

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

FILED

NOV 8 1995

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

AYSEL D. OZTURK,)
)
Plaintiff,)
)
v.)
)
TOMMY W. TERNEUS, et al.,)
)
Defendants.)

Case No. 94-C-641-H

ENTERED ON DOCKET

DATE 11-9-95

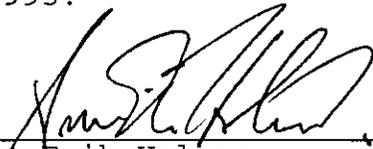
J U D G M E N T

This matter came before the Court on a Motion to Dismiss by Defendants City of Tulsa, Mayor Susan Savage, the Tulsa Police Department, and Chief Ron Palmer; a Motion to Dismiss by Defendants Joan Hastings, Jim Smith, and the Tulsa County Clerk; a Motion to Dismiss by Defendant James M. Lamb; and a Motion for Summary Judgment by Tommy W. Terneus. The Court duly considered the issues and rendered a decision in accordance with the orders filed on July 19, 1995 and November 8, 1995.

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

IT IS SO ORDERED.

This 8th day of November 1995.



Sven Erik Holmes
United States District Judge

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

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

AYSEL D. OZTURK,)
)
 Plaintiff,)
)
 v.)
)
 TOMMY W. TERNEUS,)
)
 Defendant.)

Case No. 94-C-641-H

ENTERED ON DOCKET

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O R D E R

This matter comes before the Court on the Motion of Tulsa Police Officer Tommy W. Terneus ("Terneus") for Summary Judgment.¹ Terneus asserts that no genuine issue of material fact remains for determination by a factfinder and that he is entitled to judgment as a matter of law on his qualified immunity defense.

Because Plaintiff never responded to Terneus' Motion for Summary Judgment, all material facts set forth in his statement of undisputed facts are deemed admitted, see N.D. Local Rule 56.1(B), and, further, Plaintiff is deemed to have confessed Terneus' Motion

¹ At a hearing held on July 13, 1995, this Court permitted Terneus to join in the Motion to Dismiss made by other Defendants, who are no longer parties to this action. By its order filed on July 19, 1995, the Court granted Terneus leave to supplement his motion papers by August 8, 1995. Plaintiff was given until August 29, 1995 to respond to Terneus' supplemental filing. Plaintiff was further notified that, if Terneus presented evidence outside the pleadings in his supplemental filing, then the Court would treat his motion as one for summary judgment.

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for Summary Judgment, see N.D. Local Rule 7.1(C). The Court hereby grants the Motion for Summary Judgment of Terneus.

IT IS SO ORDERED.

This 8TH day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 8 1995

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

CHUBB SOVEREIGN LIFE)
INSURANCE COMPANY,)

Plaintiff,)

v.)

GRACE JACOBUS, JIMMY N.)
YANCEY, individually and as)
Administrator of the ESTATE)
OF MICHAEL D. YANCEY,)
Deceased, and MOLLY LANETTE)
YANCEY,)

Defendants.)

Case No. 94-C-950-H ✓

FILED ON DOCKET
DATE 11-9-95

ORDER AND STIPULATION OF DISMISSAL

The remaining parties to this action, Grace Jacobus, individually ("Jacobus"), Jimmy N. Yancey as Administrator of the Estate of Michael D. Yancey, Deceased, Jimmy N. Yancey, individually, and Molly Lanette Yancey, individually ("Yancey Defendants"), as part of the compromise settlement of their competing and adverse claims herein, hereby stipulate as follows:

1. The sum of \$400,000.00 shall be paid to Jacobus and her attorney by the Court Clerk out of the funds on deposit in the registry of this Court with respect to this action.

2. All remaining funds on deposit and all accumulated interest thereon (which total approximately \$157,073.34 as of September 30, 1995), shall be paid to

Jimmy N. Yancey, Administrator of the Estate of Michael D. Yancey, Deceased.

3. All parties shall bear their own costs and attorney's fees and no party shall be a prevailing party in this action.

4. The sum of \$232,683.00 of the funds paid into the registry of this Court have been previously paid out to Jimmy N. Yancey, as Administrator of the Estate of Michael D. Yancey, Deceased, for use in payment of that portion of the estate taxes owed to the Internal Revenue Service and the Oklahoma Tax Commission by the Estate which taxes are allegedly attributable to the \$750,000.00 of life insurance proceeds which were the subject of this action (the "Tax Distribution"). It is agreed that \$180,000.00 of the Tax Distribution is hereby determined to be attributable to the \$400,000 being paid to Ms. Jacobus, and that such \$180,000.00 amount is the fair amount of estate taxes attributable to and equitably apportioned against the \$400,000.00 being paid to Ms. Jacobus. The Estate of Michael D. Yancey, Deceased and Jimmy N. Yancey, Administrator of the Estate, agree that they have no further claim against either (i) Ms. Jacobus, or (ii) the \$400,000.00 being paid to her hereunder, for the payment of any federal or state taxes owed with respect to the \$750,000.00 of life insurance proceeds in question.

5. Ms. Jacobus hereby dismisses with prejudice her claim to the insurance proceeds as set forth in the Answer and Claim to Proceeds of Grace Jacobus filed herein on October 31, 1994.

6. The Yancey Defendants hereby dismiss with prejudice their claims to the insurance proceeds in question and their cross-claims against Ms. Jacobus as set forth in (i) the Answer, Statement of Claim and Cross-Claims of Jimmy N. Yancey, Individually, and as Personal Representative of the Estate of Michael D. Yancey, Deceased, and Molly Lanette Yancey, filed herein on November 1, 1994, as well as set forth in (ii) the proposed amended and/or additional cross-claims stated in the Yancey Defendants' Application for Leave to File Amended Statement of Claim and Amended Cross-Claims filed herein on June 15, 1995.

7. The parties request that the Court enter its order approving and confirming the Stipulations of the parties and ordering dismissal of this action in accordance therewith.

The Court, having reviewed the Stipulations of the parties herein, and being fully advised in the premises, and for good cause shown, finds that the Stipulations of the parties should be approved and confirmed and accordingly enters its orders set forth below.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Stipulations of the parties should be and are hereby approved and confirmed and are made the findings of this Court.

2. The Clerk of this Court is hereby directed to pay to Grace Jacobus, and Jimmy Goodman, her attorney, the sum of \$400,000.00 out of the insurance proceeds paid into the registry of this Court.

3. The Clerk of this Court is hereby directed to pay the balance of all such insurance proceeds paid into the registry of this Court, with all accumulated interest, (in the approximate amount of \$157,073.34 as of September 30, 1995) to Jimmy N. Yancey, Administrator of the Estate of Michael D. Yancey, Deceased, and Norman and Wohlgemuth, his attorneys.

less the required registry fee [Local Rule 67.1 D]
SEH

✓ 11/22/95 jc

4. The Clerk of this Court is to make distribution of the above amounts, under paragraphs 2 and 3 above, as soon as reasonably possible after the current Treasury Bill investments mature on or about November 16, 1995.

5. The parties shall bear their own costs and attorney's fees and none shall be considered a prevailing party in this action.

6. The Court hereby finds and orders that \$180,000.00 of the \$232,683.00 previously paid out to Jimmy

N. Yancey as Administrator of the Estate of Michael D. Yancey, Deceased (for payment of that part of the estate taxes owed to the Internal Revenue Service and the Oklahoma Tax Commission allegedly attributable to the \$750,000.00 of life insurance proceeds which were the subject of this action) is hereby determined to be attributable to the \$400,000.00 being paid to Ms. Jacobus; and that such \$180,000.00 is the fair amount of estate taxes attributable to and equitably apportioned against the \$400,000.00 being paid to Ms. Jacobus; and the Estate of Michael D. Yancey, Deceased and Jimmy N. Yancey, as Administrator of the Estate, have no further claim against either (i) Ms. Jacobus or (ii) the \$400,000.00 being paid to her hereunder, for the payment of any federal or state taxes owed with respect to the \$750,000.00 of life insurance proceeds in question.

7. This action, and all claims of Grace Jacobus to the insurance proceeds which are the subject of this action, and all claims of the Yancey Defendants to the insurance proceeds which are the subject of this action, and all cross-claims of the Yancey Defendants against Ms. Jacobus (whether stated in the original cross-claims or the proposed Amended Statement of Claim and Amended Cross-Claims filed on June 15, 1995) are hereby dismissed with prejudice to the filing of any future cause of action thereon by Ms. Jacobus or the Yancey Defendants.

IT IS SO ORDERED this 8TH ^{NOVEMBER} day of ~~October~~, 1995.

Sven Erik Holmes

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AND STIPULATED TO:

Grace Jacobus
GRACE JACOBUS

Jimmy N. Yancey
JIMMY N. YANCEY, Administrator
of the Estate of Michael D.
Yancey, Deceased

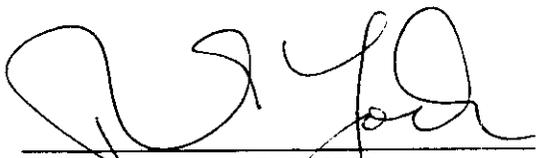
Jimmy N. Yancey
JIMMY N. YANCEY, Individually

Molly Lanette Yancey
MOLLY LANETTE YANCEY, Individually

APPROVED:

Jimmy Goodman
JIMMY GOODMAN
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700

ATTORNEY FOR GRACE JACOBUS



JOEL L. WOHLGEMUTH
THOMAS M. LADNER
NORMAN & WOHLGEMUTH
401 S. Boston Avenue
Tulsa, OK 74103
(918) 583-7571

ATTORNEYS FOR YANCEY DEFENDANTS

212.95B.JKG

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

FILED

NOV - 8 1995

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

KEN ALEXANDER)
Plaintiff,)
v.)
THE CITY OF SAPULPA, OKLAHOMA,)
et. al.)
Defendants.)

NO. 94-CV-1191-H ✓

FILED ON DOCKET

11-9-95

ORDER

On August 1, 1995, the undersigned United States Magistrate Judge entered an order compelling Plaintiff to respond to discovery [Dkt. 6]. The Court took the issue of assessing the cost of the motion to compel against Plaintiff's counsel pursuant to Fed.R.Civ.P. 37(a)(4)(A) under advisement and directed the Defendant to submit an itemization of costs and fees to the Court. On August 10, 1995 the Court directed Plaintiff's counsel to file a response: (1) setting forth arguments why attorneys fees and costs should not be assessed; (2) addressing the reasonableness of the hourly rate, time and activities itemized by Defendant; and (3) stating whether Plaintiff's counsel requests a hearing on the matter [Dkt. 8]. That response was filed on August 25, 1995 [Dkt. 9]. No hearing was requested. The matter is therefore ripe for decision.

Rule 37(a)(4)(A) provides that if a motion to compel is granted:

the court shall, after affording a opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds . . . that the opposing party's nondisclosure, response, or other objection was substantially justified, or that other circumstances make an award of expenses unjust.

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The Court finds that there was an honest disagreement over the number of interrogatories due to the inclusion of sub-parts. Thus, the Court cannot say that the Plaintiff's objections to the interrogatories were not justified, in part. For that reason, the Court declines to assess costs of the motion against Plaintiff's counsel.

However, the Court reiterates its earlier finding that Plaintiff's answers and amended answers to the interrogatories were incomplete. The Court does not condone Plaintiff's failure to completely answer discovery requests and finds that Plaintiff's counsel should have been more cooperative in returning phone calls and answering correspondence. The Court finds it particularly troubling that Plaintiff's counsel failed to appear at the meeting scheduled in accordance with N.D.L.R. 37.1(A) for counsel to resolve the discovery matters. The Court admonishes counsel for Plaintiff that he must become familiar with and adhere to the requirements imposed by the Federal Rules and Local Rules to meet and confer with opposing counsel concerning discovery disputes. The parties are expected to make every effort to resolve discovery disputes.

Defendants' request for costs and attorneys fees related to their motion to compel [Dkt. 4] is DENIED.

SO ORDERED this 8th day of November, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

NOV 8 1995 *lc*

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

CARLTON PETERS,
Petitioner,

vs.

R. MICHAEL CODY,
Respondent.

No. 94-C-389-B ✓

ENTERED ON DOCKET

DATE NOV 09 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his Tulsa County conviction in Case No. CF-92-3708. Respondent has filed a response to which Petitioner has replied. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On April 1, 1993, Petitioner pled guilty to Delivery of a Controlled Drug within 1000 feet of a Public park (Count 1); Unlawful use of a Communication Facility (Count 2); Delivery of a Controlled Drug within 1000 feet of a School House (Count 4); Trafficking in Illegal Drugs (Count 5); Failure to Obtain a Drug Stamp (Count 6), all after former conviction of one felony. Petitioner pled no contest to Conspiracy to Deliver a Controlled Drug within 1000 feet of a Public Park; Conspiracy to Traffic in Controlled Drugs (Count 3); Unlawful Use of a Communication

Facility (Count 7); Racketeering (Count 9), all after former conviction of a felony. The trial court sentenced Petitioner to fifty years on Counts 1, 3, 4, 5, 7, and 9 to be served concurrently and ten years on Counts 2, 6, and 8 to be served concurrently. Petitioner did not move to withdraw his pleas and did not file an appeal.

On May 3, 1993, he filed a pro se petition in error and designation or record on appeal and subsequently moved for Transcripts at Public Expense and for appointment of counsel. The Clerk of the Court forwarded the motions to the District Attorney for response and to Judge Dalton for ruling. On August 12, 1993, Judge Dalton construed Petitioner's motion as an application for post-conviction relief and denied the same. The court found (1) Petitioner's sentences were properly enhanced, (2) Petitioner's counsel provided effective assistance of counsel, and (3) Petitioner had not offered any reason for his failure to file a timely direct appeal following his guilty plea conviction. (Ex. 5 attached to Petitioner's Response, docket #5.) Petitioner did not appeal. Accordingly, the district court's decision became a final decision on the merits.

Thereafter, Petitioner filed a request for an appeal out of time. He alleged that his failure to perfect a direct appeal was through no fault of his own, but rather due to ineffective assistance of counsel. On February 22, 1994, the Tulsa County District Court construed petitioner's request as a second application for post-conviction relief and denied relief on the

ground that Petitioner had failed to state any reason for his failure to raise these issues in his first application; the issue of ineffective assistance of counsel was decided adversely in Petitioner's first application; and there was nothing in the record to support Petitioner's contention that he was denied an appeal through no fault of his own. (Ex. A to Respondent's Response, docket #4.) The Court of Criminal Appeals affirmed the district court's order denying relief, citing as the sole ground the finality of the unappealed decision of the district court in Petitioner's first post-conviction proceeding and Petitioner's failure to offer sufficient reason for his failure to file a timely direct appeal. (Ex. B to Respondent's response, docket #4.)

In the present petition for a writ of habeas corpus, Petitioner contends that he has been denied the effective assistance of counsel during the ten-day period for perfecting an appeal. He alleges that he informed his attorney of his desire to appeal within ten days after entering his pleas of guilty, but his counsel failed to perfect the appeal. Respondent contends that Petitioner's ineffective assistance claim is procedurally barred because he failed to raise it in his first application for post-conviction relief. Petitioner responds that a procedural bar should not be applied in his case because he notified counsel of his desire to appeal, yet counsel failed to heed his request.

II. ANALYSIS

As a preliminary matter, the Court determines that Petitioner

meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992). The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his ineffective assistance of counsel claim in the present petition for a writ of habeas corpus because he failed to raise it in his first application for post-conviction relief.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. Additionally, a finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991),

cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's ineffective assistance of counsel claim is barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were barred by res judicata for failure to appeal the denial of a first application for post-conviction relief. See Okla. Stat. tit. 22, §§ 1086 and 1087; See also Farrell v. Lane, 939 F.2d 409 (7th Cir. 1991) (petitioner defaulted claim of ineffective assistance of counsel for purposes of habeas review, even though he had raised that issue in post-conviction petition, where he had failed to appeal denial of post-conviction petition); Berry v. Cody, 1994 WL 596878 (10th Cir. Nov. 2, 1994) (unpublished opinion). The Tenth Circuit Court of Appeals has also recognized that ineffective assistance of counsel claims are procedurally barred unless raised on direct appeal or on a first application for post-conviction relief. Breechen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir. 1994).

Because of his procedural default, this Court may not consider Petitioner's ineffective assistance of counsel claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his

claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that his counsel was ineffective in failing to file a direct criminal appeal. He also argues that he was totally ignorant of the law. The Court finds these arguments unpersuasive. Petitioner has no federal constitutional right to effective assistance of counsel at the post conviction level. See Coleman, 501 U.S. at 755-56 (no constitutional right to counsel in a state post-conviction proceeding); see also Carter v. Montgomery, 769 F.2d 1537, 1543 (11th Cir. 1985); Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990). Therefore, the Court cannot consider the ineffective assistance of counsel during the ten-day period following sentencing as sufficient cause to excuse the procedural default. Moreover, Petitioner's pro se status and lack of awareness and training of legal issues do not constitute sufficient cause under

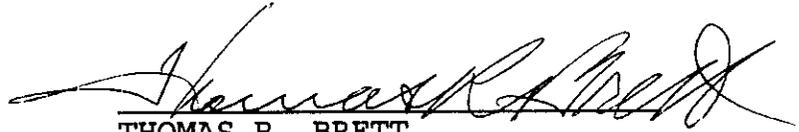
the cause and prejudice standard. Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991).

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence. Accordingly, this Court must conclude that Petitioner's ineffective assistance of counsel claim is procedurally barred.

III. CONCLUSION

After carefully reviewing the record in this case, the Court finds that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. The petition for a writ of habeas corpus (doc. #1) is therefore DENIED. The Clerk shall RETURN to Tulsa County District Court the original file in Case No. CF-92-3708 as it was not necessary for resolution of this case.

SO ORDERED THIS 8th day of Nov., 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CATHERINE J. GEORGE aka Catherine
Jo George aka Catherine George; THE
UNIVERSITY OF TULSA; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

NOV - 8 1995

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

ENTERED ON DOCKET

DATE NOV 09 1995

Civil Case No. 95 C 754B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of Nov,
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, THE UNIVERSITY OF
TULSA, appears by its Attorney, Daniel M. Webb; and the Defendant, CATHERINE J.
GEORGE aka Catherine Jo George aka Catherine George, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the
Defendant, CATHERINE J. GEORGE aka Catherine Jo George aka Catherine George, was
served a copy of Summons and Complaint on September 14, 1995, by Certified mail; that
the Defendant, THE UNIVERSITY OF TULSA, signed a Waiver of Summons on
August 22, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 5, 1995; that the Defendant, THE UNIVERSITY OF TULSA, filed its Answer on August 31, 1995; and that the Defendant, CATHERINE J. GEORGE aka Catherine Jo George aka Catherine George, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CATHERINE J. GEORGE, is one and the same person as Catherine Jo George and Catherine George, and will hereinafter be referred to as "CATHERINE J. GEORGE." The Defendant, CATHERINE J. GEORGE, is a single unmarried person.

The Court further finds that on October 20, 1994, Catherine Jo George filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, her District of Oklahoma, Case No. 94-03146-W. On February 24, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on April 12, 1995.

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 Eight (8), EAST LAWN ADDITION to
the City of Tulsa, Tulsa County, State of Oklahoma,
according to the recorded Plat thereof.**

The Court further finds that on November 18, 1988, the Defendant, CATHERINE J. GEORGE, executed and delivered to MORTGAGE CLEARING CORPORATION, her mortgage note in the amount of \$50,810.00, payable in monthly

installments, with interest thereon at the rate of Eight and Seven-Eighths percent (8 7/8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, CATHERINE J. GEORGE, a single person, executed and delivered to MORTGAGE CLEARING CORPORATION, a mortgage dated November 18, 1988, covering the above-described property. Said mortgage was recorded on November 22, 1988, in Book 5141, Page 1492, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 11, 1994, 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 July 13, 1994, in Book 5641, Page 0439, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 15, 1994, the Defendant, CATHERINE J. GEORGE, 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, CATHERINE J. GEORGE, 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, CATHERINE J. GEORGE, is indebted to the Plaintiff in the principal sum of \$56,083.14, plus interest at the rate of 8 7/8 percent per annum from February 9, 1995 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 \$28.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$27.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$28.00 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, THE UNIVERSITY OF TULSA, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of \$9,132.24 plus court costs, together with interest thereon at the rate of 7.420% per annum from the date of judgment, and for an attorney's fee of \$2,226.00, which became a lien on the property as of July 21, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CATHERINE J. GEORGE, is in default, and has 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,

CATHERINE J. GEORGE, in the principal sum of \$56,083.14, plus interest at the rate of 8 7/8 percent per annum from February 9, 1995 until judgment, plus interest thereafter at the current legal rate of ~~5 1/2~~ 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 \$83.00, 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 Defendant, THE UNIVERSITY OF TULSA, have and recover judgment in the amount of \$9,132.24 plus court costs, together with interest thereon at the rate of 7.420%, and for attorney's fee in the amount of \$2,226.00, for it judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma and CATHERINE J. GEORGE, 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, CATHERINE J. GEORGE, 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 \$55.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, THE UNIVERSITY OF TULSA, in the amount of \$9,132.24 plus court costs, together with interest at a rate of 7.420% per annum, and for attorney's fee of \$2,226.00, for its judgment.

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$28.00, 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

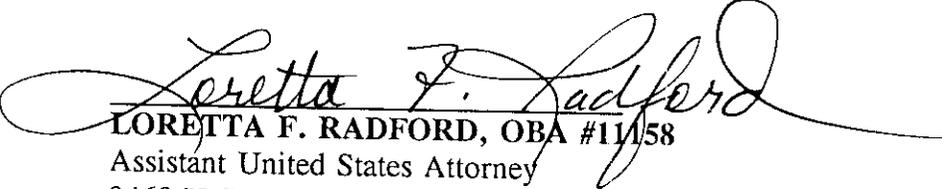
right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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.

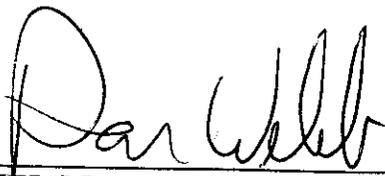
S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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



DANIEL M. WEBB, OBA #1003

1437 South Boulder, Suite 900

Tulsa, Oklahoma 74119

Attorney for Defendant,

The University of Tulsa

Judgment of Foreclosure

Civil Action No. 95 C 754B

LFR:flv

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

ENTERED ON DOCKET
DATE ~~NOV 09 1995~~

FILED

NOV - 8 1995

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

ODA L. LOVELACE,)
SS# 448-40-9655)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration)
Defendant.)

NO. 94-C-497-M

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 8th day
of Nov., 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

12

FILED

NOV - 8 1995

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

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

ODA L. LOVELACE,)
SS# 448-40-9655)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration)
Defendant.)

NO. 94-C-497-M

ENTERED ON DOCKET
DATE NOV 09 1995

ORDER

Plaintiff, Oda L. Lovelace, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's May 12, 1992 application for disability benefits was denied July 15, 1992, the denial was affirmed on reconsideration, September 10, 1992. A hearing before an Administrative Law Judge ("ALJ") was held June 24, 1993. By decision dated October 4, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 14, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence. In particular Plaintiff alleges that the ALJ failed to give controlling weight to the opinion of the Plaintiff's treating physician, Dr. Milo and that the evidence does not support the ALJ's findings with respect to his residual functional capacity "RFC".

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth both the relevant facts of this case and the required sequential analysis. The Court therefore incorporates this information into this order as the duplication of this effort would serve no useful purpose.

On March 19, 1992, Plaintiff's treating physician, Dr. Milo, expressed the opinion that due to his back and shoulder problems, Plaintiff should retrain for some job, other than his current one of truck driving [R. 207]. On May 12, 1992, Dr. Milo expressed the opinion that, in view of his medical problems, including chronic back and shoulder pain, severe uncontrolled hypertension, and chronic asthmatic bronchitis, Plaintiff is "totally permanently disabled for any kind of work" [R. 206]. On June 2, 1992, Dr. Milo made the following statement: "As far as his work limitations, he should not be involved in any lifting or carrying of more than 30 lbs. weight. As far as his range of motion in the thoracolumbar spine, this is severely restricted due

to discomfort and pain. . . . Currently, he is totally *temporarily* disabled for any kind of work and his permanent work limitations most probably will be approximately 30 lbs. weight to lift or carry." [R. 205] [emphasis supplied].

