recover judgment in the amount of \$24.57, plus costs and attorney's fees, and is the lawful holder of certain easements as shown on the duly recorded plat of.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, LARRY W. SMITH, DONNA J. SMITH, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, and NATIONAL CHECK CASHERS, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LARRY W. SMITH and DONNA J. SMITH, 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, CITY OF BROKEN ARROW,
Oklahoma, in the amount of \$24.57, plus costs and attorney's
fees.

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.

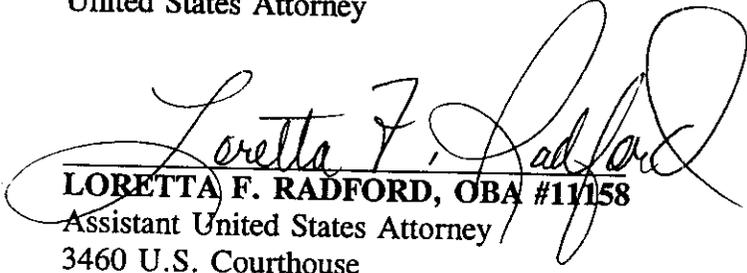
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under and by virtue of this judgment
and decree, all of the Defendants and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of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

s/ TERRY C. KEAN

UNITED STATES DISTRICT JUDGE

APPROVED:

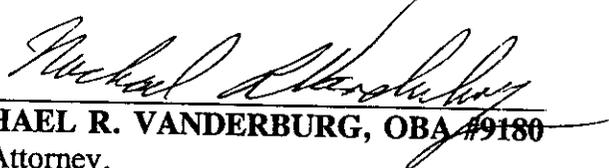
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



MICHAEL R. VANDERBURG, OBA #9180

City Attorney,

CITY OF BROKEN ARROW

P. O. Box 610

Broken Arrow, OK 74012

Attorney for the Defendant,

City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 0109K

LFR:flv

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

ENTERED ON DOCKET

DATE MAY 22 1995

In Re:

UNITED AMERICAN FUELS, INC.,
a Nebraska corporation,
EIN: 47-0698911

BENSON 66 SERVICE, INC.,
a Nebraska corporation,
EIN: 47-0458985

HUDSON-FARRIS CORPORATION,
an Oklahoma corporation, s/d/b/a
Hudson Oil Company

EIN: 73-1201006

Debtors.

) Case No. 94-13510-BH
) (Chapter 11)

) Case No. 94-13512-BH
) (Chapter 11)

) Case No. 94-13511-BH
) (Chapter 11)
) (Jointly Administered under
) Case No. 94-13510-BH in
) the United States Bankruptcy
) Court for the Western
) District of Oklahoma)

BENSON 66 SERVICE, INC., a
Nebraska corporation; BENVEST,
L.P., a Nebraska limited
partnership; CAM-DELL
ENTERPRISES, L.P., a Nebraska
Limited Partnership; THOMAS M.
CAMPBELL; KEITH L. CRANDALL;
and THE BENSON CORPORATION, a
Delaware corporation,

Plaintiffs.

vs.

W.P.G., INC., a Delaware
corporation; PETRO INVESTMENTS,
LTD., a Delaware corporation; and
MADISON CAPITAL GROUP, INC.,
a Delaware corporation,

Defendants.

FILED

MAY 19 1995

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

State Court
Case No. CJ-94-02191

District Court
Case No. 94-906-K

ADMINISTRATIVE CLOSING ORDER

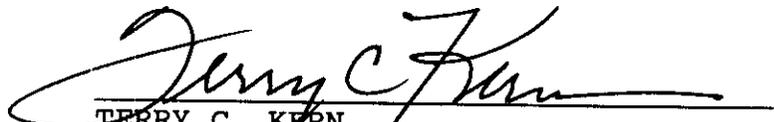
The above captioned case should be administratively closed.
An identical case, under the case number 94-MC-41-B, has already

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been referred to the bankruptcy court by Judge Brett pursuant to the District Court's Rules for Bankruptcy Practice and Procedure (Miscellaneous Order No. M-128), Rule B-5. Case Number 94-MC-41-B, is entirely duplicative of the case currently before the Court.

It is therefore ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

ORDERED this 19 day of May, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

MAY 22 1995

DATE

F I L E D

MAY 16 1995

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

JOANNE LYONS,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

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

Case No. 94-C-683-K

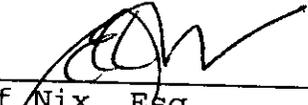
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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 15th day of May, 1995.