Plaintiff argues that Dr. Milo's opinion is entitled to controlling weight. The relevant regulations require the Secretary to give controlling weight to the opinion of a treating physician which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions, provided it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record.. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2) and §§ 404.1527(d)(2), 416.927(d)(2).

In this case at different points in time Plaintiff's treating physician offered several differing opinions regarding the level of Plaintiff's disability. The opinion Plaintiff wants the Secretary to adopt is one that the physician later abandoned in favor of one less favorable to Plaintiff's position. However, the ALJ specifically tailored his findings concerning Plaintiff's residual functional capacity to be consistent with Dr. Milo's latest opinion [R. 31, 33, 35]. The Court finds that Plaintiff's allegation that the ALJ ignored the treating physician's opinion to be without merit.

The ALJ's findings concerning Plaintiff's residual functional capacity are supported by substantial evidence. The ALJ's conclusion that Plaintiff could perform light work, reduced by the lack of ability to reach overhead is supported by Dr. Milo's June 2, 1992 opinion and by the results of electromyograms, nerve conduction velocity studies, and computerized tomography scans which indicate no objective basis for Plaintiff's claimed inability to sit or stand for any

length of time [R. 202, 207, 218, 232, 289, 290].

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 8th day of November, 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

NOV 8 1995

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

CHUBB SOVEREIGN LIFE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
GRACE JACOBUS, JIMMY N.)
YANCEY, individually and as)
Administrator of the ESTATE)
OF MICHAEL D. YANCEY,)
Deceased, and MOLLY LANETTE)
YANCEY,)
)
Defendants.)

Case No. 94-C-950-H

ENTERED ON DOCKET
DATE 11-9-95

ORDER AND STIPULATION OF DISMISSAL

The remaining parties to this action, Grace Jacobus, individually ("Jacobus"), Jimmy N. Yancey as Administrator of the Estate of Michael D. Yancey, Deceased, Jimmy N. Yancey, individually, and Molly Lanette Yancey, individually ("Yancey Defendants"), as part of the compromise settlement of their competing and adverse claims herein, hereby stipulate as follows:

1. The sum of \$400,000.00 shall be paid to Jacobus and her attorney by the Court Clerk out of the funds on deposit in the registry of this Court with respect to this action.

2. All remaining funds on deposit and all accumulated interest thereon (which total approximately \$157,073.34 as of September 30, 1995), shall be paid to

Jimmy N. Yancey, Administrator of the Estate of Michael D. Yancey, Deceased.

3. All parties shall bear their own costs and attorney's fees and no party shall be a prevailing party in this action.

4. The sum of \$232,683.00 of the funds paid into the registry of this Court have been previously paid out to Jimmy N. Yancey, as Administrator of the Estate of Michael D. Yancey, Deceased, for use in payment of that portion of the estate taxes owed to the Internal Revenue Service and the Oklahoma Tax Commission by the Estate which taxes are allegedly attributable to the \$750,000.00 of life insurance proceeds which were the subject of this action (the "Tax Distribution"). It is agreed that \$180,000.00 of the Tax Distribution is hereby determined to be attributable to the \$400,000 being paid to Ms. Jacobus, and that such \$180,000.00 amount is the fair amount of estate taxes attributable to and equitably apportioned against the \$400,000.00 being paid to Ms. Jacobus. The Estate of Michael D. Yancey, Deceased and Jimmy N. Yancey, Administrator of the Estate, agree that they have no further claim against either (i) Ms. Jacobus, or (ii) the \$400,000.00 being paid to her hereunder, for the payment of any federal or state taxes owed with respect to the \$750,000.00 of life insurance proceeds in question.

5. Ms. Jacobus hereby dismisses with prejudice her claim to the insurance proceeds as set forth in the Answer and Claim to Proceeds of Grace Jacobus filed herein on October 31, 1994.

6. The Yancey Defendants hereby dismiss with prejudice their claims to the insurance proceeds in question and their cross-claims against Ms. Jacobus as set forth in (i) the Answer, Statement of Claim and Cross-Claims of Jimmy N. Yancey, Individually, and as Personal Representative of the Estate of Michael D. Yancey, Deceased, and Molly Lanette Yancey, filed herein on November 1, 1994, as well as set forth in (ii) the proposed amended and/or additional cross-claims stated in the Yancey Defendants' Application for Leave to File Amended Statement of Claim and Amended Cross-Claims filed herein on June 15, 1995.

7. The parties request that the Court enter its order approving and confirming the Stipulations of the parties and ordering dismissal of this action in accordance therewith.

The Court, having reviewed the Stipulations of the parties herein, and being fully advised in the premises, and for good cause shown, finds that the Stipulations of the parties should be approved and confirmed and accordingly enters its orders set forth below.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Stipulations of the parties should be and are hereby approved and confirmed and are made the findings of this Court.

2. The Clerk of this Court is hereby directed to pay to Grace Jacobus, and Jimmy Goodman, her attorney, the sum of \$400,000.00 out of the insurance proceeds paid into the registry of this Court.

3. The Clerk of this Court is hereby directed to pay the balance of all such insurance proceeds paid into the registry of this Court, with all accumulated interest, (in the approximate amount of \$157,073.34 as of September 30, 1995) to Jimmy N. Yancey, Administrator of the Estate of Michael D. Yancey, Deceased, and Norman and Wohlgemuth, his attorneys.

4. The Clerk of this Court is to make distribution of the above amounts, under paragraphs 2 and 3 above, as soon as reasonably possible after the current Treasury Bill investments mature on or about November 16, 1995.

5. The parties shall bear their own costs and attorney's fees and none shall be considered a prevailing party in this action.

6. The Court hereby finds and orders that \$180,000.00 of the \$232,683.00 previously paid out to Jimmy

less the required
registry fee [Local Rule
67.1 D]
SEK

N. Yancey as Administrator of the Estate of Michael D. Yancey, Deceased (for payment of that part of the estate taxes owed to the Internal Revenue Service and the Oklahoma Tax Commission allegedly attributable to the \$750,000.00 of life insurance proceeds which were the subject of this action) is hereby determined to be attributable to the \$400,000.00 being paid to Ms. Jacobus; and that such \$180,000.00 is the fair amount of estate taxes attributable to and equitably apportioned against the \$400,000.00 being paid to Ms. Jacobus; and the Estate of Michael D. Yancey, Deceased and Jimmy N. Yancey, as Administrator of the Estate, have no further claim against either (i) Ms. Jacobus or (ii) the \$400,000.00 being paid to her hereunder, for the payment of any federal or state taxes owed with respect to the \$750,000.00 of life insurance proceeds in question.

7. This action, and all claims of Grace Jacobus to the insurance proceeds which are the subject of this action, and all claims of the Yancey Defendants to the insurance proceeds which are the subject of this action, and all cross-claims of the Yancey Defendants against Ms. Jacobus (whether stated in the original cross-claims or the proposed Amended Statement of Claim and Amended Cross-Claims filed on June 15, 1995) are hereby dismissed with prejudice to the filing of any future cause of action thereon by Ms. Jacobus or the Yancey Defendants.

IT IS SO ORDERED this 8th day of November ~~October~~, 1995.

SI SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AND STIPULATED TO:

Grace Jacobus
GRACE JACOBUS

Jimmy N. Yancey
JIMMY N. YANCEY, Administrator
of the Estate of Michael D.
Yancey, Deceased

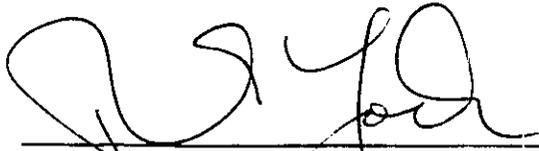
Jimmy N. Yancey
JIMMY N. YANCEY, Individually

Molly Lanette Yancey
MOLLY LANETTE YANCEY, Individually

APPROVED:

J. Goodman
JIMMY GOODMAN
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700

ATTORNEY FOR GRACE JACOBUS



JOEL L. WOHLGEMUTH
THOMAS M. LADNER
NORMAN & WOHLGEMUTH
401 S. Boston Avenue
Tulsa, OK 74103
(918) 583-7571

ATTORNEYS FOR YANCEY DEFENDANTS

212.95B.JKG

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

FILED

NOV - 8 1995

WESLEY R. SLATER,

Plaintiff,

vs.

BRADEN MANUFACTURING, A UNIT OF
JASON, INC., a Wisconsin corporation,
and SHOPMAN'S LOCAL UNION NO. 620 of
the INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, affiliated with A.F.L.-C.I.O.

Defendants.

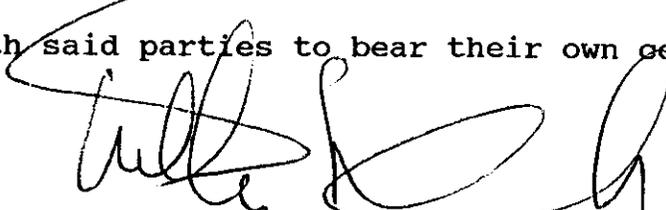
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 95-C-662 K

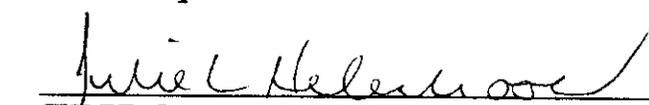
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NOV 09 1995
DATE _____

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1), Fed.R.Civ.P., Plaintiff WESLEY R. SLATER hereby dismisses with prejudice the Defendants BRADEN MANUFACTURING, A UNIT OF JASON, INC. and SHOPMAN'S LOCAL UNION NO. 620 of the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, affiliated with A.F.L.-C.I.O. from the above-referenced action with said parties to bear their own costs and attorney's fees.


TIMOTHY E. McCORMICK, OBA #5920
McCORMICK, SCHOENENBERGER & DAVIS
1516 South Boston, Suite 320
Tulsa, Oklahoma 74119-4019
(918) 582-3655

Attorney for Plaintiff


JULIE L. HELENBROOK
KATTEN, MUCHIN & ZAVIS
525 West Monroe Street, Suite 1600
Chicago, IL 60661-3693

Attorney for Defendant
Braden Manufacturing



THOMAS F. BIRMINGHAM
BIRMINGHAM, MORLEY, WEATHERFORD &
PRIORE

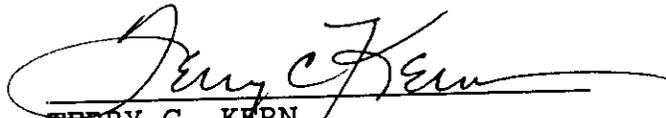
1141 E. 37th Street
Tulsa, OK 74105-3162

Attorney for Defendant
Shopman's Local Union No. 620

has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.

Plaintiff has not shown that he is entitled to relief under Rule 60(b). Accordingly, Plaintiff's motion for reconsideration (docket #16) must be DENIED.

SO ORDERED THIS 9 day of November, 1995.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

GREGORY LYNN BOLTE,
Plaintiff,

vs.

MIAMI POLICE DEPARTMENT, sued)
as Claude Briggs, JAMES ED)
WALKER, Ottawa County Sheriff,)
Defendants.)

No. 95-C-535-K

ENTERED ON DOCKET

DATE ~~NOV 0 9 1995~~

FILED

NOV 0 8 1995

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

ORDER

Before the Court are Defendants' motions to dismiss, or in the alternative for summary judgment, filed on September 21 and 22, 1995. Plaintiff, a pro se litigant, has not responded.

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

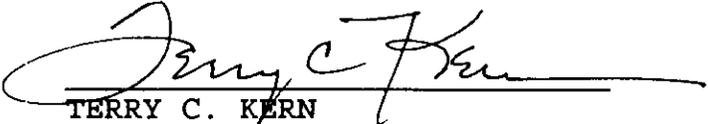
- (1) Defendants' motions to dismiss (doc. #10 and #12) are **granted** and the above captioned case is hereby **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motions to dismiss, or in the alternative for summary judgment, no later than ten (10)

¹Local Rule 7.1.C reads as follows:

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

days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 9 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 11-8-95

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 TERRY HACKLER,)
)
 Defendant.)
)

Civil No. 94-C-1174-H

FILED

NOV 7 1995

ORDER OF DISMISSAL

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

This action came on for hearing October 31, 1995, pursuant to this Court's setting of a status hearing. Present for the United States was Phil Pinnell, Assistant United States Attorney. The defendant, Terry Hackler, was absent. The Court notes that this was the second status hearing set by the Court at which the defendant, Terry Hackler, was not present. Accordingly, the Court entertained a motion to dismiss this action.

IT IS THEREFORE ORDERED that this case be dismissed, with prejudice, because of the failure of the defendant, Terry Hackler, to appear at status hearings scheduled on October 31, 1995 and August 3, 1995.

IT IS FURTHER ORDERED that the defendant's "Motion to Dismiss Order to Return Property" and "Second Motion to Dismiss Order to Return Property" are denied.

The parties will bear their own costs and fees, if any.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
United States District Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 7 1995

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

SHELIA CUNNINGHAM,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER, Commissioner of)
Social Security,^{1/})
)
Defendant.)

No. 94-C-321-J ✓

ENTERED ON DOCKET
DATE NOV-8-95

ORDER^{2/}

Plaintiff, Shelia Cunningham, appeals from the Secretary's Order denying her application for social security benefits.^{3/} The Administrative Law Judge ("ALJ") determined that despite Plaintiff's mental impairments, there were a substantial number of jobs in the national economy she could perform. Plaintiff argues that the ALJ failed to properly evaluate her mental impairment. Specifically, Plaintiff argues that the ALJ (1) ignored the opinions of her treating physicians, (2) failed to properly

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("the Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Plaintiff filed her application for benefits on June 29, 1991. The application was denied by the Secretary on November 6, 1991. Plaintiff's request for reconsideration was denied on June 17, 1992. *R. at 56-70*. A hearing before an ALJ was held on April 28, 1993. Plaintiff was represented by counsel at this hearing. *R. at 388-425*. By an Order dated August 19, 1993, and amended August 26, 1993, the ALJ denied Plaintiff's application. *R. at 15-36*. The Social Security Administration Appeals Council denied Plaintiff's request for review on February 2, 1994. *R. at 5-7*. Plaintiff has, therefore, exhausted her administrative remedies and she is entitled to bring this action seeking judicial review of the Secretary's decision. 42 U.S.C. § 405(g).

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apply Listing 12.08, and (3) failed to ask the Vocational Expert proper hypothetical questions. The Court agrees, and for the reasons discussed below, the Secretary's decision is reversed.

I. PLAINTIFF'S BACKGROUND

At the time of the hearing below, Plaintiff was a 43 year old female, who had completed the 12th grade. Upon graduation from high school, Plaintiff began working for Southwestern Bell Telephone Company ("Southwestern Bell") as a directory assistance operator. Plaintiff worked as an operator for Southwestern Bell for 21 years. She was medically retired by the company on December 21, 1987. Plaintiff has not worked since that date. Plaintiff's work as an operator was performed at the sedentary exertional level. *R. at 74-77, 392-93 and 418.*

Plaintiff alleges she is disabled primarily due to her severe depression and associated migraine headaches. Plaintiff alleges that her mental impairments (*i.e.*, depression, anxiety and personality disorder) are so severe that she is presumptively disabled pursuant to Listing 12.08, 20 C.F.R. Pt. 404, Subpt. P, App. 1. In the alternative, Plaintiff also argues that even if she does not meet the requirements of Listing 12.08, she lacks the residual functional mental capacity ("mental RFC") to perform a substantial number of jobs in the national economy. The ALJ disagreed, finding that (1) Plaintiff's depression was not severe enough to meet or equal Listing 12.08, and (2) although her depression was severe, it did not significantly limit her mental RFC to the point she could not perform a substantial number of jobs in the national economy. *R. at 24-32.*

II. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Secretary has established a five-step sequential evaluation process.^{4/}

The standard of review to be applied by this Court to the Secretary's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a

^{4/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Secretary's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Secretary. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Secretary's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985). At this stage, the Court must fully consider anything in the record that detracts from the ALJ's decision. Neito v. Heckler, 750 F.2d 59, 60 (10th Cir. 1984).

The Court will typically defer to the ALJ's determinations of witness credibility. Hamilton v. Secretary of H.H.S., 961 F.2d 1495, 1498 (10th Cir. 1992). While evaluating medical evidence, however, more weight will be given to evidence from a treating physician than will be given to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the Plaintiff. Williams, 844 F.2d at 757-58; Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). A treating physician's opinion may be rejected "if it is

brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If the ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

In addition to determining whether the Secretary's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Secretary applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Secretary's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. **THE SECRETARY'S DISABILITY DETERMINATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

Plaintiff's medical records clearly demonstrate that she has been diagnosed by several doctors with major depression of long standing duration. Plaintiff alleges that her depression, migraines and all of the symptoms associated with these disorders results in a personality disorder so severe that it meets or equals Listing 12.08.^{5/}

^{5/} Listing 12.08 provides as follows:

Personality Disorders: A personality disorder exists when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress. Characteristic features are typical of the individual's long-term functioning and are not limited to discrete episodes of illness.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Deeply ingrained, maladaptive patterns of behavior associated with one of the following:

1. Seclusiveness or autistic thinking; or
2. Pathologically inappropriate suspiciousness or hostility; or
3. Oddities of thought, perception, speech and behavior; or
4. Persistent disturbance of mood or affect; or

When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520a. Cruse v. D.H.H.S., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883 F.Supp. 1492, 1498 (D. Kan. 1995).^{6/}

This procedure first requires the Secretary to determine the presence or absence of 'certain medical findings which have been found especially relevant to the ability to work,' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria. See Woody v. Secretary of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988); 20 C.F.R. § 404.1520a(d). At the ALJ hearing level, the regulations allow the ALJ to complete the PRT form with or without the assistance of a medical advisor and require the ALJ to attach the form to his or her written decision Id.

-
5. Pathological dependence, passivity or aggressivity; or
 6. Intense and unstable interpersonal relationships and impulsive and damaging behavior;

AND

- B. Resulting in three of the following:
 1. Marked restriction of activities of daily living; or
 2. Marked difficulties in maintaining social functioning; or
 3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs or symptoms (which may include deterioration of adaptive behaviors).

20 C.F.R. Pt. 404, Subpt. P, App. 1.

^{6/} Because the Court believes that Cruse is virtually dispositive of this case, the Court will quote liberally from the language of the Tenth Circuit's opinion.

Cruse, 49 F.3d at 617.

In this case, the ALJ completed a PRT form, without the assistance of a medical advisor, and concluded that Plaintiff did not meet either the Part "A" or the Part "B" criteria of Listing 12.08. *R. at 16-19*. When the ALJ completes the PRT form himself, not only must the record contain substantial evidence to support each of his findings, he must "discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." Cruse, 49 F.3d at 617-18 (quoting Washington, 37 F.3d at 1442). The ALJ failed to do this. In his Order, the ALJ discusses the medical evidence regarding Plaintiff's mental impairment in general terms. The ALJ does not, however, discuss his PRT form conclusions or attempt to relate the medical evidence to his PRT form conclusions. More importantly, however, the ALJ completely fails to discuss or deal with several pieces of evidence that detract from his PRT form conclusions.

Other than the ALJ, four other doctors evaluated Plaintiff and completed a PRT form. These evaluations range in time from March 1989 to June 1992.^{7/} Three out of four of these doctors determined that Plaintiff met the Part "A" criteria of Listing 12.08.^{8/} The fourth doctor determined that she did not have enough evidence before her to make a determination. *R. at 128*. The ALJ does not discuss these other PRT forms, much less indicate why he failed to give them any weight at all. The opinion

^{7/} These PRT forms were completed by the following doctors: Stephen J. Miller, Ph.D. (3/1/89) [*R. at 153-160*]; Unknown (6/29/89) [*R. at 138-144*]; Janice C. Boon, Ph.D. (10/31/91) [*R. at 128-134*]; and Charles D. Harris, Jr., Ph.D. (6/6/92) [*R. at 119-125*].

^{8/} Stephen J. Miller, Ph.D., *R. at 157*; Unknown, *R. at 142*; and Charles D. Harris, Jr., Ph.D., *R. at 123*.

of these three doctors, whose attention was squarely focused on the Listing issue presented by this case, cannot simply be dismissed without any discussion by the ALJ. Furthermore, Plaintiff's treating physician for many years, William R. Reid, M.D., also specifically determined that Plaintiff met the Part "A" criteria of Listing 12.08. *R. at 375-376.*

Once a medically determinable mental impairment is found to exist (*i.e.*, using Part "A" criteria), the severity of that mental impairment "is assessed in terms of the functional limitations imposed by the impairment. Functional limitations are assessed using the criteria in paragraph B of the listings for mental disorders. . . ." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C). The following four functional areas are considered under Part "B" of Listing 12.08: (1) activities of daily living;^{9/} (2) social functioning;^{10/} (3) concentration, persistence or pace;^{11/} and (4) deterioration or decompensation in work or work-like settings.^{12/}

^{9/} "*Activities of daily living* include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, caring appropriately for one's grooming and hygiene, using telephones and directories, using a post office, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(1) (italics original).

^{10/} "*Social functioning* refers to an individual's capacity to interact appropriately and communicate effectively with other individuals. Social functioning includes the ability to get along with others. . . . Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority, e.g., supervisors, or cooperative behaviors involving coworkers." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(2) (italics original).

^{11/} "*Concentration, persistence and pace* refer to the ability to sustain focused attention sufficiently long to permit the timely completion of tasks commonly found in work settings." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(3) (italics original).

^{12/} "*Deterioration or decompensation in work or work-like settings* refers to repeated failure to adapt to stressful circumstances which cause the individual either to withdraw from that situation or to experience exacerbation of signs and symptoms (*i.e.*, decompensation) with an accompanying difficulty in maintaining activities of daily living, social relationships, and/or maintaining concentration, persistence, or pace (*i.e.*, deterioration which may include deterioration of adaptive behaviors). Stresses common to the

In order for a claimant's mental impairment to be severe enough to meet or equal a mental impairment listing, the claimant must have sufficient limitation in at least two of the four functional areas mentioned above. The PRT form rates the degree of functional loss for the first two areas (*i.e.*, daily activities and social functioning) as "none," "slight," "moderate," "marked" and "extreme." Only a "marked" or "extreme" rating in these first two areas is significant enough to meet or equal a mental impairment listing. The PRT form rates the degree of functional loss for the third area (*i.e.*, concentration, etc.) as "never," "seldom," "often," "frequent" and "constant." Only a "frequent" or "constant" rating in this third area is significant enough to meet or equal a mental impairment listing. The PRT form rates the degree of functional loss for the fourth area (*i.e.*, decompensation or deterioration) as "never," "once/twice," "repeated" and "continual." Only a "repeated" or "continual" rating in this fourth area is significant enough to meet or equal a mental impairment listing. The ALJ in this case rated Plaintiff's functional limitations as a result of her mental impairments as slight in area one, moderate in area two, often in area three, and he found that there was insufficient evidence to rate Plaintiff in area four. *R. at 18-19.* In other words, the ALJ found that Plaintiff's mental impairment did not significantly limit her in any of the four functional areas measured by Part "B" of Listing 12.08.

The Secretary sent Plaintiff to Donald R. Inbody, M.D., for an evaluation of her mental impairments. Instead of completing a PRT form, or some other form matching

work environment include decisions, attendance, schedules, completing tasks, interactions with superiors, interactions with peers, etc." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(C)(4).

the Part "B" criteria of Listing 12.08, Dr. Inbody completed a form titled "Medical Assessment of Ability to Do Work-Related Activities (Mental)" (hereinafter referred to as the Mental Assessment form). *R. at 382-384.* A Mental Assessment form was also completed by an unknown consulting physician. *R. at 371-373.* As the Tenth Circuit has repeatedly held, this form does not match the four requirements of Listing 12.08(B) or the PRT form. Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991); Cruse, 49 F.3d at 618. "Not only do these forms hamper our review, but they hamper an ALJ's review as well." Cruse, 49 F.3d at 618.

The Tenth Circuit has explained the problem with the Mental Assessment form as follows:

Instead of seeking data directly tied to the severity of the impairment under Part B of the listing requirements, the mental assessment forms ask for evaluations of a claimant's abilities in three work-related areas: making occupational adjustments, making performance adjustments, and making personal-social adjustments. Then, rather than evaluating the severity of a claimant's functional impairments using the same terms as the listing requirements, the mental assessment forms evaluate the claimant's abilities as 'unlimited/very good,' 'good,' 'fair,' and 'poor or none.' Moreover, the forms' definition of 'fair' is misleading. Though describing a functional ability as 'fair' would imply no disabling impairment, 'fair' is defined to mean: 'Ability to function in this area is seriously limited but not precluded.' [*R. at 371 and 382.*] We conclude that 'seriously limited but not precluded' is essentially the same as the listing requirements' definition of the term 'marked:'

Where 'marked' is used as a standard for measuring the degree of limitations, it means more than moderate, but less than extreme. A marked limitation may arise when several activities or functions are impaired or even where only one is

impaired, so long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately and effectively.

[20 C.F.R. Pt. 404, Subpt. P, App. 1,] § 12.00(C).

Cruse, 49 F.3d at 618. A rating of "fair" is also a significant enough limitation to warrant a "frequent" or "repeated" rating on the PRT form, where these ratings are used instead of "marked." Id. at 619, n. 3 (recognizing the difficulty in correlating the terms on the Mental Assessment form and the PRT form as the primary reason why the Secretary's use of the Mental Assessment form is "unfortunate.").

The unknown doctor completing a Mental Assessment form rated Plaintiff as "fair" or "poor to none"^{13/} in all categories but one. Plaintiff was rated as "good"^{14/} in the "[m]aintain personal appearance" category. In eleven of the fifteen categories on the Mental Assessment form, Dr. Inbody also rated Plaintiff as "fair" or "poor/none."^{15/} From the teaching of the Tenth Circuit in Cruse, ratings such as those on Dr. Inbody's and the unknown doctor's Mental Assessment forms are sufficient to indicate that the Part "B" criteria of Listing 12.08 have been met or equaled. Cruse, 49 F.3d at 618-19. See also Berglan v. Chater, No. 94-6390, 1995 W.L. 364676, at *2 (10th Cir. Jun. 19, 1995). The ALJ does not discuss these Mental Assessment forms, much less indicate why he failed to give them any weight

^{13/} "Poor to None" is defined as "[n]o useful ability to function in this area." *R. at 371 and 382.*

^{14/} "Good" is defined as "[a]bility to function in this area is limited but satisfactory." *R. at 371 and 382.*

^{15/} Some of the eleven areas rated as "fair" or "poor/none" were the ability to relate to co-workers, interact with supervisors, deal with work stresses, maintain attention/concentration, behave in an emotionally stable manner and demonstrate reliability. *R. at 382-83.*

at all.^{16/}

Plaintiff's treating physician, Dr. Reid, completed a "Mental Status Form" on August 28, 1991, in which he concluded as follows:

[Plaintiff] tends to be so withdrawn from other people, that it would be difficult for her to work with either supervisors or co-workers. She and her ability to tolerate stress or pressure of any kind would make it hard for her to sustain the effort needed for regular work.

R. at 304. Even Thomas A. Goodman, M.D., upon whom the ALJ relies to support his decision, concluded in his June 8, 1992 report that "[i]f [Plaintiff] can emotionally be stabilized, she could probably return to some kind of simple repetitive work." *R. at 331.* This is hardly a ringing endorsement of Plaintiff's ability to work. In fact it can be inferred from Dr. Goodman's report that at that time Plaintiff was not emotionally stable enough to return to work. *Id.*

The ALJ spends two full pages describing how Plaintiff stormed out of various doctors offices when they confronted her with her failure to follow through on various courses of treatment. The ALJ also documents the fact that Plaintiff would become quite angry with her doctors if they did not say what she wanted to hear or prescribe the medications she wanted. *R. at 25-26.* These actions would seem to be quite consistent with a woman who has a severe personality disorder and a problem coping with confrontation or authority figures. Thus, in light of the record, the Court must

^{16/} The four doctors identified in Note 7, *supra*, also evaluated the Part "B" criteria of Listing 12.08 on the PRT forms they filled out. Drs. Boon and Harris determined that they did not have enough evidence to evaluate the Part "B" criteria. [*R. at 125 & 134*]. The unknown doctor and Dr. Miller determined that Plaintiff did not meet the Part "B" criteria. These findings do not, however, relieve the ALJ from his duty to address other evidence in the record from Plaintiff's treating physicians, which detracts from Dr. Miller's and the unknown doctor's findings.

agree with Plaintiff that the Secretary improperly evaluated her mental impairment at step three of the sequential evaluation process.

When the listing requirements of a particular mental impairment are not met, the ALJ must proceed to steps 4 and 5 of the sequential evaluation process. That is, the ALJ must first determine the claimant's mental RFC and then decide, after consulting a vocational expert^{17/}, whether in light of the claimant's mental RFC significant jobs exist in the national economy she can perform. Just as the ALJ did in Cruse, the ALJ in this case did attempt to assess Plaintiff's mental RFC and did take vocational testimony. However, the Court finds, as did the Tenth Circuit in Cruse, that the ALJ's errors at step three taint his step four and five analysis. Cruse, 49 F.3d at 619.

While questioning the vocational expert in this case, the ALJ gave her two hypothetical scenarios. In the first, he asked the vocational expert to assume that the hypothetical individual could "perform simple tasks, needs routine supervision and only incidental contact with the public." *R. at 419*. With these limitations, the vocational expert did conclude that there were a significant number of jobs in which the hypothetical person could engage. *R. at 419-20*. The ALJ then had the vocational expert refer to the Mental Assessment form completed by an unknown doctor, discussed above. See R. at 371-373 for a copy of this form. This is the form

^{17/} Vocational testimony must be taken because the Grids, which are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2, may not be relied on where a mental impairment (*i.e.*, a non-exertional impairment) is present. Where a mental impairment is present, the Grids may only be used as a framework for decision-making. 20 C.F.R. Pt. 404, Subpt. P., App. 2, § 200(e)(2); Channel v. Heckler, 747 F.2d 577, 581 (10th Cir. 1984).

Court expressly determines, in accordance with Fed. R. Civ. P. 54(b), that there is no just reason for delay and that final judgment should be entered in favor of Thrifty and against MEI and Carr.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Plaintiff, Thrifty Rent-A-Car System, Inc., have and recover judgment of and from Defendants Michael E. Erbaugh, Inc. and William Carr, jointly and severally, in the sum of \$170,000.00 plus post-judgment interest at the federal statutory rate of 5.49% per annum for all of which let execution issue.

DATED this 28 day of Nov, 1995.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

AGREED AND APPROVED:

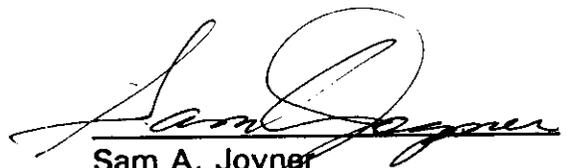

Michael J. Gibbens, OBA #3339
CROWE & DUNLEVY
321 S. Boston, Suite 500
Tulsa, Oklahoma 74103-3313
(918) 592-9800

ATTORNEYS FOR PLAINTIFF

on which the doctor rated Plaintiff as "fair" or "poor/none" in all categories except maintenance of personal appearance. With all of these restrictions, the vocational expert determined that there were not significant jobs in which the hypothetical person could engage. *R. at 420-21.* As discussed above, the ALJ does not discuss any of the Mental Assessment forms in the record, including the one to which he referred the vocational expert. The ALJ gives no reasons for rejecting the findings on the Mental Assessment forms and he gives no reason for rejecting the vocational expert's opinion based on at least one of these forms. In short, the same errors discussed at step three are present at step five.

Because the ALJ did not adequately deal with adverse medical reports, and because of the Tenth Circuit's recent holding in Cruse, the Secretary's decision is **REVERSED** and **REMANDED** for further consideration of Plaintiff's mental impairment.

Dated this 7th day of November 1995.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SHELIA CUNNINGHAM,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security,^{1/}

Defendant.

NOV 7 1995

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

No. 94-C-321-J ✓

ENTERED ON DOCKET
DATE 11-8-95

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the Secretary's decision has been entered. Consequently, judgment for the Plaintiff and against the Defendant is hereby entered.

It is so ordered this 7th day of November 1995.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("the Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action.

SF
11-3-95

ENTERED ON DOCKET

DATE 11-8-95

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

DON AUSTIN, an individual,)
 BARBARA WILLIS, an individual,)
 DOROTHY COOKS, an individual,)
 KAREN SNAP, an individual, and)
 other JOHN DOE or JANE DOE)
 Plaintiffs as they become known,)
 Plaintiffs,)
 vs.)
 SUN REFINING AND MARKETING)
 COMPANY,)
 Defendant.)

FILED

NOV 7 1995



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

Case No. 92-C-258-H ✓

ORDER TO DISMISS PLAINTIFF, DARIN POWELL

NOW ON THIS 7TH day of NOVEMBER, 1995, comes on for hearing the Application to dismiss with prejudice plaintiff Darin Powell. The Plaintiffs pray this Court grant the dismissal of Darin Powell; and the Court being advised in the premises of therein finds that such application should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that such moving party is granted the dismissal of Plaintiff, Darin Powell, with prejudice.



 UNITED STATES DISTRICT JUDGE

387

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

ENTERED ON DOCKET
DATE 11-8-95

STEVEN G. FROST)

Plaintiff,)

v.)

THE EMPLOYERS FIRE INSURANCE)
COMPANY, a/k/a COMMERCIAL UNION)
INSURANCE COMPANIES, a)
Massachusetts corporation; and,)
GEORGE E. AYERS INSURANCE)
AGENCY, INC., an Ohio)
corporation)

Defendant.)

Case No. 95-C-506-H ✓

FILED

NOV 7 1995 *sa*

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

O R D E R

This matter comes before the Court on a motion by Plaintiff Steven G. Frost for a new trial.

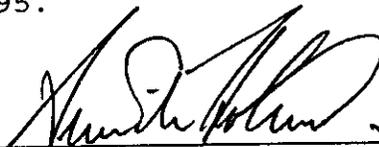
Because a trial has not been held, the Court construes Plaintiff's motion as a motion to reconsider, modify, or vacate the Court's order filed October 13, 1995 insofar as that Order granted summary judgment to Defendant on Plaintiff's bad faith claim. Under Rule 60(b) of the Federal Rules of Civil Procedure, the Court has discretion to grant the "extraordinary procedure" of relief from a final judgment or order. Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp., 837 F.2d 423, 426 (10th Cir. 1988); Cessna Fin. Corp. v. Bielenberg Masonry Contracting, Inc., 715 F.2d 1442, 1444 (10th Cir. 1983). Based on its review of Plaintiff's motion, the Court declines to grant this relief.

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Defendant's motion for reconsideration of the Court's order of October 13, 1995 (Docket #16) is hereby DENIED.

IT IS SO ORDERED.

This 7th day of November, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 7 1995

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

THRIFTY RENT-A-CAR SYSTEM, INC.,)
)
 Plaintiff,)
)
 v.)
)
 NEWCO CORPORATION and ALLAN)
 G. HOLMS,)
)
 Defendants.)

Case No. 95-C-265-H ✓

ENTERED ON DOCKET

DATE 11-8-95

JUDGMENT

In light of the Court's Order of October 26, 1995, judgment is granted to Plaintiff, Thrifty Rent-a-Car System, Inc. and against the Defendant Allan G. Holms as follows:

1. in favor of Plaintiff and against Defendant Holms in the amount of \$124,699.89 plus interest at \$59.09 per day from March 9, 1995 to the date of judgment;
2. awarding Plaintiff its costs for this action;
3. for reasonable attorney's fees incurred in connection with Plaintiff's Motion for Sanctions; and
4. in favor of Plaintiff and against Defendant Holms on the counterclaims of Defendant Holms against Plaintiff.

THEREFORE, this judgment is entered against Defendant Holms and in favor of Plaintiff.

This 7TH day of NOVEMBER, 1995.


Sven Erik Holmes
United States District Judge

FILED

NOV 7 1995 *js*

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

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

SONYA FAIR,
Plaintiff,

v.

INTER-TRIBAL COUNCIL, INC. and
HARRY F. GILMORE,

Defendants.

Case No. 94-C-418-H ✓

ENTERED ON DOCKET

DATE 11-8-95

J U D G M E N T

This Court entered an order on July 21, 1995 granting Defendants' Motion for Partial Summary Judgment and dismissing Plaintiff's pendant state law claims.

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

IT IS SO ORDERED.

This 7th day of November, 1995.



Sven Erik Holmes
United States District Judge

35

ENTERED ON DOCKET
DATE 11-8-95

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

FILED

NOV 7 1995

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

WILLIAM H. DAVIS, TRUSTEE OF THE)
JOE D. DAVIS REVOCABLE TRUST,)
)
Plaintiff,)
)
v.)
)
SONAT EXPLORATION COMPANY,)
)
Defendant.)

Case No. 94-C-828-H ✓

J U D G M E N T

This Court entered an order on October 17, 1995 granting Defendant's Motion for Summary Judgment.

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

IT IS SO ORDERED.

This 7th day of November, 1995.



Sven Erik Holmes
United States District Judge

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

STEVEN JAMES WARNER,
Plaintiff,
vs.
OTTAWA COUNTY JAIL, SHERIFF
ED WALKER,
Defendant.

No. 95-C-526-H

ENTERED ON DOCKET

DATE NOV 0 8 1995

FILED

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

ORDER

Before the Court is Defendant's motion to dismiss, or in the alternative for summary judgment, filed on September 21, 1995. Plaintiff, a pro se litigant, has not responded.

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendant's motion to dismiss (doc. #6) is **granted** and the above captioned case is hereby **dismissed without prejudice** at this time.
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendant's motion to dismiss, or in the alternative for summary judgment, no later than ten (10)

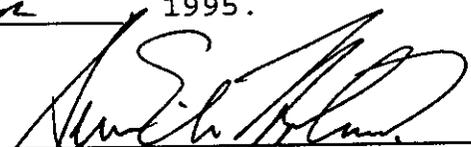
¹Local Rule 7.1.C reads as follows:

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

days from the date of entry of this order. See Miller v. Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

IT IS SO ORDERED.

This 6TH day of NOVEMBER 1995.


Sven Erik Holmes
United States District Judge

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

FILED

NOV 7 1995

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

ROBERT E. COTNER,
Plaintiff,

vs.

LARRY FUGATE, and DOUG
NICHOLS,
Defendants.

No. 92-C-1182-H

ENTERED ON DOCKET

DATE NOV 08 1995

ORDER

This matter comes before the Court on Defendants' motion to dismiss this case for failure to state a claim or, in the alternative, for summary judgment. Plaintiff has objected. For the reasons stated below, the Court concludes that Defendants' motion to dismiss should be granted.

In this action Plaintiff Robert E. Cotner, a state inmate, sues Creek County Sheriff Doug Nichols and Deputy Sheriff Larry Fugate, seeking monetary damages for illegal searches and seizures and his illegal arrest. He alleges that Fugate arrested him on July 20, 1991, without a warrant and seized items which were not listed on the search warrant. Plaintiff further alleges that the majority of the seized items were not turned into the police property room and, therefore, that he should be fully reimbursed for the loss.

I. STANDARD

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set

of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

II. ANALYSIS

Construing all allegations in the light most favorable to Plaintiff, the Court concludes that Plaintiff cannot seek money damages for the alleged invalidity of his conviction in Creek County District Court prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S. Ct. 2364, 2372 (1994), that

in order to recover damages [in an action brought pursuant to 42 U.S.C. § 1983] for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The facts of Heck are similar to those presented in the

instant case. The section 1983 plaintiff in that case, Roy Heck, was convicted of involuntary manslaughter in an Indiana state court and sentenced to a fifteen-year term of imprisonment. Id. at 2368. He filed his section 1983 lawsuit in federal court while his appeal from his conviction was pending in the Indiana courts, alleging that he had been the victim of a conspiracy by county prosecutors and a police investigator to destroy exculpatory evidence and to use an illegal voice identification procedure at his trial. Id. The district court dismissed Heck's section 1983 action because the issues raised in that action directly implicated the legality of Heck's confinement. Id. While Heck's appeal to the Seventh Circuit was pending, the Indiana Supreme Court affirmed his conviction. Id. The Seventh Circuit affirmed the dismissal of Heck's section 1983 action, following the rule that

[i]f, regardless of the relief sought, the [section 1983] plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.

Heck v. Humphrey, 997 F.2d 355, 357 (7th cir. 1993), aff'd, 114 S.Ct. 2364 (1994).

Although the Supreme Court affirmed the judgment in Heck, it rejected the analysis employed by the Seventh Circuit. The Court adhered to its "teaching that § 1983 contains no exhaustion required beyond what Congress has provided." Heck, 114 S.Ct. at 2370. The Court, however, agreed that Heck could not proceed with his section 1983 action. Using the common law tort of malicious

prosecution as an analogy to aid in interpretation of section 1983, the Court concluded that a claim for damages bearing a close relationship to an unconstitutional conviction or sentence that has not been invalidated is not cognizable under section 1983. Id. at 2372. As the Court remarked a little later in the opinion,

We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under section 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. . . . [A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

Id. at 2373-74.

While a Fourth Amendment violation does not undermine the validity of an illegal conviction, Heck has recognized that an illegal seizure does not alone create an injury compensable under section 1983. Id. at 2372-73 n.7.

[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that . . . result[ed] in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and discovery, and especially harmless error, such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury which, we hold today, does not encompass the "injury of being convicted and imprisoned (until his conviction has been overturned).

Id.

Because Plaintiff has failed to show that his state conviction has been rendered invalid, his section 1983 action for illegal

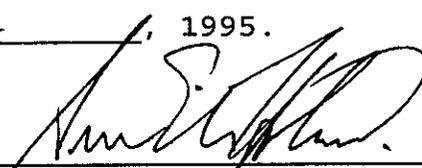
arrest and illegal search and seizure is premature. See Schilling v. White, 58 F.3d 1081, 1084-87 (6th Cir. 1995) (petitioner had no § 1983 cause of action for alleged violation of his Fourth Amendment rights until such time as petitioner succeeded in having his conviction set aside).

III. CONCLUSION

After liberally construing Plaintiff's complaint, the Court concludes that Defendants' motion to dismiss for failure to state a claim should be granted and this action is hereby **dismissed without prejudice**. Accordingly, Defendants' motions to dismiss and to supplement brief in support of motion to dismiss (docket #60-1 and #63) are hereby **granted**. Defendants' motions to stay proceedings, for reasonable restrictions, and for summary judgment (docket #59 and #60-2) are **denied as moot**. Plaintiff's motions for appointment of counsel, to compel discovery, to dismiss, to deny Defendants' motions and set for jury trial, to strike motion to stay, for restrictions against Loeffler, and for ruling (docket #54, #55, #56, #57, #58, #64, and #65) are hereby **denied**.

IT IS SO ORDERED.

This 6TH day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 7 1995

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

GREGORY EUGENE TOLIVER,

Petitioner,

vs.

EDWARD L. EVANS, JR.,

Respondent.

No. 94-C-877-H

ENTERED ON DOCKET

DATE NOV 08 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his jury conviction for Robbery with a Firearm, after former conviction of two or more felonies, in Tulsa County District Court, Case No. CF-88-3301. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied.

I. BACKGROUND

During the second stage enhancement proceedings, the prosecution offered in evidence State's Exhibit Nos. 4, 5, and 6: certified copies of three Judgments and Sentences in the name of "Gregory Eugene Toliver," each showing a date of birth of June 24, 1961, and each from Tulsa County. Petitioner objected to the admission of one Judgment and Sentence, State's Exhibit No. 6, but otherwise provided no evidence controverting the evidence. The jury found Petitioner had two or more prior convictions and assessed his punishment at the minimum twenty years in each count,

(13)

pursuant to Okla. Stat. tit. 21, § 51(B). The Court of Criminal Appeals affirmed Petitioner's conviction and sentence. (Attach. E to Respondent's Response, docket #8.)

While Petitioner's appeal was pending, the Court of Criminal Appeals ruled in Cooper v. State, 810 P.2d 1303 (Okla. Crim. App. 1991), that in proving prior felony convictions the State has the burden of establishing more than mere identity of name between the accused and the person listed as the defendant on the prior Judgment and Sentence. Rather, there must be other facts and circumstances for the jury to consider in reaching its verdict. Id. at 1306. Examples of facts and circumstances that might suffice included unusualness of name, the character of the former crimes, and the place of their commission. Id.

In September 1992, Petitioner sought post-conviction relief challenging his enhanced sentence under Cooper. He argued that his enhanced sentence should be vacated because the State failed to meet its burden of proving he was a prior felon. The district court denied relief, finding Cooper could not be applied retroactively to Petitioner's case. The Court of Criminal Appeals reversed. On remand the district court again denied post-conviction relief, making the following findings on the basis of the record:

- 1) The petitioner has an unusual name and his name is the same as the name shown on each of the Judgments and Sentences offered by the State.
- 2) The petitioner is about the same age as the "Gregory Eugene Toliver" whose convictions appear on the Judgments and Sentences offered by the State.

3) The petitioner is charged with the same character of crime and the crime occurred in the same general location as the crimes committed by "Gregory Eugene Toliver" on the Judgments and Sentences offered by the State.

4) The petitioner did not offer any objection to the introduction of two of the judgments and sentences.

(Attachment I to Respondent's response.) On May 17, 1991, the Court of Criminal Appeals affirmed the denial of post-conviction relief, finding that the first three of the four findings of the trial court were sufficient to support the verdict of the jury on the recidivist charge.

In the instant petition, Petitioner challenges the factual determinations of the Court of Criminal Appeals as clearly erroneous under Sumner v. Mata, 449 U.S. 539, 545-47 (1981), and contends he was denied due process and equal protection during the second stage enhancement proceeding.

II. ANALYSIS

As a preliminary matter, the Court determines that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also determines that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

Respondent has objected to Petitioner's request for habeas relief on the ground that enhancement issues are matters of state law not reviewable by a federal court in a habeas corpus action.

This Court agrees. A federal court's power is not unlimited. When reviewing a state court conviction, a federal court is limited to violations of federal constitutional and statutory law. A federal court has no authority to review a state's interpretation or application of its own laws. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993), cert. denied, 114 S.Ct. 1074 (1994).

Petitioner's arguments contain absolutely no mention or citation to any article or amendment of the United States Constitution. Petitioner's discussion of this claim rests instead on the interpretation of Oklahoma law. Cf. Johnson v. Cowley, 40 F.3d 341, 345-46 (10th Cir. 1994) (claim that trial court failed to make an independent determination of the voluntariness of the stipulation to the prior convictions raised a federal constitutional claim); Carr v. Reynolds, 9 F.3d 116, 1993 WL 432572 (10th Cir. 1993) (No. 93-7077) (unpublished opinion) (claim that state had improperly shifted to petitioner the burden of proving that petitioner was not the person convicted of prior felony raised a federal constitutional question); Camillo v. Armontrout, 938 F.2d 879, 881 (8th Cir. 1991) (when enhanced punishment depends on evidence of prior criminal convictions, defendant has due process right to be personally present at the proceeding).

At any rate, the Court finds that the Judgements and Sentences which the State introduced during the second stage proceedings were sufficient to sustain the State's burden of proving the prior convictions under Oklahoma law. While the better practice would be

for the prosecution to introduce other supporting evidence as set out in Cooper, the Oklahoma Court of Criminal Appeals has recognized that identity of name is sufficient when the defendant's name is unique. Battenfield v. State, 826 P.2d 612, 614 (Okla. Crim. App. 1991), cert. denied, 503 U.S. 943 (1992). In the case at hand, Petitioner's name was not so common and the prior offenses were perpetrated in the same county. Moreover, Petitioner did not object to the introduction of two of the Judgments and Sentences which is all that is necessary for enhancement under Okla. Stat. tit. 21, § 51(B).¹

The Court further finds that Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to the case at hand, or that the factual determinations made by the Oklahoma Court of Criminal Appeals are not fairly supported by the evidence in the state court record. Thus, the Court of Appeal's findings of fact are entitled to a presumption of correctness.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner has not established that he is in custody

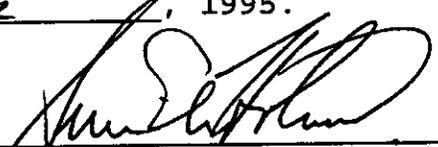
¹ Section 51(B) reads in part as follows:

Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years.

in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus is hereby **denied.**

IT IS SO ORDERED.

This 6TH day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA NOV 07 1995
TULSA DIVISION

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

CAT SCALE COMPANY,)

Plaintiff,)

v.)

BRUCE'S TRUCK STOPS, INC.)
and B. D. JONES)

Defendants.)

Civil Action No.