Respectfully submitted,

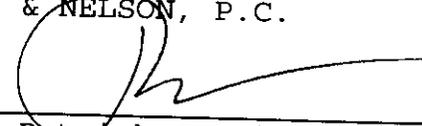
By:


Jeff Nix, Esq.
Joy Kay Williams, Esq.
2121 South Columbia
Suite 710
Tulsa, Oklahoma 74114-3521

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



ENTERED ON DOCKET
DATE MAY 22 1995

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

FILED
MAY 19 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GARY MCCULLOUGH,)
)
Plaintiff,)
)
v.)
)
LINDBERG HEAT TREATING CO.,)
)
Defendant.)

Case No. 93-C-790-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 19th day of May, 1995.

Respectfully submitted,

By: [Signature]
Ken Ray Underwood
525 S. Main Park Centre
Tulsa, OK 74103
(918) 582-7447

ATTORNEY FOR PLAINTIFF

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

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

ATTORNEYS FOR DEFENDANT

37

[Handwritten mark]

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

ENTERED ON DOCKET
DATE MAY 22 1995

LLOYD NEAFUS AND SUE NEAFUS,)
)
 Plaintiffs,)
)
 v.)
)
 ATLANTA CASUALTY COMPANY,)
)
 Defendant.)

No. 94-C-314-K

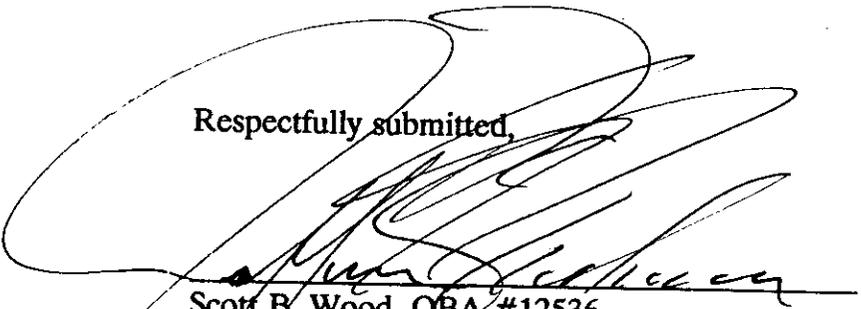
JUL 1 1995
MAY 17 1995
RECEIVED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Lloyd Neafus and Sue Neafus, by and through their attorneys of record, Joseph F. Clark and Randolph P. Stainer of the firm Clark & Stainer, P.C., joining with the Defendant, Atlanta Casualty Company, by and through its attorneys, Jeffrey A. Glendening, Scott B. Wood and Jeffrey C. Sacra, of Barkley & Rodolf, and submit the following Stipulation of Dismissal With Prejudice, to the Court.

It is stipulated, understood and agreed by and between the parties hereto that the above-numbered and styled cause is hereby dismissed with prejudice as to the refiling of any future actions thereon, based upon grounds that the parties have entered into a compromise settlement of any and all claims by Plaintiffs against the Defendant. Each party will bear their own fees and costs.

Respectfully submitted,



Scott B. Wood, OBA #12536

Jeffrey A. Glendening, OBA #11643

Jeffrey C. Sacra, OBA #15342

BARKLEY & RODOLF

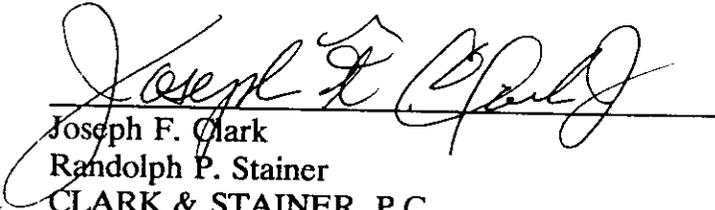
2700 Mid-Continent Tower

401 South Boston Avenue

Tulsa, Oklahoma 74103

(918) 599-9991

ATTORNEYS FOR DEFENDANT



Joseph F. Clark

Randolph P. Stainer

CLARK & STAINER, P.C.

406 South Boulder Avenue

Suite 600

Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFFS

ENTERED ON DOCKET
DATE MAY 22 1995

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

F I L E D

MAY 16 1995

U.S. DISTRICT COURT

SUSAN THOMASON,

Plaintiff,

vs.

CORVEL HEALTHCARE CORPORATION,

Defendant.

Case No. 94-C-662K/

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties have settled the captioned matter and hereby request that this Court enter the attached Order of Dismissal With Prejudice.

Respectfully submitted,

Kimberly Lambert Love

Kimberly Lambert Love, OBA #10879
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4215
(918) 587-0000

Attorneys for the Defendant, CorVel Healthcare
Corporation

025



Richard J. Borg
5314 S. Yale, Suite 206
Tulsa, Oklahoma 74135

Attorneys for the Plaintiff, Susan Thomason (now
Robins)