95-CV-00595

Hon. Thomas R. Brett, Judge

ENTERED ON DOCKET

DATE NOV 08 1995

STIPULATED ORDER OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1), the parties hereto, plaintiff, CAT SCALE COMPANY, and defendants, BRUCE'S TRUCK STOPS, INC. and B. D. JONES, through their respective counsel, consent to entry of the following Order of Dismissal:

IT IS HEREBY ORDERED THAT

1. Plaintiff's complaint be and the same is hereby dismissed with prejudice;
2. Each party will bear its own costs and attorneys fees.

SO ORDERED this 5 day of November, 1995.

S/ THOMAS R. BRETT

United States District Judge

FILED

NOV 1 1995

CONSENT TO ORDER OF DISMISSAL

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

The parties hereto, through their respective counsel, hereby stipulate to entry of the foregoing Order of Dismissal.

BRUCE'S TRUCK STOPS, INC.

CAT SCALE COMPANY

By: Vicki E. Morgan

Date: 10-31-95

By: Lawrence R. Uttsom

Date: 11/1/95

B. D. JONES

By: Vicki E. Morgan

Date: 10-31-95

CERTIFICATE OF SERVICE

This is to certify that on this 1st day of November, 1995, a true and correct copy of the foregoing STIPULATED ORDER OF DISMISSAL delivered by first class mail, postage-prepaid, to:

Gary H. Baker, Esq.
Victor E. Morgan, Esq.
BAKER & HOSTER
800 Kennedy Building
Tulsa, OK 74103



Lawrence R. Watson
OBA ID 010148

DOUGHERTY, HESSIN, BEAVERS & GILBERT
Attorneys for Plaintiff CAT
Scale Company

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Tulsa, OK 74103
(918) 592-6970

OF COUNSEL:
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Jeffry W. Smith
Marshall, O'Toole, Gerstein,
Murray & Borun
6300 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6402

ENTERED ON DOCKET
DATE NOV 08 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIE RAY CRAWFORD;)
)
 COUNTY TREASURER, Tulsa County,)
)
 Oklahoma; BOARD OF COUNTY)
)
 COMMISSIONERS, Tulsa County,)
)
 Oklahoma,)
)
 Defendants.)

NOV 7 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

) Civil Case No. 95-C 378H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 7th day of November, 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 Defendant, WILLIE RAY CRAWFORD, appears not, but makes default.

The Court further finds that the Defendant, WILLIE RAY CRAWFORD, 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 September 1, 1995, and continuing through October 6, 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

NOTE: THIS DOCUMENT IS TO BE MAILED
BY 12:00 PM TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

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

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 11, 1995; and that the Defendant, WILLIE RAY CRAWFORD, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Defendant, WILLIE RAY CRAWFORD, is a single unmarried person.

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 FIFTEEN (15), BLOCK ONE (1), MARY-ELLEN
ADDITION TO TULSA, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

The Court further finds that on March 19, 1987, Charles Romulus Shoun, Jr., and Robyn Gayle Shoun, executed and delivered to INLAND MORTGAGE CORPORATION, their mortgage note in the amount of \$35,690.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles Romulus Shoun, Jr., and Robyn Gayle Shoun, Husband and Wife, executed and delivered to INLAND MORTGAGE CORPORATION, a mortgage dated March 19, 1987, covering the above-described property. Said mortgage was recorded on March 26, 1987, in Book 5010, Page 2230, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 25, 1987, INLAND MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on April 22, 1987, in Book 5017, Page 1419, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A, its successors and assigns. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1989, TRIAD BANK, N.A., assigned the above-described mortgage note and mortgage to the Secretary of Housing and

Urban Development of Washington, D.C., its successors and assigns. This Assignment of Mortgage was recorded on September 6, 1989, in Book 5205, Page 1283, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 8, 1988, Charles Romulus Shoun, Jr., and Robyn Gayle Shoun, Husband and Wife, granted a general warranty deed to Willie Ray Crawford, a single person. This deed was recorded with the Tulsa County Clerk on December 14, 1988, in Book 5145 at Page 2061 and the Defendant, WILLIE RAY CRAWFORD, assumed thereafter payment of the amount due pursuant to the note and mortgage described above, and is the current assumptor or the subject indebtedness.

The Court further finds that on September 1, 1989, the Defendant, WILLIE RAY CRAWFORD, 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 May 1, 1990, December 1, 1990, July 1, 1991, and August 1, 1992.

The Court further finds that the Defendant, WILLIE RAY CRAWFORD, 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, WILLIE RAY CRAWFORD, is indebted to the Plaintiff in the principal sum of \$54,779.02, plus interest at the rate of 9 percent per annum from April 1, 1995 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 26, 1992, a lien in the amount of \$16.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$17.00 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, WILLIE RAY CRAWFORD, is in default, and has 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, WILLIE RAY CRAWFORD, in the principal sum of \$54,779.02, plus interest at the rate of 9 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 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 \$49.00, plus costs and interest, for personal property taxes for the years, 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, and WILLIE RAY CRAWFORD, 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, WILLIE RAY CRAWFORD, 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 \$49.00, 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.

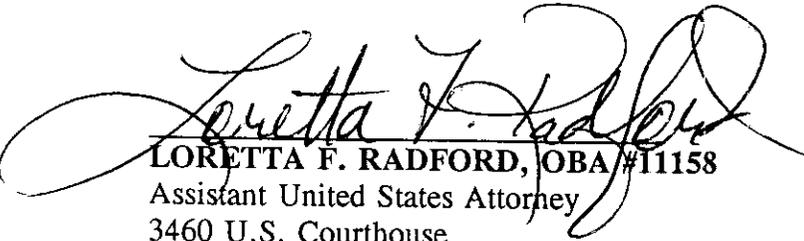
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ SVEN ERIK HOLMES

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. 95 C 378H

LFR:flv

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

ENTERED ON DOCKET

WILLIAM NOE and MELANIE NOE,)
Husband and Wife,)
)
Plaintiff,)
)
vs.)
)
MAYFLOWER TRANSIT, INC., a)
foreign corporation; and)
ACCENT MOVING & STORAGE)
COMPANY, an Oklahoma)
corporation,)
)
Defendants.)

DATE ~~NOV 08 1995~~

No. 95-C-222H

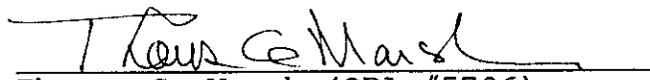
FILED

NOV 7 1995

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

JOINT STIPULATION OF DISMISSAL

It is hereby stipulated, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and by and between the Plaintiffs, William Noe and Melanie Noe, by their attorney, Thomas G. Marsh, and Defendants, Mayflower Transit, Inc. and Accent Moving & Storage Company, by their attorneys, John R. Woodard, III and Jody Nathan, that the above-styled and captioned matter, on the Complaint, may be, and the same is hereby dismissed with prejudice, without costs to either party.



Thomas G. Marsh (OBA #5706)
MARSH & MARSH, P.C.
15 W. Sixth, Suite 1302
Tulsa, Oklahoma 74119-5407
(918) 587-0141
Attorneys for Plaintiffs



John R. Woodard, III
Jody Nathan
**FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS**
525 S. Main, Suite 1400
Tulsa, OK 74103-4409
Attorneys for Defendants

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

BLAKE'S LOTABURGER, INC., a)
New Mexico corporation,)

Plaintiff,)

v.)

LOT-A-BURGER OF ARKANSAS, INC., an)
Arkansas corporation, JOHNNY P. AKERS,)
JOHN D. AKERS, LOT-A-BURGER, INC.,)
an Oklahoma corporation, LOT-A-BURGER,)
INC., a Tennessee corporation, BURGER)
BARON, INC., an Oklahoma corporation,)

Defendants.)

ENTERED ON DOCKET
DATE 11-7-95

Case No. 95-C-800H ✓

FILED

NOV 7 1995

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

TEMPORARY RESTRAINING ORDER

Now on this 31st day of October, 1995, Plaintiff's Application for Temporary Restraining Order came before the Court for hearing. The Plaintiff was present by and through its counsel Brune & Neff, P.C. by Kenneth L. Brune. The Defendants were present by and through their counsel Johnny P. Akers.

The Court received exhibits and heard testimony. After careful consideration of the exhibits and testimony presented, the Court finds as follows:

1. The Defendants are using a ® indicating a registered trademark in conjunction with the name LOT-A-BURGER.

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2. The Defendants acknowledge that they have used the ® in connection with the name LOT-A-BURGER on billboards, paper cups, paper napkins, other paper products, coupons, advertising and promotional material.

3. The use of the ® is in violation of the Lanham Act for which violation the Plaintiff has no adequate remedy at law.

4. Defendants' continued use of the ® in connection with the word LOT-A-BURGER constitutes immediate and irreparable harm to the Plaintiff.

5. The Plaintiff has not pursued a request for additional relief under the Application for Temporary Restraining Order, therefore, any request for additional relief made in the Application is denied.

6. The Court will set this matter down for further proceedings to permit sufficient time to deal with the underlying substantive issues.

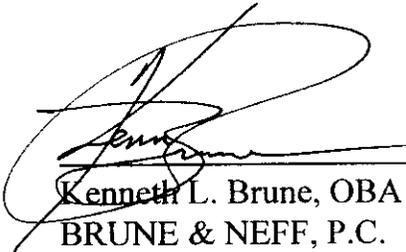
IT IS THEREFORE ORDERED that, effective immediately, each of the Defendants their agents, servants, employees and attorneys and all persons acting in concert and participation with them are restrained and enjoined from further use of the symbol ® in connection with the word LOT-A-BURGER and shall, no later than November 5, 1995, remove all representations of registration including the ® in connection with the name LOT-A-BURGER on any materials, including but not limited to, advertising, billboards, paper products, coupons and promotions. Any other relief requested in the Application for Temporary Restraining Order is denied.

This Restraining Order shall be in effect until such time as the Court has ruled on Plaintiff's Application for Preliminary and Permanent Injunction.



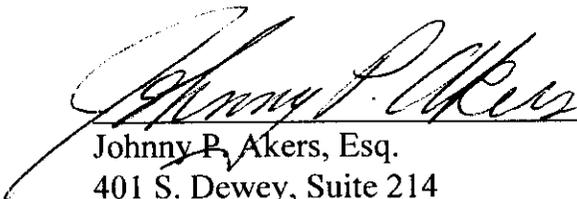
Honorable Sven Erik Holmes
United States District Court
Northern District of Oklahoma

APPROVED AS TO FORM:



Kenneth L. Brune, OBA 1249
BRUNE & NEFF, P.C.
401 S. Boston, 230 Mid-Continent Tower
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF,
BLAKE'S LOTABURGER, INC.



Johnny P. Akers, Esq.
401 S. Dewey, Suite 214
Bartlesville, Oklahoma 74005

ATTORNEY FOR DEFENDANTS,
LOT-A-BURGER of Arkansas, Inc.,
JOHNNY P. AKERS, JOHNNY D.
AKERS, LOT-A-BURGER, INC. of
Oklahoma, LOT-A-BURGER, INC. of
Tennessee, and BURGER BARON, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JOHN L. DISMUKE aka John Lee)
 Dismuke; DAVINA C. DISMUKE aka)
 Davina Capri Dismuke; TEXAS)
 MORTGAGE INVESTORS, INC.; CITY)
 OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

NOV 6 1995

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

Civil Case No. 95 C 701B

ENTERED ON DOCKET

DATE NOV 07 1995

ORDER

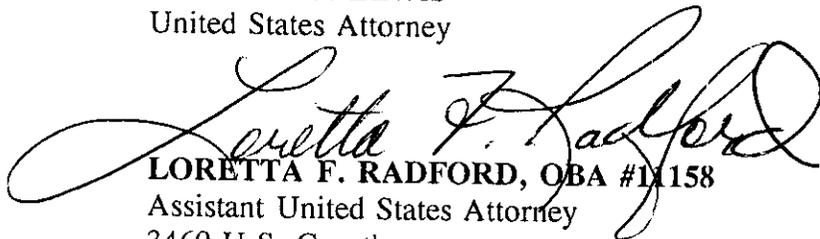
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED**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

Dated this 6 day of Nov, 1995.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large, flowing loops.

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

LFR:flv

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

FILED

NOV 6 1995

IVANIA D. LAWRENCE and
GEORGIANNA E. ("GINA")
LAWRENCE,

 Plaintiffs,

vs.

STATE FARM FIRE AND CASUALTY
COMPANY,

 Defendant.

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

Case No. 95-C-639-E

ENTERED ON DOCKET
NOV 6 1995
DATE _____

**ORDER DISMISSING CLAIMS OF GEORGIANNA E. ("GINA") LAWRENCE
AND ALLOWING WITHDRAWAL OF COUNSEL OF RECORD FOR PLAINTIFFS**

On this 12th day of October, 1995, this case comes before the court pursuant to regular setting for case management conference. The plaintiffs appear by counsel, R. Jack Freeman of Feldman, Hall, Franden, Woodard & Farris; the defendant, State Farm Fire and Casualty Company appears by company representative and by counsel, Neal E. Stauffer of Selman & Stauffer, Inc.

Having been fully advised in the premises and in consideration thereof, the court finds:

1. Yesterday Mr. Freeman, in behalf of himself and the firm of Feldman, Hall, Franden, Woodard & Farris, filed an application for order allowing withdrawal as counsel of record for plaintiffs. Contemporaneously, with that filing, Mr. Freeman filed in behalf of plaintiff, Georgianna E. ("Gina") Lawrence, a motion for voluntary dismissal of her claims.

2. Regarding plaintiff Georgianna E. ("Gina") Lawrence's motion for voluntary dismissal, Mr. Freeman requests that the

dismissal be allowed without prejudice, and defendant advises that it has no objection to an order allowing the dismissal without prejudice and further advises that it will waive any application for assessment of costs as to plaintiff, Georgianna E. ("Gina") Lawrence.

3. Good cause exists for the withdrawal of present counsel of record for the plaintiffs, and withdrawal can be accomplished without material adverse effect on the interest of either of the plaintiffs. New counsel for plaintiff Ivania D. Lawrence shall file a formal entry of appearance as counsel of record within ten (10) days, or by October 21, 1995, and failing the retention of new counsel in her behalf, plaintiff Ivania D. Lawrence shall enter her formal appearance as *pro se* litigant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Mr. R. Jack Freeman and his law firm, Feldman, Hall, Franden, Woodard & Farris be and hereby are allowed to withdraw as attorneys of record for plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that new counsel for plaintiff Ivania D. Lawrence shall file a formal entry of appearance as counsel of record on or before October 21, 1995, and failing the retention of new counsel, plaintiff Ivania D. Lawrence shall enter her formal appearance as *pro se* litigant by no later than October 21, 1995.

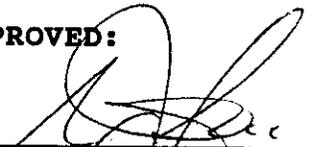
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of Georgianna E. ("Gina") Lawrence brought herein against defendant, State Farm Fire and Casualty Company, be and hereby are dismissed

without prejudice without the assessment of costs.

S/ JAMES O. ELLISON

THE HONORABLE JAMES O. ELLISON
U. S. DISTRICT COURT JUDGE

APPROVED:



R. Jack Freeman, OBA # 3128



Neal E. Stauffer, OBA # 13168

jack\law-dis.ord

FILED
NOV 6 1995

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

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

DONALD MARK NEWMAN,)
)
 Plaintiff,)
)
 vs.)
)
 OKLAHOMA STATE UNIVERSITY,)
)
 Defendants.)

No. 95-C-1037-E

ENTERED ON DOCKET
NOV 07 1995
DATE _____

ORDER

Before the court is Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and civil complaint pursuant to the Freedom of Information Act (FOIA). Plaintiff's motion for leave to proceed in forma pauperis is granted. Upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district court. The action is thus transferred to the proper district. See Costlow v. Weeks, 790 F.2d 1486 (12th Cir. 1986) (court has the authority to raise venue issue sua sponte).

The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Plaintiff bases his Complaint on allegations that Defendant Oklahoma State University interfered with his request for

information under the FOIA. According to the Complaint, the Defendant is located in Stillwater, Oklahoma. The Court takes judicial notice that the city of Stillwater is located within the Western District of Oklahoma. 28 U.S.C. §116. Thus, it is clear that venue is not proper before this Court.

Accordingly, Plaintiff's complaint is hereby DISMISSED WITHOUT PREJUDICE. 28 U.S.C. §1406(a). Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is GRANTED. The Clerk shall MAIL to Plaintiff the extra copies of the complaint.

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



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 6 1995

LC

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

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

No. 95-C-406-B

ENTERED ON DOCKET

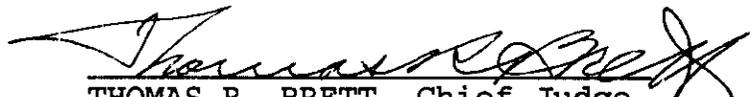
DATE NOV 07 1995

ORDER

This matter comes before the Court on Plaintiff's "Petition for Peremptory Writ of Mandamus," filed on October 20, 1995. Plaintiff requests this Court to issue an order directing the Oklahoma Court of Criminal Appeals to rule on certain dispositive motions.

The Court cannot consider Plaintiff's request as this action was dismissed as frivolous on May 24, 1995. Accordingly, the "Petition for Peremptory Writ of Mandamus" (docket #7) is hereby DENIED.

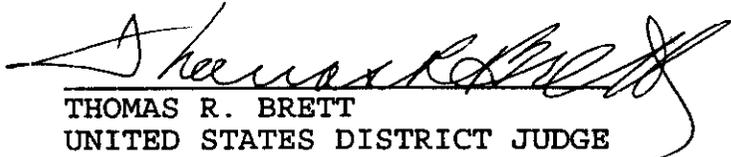
SO ORDERED THIS 5 day of Nov., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

(a)

Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 5th day of Nov., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 6 1995

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

JAMES CAGLE,

Petitioner,

vs.

SEMINOLE COUNTY DISTRICT
COURT, et al.,

Respondents.

No. 95-C-993-B

and

No. 95-C-1089-B

ENTERED ON DOCKET

DATE NOV 07 1995

ORDER

On October 4, 1995, Petitioner submitted a petition for a writ of habeas corpus, along with the \$5.00 filing fee, and the Clerk opened Case No. 95-C-993-B. On October 16, 1995, the Court informed Petitioner that his petition in Case No. 95-C-993-B was not on the form approved for use by the Tenth Circuit Court of Appeals and mailed him the requisite forms. On October 31, 1995, the Clerk of this Court received the completed forms from Petitioner, but inadvertently opened a new action, Case No. 95-C-1089-B. On November 6, 1995, the Clerk received a second filing fee of \$5.00.

Because Case No. 95-C-1089-B is duplicitous, the Clerk is directed to close it and docket the petition as an amended petition in Case No. 95-C-993-B. Respondent shall then respond to the original and amended petition in Case No. 95-C-993-B pursuant to Rule 5 of the Rules Governing § 2254 Habeas Corpus Cases. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the

statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts . . . are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to Rule 9 of the Rules Governing § 2254 Habeas Corpus Cases, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss.

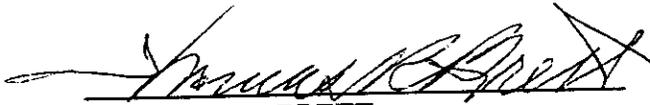
ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Clerk shall **close** Case No. 95-C-1089-B as it was inadvertently opened and docket the October 31, 1995 petition in Case No. 95-C-1089 as an amended petition in Case No. 95-C-993-B.
- (2) The Clerk shall **serve** by mail a stamped-filed copy of the

original and amended petition in Case No. 95-C-993-B on the Oklahoma Attorney General. See Local Rule 9.3(B).

- (3) The Clerk shall also **mail** to Petitioner a stamp-filed copy of the amended petition, the October 5, 1995 Receipt for Payment, and the \$5.00 check received by this Court on November 6, 1995.
- (4) Respondent shall **show cause** why the writ should not issue and **file** a response to the amended petition for a writ of habeas corpus within thirty (30) days from the date of entry of this order. Extensions of time will be granted for good cause only and in no event for longer than an additional twenty (20) days. Fed. R. Civ. P. 81(a)(2).
- (5) Petitioner may file a **reply brief** within fifteen (15) days after the filing of Respondent's response.

SO ORDERED THIS 5th day of Nov., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

RONNIE D. ROY, et al.)
)
Plaintiffs)
)
vs.)
)
KIMBALL'S PRODUCE, INC.,)
an Oklahoma Corporation,)
)
Defendant.)

Case No. 94-C-829-K

ENTERED ON DOCKET
DATE NOV 07 1995

FILED

NOV 06 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 6 day of Nov, 1995, there comes before the Court the Joint Application for Dismissal with Prejudice presented by Fred Pena, Toya Mize and Jack Curtis Brown, II, consolidated with Plaintiff's case and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein Fred Pena, Toya Mize and Jack Curtis Brown, II, and said Defendant stipulate that the complaint, insofar as they are concerned, should be dismissed as to such Defendant.

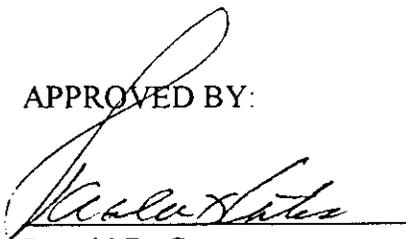
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiffs' complaint, insofar as it involves these parties, is hereby dismissed, with prejudice, as to the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

SO ORDERED

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED BY:

A handwritten signature in cursive script, appearing to read "Ronald D. Cates", written over a horizontal line.

Ronald D. Cates,
Attorney for Defendant

A handwritten signature in cursive script, appearing to read "H.I. Aston", written over a horizontal line.

H.I. Aston,
Attorney for Plaintiff's

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

RONNIE D. ROY, et al.)
)
Plaintiffs)
)
vs.)
)
KIMBALL'S PRODUCE, INC.,)
an Oklahoma Corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE NOV 07 1995

Case No. 94-C-829-K

FILED

NOV 06 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

NOW, on this 6 day of Nov., 1995, there comes before the Court the Joint Application for Dismissal with Prejudice presented by Brian Joseph and Jerry Eugene Phillips, consolidated with Plaintiff's case and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein Brian Joseph and Jerry Eugene Phillips, and said Defendant stipulate that the complaint, insofar as they are concerned, should be dismissed as to such Defendant.

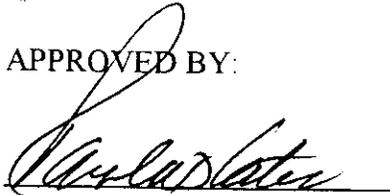
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiffs' complaint, insofar as it involves these parties, is hereby dismissed, with prejudice, as to the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

SO ORDERED

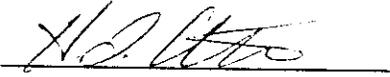
/s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED BY:

A handwritten signature in cursive script, appearing to read "Ronald D. Cates", written over a horizontal line.

Ronald D. Cates,
Attorney for Defendant

A handwritten signature in cursive script, appearing to read "H.I. Aston", written over a horizontal line.

H.I. Aston,
Attorney for Plaintiff's

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

CONTINENTAL NATURAL GAS, INC., an)
Oklahoma corporation; COTTONWOOD)
PARTNERSHIP, an Oklahoma general)
partnership; MICHAEL C. YANCEY;)
SCOTT C. LONGMORE; GARRY D. SMITH;)
TERRY K. SPENCER; and ADAMS ENERGY)
COMPANY, an Oklahoma corporation,)

Plaintiffs,)

vs.)

ASTRA RESOURCES, INC., a Kansas)
corporation,)

and)

WESTERN RESOURCES, INC., a Kansas,)
corporation,)

Defendants.)

ENTERED ON DOCKET

DATE NOV 07 1995

Case No. 94-C-485-K

FILED

NOV 06 1995

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

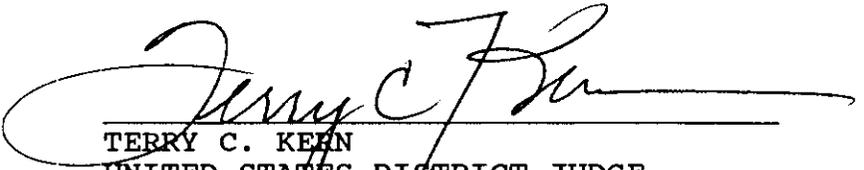
ADMINISTRATIVE CLOSING ORDER

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

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

necessary.

ORDERED this 6 day of November, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

CLYDE ALLRED,)
)
 Plaintiff,)
)
 vs.)
)
 MID-SOUTH MAINTENANCE, INC.,)
 a Tennessee Corporation,)
)
 Defendant.)

No. 94-C-873-K

ENTERED ON DOCKET
NOV 07 1995
DATE _____

FILED

NOV 06 1995

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

ORDER

Before this Court is Plaintiff's Request for Remand to State Court. Plaintiff has noticed this Court that a settlement with Defendant has been reached, contingent upon reaching an agreement with the Intervenor for their subrogation lien. Therefore, the only remaining claim is that of the Intervenor, which amounts to less than \$50,000 and over which this Court has only supplemental jurisdiction. Pursuant to 28 U.S.C. § 1367(c), this Court declines to continue to exercise supplemental jurisdiction over Intervenor's claim, see Shanaghan v. Cahill, 58 F.3d 106, 109-110 (4th Cir. 1995), and orders this case REMANDED to the District Court of Rogers County.

ORDERED this 6 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

29

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

MARY GWENDOLYN STAFFORD,)
)
 Plaintiff,)
)
 v.)
)
 TERRY BENESH, ROBIN BENESH,)
 DAVID SPENCOR, COPIER &)
 COMPUTER SYSTEMS OF)
 OKLAHOMA, A TRADE NAME FOR)
 GENERAL OFFICE SYSTEMS, INC.)
 OF OKLAHOMA, AND GENERAL)
 OFFICE SYSTEMS, INC. OF)
 OKLAHOMA,)
)
 Defendant.)

ENTERED ON DOCKET
NOV 07 1995
Case No. 94-C-1180K
DATE _____

FILED

NOV 06 1995

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

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 6 day of Nov ~~October~~, 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 Defendants is hereby dismissed with prejudice with each party to bear its own costs and attorneys' fees.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

NOV 3 1995

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

EOD 11/6/95

Civil Case No. 94-C-1151-BU

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 18, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

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

Dated this 3 day of Nov, 1995.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS BEING FILED
BY MICHAEL BURRAGE, CLERK AND
FOR THE COURT'S IMMEDIATE
ATTENTION.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

NOV 3 1995

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

EOD 11/16/95

Civil Case No. 95-C-0061-BU

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 18, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

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

Dated this 3rd day of Nov, 1995.

s/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

RECEIVED
BY MAIL ROOM
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

NOV 3 1995

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

EOD 11/6/95

Civil Case No. 94-C-741-BU

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 18, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

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

Dated this 3 day of Nov, 1995.

s/ MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

NOV 10 1995
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RICHARD TACKETT aka RICHARD L.)
TACKETT aka RICHARD LEE)
TACKETT; VAUNITA TACKETT aka)
VAUNITA L. TACKETT aka VAUNITA)
LYNN TACKETT; AMERICAN)
BUILDING MAINTENANCE, CO.;)
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,)
Defendants.

FILED

NOV 3 1995

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

EOD 11/6/95

Civil Case No. 94-C 938BU

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 18, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

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

Dated this 3 day of Nov, 1995.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

NOTE: THIS DOCUMENT IS TO BE FILED IN THE CLERK'S OFFICE AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD ALLEN WILEY; PEGGY)
 MARIE WILEY; COUNTY)
 TREASURER, Rogers County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Rogers County,)
 Oklahoma,)
)
 Defendants.)

FILED

NOV 3 1995

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

*EOD
11/6/95*

Civil Case No. 94-C 1128BU

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed October 18, 1995, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

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

Dated this 3 day of Nov, 1995.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

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

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

VIRGIL BOWLINE and)
PAUL KNIGHT,)
)
Plaintiffs,)
)
v.)
)
BORDEN, INC., MEADOW GOLD)
DAIRIES, INC., and ASSOCIATED)
MILK PRODUCERS, INC.,)
)
Defendants.)

NOV - 3 1995

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

No. 94-C-984-B

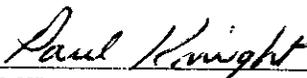
ENTERED ON DOCKET

DATE NOV 06 1995

STIPULATION FOR DISMISSAL WITH PREJUDICE

In accordance with Rule 41(a)(1), Federal Rules of Civil Procedure, plaintiff, Paul Knight ("Knight"), and defendants; Borden, Inc. and Meadow Gold Dairies, Inc., hereby stipulate that Knight's Complaint ("Petition") and all causes of action which were or could have been stated therein are hereby dismissed with prejudice to Knight refiling them against either Borden, Inc. or Meadow Gold Dairies, Inc.

DATED this 1 day of November, 1995.



PAUL KNIGHT



PHIL FRAZIER,
Attorney for Paul Knight

BORDEN, INC. and
MEADOW GOLD DAIRIES, INC.

By: Jimmy Goodman
JIMMY GOODMAN
One of Their Attorneys *J. RAW*

303.95B.JKG

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

FILED

NOV 6 1995

VIRGIL BOWLINE and)
PAUL KNIGHT,)
)
Plaintiffs,)
)
v.)
)
BORDEN, INC., MEADOW GOLD)
DAIRIES, INC., and ASSOCIATED)
MILK PRODUCERS, INC.,)
)
Defendants.)

No. 94-C-984-B

ENTERED ON DOCKET
NOV 06 1995
DATE _____

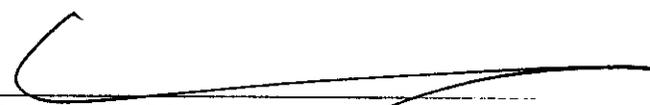
STIPULATION FOR DISMISSAL WITH PREJUDICE

In accordance with Rule 41(a)(1), Federal Rules of Civil Procedure, plaintiff, Virgil Bowline ("Bowline"), and defendants, Borden, Inc. and Meadow Gold Dairies, Inc., hereby stipulate that Bowline's Complaint ("Petition") and all causes of action which were or could have been stated therein are hereby dismissed with prejudice to Bowline refiling them against either Borden, Inc. or Meadow Gold Dairies, Inc.

DATED this 31 day of October, 1995.



VIRGIL BOWLINE



KEN UNDERWOOD,
Attorney for Virgil Bowline

BORDEN, INC. and
MEADOW GOLD DAIRIES, INC.

By: Jimmy Goodman
JIMMY GOODMAN
One of Their Attorneys *J. R. W.*

302.95B.JKG

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

FILED

NOV 03 1995

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

Bristol Resources Corp.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
Atlantic Richfield Co.,)
a Delaware corporation,)
)
Defendant.)

No. 94-C-1117-K

ENTERED ON DOCKET

DATE NOV 06 1995

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 3 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

24

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

FILED
NOV 2 1995

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

OKLAHOMA OFFSET, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
WEINTRAUB & ASSOCIATES, INC.,)
a Missouri corporation,)
)
and)
)
SANDLER & WORTH, INC.,)
a New York corporation,)
)
Defendants.)

No. 94-C-1142B

NOV 03 1995

**ORDER ALLOWING STIPULATED MOTION
FOR DISMISSAL WITH PREJUDICE**

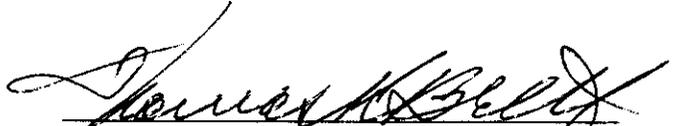
Now on this 2nd day of Nov, 1995, this matter comes before the Court upon the Stipulated Motion for Dismissal With Prejudice filed by Plaintiff and Defendant Weintraub & Associates, Inc.

For good cause shown, said Motion is granted and the above-entitled action is hereby dismissed with prejudice as to any and all claims asserted in Oklahoma Offset's Amended Complaint against Defendant Weintraub & Associates, Inc. only, in the above entitled action filed herein, and any and all counterclaims asserted in Weintraub & Associates, Inc.'s Answer against Plaintiff Oklahoma Offset, Inc. only.

Plaintiff Oklahoma Offset, Inc. specifically reserves its claims against Defendant Sandler & Worth, Inc. Defendant Weintraub & Associates, Inc. specifically reserves its cross-claim against Defendant Sandler & Worth, Inc.

Plaintiff and Defendant shall each bear their own court costs and attorneys fees.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

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

ERHAN OZEY,

Appellant,

v.

JOSEPH Q. ADAMS,

Appellee.

)
)
)
)
)
)
)
)
)
)

FILED

NOV 02 1995

Case No. 94-C-932-B

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

ENTERED ON CLERK'S
DATE NOV 03 1995

ORDER

Sua sponte, the court orders this bankruptcy appeal dismissed pursuant to Rule 8001(a), Rules of Bankruptcy Procedure, as a result of Appellant's failure to timely file a brief on appeal in accordance with Bankruptcy Rule 8009(a)(1).

Dated this 2nd day of Nov., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

S:ozey

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

FILED

NOV 2 1995 *mu*

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

CHARLES WAGNON and
LORALEE WAGNON,

Plaintiffs,

v.

STATE FARM FIRE and
CASUALTY COMPANY,

Defendant.

No. 94-C-972-B ✓

ENTERED ON FILE
DATE NOV 03 1995

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the Plaintiffs, Charles Wagnon and Lorelee Wagnon, and against the Defendant, State Farm Fire and Casualty Company, in the amount of Twelve Thousand Eight Hundred Ninety Nine and 68/100 Dollars (\$12,899.68), with interest at the rate of 15% per annum from the date of November 5, 1992, to the date hereon, and at the rate of 5.62% per annum thereafter. Plaintiffs are also entitled to the costs of this action and a reasonable attorneys fee if timely applied for pursuant to Local Rules 54.1 and 54.2. The Defendants are granted judgment against the Plaintiffs in reference to Plaintiffs' claim for punitive damages.

DATED this 2nd day of November, 1995.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

04

FILED

NOV 2 1995

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

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

CHARLES WAGNON and)	
LORALEE WAGNON,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE FARM FIRE and)	
CASUALTY COMPANY,)	
)	
Defendant.)	

No. 94-C-972-B ✓

ENTERED
DATE NOV 03 1995

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

In this diversity action, the Plaintiffs, Charles Wagon and Lorelee Wagon, seek damages under their residential personal property theft insurance with the Defendant, State Farm Fire and Casualty Company (hereafter "State Farm"). The case was tried to the Court, sitting without a jury, on October 16 and 17, 1995. After considering the evidence presented, arguments of counsel and applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT¹

1. This Court has jurisdiction and venue to determine Plaintiffs' claims.
2. On or about January 3, 1992, State Farm issued a contract of insurance to the Plaintiffs, Charles D. and Lorelee Wagon, Policy No. 36-37-5801-2 (Plaintiffs' Exhibit 1).

¹Findings of Fact 1, 2 and 3 and 12 through 21, are admitted facts in the Pretrial Order filed by the parties herein on October 16, 1995.

13

3. Policy No. 36-37-5801-2 was in effect from January 3, 1992 through January 3, 1993.

4. Among other insurance coverages, the policy provided for coverage of up to \$20,000.00 for the loss of personal property at Plaintiffs' residence.

5. In the evening of April 4, 1992, Plaintiff, Charles Wagnon, was at work, and Plaintiff, Lorelee Wagnon, was away from the Plaintiffs' home running various errands.

6. When Plaintiff, Lorelee Wagnon, returned to her home, she observed that her dog was outside, all the lights were off, and the garage door was unlocked and partially open. The cumulative effect of these observations caused Mrs. Wagnon to be concerned that someone had been, or was in her home, without permission or consent. Mrs. Wagnon's husband was still at work when Mrs. Wagnon made these observations.

7. Instead of entering her home, Mrs. Wagnon left and contacted a Tulsa Police unit. One or more police officers escorted Mrs. Wagnon back to her home.

8. While Mrs. Wagnon waited outside her home, one or more police officers entered the Plaintiffs' home, then exited and informed Mrs. Wagnon that it appeared she had had visitors, but that no one was presently inside the home.

9. Mrs. Wagnon entered her home, she found it in disarray, she noticed that a sliding glass door appeared to have been forced open, and she noticed that several items of personal property were missing.

10. Mrs. Wagnon went through her possessions to determine what was missing, and a burglary report was made to the Tulsa Police Department.

11. Plaintiff, Charles Wagnon, contacted his insurance agent on Monday, April 6, 1992, reported the burglary, and advised that the Plaintiffs wished to make claim on their insurance policy with the Defendant.

12. On or about April 27, 1992, the Plaintiffs submitted a Sworn Statement in Proof of Loss (Proof of Loss) to State Farm in the amount of \$21,176.84 (Plaintiffs' Exhibit 46), for insurance proceeds resulting from the alleged theft of personal property from their home on April 4, 1992. (This was based on replacement value).

13. On or about July 27, 1992, the Plaintiffs submitted a second Sworn Statement in Proof of Loss to State Farm (Plaintiffs' Exhibit 52) in the amount of \$11,658.69, for insurance proceeds resulting from the alleged theft of personal property from their home on April 4, 1992. (This was based on actual cash value, replacement cost less depreciation).

14. At or about the time that the Proofs of Loss were submitted, Plaintiffs submitted two sets of Personal Property Inventory Forms (PPIFs) dated April 10, 1992 and July 7, 1992, in support of their claim. (Attached to Plaintiffs' Exhibits 46 and 52, respectively).

15. Plaintiff, Charles D. Wagnon's signature appears on the bottom of the PPIFs certifying that the information contained thereon is true to the best of his knowledge.

16. Plaintiffs made timely presentment of their theft loss claim to the Defendant.

17. On April 20, 1992, Plaintiff, Charles Wagnon, gave his recorded statement to Defendant's representative. (A true and correct transcript of that statement is attached as an exhibit to Plaintiffs' Exhibit 4).

18. On April 21, 1992, Plaintiff, Lorelee Wagnon, gave her recorded statement to Defendant's representative. (A true and correct transcript of that statement is attached as an exhibit to Plaintiffs' Exhibit 3).

19. On June 3, 1992, Plaintiff, Lorelee Wagnon, submitted to an examination under oath conducted by Defendant's attorney. (Plaintiffs' Exhibit 3, and its attached exhibits, is a true and correct copy of that examination under oath and the exhibits referenced therein).

20. On June 3, 1992 and June 8, 1992, Plaintiff, Charles Wagnon, submitted to an examination under oath conducted by Defendant's attorney. (Plaintiffs' Exhibits 3 and 4, and their attached exhibits, are true and correct copies of the examinations under oath and the exhibits referenced therein).

21. On October 14, 1992, Plaintiff, Lorelee Wagnon, submitted to a second examination under oath conducted by Defendant's attorney. (Plaintiffs' Exhibit 5, and its attached exhibits, is a true and correct copy of that examination under oath and the exhibits referenced therein).

22. Plaintiff, Charles Wagon, originally claimed that his father gave him approximately 30 various hand tools or sets that were claimed to be stolen in the burglary. Plaintiff, Charles Wagon, at first refused to cooperate in telling Defendant's representative where his father could be contacted.

23. Plaintiff, Charles Wagon's father, Olen Wagon, when later contacted, stated that he gave his son a very few tools or sets, perhaps four.

24. Plaintiffs originally claimed the loss of two camera tripods and then subsequently admitted the loss of only one.

25. In an effort to provide documentation requested by the Defendants, Plaintiffs submitted numerous documents which are attached as exhibits to Plaintiffs' examinations under oath, and received into evidence in this case.

26. The Defendant, State Farm Fire and Casualty Company, did not take issue with the fact that the burglary occurred or take issue with any of the personalty claimed to be lost or stolen, with the exception of the extra tripod.

27. Early on in the investigation, a third-party, whose credibility was questionable due to Mrs. Wagon previously having reported him as a child molester, of which he was convicted, advised the Defendant that the Plaintiffs' burglary claim was fraudulent.

28. Plaintiff, Charles Wagon, stated in reference to the tools that he could not recall where he actually obtained or purchased many of them. While Mr. Wagon's statement that many of

the tools came from his father was a misrepresentation, under the facts and circumstances herein, the evidence does not support coverage being vitiated as a result.

29. The insurance policy (Defendant's Exhibit 1) in pertinent part provides:

"SECTION I - CONDITIONS

3. Loss Settlement.

* * *
b. We will pay the cost to repair or replace all other personal property subject to the following:

- (1) loss to property not repaired or replaced within one year after the loss will be settled on an actual cash value basis; ***"

30. None of the Plaintiffs' personal property taken in the burglary, the subject of Plaintiffs' claim, was repaired or replaced within one year after the loss.

31. The Plaintiffs are entitled to recover from the Defendant the sum of \$12,899.68, the actual cash value for their personal property loss claimed herein. (Defendant's Exhibit 56).

32. The evidence does not support Plaintiffs' claim of bad faith because legitimate fact questions regarding Plaintiffs' loss were present.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter in this diversity action. Venue is also appropriate.

2. Any Finding of Fact that can be appropriately characterized a Conclusion of Law is included herein.

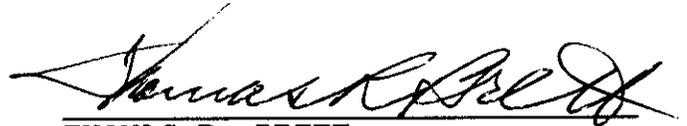
3. Plaintiffs are entitled to recover from Defendant the sum of \$12,899.68, the actual cash value of the subject personal property. (Defendant's Exhibits 1 and 56). The insurance policy provision stating that "loss" property not repaired or replaced within one year shall be valued at actual cash value is valid and enforceable.

4. The Plaintiffs are entitled to pre-judgment interest at the rate of 15% per annum from November 5, 1992 to the date hereon, costs and a reasonable attorney's fee if timely applied for pursuant to Local Rules 54.1 and 54.2. 36 O.S. 3629(B).

5. The evidence does not support a claim for alleged punitive damages.

6. A Judgment in keeping with these Findings of Fact and Conclusions of Law shall be filed contemporaneous herewith.

IT IS SO ORDERED this 5th day of November, 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:)
)
SUBPOENA OF STRICKLAND TOWER)
MAINTENANCE, INC.)
)
AT&T CORP., AT&T COMMUNICATIONS,)
INC. AND AT&T COMMUNICATIONS OF)
THE SOUTHWEST, INC.,)
)
Plaintiff,)
)
v.)
)
STRICKLAND TOWER MAINTENANCE,)
INC.,)
)
Defendant.)

FILED

NOV 1 1995



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

No. 95-C-426-H ✓

ENTERED ON DOCKET

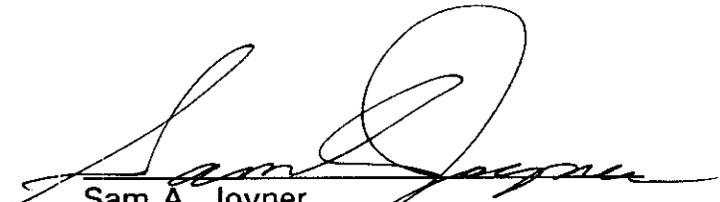
DATE NOV 03 1995

ADMINISTRATIVE CLOSING ORDER

Pursuant to N.D. LR 41, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IT IS SO ORDERED.

Dated this 1 day of November 1995.



Sam A. Joyner
United States Magistrate Judge

(4)

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

FILED

JUN 15 1995

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

KENSINGTON RESOURCES, INC.,
an Oklahoma corporation; and
PAUL A. ROSS, an individual,

Plaintiffs,

v.

GRUPO CARSO, S.A., a Mexican
corporation; SERGIO CASTILLO;
JORGE SLIM; and LOUIS MEDINA,

Defendants.

No. 93-C-717-H

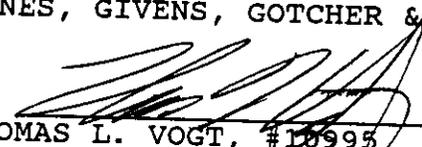
RECORDED ON BOOKET

11-3-95

DISMISSAL

COME NOW the Plaintiffs, KENSINGTON RESOURCES, INC., and PAUL
A. ROSS, and hereby dismiss without prejudice this action.

JONES, GIVENS, GOTCHER & BOGAN

By 
THOMAS L. VOGT, #18995
15 East 5th Street, #3800
Tulsa, OK 74103
918/581-8200

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF MAILING

THE UNDERSIGNED hereby certifies that on the 15th day of
June, 1995, a true and correct copy of the above and foregoing
document was mailed, with proper postage affixed thereon, to:

L. K. Smith
Paul J. Cleary
BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 OneOk Plaza
100 West Fifth Street
Tulsa, OK 74103

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

RICKY SANDRIDGE,)
)
 Plaintiff,)
)
 v.)
)
 COMMISSIONER OF SOCIAL)
 SECURITY ADMINISTRATION,)
)
 Defendant.)

No. 95-CV-38-K

NOV 1 1995

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

ENTERED ON DOCKET

DATE NOV 03 1995

ORDER OF DISMISSAL

For the following reasons, the Court hereby dismisses Plaintiff's social security appeal:

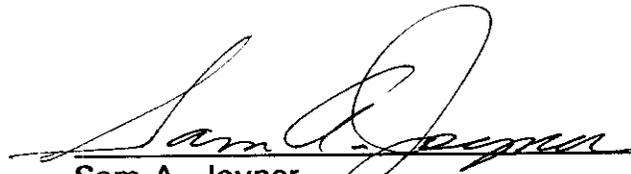
1. Plaintiff filed a Social Security Appeal on January 11, 1995.
2. Defendant filed a Motion to Dismiss [7-1] on March 21, 1995. The original motion did not contain a certificate of service. On July 13, 1995, Defendant filed a Supplemental Certificate of Mailing [9-1].
3. Plaintiff failed to file a timely response to Defendant's Motion to Dismiss.
4. On September 21, 1995, this Court entered an Order granting Plaintiff until October 20, 1995 to show cause why this case should not be dismissed. The Order specifically stated that "[f]ailure of Plaintiff to show cause by this date will result in the dismissal of this action."
5. Plaintiff did not show cause by October 20, 1995.

6. On November 1, 1995, the Court contacted Plaintiff's counsel to determine why he had failed to prosecute this action. At that time, Plaintiff's counsel agreed to confess Defendant's motion to dismiss.

The Court hereby sustains Defendant's Motion to Dismiss [7-1] and dismisses this action with prejudice.

IT IS SO ORDERED.

Dated this 1st day of November 1995.


Sam A. Joyner
United States Magistrate Judge

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

FILED
NOV 1 1995

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

MICHAEL MEURE,)
)
Plaintiff,)
)
v.)
)
DOUGLAS BATTERY, INC.,)
SHOEMAKER BATTERY WAREHOUSE,)
and ABC COMPANY,)
)
Defendants.)

Case No. 95-C-341-H ✓

ENTERED ON DOCKET

DATE NOV 02 1995

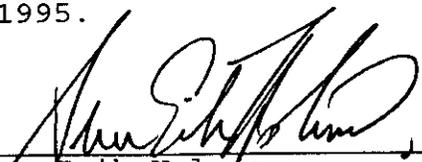
O R D E R

This matter comes before the Court on a Motion for Summary Judgment by Defendant Douglas Battery, Inc. ("Douglas Battery"). At a status conference held on August 18, 1995, the Motion of Douglas Battery was deemed filed as of that date. The Court allowed the Plaintiff 15 days to respond to the Motion. Nearly two months later, no response has been filed. Because Plaintiff has failed to respond, the Court hereby deems the Motion confessed and grants summary judgment in favor of Defendant Douglas Battery. See Local Rule 7.1(C) of the Local Rules of the United States District Court for the Northern District of Oklahoma.

Defendant's Motion (Docket # 5) is hereby granted.

IT IS SO ORDERED.

This 31st day of October 1995.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 02 1995

ROBERT ORIEN BUCHANAN,)
)
 Plaintiff,)
)
 v.)
)
 EVERETT SCHOOL DISTRICT NO. 2,)
 ROY GATES, PRESIDENT; JANE)
 HAMMOND, SUPERINTENDENT;)
 SNOHOMISH COUNTY PHYSICIANS)
 ASSOCIATION; SUZANNE LEE)
 BUCHANAN,)
)
 Defendants.)

Case No. 94-C-419-H ✓

FILED

NOV 1 1995

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

O R D E R

This matter comes before the Court on a Motion to Dismiss or, in the Alternative, to Transfer by Defendants Everett School District No. 2 (the "District"), Jane Hammond, and Snohomish County Physicians Corporation ("SCPC") (collectively, the "Moving Defendants").

The District is a quasi-municipal corporation formed under the laws of the State of Washington for the purpose of delivering educational services to children within Snohomish County, Washington. Dr. Jane Hammond is the District's Superintendent and a resident of Snohomish County, Washington.

The District extends to its employees, and, upon the employees' election, to their spouses and dependents health insurance coverage under an employee benefits trust which serves as a group health plan. SCPC, a division of King County Medical Blue Shield, is a health care contractor serving the District's covered employees, their spouses, and dependents. The administrator of the employee benefits trust is Margaret Templeton.

file

Plaintiff Robert Orien Buchanan and District employee Suzanne Lee Buchanan were divorced on October 27, 1992. Ms. Buchanan, a resident of Snohomish County, Washington, has been employed by the District as a teacher since August 28, 1989 and has received health insurance coverage through the employee benefits trust in which the District participates since October 1, 1989. Plaintiff received health insurance coverage through the same trust from October 1, 1989 to October 31, 1992. Plaintiff's coverage terminated on October 31, 1992 because, on October 9, 1992, during a period of open enrollment, Ms. Buchanan cancelled Plaintiff's health coverage.

Plaintiff alleges in his complaint that the District and SCPC breached a duty owed him under the Public Health Service Act, 42 U.S.C. §§ 300bb-1 et seq., to notify him of a right to elect to continue health insurance after his divorce from Ms. Buchanan.

The statute governing venue in cases founded upon federal question jurisdiction provides that the action may be brought only in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Here, the Plaintiff's choice of forum does not satisfy the requirements of either of the three statutory options.

A corporate defendant resides in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Id. § 1391(c). The District is a quasi-municipal corporation organized under the laws of the State of Washington. Neither the District nor its superintendent delivers educational services in or does business of any kind in Oklahoma. SCPC, a division of a corporation organized under the laws of the State of Washington, does not solicit business in, have agents or offices in, or own assets of any kind in Oklahoma. Neither of these Defendants has "purposefully avail[ed] [itself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Rather, because both conduct business in Snohomish County, Washington, both are subject to personal jurisdiction in and, for purposes of the venue statute, are thus residents of the Western District of Washington.

The individually-named Defendants, Jane Hammond and Suzanne Lee Buchanan, dwell in Snohomish County, Washington. Accordingly, they reside in the Western District of Washington.¹ None of the Defendants in this case reside in the Northern District of Oklahoma. Therefore, venue is not proper under 28 U.S.C. § 1391(b)(1).

¹ It is unclear where Roy Gates, the President of the District, resides. Plaintiff has not controverted the Moving Defendants' declaration that no individual Defendant resides in the Northern District of Oklahoma; therefore, the Court accepts this as true. Further, because Mr. Gates is the President of a Washington School District, it is logical that he resides in Washington, along with the other Defendants.

Neither is venue proper in the Northern District of Oklahoma under 28 U.S.C. § 1391(b)(2). Plaintiff alleges that the District provided him health care benefits. These benefits were indisputably provided in Snohomish County, Washington. Plaintiff alleges that he was divorced from District employee Suzanne Buchanan. The divorce occurred in Snohomish County, Washington. The sole event that Plaintiff claims occurred in the Northern District of Oklahoma is his posting of a letter to the District's superintendent requesting benefit information. This single event does not constitute "a substantial part of the events or omissions giving rise to the claim." 28 U.S.C. § 1391(b)(2).²

Subsection three of the venue statute is inapplicable because the Court finds that there is a judicial district where this action may be brought. That district is the Western District of Washington.

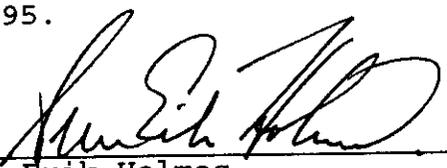
Under 28 U.S.C. § 1406(a), because Plaintiff commenced this action in an improper venue, the Court grants the Motion to Transfer the case (Docket # 8). Accordingly, the Court hereby

² Because there is no tangible property in dispute in this case, the second clause of 28 U.S.C. § 1391(b)(2), regarding locus of "the property that is the subject of the action," is not implicated.

orders that Case Number 94-C-419(H) be transferred to the Western District of Washington.

IT IS SO ORDERED.

This 31ST day of October, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 01 1995

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

FRANKLIN HOWARD and
JANET HOWARD, husband and wife,

Plaintiffs,

vs.

AMERICAN AIRLINES, INC.,
a foreign Corporation,

Defendant.

Case No. 95-C-94-B

ENTERED ON DOCKET

DATE NOV 02 1995

ORDER

This matter comes on for consideration of Defendant American Airlines, Inc.'s (American) Motion For Summary Judgment (docket # 12).

HISTORY OF THE CASE

Plaintiffs sued Defendant for the value of personal property entrusted to Defendant, allegedly lost household goods, accumulated over 20 years. Plaintiffs claim Defendant's employees converted some of the property to its own use and put many of the personal items out for sale to its employees and to others, in March and April, 1994. Plaintiffs seek damages in excess of \$50,000 plus consequential damages exceeding \$10,000 plus punitive damages exceeding \$10,000.

Defendant alleges this action is governed by the Warsaw Convention, 49 U.S.C. §1502 et seq and that by reason of that treaty consequential damages, punitive damages, attorneys fees and certain other damages are not properly recoverable herein.

American has filed a motion for summary judgment alleging that

about

plaintiffs, who shipped their household goods and belongings from Brazil in March, 1994, via American, took possession of most of their property from American's Surplus Store. American also alleges that the first written complaint plaintiffs made was dated April 25, 1994, more than 14 days after plaintiffs had picked up their property from American. American alleges that, as required by the Warsaw Convention, plaintiffs were obligated to make a written demand within 14 days and, having failed to so do, are barred from bringing the present action.

In response, Plaintiffs assert that American was negotiating with them after the March 31 partial recovery of their property and in no way indicated plaintiffs must file a written claim or that their notice was untimely. Plaintiffs also aver that such a defense is an affirmative defense which American failed to plead in their Answer and time has long since run for American to amend its Answer. Further, plaintiffs argue that disputed facts exist as to how much of their possessions they received on March 31, how damaged it was and what assurances were given them by American personnel. Plaintiffs also allege that MTI (an adjustment company), acting on behalf of American, did not make an inspection until April 15, 1994, and that Plaintiffs' written demand was made on April 25, 1994, less than fourteen days later.

Plaintiffs acknowledge that punitive damages are not appropriate under the Warsaw Convention but allege prejudgment interest is recoverable.¹

¹ The Court reaches no conclusions relative to whether certain of Plaintiffs' goods were either lost, damaged or destroyed. The parties are in agreement that lost goods are not

AMERICAN'S STATEMENT OF UNDISPUTED FACTS

1. Plaintiff shipped their household belongings from Rio de Janeiro via American Airlines to Tulsa in March, 1994.

2. Plaintiffs picked up their items of furniture and other household belongings from the American Airlines dock, without exception, on March 31, 1994.

3. Plaintiffs sent a letter to American Airlines giving notice of claim for damaged goods on April 25, 1994.

4. MTI was assigned the inspection on April 13, 1994.

5. MTI made its inspection on April 15, 1994.

6. MTI's inspection was made more than 14 days after Plaintiffs received delivery of their goods.

7. The MTI inspection report was not a claim since (on) the bottom of the first page of such report it is stated in bold face "THIS INSPECTION REPORT IS NOT A CLAIM".

8. Further, the MTI Inspection Report, at the bottom of the first page, notes as follows, "NOTE: THIS REPORT IS SUBJECT TO THE TERMS AND CONDITIONS OF THE BILL OF LADING AND IS NOT AN ADMISSION OF LIABILITY, NOR A CLAIM, AGAINST THE CARRIER."

9. Although the Warsaw Convention only allows 7 days within which to make a written complaint for damaged goods to the airline, the waybill concerning the Plaintiffs' goods shipped from Rio de Janeiro, Brazil, to Tulsa, on the reverse side indicates that the Plaintiffs were given 14 days to make any written notice of claim

subject to notice requirements while damaged goods are. The parties are in conflict as to "destroyed" but delivered goods as to whether notice is required.

for damages.

PLAINTIFFS' RESPONSE TO DEFENDANT'S UNDISPUTED FACTS

Plaintiffs admit Facts 1,3,4 and 5 but dispute the remaining alleged undisputed facts as will be discussed *infra*.

LEGAL ANALYSIS

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322. 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing

there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., *supra*, wherein the Court stated that:

" . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . ." *Id.* at 252.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

ARGUMENT AND AUTHORITY

Plaintiffs dispute they "picked up their items of furniture and other household belongings from the American Airlines dock, without exception, on March 31, 1994". In an affidavit, Plaintiff Franklin Howard states that, on that date, an American employee, Hilda Carries, advised Plaintiffs that she would notify American's Dallas, Texas, facility of the losses so the claims could begin immediately, and that the Plaintiffs should "not worry about it" because American would stand behind the losses and damages suffered by the Plaintiffs. Plaintiffs aver that they relied upon these representations and did not write on the air bill any exception. Plaintiff Franklin Howard's affidavit also states that Plaintiffs, in the next several weeks, had other contact with American employees who advised Plaintiffs their claim was being investigated and that an investigation firm, MTI, would furnish a report to American so that the claim could be fully processed. Affiant Howard states that American personnel advised him, on April 15, 1994, that MTI had given American information on the claim and that Plaintiffs

should send American a letter with some "preliminary evaluations". Plaintiffs allege they complied with this directive on April 25, 1994.

American seeks summary judgment on four issues: (1) That the Warsaw Convention applies to the Plaintiffs' claim, (2) That Plaintiffs' action should be dismissed since no written claim was made in accordance with Article XXVI(2) of the Convention, (3) That Plaintiffs are not entitled to punitive damages, and (4) That Plaintiffs are not entitled to attorney fees or prejudgment interest.

Plaintiffs concede issues (1) and (3) as proper statements of the law. Plaintiffs apparently concede the attorney fees issue of (4) in that they failed to address such issue in their response. However, Plaintiffs urge the Court to recognize that prejudgment interest is indeed recoverable under a Warsaw Convention claim, citing Boehringer-Mannheim Diagnostics v. Pan American World Airlines, 737 F.2d 456 (5th Cir.1984) and Domanque v. Eastern Airlines, Inc., 722 F.2d 256 (5th Cir.1984). Apparently, there exists division on this issue. See, O'Rourke v. Eastern Airlines, Inc., 730 F.2d 842 (2nd Cir.1984). Neither party has cited authority from the Tenth Circuit Court of Appeals nor has the Court determined that such exists. Notwithstanding, the Court concludes the better rule is to deny prejudgment interest, at this time, in the absence of Warsaw Convention directive.

Plaintiffs urge that American, in its answer, failed to plead as an affirmative defense the 7 day notice requirement, expanded to 14 days in this matter by the waybill. The Court, upon examination

of American's answer, agrees that no defense of avoidance was specifically raised by American although it is clear American pleaded applicability of the Warsaw Convention. However, in the Court's view, merely pleading that a statute or treaty exclusively covers a particular claim or complaint does not automatically raise affirmative defenses contained within such statute or treaty. The Court has found authority, cited by neither party, for this view. Bernard v. U.S. Aircoach, 117 F.Supp. 134 (D.C. S.D.CA 1953); Tancredi v. Dive Makai Charters, 823 F.Supp. 778 (D.Hawaii,1993) (holding that although absolute specificity in pleading is not required, fair notice of an affirmative defense is.)

Under the admitted facts herein, Plaintiffs had no notice until well into this case that American would attempt to rely on a defense of avoidance based upon the 14 day notice provision set forth in the waybill. Further, the Court has grave concerns whether such notice requirement, had it been properly raised as an affirmative defense, would be a proper matter for summary resolution given the factual conflicts regarding American's actions toward and statements to Plaintiffs immediately upon Plaintiffs' discovery of the loss.²

The Court concludes Defendant's motion on this issue should be denied.

Notwithstanding the Court's view on the untimely raising of an affirmative defense, summary disposition of the 14 day notice issue

² Plaintiff has offered deposition testimony indicating that American employee Carries conveyed to other employees that, if Mr. Howard contacted them, they were not to disclose any problems with his shipment.

would not be warranted herein.

Article 26 of the Warsaw Convention provides:

"(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 day from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the time aforesaid.

(4) Failing complaint within the time aforesaid, no action shall lie against the carrier, save in the case of fraud on his part."

In Schmoldt Importing v. Pan Am.W. Airways, 767 P.2d 411, (Okla.1989), the defendant carrier Pan Am delivered the waybill and the goods³ to a connecting carrier, Continental Airlines, who stamped "RECEIVED DAMAGED" on the air waybill, the transporting document. On December 27, 1982, Continental completed the shipment to a Schmoldt representative who signed the waybill after writing, "1 Box open prior to Inspection." Schmoldt subsequently wrote a more detailed complaint and mailed it to Pan Am on February 16, 1983, well beyond the 7 and 14 day limitation periods. Schmoldt filed suit against Pan Am alleging it suffered losses due to both delay and water-damage to the goods. The Oklahoma Supreme Court held that a written statement of damage on the waybill was sufficient to satisfy the requirement but disallowed the delay

³ 1000 fur hats for retail sale during the 1982 Christmas season.

claim since no notation as to delay was made on the waybill.

In the present matter Affiant Howard avers that American employee Carries directed Howard that he "did not need to note any damages on the air bill, since she was already in the process of sending the specific information concerning such damages to the Claims Department in Dallas, Texas." In the Court's view this is sufficient to establish a fact question whether American's actions substantially prevented Plaintiff Howard from complying with the rather stringent requirements of the Warsaw Convention's notice requirements.⁴

Summary

In summary, the Court concludes American's Motion For Summary Judgment on the four issues, (1) That the Warsaw Convention applies to the Plaintiffs' claim, should be GRANTED, (2) That Plaintiffs' action should be dismissed since no written claim was made in accordance with Article XXVI(2) of the Convention, should be DENIED, (3) That Plaintiffs are not entitled to punitive damages, should be GRANTED, and (4) That Plaintiffs are not entitled to attorney fees or prejudgment interest, should be GRANTED as to attorney fees and DENIED as to prejudgment interest, at this time.

⁴ In Abdul-Hag v. Pakistan Intern. Airlines, 420 N.Y.S.2d 848, 101 Misc.2d 213 (N.Y.1979), the Court noted: "While the realities of modern air carriage and the developing recognition of consumer rights may warrant a modification of the Warsaw Convention's notice provisions, such a change should properly be made by further international understandings or treaties or by regulatory bodies, like the Civil Aeronautics Board."

IT IS SO ORDERED this 1st day of November, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT¹

1. This action arises from COBRA as codified at 29 U.S.C. § 1001, *et seq.* This Court has jurisdiction over the parties and the subject matter. Venue is proper.

2. Clarence and Betty Smith are husband and wife.

3. Clarence and Betty Smith are residents of the County of Tulsa, State of Oklahoma.

4. Rogers Galvanizing Company ("Rogers") is a Delaware corporation doing business in the County of Tulsa, State of Oklahoma.

5. Clarence Smith, who suffers from emphysema, was last able to work for Rogers on May 18, 1992.

6. In May 1992, Clarence Smith began drawing \$150 a week under a short-term disability policy provided by Rogers, which payments lasted six months.

7. At the time he went on disability, Clarence Smith and Betty Smith were covered under a health insurance plan provided by Rogers through Blue Cross Blue Shield of Oklahoma ("BCBS") at no cost to the Smiths.

8. Rogers paid Blue Cross Blue Shield \$547 per month for the BCBS Plan for the Smiths.

9. Until June 1993, Rogers provided an employee welfare benefit plan (*i.e.*, a group health insurance plan) to its employees

¹Findings of Fact Nos. 1 through 24 are those stipulated by the parties in the Pretrial Order filed September 19, 1995.

and dependents through Blue Cross Blue Shield of Oklahoma (hereinafter "BCBS Plan").

10. The health insurance policy carried through Blue Cross Blue Shield covered only "regular, full-time active" employees who worked 30 or more hours per week.

11. If an employee of Rogers became disabled and unable to work, the employee continued to be covered by the BCBS Plan for up to six months.

12. Smith exhausted his short-term disability benefits in November 1992.

13. At all times, Rogers was subject to the requirements of COBRA.

14. Clarence Smith was terminated from employment by Rogers effective November 1, 1992.

15. At the time of Clarence Smith's termination from Rogers, he and his spouse, Betty Smith, were participants under the BCBS Plan.

16. The termination of Clarence Smith from Rogers was a qualifying event as defined by COBRA (42 U.S.C. § 1163(2)), which entitled both Clarence Smith and Betty Smith to elect continuation of coverage under the BCBS Plan.

17. If the Smiths elected continuation of coverage of their health insurance, they were required to pay the monthly cost of health insurance premiums of not more than one hundred two percent (102%) of the premium (42 U.S.C. § 1162(3)), or \$557.94 per month.

18. Rogers was the sponsor and administrator of the BCBS Plan.

19. Rogers paid the premiums of the BCBS Plan by mailing the premiums directly to Blue Cross Blue Shield.

20. On or about October 28, 1992, Mr. Robert Krewett, Rogers' Human Resources Manager (hereinafter "Krewett"), visited Clarence Smith in his home for the purpose of notifying Clarence Smith that his employment with Rogers was being terminated effective November 1, 1992.

21. By letter dated November 3, 1992, Clarence Smith was notified by the Social Security Administration that he had been determined to be disabled and entitled to retirement, survivors and disability insurance benefits in the amount of \$944.40 per month, beginning in November 1992 under Title XVI (42 U.S.C. § 1381). The Social Security Administration determined that Clarence Smith became disabled on May 22, 1992.

22. Clarence Smith received his first social security check in December 1992 for benefits accrued in November.

23. Effective May 31, 1993, Rogers terminated the group BCBS Plan for all employees of Rogers.

24. Following May 31, 1993, Rogers implemented a self-funded group for all of the employees at Rogers.

25. The reason Robert Krewett visited Clarence Smith at his home on October 28, 1992, was at the request of Rogers Galvanizing Company President Russell Patterson because Clarence R. Smith was a valued employee of in excess of 30 years. Mr. Patterson thought

it more appropriate that Mr. Smith be personally visited by a Rogers Galvanizing Company representative rather than be informed of his termination and COBRA rights by an impersonal letter or written document.

26. On October 28, 1992, Robert Krewett went to Clarence Smith's home for the purpose in good faith of advising him of his employment termination as of November 1, 1992, and that such was a qualifying event entitling Clarence Smith and/or Betty Smith to elect to continue medical insurance coverage under the BCBS Plan of Rogers Galvanizing Company. Mr. Smith's date of termination was coordinated by Rogers Galvanizing with the date he would commence receiving social security benefits. Mr. Krewett advised Mr. Smith of his termination of employment effective November 1, 1992, and told Mr. Smith that he had 60 days to notify Rogers Galvanizing Company of his election to continue the existing Rogers Galvanizing Company BCBS Plan medical coverage. Robert Krewett advised Mr. Smith that the cost of said coverage to the Smiths would be between \$550 to \$600 per month. The notice by Krewett to the Smiths was defective because it did not advise the Smiths of the specific amount of the monthly premium (not to exceed 102% of the actual premium) nor did it advise them that they had 45 days to pay the monthly premium current from the date of their election given within the 60-day period. Mr. Krewett did not follow up his October 28, 1992 personal visit with Mr. Smith with a confirming letter regarding COBRA benefits and election.

27. On October 28, 1992, Mr. Smith asked Mr. Krewett if Rogers Galvanizing Company could arrange to go ahead and pay his medical insurance premium for them while he was awaiting getting on social security Medicare which ultimately was November 1, 1994, twenty-four months after his permanent disability was established as of November 1, 1992. Mr. Krewett told Mr. Smith that he would check into it. Mr. Krewett did not get back with an answer to Mr. Smith's request until June 1993, when he advised Mr. Smith and Mrs. Smith that their failure to elect COBRA continuation coverage within 60 days of his November 1, 1992 termination date, terminated their COBRA rights.

28. It was the intention of Rogers Galvanizing to pay the Smiths' BCBS Plan premium for the months of November and December 1992, while awaiting their election. Through internal error, Rogers Galvanizing went ahead and paid the \$557.94 monthly premium through January 31, 1993.

29. Because of a failure of communication, BCBS improperly failed to delete Mr. Smith from the BCBS Plan coverage as of January 31, 1993, and went ahead and paid the Smiths' incurred and covered medical bills through May 31, 1993. As a result, the Smiths thought that Rogers Galvanizing was acceding to the request of Mr. Smith to continue the Smiths on the Rogers Galvanizing BCBS Plan pending his qualifying for Medicare.

30. On June 8, 1993, as a result of Mr. Smith being hospitalized at the Bartlett Memorial Hospital in Sapulpa, Oklahoma, he and Mrs. Smith learned that as of May 31, 1993, no

further coverage under the BCBS Plan was available to them because the BCBS Plan was terminated by Rogers Galvanizing as of May 31, 1993, and the new self-funded or self-insured group medical plan for all employees at Rogers Galvanizing had been implemented.

31. In the latter part of June 1993, the Smiths consulted David Shepard, an insurance consultant retained by Bartlett Memorial Hospital, who is knowledgeable in the group life and health insurance field. Mr. Shepard advised the Smiths to exercise their BCBS plan COBRA election with Rogers Galvanizing in July 1993, and they attempted to do so by communication to Rogers Galvanizing. By July of 1993, after further discussions with Mr. Krewett of Rogers Galvanizing in June of 1993, and discussions with Mr. Shepard, the Smiths fully understood their COBRA rights under the BCBS plan, but it had been terminated. The Smiths were unable to exercise an informed election concerning the Rogers Galvanizing new medical plan of June 1, 1993, because they were not advised of the coverage premium, deductible, etc.

32. The record is void of any evidence of either coverage or premium regarding the new self-funded medical group plan of Rogers Galvanizing through Guardian Insurance Company that became effective June 1, 1993. The Smiths were entitled to be but were not advised of their rights under COBRA to elect to come under the new plan, because the termination of the BCBS plan and implementation of the new plan was a qualifying event.

33. The evidence reveals that the Smiths' only income during all relevant times herein, after November 1, 1992, was the \$994.40

per month that they received from social security. The Smiths admitted that at all relevant times they did not have sufficient income to pay the monthly premium to continue their Rogers Galvanizing BCBS medical plan coverage because their \$994.40 monthly income was required to pay other necessary living expenses. However, the Smiths were entitled to a proper statutory COBRA election notice irrespective of their ability to pay the premium, and since the Smiths were not advised of the June 1, 1993 new plan coverage or premium, they were not given the opportunity to elect and determine how it might fit into their finances.

34. Rogers Galvanizing Company was within its rights under COBRA to terminate the BCBS Plan as of May 31, 1993, for all applicable employees and to implement a new self-funded or self-insured plan for all employees.

35. As there is no evidence before the Court regarding the coverage provided by the new self-funded or self-insured medical insurance plan of Rogers Galvanizing implemented June 1, 1993, the Court is unable to determine the damages, if any, experienced by the Plaintiffs. From any medical expenses incurred by the Plaintiffs Rogers Galvanizing would be entitled to offset from the applicable plan coverage the monthly premium due (102%) and the deductible (recoupment).

36. Any lien claim of Oklahoma Department of Human Services through the Oklahoma Health Care Authority, is derivative of the rights of the Plaintiffs so is incapable of determination at this time.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over the Plaintiffs' COBRA claim pursuant to 29 U.S.C. § 1132(e)(1) and (f).

2. The District Court for the Northern District of Oklahoma is the proper venue for this action. 29 U.S.C. § 1132(e)(2).

3. Any Finding of Fact that might be characterized as a Conclusion of Law is incorporated herein.

4. Plaintiffs, as beneficiaries under Rogers Galvanizing's health insurance plan, are entitled to bring this civil action for the relief provided for in 29 U.S.C. § 1132(c) and to recover benefits due them under the terms of the plan, to enforce their rights under the terms of the plan, and to clarify their rights to future benefits under the terms of the plan. 29 U.S.C. § 1132 (a)(1).

5. Clarence and Betty Smith are qualified beneficiaries under Rogers Galvanizing's group health plan. 29 U.S.C. § 1167(3).

6. The parties have stipulated that Rogers Galvanizing is the sponsor and administrator of the group health plan.

7. Rogers Galvanizing is subject to the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, codified at 29 U.S.C. § 1161 *et seq.* ("COBRA"). 29 U.S.C. § 1161.

8. A qualifying event occurred, under COBRA, upon the termination of Clarence Smith on November 1, 1992. 29 U.S.C. § 1163(2).

9. Upon the occurrence of the qualifying event, Clarence and Betty Smith became entitled to elect continuation coverage under their health insurance. 29 U.S.C. § 1161.

10. Upon the occurrence of the qualifying event, Rogers Galvanizing was required to provide Clarence and Betty Smith with notice of their right to elect continuation coverage under their health insurance. 29 U.S.C. § 1166(4).

11. Rogers Galvanizing failed to provide Clarence Smith and Betty Smith with a proper qualifying event notification as required under COBRA. 29 U.S.C. § 1166.

12. Since Rogers did not provide the Smiths with a qualifying event notice, the period within which Betty Smith may elect continuation coverage has not expired. 29 U.S.C. § 1165(1).

13. Both Clarence and Betty Smith were initially entitled to continuation coverage for a period of 18 months. 29 U.S.C. § 1162(a)(i).

14. Upon a qualified beneficiary being determined disabled at the time of the qualifying event by the Social Security Administration, the continuation coverage period is extended from 18 months to 29 months if the qualified beneficiary notifies the administrator of the determination by the Social Security Administration. 29 U.S.C. § 1162(2)(A). Rogers Galvanizing was timely advised of Mr. Smith's social security disability determination.

15. Clarence Smith became entitled to benefits under Title XVIII of the Social Security Act on November 1, 1994. 42 U.S.C. §

1395c.

16. Clarence Smith's continuation coverage period terminated as of November 1, 1994, upon becoming entitled to benefits under Title XVIII of the Social Security Act. 29 U.S.C. § 1162(2)(D).

17. Upon Clarence Smith becoming entitled to benefits under Title XVIII of the Social Security Act [42 U.S.C. § 1395 et seq.], Betty Smith's continuation coverage period was extended for 36 months beyond the date that Clarence Smith became entitled to benefits under Title XVIII. Betty Smith's continuation coverage will not expire until October 31, 1997. 29 U.S.C. § 1162(2)(A)(v).

18. Betty Smith is entitled to the benefits of health insurance through October 31, 1997. 29 U.S.C. §§ 1161 and 1162.

19. If the plan allows beneficiaries, to whom a qualifying event has not occurred, to elect single or family coverage, then, the continuation coverage must provide the same option. 29 U.S.C. § 1162(1).

20. The spouse of a covered employee is entitled to elect continuation coverage irrespective of whether the covered employee elects continuation coverage. 29 U.S.C. § 1161(a); Van Hoove v. Mid-America Building Maintenance, Inc., 841 F.Supp. 1523, 1532 (D.Kan. 1993).

21. At any time during the continuation coverage period such as upon the termination of Clarence Smith's continuation coverage period, Betty Smith would be entitled to elect single coverage. 29 U.S.C. § 1162(2)(A)(v).

22. The Plaintiffs are not entitled to penalties against the Defendant, as provided for under 29 U.S.C. § 1132(c) because Rogers Galvanizing was acting in good faith, although their COBRA notice was defective.

23. Clarence and Betty Smith are entitled to collect from Rogers Galvanizing the amount of any medical bills incurred during the continuation coverage period as set out herein under the new plan, less premium and applicable deductible (recoupment). Phillips v. Riverside, Inc., 796 F.Supp. 403 (E.D.Ark. 1992); Gaskell v. Harvard Co-op. Soc., 3 F.3d 495 (C.A.1 (Mass.) 1993); Sirkin by Albies v. Phillips Colleges, Inc., 779 F.Supp. 751 (D.N.J. 1991).

24. Mrs. Smith is to make her COBRA election within sixty days of December 7, 1995, and actually pay the premium current within forty-five days of the date of said election, should she elect to be covered, regarding the Rogers Galvanizing new plan coverage of June 1, 1993, in Mrs. Smith's case effective to October 31, 1997. Failure to timely pay premium can result in termination of coverage.

25. Proper notice to a qualified beneficiary under COBRA is notice to all such qualified beneficiaries. (Agreement of parties at the August 4, 1995 hearing).

26. The lien asserted by the Oklahoma Department of Human Services by way of the Oklahoma Health Care Authority must await further determination of Plaintiffs' rights herein.

27. On or before the 27th day of November, 1995, the parties are to submit a Judgment in keeping with the above Findings of Fact and Conclusions of Law for the Court's approval. Failing in which the Court will conduct an additional hearing on December 7, 1995, at 1:30 P.M., to determine Plaintiffs' damages, including costs and a reasonable attorneys fee. It is the Defendant's burden to present evidence regarding the June 1, 1993 new plan coverage, premium and deductible. It is the Plaintiffs' burden to establish which of Plaintiffs' medical expenses are covered thereunder and application of the Oklahoma Health Care Authority lien.

IT IS SO ORDERED this 1ST day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE NOV 01 1995

Timothy P. Suder,)
)
 Plaintiff,)
)
 vs.)
)
 Blue Circle, Inc.,)
 an Alabama Corporation,)
)
 Defendant.)

Case No. 95-C-946-K ✓

FILED

OCT 31 1995

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

O R D E R

Before this Court is Plaintiff Timothy P. Suder's motion to remand this action to the District Court of Tulsa County, from whence it came. Plaintiff brought this action in state court against Defendant Blue Circle Inc. for retaliatory discharge under 85 O.S. § 5. Defendant removed the action to this Court, asserting diversity jurisdiction. 28 U.S.C. § 1332. Plaintiff now moves for remand pursuant to 28 U.S.C. § 1445(c) which provides, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

Title 85 of the Oklahoma Statute comprises the workers' compensation laws of this State. Title 85 O.S. § 5 governs retaliatory discharge, providing a cause of action for discharge of an employee because that employee has filed a workers' compensation claim. In view of the unambiguous language of 28 U.S.C. § 1445(c), this Court concludes that it does not have jurisdiction to hear

§

Plaintiff's lawsuit and therefore must remand the action to state court. 28 U.S.C. § 1447.

Plaintiff's motion to remand this action to the District Court of Tulsa County is therefore GRANTED, and Defendant is hereby ordered to pay costs and expenses, including attorney fees, incurred by Plaintiff as a result of the removal. 28 U.S.C. § 1447.

ORDERED THIS 30 DAY OF OCTOBER, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

OCT 31 1995 *W*

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

PATSY G. REDFEARN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

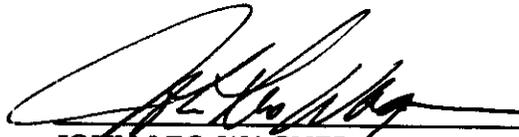
Case No: 94-C-1063-W ✓

ENTERED ON DOCKET
DATE NOV 01 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed October 31, 1995.

Dated this 31st day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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

FILED

OCT 31 1995

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

PATSY G. REDFEARN,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 94-C-1063-JLW /

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ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v.

9

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the full range of light work, except with respect to work requiring frequent stooping and bending or work requiring frequent overhead reaching. He concluded that claimant's past relevant work as a dispatcher did not require the above limitations, so claimant retained the residual functional capacity to return to her past relevant work as a dispatcher. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ failed to consider all of claimant's impairments together in arriving at his decision.
- (2) The ALJ's decision that claimant can do light work is not supported by substantial evidence.
- (3) The ALJ erred in relying on the opinion of a non-treating physician.
- (4) The ALJ failed to fully develop the record and discounted claimant's psychological problems and complaints of pain.

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant attaches nine pages of medical records to her brief and states in a footnote on page 4 that "[s]ome of the records from Dr. Choteau were included in the record at the time of Ms. Redfearn's hearing. However, there are additional records from that provider which were not in the record. As current counsel was not representing Ms. Redfearn at the administrative level, it is unknown whether those records were submitted; however, they are attached to this appeal and pertain to the time period prior to Ms. Redfearn's hearing." Defendant argues that the additional evidence should not be considered.

Section 405(g) of Title 42 of the United States Code provides that this court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding for a rehearing The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary" Under that section, a claimant may submit new evidence regarding a disability, but several requirements must be met before the court remands the case for reconsideration. The evidence must be new and not merely additional and cumulative of what is already in the record, because a plaintiff may not relitigate the same issues. Bradley v. Califano, 573 F.2d 28, 30-31 (10th Cir. 1978). The evidence must also be material, that is, relevant and probative.

The courts have also found that there must be a reasonable possibility that the new evidence would have changed the Secretary's decision had it been before him. Cagle v.

Califano, 638 F.2d 219, 221 (10th Cir. 1981), cert. den. 451 U.S. 993 (1982). Implicit in the materiality requirement is the idea that new evidence should relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Haywood v. Sullivan, 888 F.2d 1463, 1471-72 (5th Cir. 1989) (citing Johnson v. Heckler, 767 F.2d 180, 183 (5th Cir. 1985)). The final requirement is that plaintiff must demonstrate good cause for not having incorporated the new evidence into the administrative record. Id.

This court may only consider the new evidence proffered to determine whether the case should be remanded under 42 U.S.C. §405(g). Selman v. Califano, 619 F.2d 881, 885 (10th Cir. 1980). The court has examined the new evidence and finds it is merely cumulative of what is already in the record and would not have changed the ALJ's decision had it been before him. Claimant has not given any reason why the new evidence was not incorporated into the administrative record, and therefore has not demonstrated good cause for the failure to do so. The court will not remand the case for rehearing on the basis of the new evidence.

Claimant alleges disability from August 10, 1990, as the result of a shoulder injury, arthritis and arthritic pain. She was seen by Dr. Scott Dunitz, on October 1, 1990, for complaints of right shoulder pain. (TR 145). The examination showed a full range of motion with diminished strength in abduction with some give way and tenderness over the lateral border of the scapula, but grips and intrinsic were equal. (TR 145). X-rays of the right scapula were negative for fracture or dislocation. (TR 145).

Claimant was seen again on November 15, 1990, for the same symptoms of pain in the back of her shoulder radiating to the breast region. (TR 143). The neurovascular examination and bone scan were completely normal. (TR 143). The doctor's impression was muscle strain or possibly a peripheral nerve impingement, and he prescribed Amitriptyline. (TR 143). She was referred to Dr. Michael Morse, a neurologist, who reported on January 14, 1991, that an electromyogram was within normal limits and there was no evidence of nerve root entrapment. (TR 154-156). The doctor suggested she try a TENS unit. (TR 154-156). She was involved in a work hardening program in August of 1991, but was found unable to complete it due to increasing pain with activity. (TR 159-160). Her functional tolerance at that time was ten minutes of sitting, one hour of walking, no limits on standing, and lifting only three pounds. (TR 164).

Claimant was seen at the Adult Medicine Clinic of the University of Oklahoma College of Medicine on January 29, 1993, complaining of chronic generalized joint pain beginning seven years before and getting progressively worse. (TR 196, 200). Claimant complained of pain in her lower spine, right elbow, and right shoulder and weakness in her hands and fingers. (TR 196). The physical examination revealed pain on palpation of the lower back, and x-rays of the lumbar spine revealed mild narrowing of the L5-S1 disk space, and x-rays of the hand revealed changes in the distal interphalangeal joints of the left second and third and right second fingers suggesting osteoarthritis. (TR 196, 198). The doctor diagnosed polyarthritic joint pain and prescribed Ibuprofen. (TR 196, 200).

Claimant was seen again on March 10, 1993, and reported that the Ibuprofen was working some, but she had days when she hurt in her joints, elbows, and hands. (TR

195). The physical examination revealed that her knees were okay and she had a full range of motion without swelling in her elbows and shoulders. (TR 195). The diagnosis was osteoarthritis. (TR 195). She was seen on June 17, 1993, complaining of pain on the bottom of her feet. (TR 194). The doctor found her arches to be moderately tender, but there was a full range of motion in her ankle joints and toes. (TR 194). She was advised to get good arch supports and new tennis shoes and continue with Ibuprofen. (TR 194).

On May 27, 1993, claimant was evaluated by Dr. Charles Harris, who found that her elbows and shoulders had full range of motion with no swelling, but she had lower back pain, which limited her ability to stoop and crouch. (TR 79). The doctor concluded that she could lift fifty pounds occasionally and twenty-five pounds frequently, and stand, walk, and sit about six hours in an eight-hour workday. (TR 78).

At the hearing on March 1, 1994, claimant testified that she could probably perform her past relevant work as a dispatcher. (TR 37-38). She stated that she bathes and dresses herself, cooks two meals a day, cleans, drives a car, and watches television four to five hours a day. (TR 38-39, 40-42). However, she claimed she can walk only 50 yards, stand or sit, on the average, 20 to 30 minutes, and cannot climb stairs. (TR 40, 49-50, 51). She also testified that she has a limited ability to grasp objects in her hands, especially her right hand, and limited feeling in her fingers. (TR 52). She claimed that it is so difficult to lift a gallon of milk that on occasion she has dropped it. (TR 50).

There is no merit to claimants contentions. The ALJ clearly considered claimant's complaints of pain, as required by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987). Pain, even if not disabling, is a nonexertional impairment to be taken

into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna, 834 F.2d at 165-66, discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

The ALJ noted that claimant was no longer receiving medical care or treatment, took no medication other than over-the-counter pain remedies, did not use a crutch or cane, and participated in normal daily activities. He also noted that two non-examining physicians had concluded she could occasionally lift fifty pounds or frequently lift twenty-five pounds and could walk, stand, or sit six hours in an eight-hour day. (TR 15). The mere fact that

working may cause the claimant pain or discomfort does not mandate a finding of disability. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990).

The ALJ correctly determined that claimant did not have a psychological disorder. (TR 15). There is no medical evidence that claimant has such a problem or sought treatment for one. She stated at the hearing that she takes Zoloft for nervousness and depression and it helps her. (TR 45-46). One doctor noted that she claimed she felt "real nervous - feels like crying . . . easily angered," but he did not refer her to a psychologist. (TR 137). The brief conclusory statements of the doctor describing her complaints were not supported by any psychological tests, and the doctor was not a trained psychologist or psychiatrist. The record demonstrates that her activities were not restricted due to a mental impairment, and she had no difficulty with activities of daily living, social functioning, or completing tasks in a timely manner. Her statements to one doctor do not show that she has a mental impairment which prevents her from working. See Coleman v. Chater, No. 94-2235 (10th Cir. June 23, 1995).⁴

The ALJ clearly considered all of claimant's impairments which were supported in the medical evidence when he concluded she could do light work with certain limitations. (TR 16). He also included them in his hypothetical questions to the vocational expert and the expert concluded claimant could return to certain of her past relevant jobs.⁵

⁴ The court notes that the Tenth Circuit in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must evaluate a claimant's mental impairment if the record contains evidence of a mental impairment which would prevent the claimant from working.

⁵The questioning of the vocational expert was:

Q Okay. Let's go to a hypothetical question. Say this individual was 47 years of age; had completed the eighth grade or equivalent to the eighth grade; female; has great ability to read, write and use numbers; and has the past vocational that you just described. Let's assume further the individual can perform sedentary, light or medium work. And first of all, use Exhibit 3, original Residual Functional Capacity. Let's see. Let's say the individual can lift 25 to 50 pounds; stand or walk six hours in an eight-hour day;

The ALJ did not rely on non-examining physicians. He discussed the reports of treating physicians, Drs. Dunitz and Morse, and those from the clinic at the University of Oklahoma College of Medicine, and then clearly stated he was "convinced on the basis of the foregoing evidence that while this claimant is severely impaired she does not "meet the social security listings of impairments. (TR 14). He went on to consider in addition, her testimony concerning her daily activities, medications, the opinions of the consultative physicians, and the vocational expert's testimony and "on the basis of the foregoing medical evidence and testimony" concluded she could perform her past work as a dispatcher. (TR

same for sitting; no restrictions as far as pushing and pulling; only occasional stooping and crouching due to back pain. And those are the primary restrictions. With those restrictions, would there be any jobs in the regional and national economy such a person could perform?

A With your hypothetical, Your Honor, the person would be able to return to the former jobs, with the exception of the packaging. There's -- that would be questionable whether she could do that. The other jobs, she would be able to do, based on your hypothetical.

Q Okay. See, her hypothetical -- let's assume that the individual is limited to just say sedentary, light work, with these additional restrictions. The primary restriction is problem with the decreased range of motion in the right shoulder, such that the person is unable to reach overhead, for the right shoulder. Again, we have the occasional stooping and crouching, and addition, as we did before. Would that additional restriction of the decreased range of motion in the shoulder, due to pain there, limitations there, would that change your answer you stated?

A Are you basically limiting her range of motion overhead or are you meaning all facets of movement?

Q Let's just say overhead --

A Okay.

Q -- limited overhead reaching now. No. She's unable to reach overhead. Let's say she can reach up to shoulder level and that's as high as she can go.

A Okay. She should be able to return to the dispatching job, beautician job, bartending job, a waitress, and the line work, not the packaging, but the line work.

Q So, again, all except for the packing --

A Yes, sir.

Q -- work and the -- are the other jobs -- what about the --

A The cooking job --

Q -- waitress and cooking? That -- those would be out, wouldn't they?

A Waitress should be all right, but cooking would be a problem. (TR 66-68).

15-16). He gave substantial weight to the statements of her treating physicians, as required by Castellano v. Secretary of HHS, 26 F.3d 1027, 1029 (10th Cir. 1994) and Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

The ALJ met his obligation to ensure that an adequate record was developed consistent with the issues raised; the ALJ is not required to be the plaintiff's advocate. Glass v. Shalala, 43 F.3d 1392, 1396 (10th Cir. 1994). He asked probing questions concerning the symptoms claimant experiences with her joint, back and pain problems (TR 46, 47, 53-56, 59), her functional limitations (TR 37-43, 48-51, 53, 60), her past work experience, education, and vocational training (TR 29-37), and her medication for depression. (TR 45-46). While claimant claims that the medical records from one of her treating physicians indicate "that she has significant emotional problems and include a diagnosis of depression," this is not true. As already discussed, the doctor was merely listing claimant's self-serving comments and this "evidence" of psychological complaints did not require the ALJ to order a consultative psychological examination in order to develop the record.

The decision of the ALJ is supported by substantial evidence and is a correct application of the pertinent regulations. The decision is affirmed.

Dated this 31st day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Redfearn.or

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 31 1995

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 PATRICE G. BYRNES KELLAMS aka)
 Patrice Kellams fka Patrice Byrnes aka)
 Patrice Gwen Byrnes; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma; TULSA ADJUSTMENT)
 BUREAU, INC,)
)
 Defendants.)

ENTERED ON DOCKET
DATE NOV 01 1995

Civil Case No. 95 C 471B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 31 day of Oct.,
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, TULSA ADJUSTMENT
BUREAU, appears not having previously filing a Disclaimer; and the Defendant,
PATRICE G. BYRNES KELLAMS fka Patrice Byrnes aka Patrice Gwen Byrnes, appears
not, but makes default.

The Court being fully advised and having examined the court file finds that the
Defendant, PATRICE G. BYRNES KELLAMS fka Patrice Byrnes aka Patrice Gwen Byrnes,
was served a copy of Summons and Complaint on September 21, 1995, by Certified Mail;

that the Defendant, TULSA ADJUSTMENT BUREAU, signed a Waiver of Summons on July 25, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 6, 1995; that the Defendant, TULSA ADJUSTMENT BUREAU, filed its Disclaimer on July 20, 1995; and that the Defendant, PATRICE G. BYRNES KELLAMS fka Patrice Byrnes aka Patrice Gwen Byrnes, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Defendant, PATRICE G. BYRNES KELLAMS, is one and the same person as Patrice Kellams formerly referred to as Patrice Byrnes and Patrice Gwen Byrnes, and will hereinafter be referred to as "PATRICE G. BYRNES KELLAMS." The Defendant, was Divorced from Robert James Byrnes on May 7, 1979, in Case No. JFD-79-1807, in Tulsa County District Court. The Defendant, PATRICE G. BYRNES KELLAMS, is a single unmarried person.

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

Lot Three (3), Block "k" CREST VIEW ESTATES, an addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on June 14, 1976, the Defendant, PATRICE BYRNES and Robert J. Byrnes, executed and delivered to MAGER MORTGAGE COMPANY, their mortgage note in the amount of \$20,950.00, 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 Defendant, PATRICE BYRNES and Robert J. Byrnes, then husband and wife, executed and delivered to MAGER MORTGAGE COMPANY, a mortgage dated June 14, 1976, covering the above-described property. Said mortgage was recorded on June 17, 1979, in Book 4219, Page 1522, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 17, 1989, Brumbaugh and Fulton Company, formerly known as Mager Mortgage Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 19, 1989, in Book 5178, Page 1308, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1989, the Defendant, PATRICE G. BYRNES KELLAMS, 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 July 1, 1990.

The Court further finds that the Defendant, PATRICE G. BYRNES KELLAMS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, PATRICE G. BYRNES KELLAMS, is indebted to the Plaintiff in the principal sum of \$30,105.71, plus interest at the rate of 8.5 percent per annum from March 14, 1995 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, PATRICE G. BYRNES KELLAMS, is 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, TULSA ADJUSTMENT BUREAU, Disclaims any right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, PATRICE G. BYRNES KELLAMS, in the principal sum of \$30,105.71, plus interest at the rate of 8.5 percent per annum from March 14, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 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 Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, TULSA ADJUSTMENT BUREAU, and PATRICE G. BYRNES KELLAMS, 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, **PATRICE G. BYRNES KELLAMS**, 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;

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.

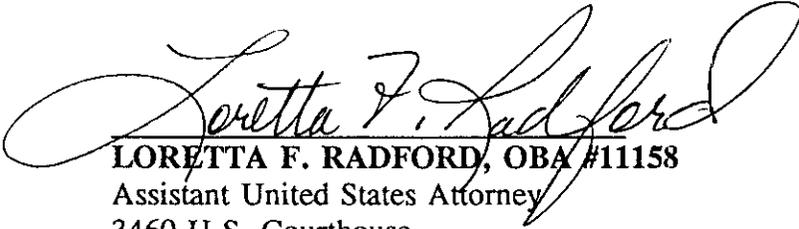
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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



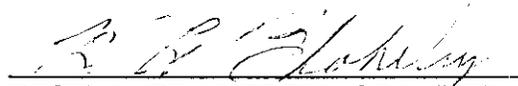
LORETTA F. RADFORD, OBA #11158

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. 95 C 471B

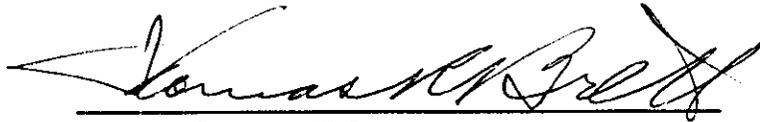
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On August 15, 1994, Appellant/Debtor, Preferred Hospitality, Inc., d/b/a Stratford House Inn ("Appellant") filed a Notice of Appeal from the Order entered by the United States Bankruptcy Court for the Northern District of Oklahoma on August 4, 1994. First National Bank of Oklahoma ("FNB") filed a Motion to Dismiss or in the Alternative for an Order compelling Appellant to file a Statement of Issues to be Presented on Appeal as a result of Appellant's failure to comply with Bankruptcy Rule 8006. Appellant subsequently filed its Statement of Issues on Appeal on approximately September 22, 1994. On September 19, 1994, Appellant filed its Designation of Record on Appeal, and on September 22, 1994, FNB filed its Counter-Designation of Record on Appeal. The Record on Appeal was filed on March 16, 1995. On March 17, 1995, parties were given notice that the time in which to submit briefs under Rule 8009(a), Rules of Bankruptcy Procedure, began to run on March 16, 1995.

Pursuant to Rule 8009(a)(1), Rules of Bankruptcy Procedure, Appellant had 15 days from March 16, 1995 or until approximately April 1, 1995 in which to file its appellate brief. Appellant has completely and wholly failed to comply with this procedural requirement. Counsel for Appellant filed a Motion to Withdraw on July 19, 1995, stating that Appellant had obtained other counsel in this case, Timothy D. McCoy. However, Mr. McCoy has informed the court by telephone that he does not represent Appellant in this case.

Appellant has failed to comply with Bankruptcy Rule 8009(a)(1). First National Bank of Oklahoma's Motion to Dismiss (Docket #4) is granted.

Dated this 31 day of Oct, 1995.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

S:Preferred

JCD/jo/10/28/95

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV - 1 1995

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

PHILLIP RUNYON,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED INSURANCE COMPANY)
 OF AMERICA, an Illinois)
 corporation,)
)
 Defendant.)

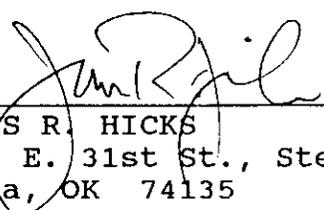
Case No.: 94 C 951 K

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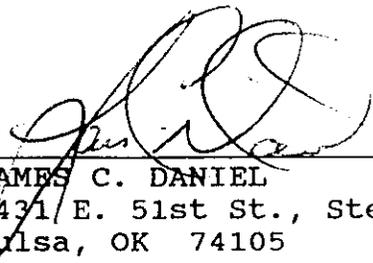
DISMISSAL WITH PREJUDICE BY STIPULATION

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



JAMES R. HICKS
5310 E. 31st St., Ste. 900
Tulsa, OK 74135

Attorney for Plaintiff



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

Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 HOWARD HAMILTON, a single person;)
 JUSTINA WENZEL fka Justina Hamilton;)
 JODY WENZEL; THE COMMONS)
 HOMEOWNER'S ASSOCIATION; CITY)
 OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

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DATE ~~NOV 01 1995~~

FILED

OCT 31 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
Civil Case No. 95-C 192K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Department of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby **ORDERED** that the Judgment of Foreclosure filed on the 27th day of July, 1995, and the Notice of Sale filed herein on the 13th day of September, 1995, are vacated, the sale scheduled for the 23rd day of October, 1995 is canceled, and this action is dismissed without prejudice.

Dated this 30 day of Oct, 1995.

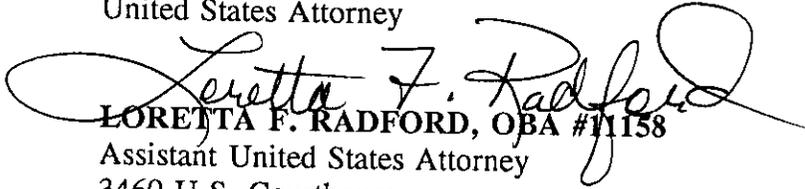
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

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

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the typed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, OK 74103

(918) 581-7463

LFR:flv

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

JAMES JONES,

Plaintiff,

vs.

WAL-MART STORES, INC.,
d/b/a SAM'S CLUB, a Delaware
corporation,

Defendant.

ENTERED ON DOCKET

DATE ~~NOV 01 1995~~

Case No. 94C-867-K ✓

FILED

OCT 31 1995

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

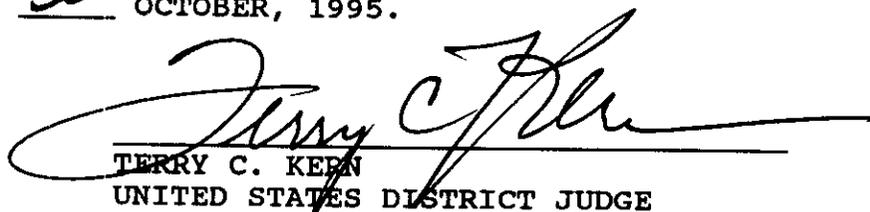
JUDGMENT

This matter came before the Court for consideration of the Motion by Defendant WAL-MART STORES, INC., d/b/a SAM'S CLUB for Summary Judgment against Plaintiff James Jones.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS DAY OF 30 OCTOBER, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

36

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

ENTERED ON DOCKET
DATE NOV 01 1995

JAMES JONES,

Plaintiff,

vs.

WAL-MART STORES, INC.,
d/b/a SAM'S CLUB, a Delaware
corporation,

Defendant.

Case No. 94C-867-K ✓

FILED

OCT 31 1995

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

ORDER

The Defendant Wal-Mart Stores, Inc., d/b/a Sam's Club ("Sam's") pursuant to Federal Rule of Civil Procedure 56 moves this Court for an Order granting summary judgment as to Plaintiff James Jones' Complaint. Plaintiff's Complaint alleges that Sam's discriminated against him on the basis of his race (African-American) in violation of his rights under 42 U.S.C. § 2000e-2 et seq ("Title VII").

I. Plaintiff's Contentions

When considering a motion for summary judgment, a Court must view the facts in the light most favorable to the non-moving party. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1379 (10th Cir. 1994). The Plaintiff, James Jones, an African-American, was hired as a

35

night stockman by the Defendant, Sam's, on March 30, 1992. On December 28, 1992, Plaintiff was laid off by Sam's. Plaintiff makes several allegations of unlawful discrimination. First, he alleges that his discharge was discriminatory. Second, he alleges that he was discriminatorily passed over for promotion to Team Leader while white co-workers equally or less qualified were promoted. Third, he contends that he was discriminated against in that he was consistently given more difficult work assignments than white coworkers. Fourth, he claims that he was discriminated against by being required to assist his white co-workers to complete their assignments, while white co-workers were not required to assist him in completing his assignments. Fifth, he alleges that he was discriminated against by not being given desirable forklift driving duties, while white persons equally or less qualified were given such duties. And sixth, Plaintiff contends that employees of Sam's harassed him based on his race and thereby created a hostile or offensive work environment. Defendant denies all of Plaintiff's claims of discrimination and alleges that its employment decisions concerning Plaintiff were based on nondiscriminatory reasons.

II. Summary Judgment Standard

Summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson

v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den., 480 U.S. 947 (1987). The Supreme Court explains:

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

Celotex, 477 U.S. at 322. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial.

In Anderson, the Court stated:

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

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards established by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

III. Discussion

This Court will take up each of Plaintiff's six allegations of discrimination. For purposes of doctrinal clarity, Plaintiff's claims will be divided and examined under the hostile work environment and disparate treatment models of Title VII

jurisprudence.

A. *Hostile Work Environment.* Although hostile work environment is not explicitly mentioned in Title VII, it is well established that a victim of a racially hostile or abusive work environment may bring a cause of action pursuant to 42 U.S.C. § 2000e-2(a)(1).¹ *Bolden v. PRC, Inc.*, 43 F.3d 545, 550 (10th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3241 (U.S. Oct. 2, 1995) (No. 94-8963). To constitute actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). The Supreme Court also explains that an employer who does not actively engage in the harassment may still be liable under agency principles. *Id.* at 72.

For Plaintiff's harassment claim to survive summary judgment, the facts he alleges must support the inference of a racially hostile environment. *Bolden*, 43 F.3d at 551. Specifically, plaintiff must show that under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, *Meritor*, 477 U.S. at 67, and (2) the harassment was racial or stemmed from racial

¹ Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

It shall be an unlawful employment practice for an employer--
(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race
42 U.S.C. § 2000e-2(a).

animus, Bolden, 43 F.3d at 551 (holding that general harassment, if not racial, is not actionable). To satisfy the Bolden test, the plaintiff must show more than a few isolated incidents of racial enmity. Id. at 551 (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412 (10th Cir. 1987)). Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments. Bolden, 43 F.3d at 551 (citing Hicks, 833 F.2d at 1412-13).

The racial joke and racist comment alleged by Plaintiff constitute the only verbal racial harassment claimed by Plaintiff during his over eight-month period of employment at Sam's. Although Plaintiff has not presented evidence of a "steady barrage of opprobrious racial comments" as required to show a racially hostile work environment under the Hicks and Bolden standards, this Court must consider the totality of the circumstances and therefore may consider the racial comments along with other alleged harassment. See Bolden, 43 F.3d at 551. In addition to the comments, Plaintiff has alleged and supplies affidavits to the effect that two Sam's employees, Jeff Jones and Rick Hollenbeck, "drove their forklift[s] in an unsafe, reckless manner, at high rates of speed when around James Jones, but did not do so when in the vicinity of white employees." Trevor Adams Aff. ¶ 11. The pleadings and affidavit imply that the reckless forklift driving occurred on more than one occasion but do not specify how frequently. Even taken together, these alleged incidents do not appear to be pervasive or severe enough to alter the terms, conditions, or privilege of Plaintiff's employment.

However, assuming *arguendo* that these alleged comments and incidents did meet the Bolden standard, Plaintiff must also show that these alleged facts support a basis of liability for Sam's. Bolden, 43 F.3d at 551 n.1 The Tenth Circuit has held that an employer is not always liable for harassment committed by its employees, but may be liable under agency principles. Griffith v. State of Colorado, Div. of Youth Services, 17 F.3d 1323, 1330 (10th Cir. 1994) (citing Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986)).² Under these cases, three possible sources of liability for Sam's are possible: (1) the harassment occurred within the scope of employment; (2) the employer acted negligently or recklessly in failing to recognize and deal with the harassment directed at Plaintiff; or (3) the harasser or harassers acted under apparent authority from the employer. Griffith, 17 F.3d at 1330.

This Court will take up the two racial comments first. The racial comments came from Plaintiff's coworkers, not from Sam's nor from Plaintiff's supervisors. Plaintiff states that he reported the racial joke to his supervisor, Jim Palmer, and acknowledges that Palmer stated that he would take care of it. Plaintiff contends that the racist comment was said in front of Palmer, but Palmer denies any knowledge of the comment. In any case, there were no future incidents of such racial jokes or comments. Under either the Plaintiff's or Defendant's version of the events surrounding these comments, this does not present a situation in

² Although Griffith and Meritor dealt with sexual harassment claims under Title VII, the questions of agency are analytically identical in the racial harassment context.

which racially offensive conduct continued despite an employee's complaints to his superior. Therefore, it cannot be said that the employer acted negligently or recklessly in failing to recognize and deal with the verbal harassment directed at Plaintiff (prong two).

Nor can Plaintiff establish liability under either prong one or three. The racial comments cannot be said to have occurred within the scope of employment, as there is no evidence that making racial jokes or comments is within the employees' job descriptions.³ Nor is there any evidence that the joke or comment were made under the apparent authority from the employer. Hence, Sam's is not liable as to the racial comments.

As to the alleged forklift incidents, there remains a factual dispute as to whether Jeff Jones, one of the allegedly reckless forklift drivers, was a Team Leader or simply a coworker of Plaintiff. Even assuming that Jeff Jones was a Team Leader at the time of the incidents, Plaintiff has not established Sam's liability. First, Jeff Jones was not acting within the scope of employment; there is no evidence that driving recklessly at a Sam's employee is within the job description. Second, Plaintiff has not established that any management-level employees knew, or in the exercise of reasonable care should have known, about the forklift incidents. Hirschfeld v. New Mexico Corrections Dept., 916 F.2d

³ The Tenth Circuit acknowledges that this first prong is rather ludicrous, requiring that in order for employers to be accountable, they must explicitly require or consciously allow their supervisors to molest women employees. Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 576-77 (10th Cir. 1990).

572, 577 (10th Cir. 1990). Sam's asserts that Jeff Jones was not a management employee during Plaintiff's tenure at Sam's, Def.'s Supp. Br. (citing Palmer Aff. at ¶ 5), and Plaintiff makes no supported allegation to that effect. Nor does Plaintiff allege that he reported the forklift driving incidents to his supervisor. Third, Plaintiff makes no claim that the reckless driving was under the apparent authority of Sam's. In sum, even if, *arguendo*, the two racial remarks combined with the forklift incidents rose to the level of "severe or pervasive" harassment, Plaintiff has not established Sam's liability under the hostile environment model of Title VII.

B. Disparate Treatment. A claim of disparate treatment embodies the situation where the employee claims that the employer treated him less favorably than others because of his race. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 (1977). Plaintiff's disparate treatment claims can be divided into three categories: (1) discriminatory discharge, (2) discriminatory denial of promotion, and (3) discriminatory assignment of work.

1. Discriminatory Discharge. Plaintiff alleges that he was a victim of discriminatory discharge when he was laid off by Sam's in December of 1992. In Title VII disparate treatment claims, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981). To establish a prima facie case of

intentional racial discrimination under Title VII for discriminatory discharge, a plaintiff must generally show (1) that he is African-American; (2) that he was qualified for his position as night stocker; (3) that, despite his qualifications, he was discharged; and (4) that after his discharge the job remained available. Lujan v. State of New Mexico Health and Social Services, 624 F.2d 968, 970 (10th Cir. 1980) (citing McDonnell Douglas, 411 U.S. at 802). In reduction-in-force cases, such as the instant one, the Tenth Circuit has modified the fourth prima facie element by requiring the plaintiff to "produce evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988). This element may be established through circumstantial evidence that the plaintiff was treated less favorably than white employees during the reduction-in-force. Id. Plaintiff meets prongs one, two and three. Plaintiff's contention that he was the only African American employee on the graveyard shift at Sam's at the time of his discharge is sufficient, for the purposes of this prima facie showing, to satisfy the fourth prong.

Defendant can rebut the presumption of discrimination by producing some evidence that it had legitimate, nondiscriminatory reasons for its action. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1379 (10th Cir. 1994). The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the adverse employment decision. Considine v. Newspaper Agency

Corp., 43 F.3d 1349, 1363 (10th Cir. 1994). The proffered reason for the action taken against the minority employee must be reasonably specific and clear. EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992). Defendant has met this burden by explaining that there was a general reduction in workforce due to a post-Christmas decline in sales and that Plaintiff was among those discharged because he was less productive than other employees. Palmer Aff. ¶ 8; Barbee Aff. ¶ 6. Once the defendant has met "its burden of production, the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant." St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2749 (1993).

The plaintiff must then show by a preponderance of the evidence that the legitimate reason offered by the defendant was a pretext for racial discrimination. EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) ("Even a finding that the reason given for the [adverse employment action] was pretextual does not compel [a finding of discrimination], unless it is shown to be a pretext for discrimination against a protected class."). The Title VII plaintiff at all times bears the ultimate burden of persuasion. St. Mary's Honor Ctr., 113 S.Ct. at 2749. Here, the Plaintiff has not met his burden; he points to no direct or statistical evidence sufficient to prove that the reasons asserted by Defendant were a pretext for racial discrimination. Plaintiff contends only that he was as qualified as any of the white employees who were not discharged, and he disputes Defendant's claims that Plaintiff was not a productive worker nor a "team player." Even if factually

accurate, these claims alone would not satisfy Plaintiff's burden of proving pretext for racial discrimination. Plaintiff's discriminatory discharge claim therefore cannot withstand summary judgment.

2. *Discriminatory Denial of Promotion.* Plaintiff's prima facie case for his claim that he was discriminatorily denied promotion to Team Leader is slightly different. Plaintiff must show (1) that he is African-American; (2) that he applied⁴ and was qualified for the position of Team Leader; (3) that he was rejected despite those qualifications; and (4) that the position remained open and was ultimately filled by a white man. McDonnell Douglas Corp. v. Green, 411 U.S. 92, 802 (1973).

Plaintiff has probably alleged sufficient facts to make a prima facie showing on this claim. Again the defendant can then rebut the presumption of discrimination by producing some evidence that it had legitimate, nondiscriminatory reasons for its action. Defendant has met this burden by showing that the two white men it promoted to team leader were substantially better qualified than Plaintiff. See Final Pretrial Order, Stipulations ¶ 10-12. The plaintiff must then show by a preponderance of the evidence that

⁴ Although Plaintiff apparently did not formally apply for promotion to Team Leader, this does not necessarily preclude a successful prima facie case. Where there is no formal system of posting job openings, the failure to apply is not always required for a prima facie case. See Box v. A. & P Tea Co., 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986). In the instant case, there was no evidence that such a formal system existed, therefore, construing the facts in the plaintiff's favor, his failure to apply will not prevent him from making a prima facie case.

the legitimate reasons offered by the defendant were a pretext for discrimination. Here, again, the Plaintiff has not met his burden of proving that the reasons given by Sam's for the promotion of the two white employees to Team Leader, rather than Plaintiff, were a pretext for discrimination. Plaintiff's discriminatory failure to promote claim therefore must also fail.

3. *Discriminatory Work Assignments.* Plaintiff alleges that he was given difficult work assignments, was required to assist his white co-workers to complete their assignments, while white co-workers were not required to assist him in completing his assignments and was discriminated against by not being given desirable forklift driving duties. A Tenth Circuit opinion of particular relevance to this claim is worth citing at length:

Title VII does not make unexplained differences in treatment per se illegal It prohibits only intentional discrimination based upon an employee's protected class characteristics. . . .

. . . . The law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality.

What the law does require is that an employer not discriminate against an employee on the basis of the employee's protected class characteristics. . . .

It is error to assume . . . that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy must be based on illegal discrimination because of an employee's protected class characteristics. . . . Under Title VII, the defendant does not have to prove why the differential treatment occurred; it is up to the plaintiff to prove why it did occur--and to prove that it was caused by intentional discrimination against a protected class.

EEOC v. Flasher Co., 986 F.2d 1312, 1319-20 (10th Cir. 1992)

(emphasis in original).

Even assuming, arguendo, that Plaintiff has established a prima facie case of discrimination with respect to these various work assignments, Defendants have proffered facially nondiscriminatory reasons for each claimed disparity. Defendant showed that Plaintiff worked many different aisles and that Plaintiff was sometimes allowed to chose his aisle assignments. Defendant asserts, and Plaintiff acknowledges in his deposition, that at certain times, other night stockers did help Plaintiff finish his aisles. And Defendant explains that Plaintiff was not given forklift driving duties because he lacked dexterity for the job and had no previous experience driving forklifts. As the Tenth Circuit explains, it is not enough for Plaintiff to allege that he had different assignments from white employees; he must show that the differences were caused by intentional discrimination based on his race. Plaintiff does not present evidence sufficient to make such a showing.

IV. Conclusion

Plaintiff bears the burden of proof at trial, and therefore to survive a summary judgment motion, he must make a showing sufficient to establish the existence of elements essential to his case and affirmatively prove specific facts showing there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). As discussed above, Plaintiff has failed to satisfy that burden. Defendant's Motion for Summary Judgment is

therefore GRANTED.

ORDERED this 30 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE NOV 01 1995

ROBERT C. BATES

Plaintiff,

vs.

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

Defendants.

No. 95-C-129-K ✓

FILED

OCT 31 1995

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

ADMINISTRATIVE CLOSING ORDER

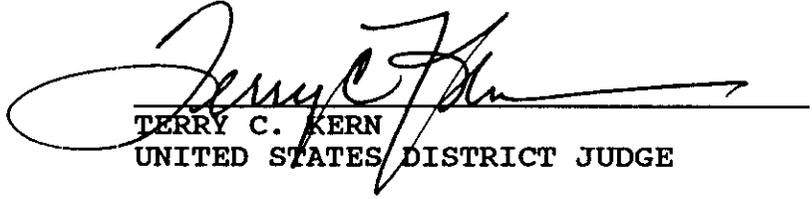
This Court having entered Judgment for the Plaintiff Robert C. Bates and against the Defendant Eagle Gaming, and Plaintiff Robert C. Bates having filed a Release and Satisfaction of Judgment as to Defendants Eagle Gaming and Wild West Corporation;

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days of this Order. If, within thirty (30) days of this Order, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with

13

prejudice.

ORDERED this 30 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

INDEPENDENT EMPLOYEES' ASSOC.,)
)
Plaintiff,)
)
vs.)
)
SHELL PIPE LINE CORPORATION,)
)
Defendant.)

ENTERED ON DOCKET
DATE NOV 01 1995

No. 95-C-165-K

FILED

ORDER

OCT 31 1995

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

By Order entered October 17, 1995, the Court ordered Plaintiff until October 27, 1995 to effect proper service upon the defendants or face dismissal pursuant to Rule 4(m) F.R.Cv.P.. The deadline has passed and the record does not reflect that proper service has been effected or that plaintiff has demonstrated good cause for the failure.

It is the Order of the Court that the above-styled case is hereby dismissed without prejudice.

ORDERED this 30 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

JASON EDWARD HENDERSON and)
DONNA S. HENDERSON, husband)
and wife,)
)
Plaintiffs,)
)
vs.)
)
CONTINENTAL EMSCO,)
)
Defendant.)

ENTERED ON DOCKET

DATE NOV 01 1995

No. 94-C-515-K ✓

FILED

OCT 31 1995

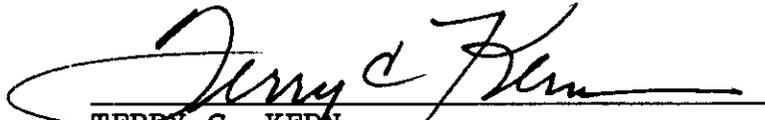
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

JUDGMENT

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

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

ORDERED this 30 day of October, 1995.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

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

Linda S. Russell,)
)
 Plaintiff)
)
 vs.)
)
 Halliburton Company,)
 a foreign corporation,)
)
 Defendant.)

No. 94-C-1138-K

ENTERED ON DOCKET
DATE NOV 01 1995

FILED

OCT 31 1995

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

ADMINISTRATIVE CLOSING ORDER

As the Court has been advised by Plaintiff's counsel that this action has been settled and as Plaintiff Linda S. Russell has dismissed the case with prejudice, it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records.

ORDERED this 30 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

6

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

FILED

OCT 31 1995

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

ROBERT MCELHATTAN,)
)
 Plaintiff,)
)
 v.)
)
 AMERADA HESS CORPORATION,)
)
 Defendant.)

Case No. 94-C-1065K

ENTERED ON DOCKET

DATE NOV 01 1995

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 30 day of
October, 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.

/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

RONNIE D. ROY, et al.)
)
 Plaintiffs)
)
 vs.)
)
 KIMBALL'S PRODUCE, INC.,)
 an Oklahoma Corporation,)
)
 Defendant.)

ENTERED ON DOCKET
DATE ~~NOV 01 1995~~

Case No. 94-C-829-K

FILED
OCT 31 1995

ORDER OF DISMISSAL WITH PREJUDICE Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

NOW, on this 30 day of Oct, 1995, there comes before the Court the Joint Application for Dismissal with Prejudice presented by Keith Pickens and Steve Rust, consolidated with Plaintiff's case and the Defendant, Kimball's Produce, Inc., an Oklahoma Corporation, wherein Keith Pickens and Steve Rust, and said Defendant stipulate that the complaint, insofar as they are concerned, should be dismissed as to such Defendant.

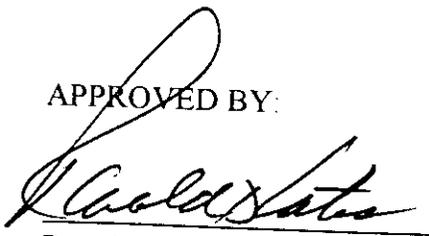
The Court finds that a dismissal of said Defendant under Rule 41 of the Federal Rules of Civil Procedure is proper pursuant to the stipulation of these parties. It is therefore ordered that the Plaintiffs' complaint, insofar as it involves these parties, is hereby dismissed, with prejudice, as to the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

SO ORDERED

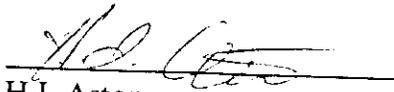
s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED BY:

A handwritten signature in cursive script, appearing to read "Ronald D. Cates", written over a horizontal line.

Ronald D. Cates,
Attorney for Defendant

A handwritten signature in cursive script, appearing to read "H.I. Aston", written over a horizontal line.

H.I. Aston,
Attorney for Plaintiff's

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

MARY GWENDOLYN STAFFORD,
Plaintiff,

v.

TERRY BENESH, ROBIN BENESH,
DAVID SPENCOR, COPIER &
COMPUTER SYSTEMS OF
OKLAHOMA, A TRADE NAME FOR
GENERAL OFFICE SYSTEMS, INC.
OF OKLAHOMA, AND GENERAL
OFFICE SYSTEMS, INC. OF
OKLAHOMA,
Defendant.

ENTERED ON DOCKET

DATE NOV 01 1995

Case No. 94-C-1180K

FILED

OCT 31 1995

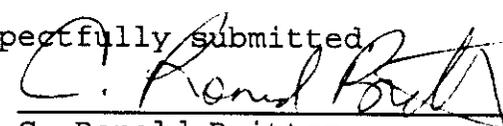
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys fees.

DATED this 30th day of October, 1995.

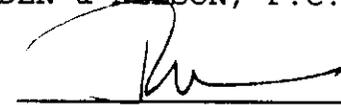
Respectfully submitted,

By: 

C. Ronald Britton
P.O. Box 309
Edmond, Oklahoma 73083-0309

ATTORNEYS FOR PLAINTIFF

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

By: 

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Steven A. Broussard/OBA #12582
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANTS

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

FILED

OCT 31 1995

BRENDA OLIVER,)
)
Plaintiff,)
)
v.)
)
AMERADA HESS CORPORATION,)
)
Defendant.)

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

Case No. 94-C-1124K

ENTERED ON DOCKET

DATE NOV 01 1995

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 30 day of October, 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