

FILED

NOV 29 1995

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

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

PATRICK OSEI,)
)
Plaintiff,)
)
vs.)
)
KIMBERLY-CLARK CORPORATION,)
)
Defendant.)

Case No. 95-C-910-BU

ENTERED ON DOCKET
DATE NOV 30 1995

ORDER

This matter comes before the Court upon Plaintiff's Motion to Remand. Defendant has now responded to the motion and upon due consideration of the parties' submissions, the Court makes its determination.

On September 12, 1995, Defendant removed this action from the District Court of Tulsa County, Oklahoma, pursuant to 28 U.S.C. § 1441(b). In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

In his motion, Plaintiff contends that this matter should be remanded on the basis that the amount in controversy is less than \$50,000. Plaintiff states that his Petition has prayed for a judgment against Defendant for actual and punitive damages "in excess of \$10,000, but not yet in excess of \$50,000." Because Defendant does not cite to any evidence in its Notice of Removal which rebuts the amount claimed in the Petition, Plaintiff contends that remand is required.

Defendant, in response, contends that it has met its burden of

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establishing that the amount in controversy exceeds \$50,000. Defendant states that it asserted in the Notice of Removal its good-faith belief that the amount in controversy is greater than \$50,000. According to Defendant, that belief was based upon allegations that Plaintiff was seeking actual damages in excess of \$10,000, punitive damages in excess of \$10,000 and "all other appropriate relief, at law or in equity." According to Defendant, such statement of belief is all that is required.

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000.'" Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (emphasis in original). Furthermore, there is a presumption against removal jurisdiction. Id.

In the instant case, Plaintiff's Petition does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely alleges actual damages "in excess of \$10,000, but not yet in excess of \$50,000" and punitive damages "in excess of \$10,000, but not yet in excess of \$50,000." As a result,

Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant has offered no facts whatsoever to support the Court's exercise of diversity jurisdiction. Defendant has simply alleged in the Notice of Removal that "the amount of controversy in this action is reasonably believed by [Defendant] to exceed the sum or value of \$50,000, exclusive of interest and costs" and "[Defendant] in good faith believes the amount of controversy to exceed the sum of \$50,000, exclusive of interest and costs." These allegations do not, in the Court's view, satisfy Defendant's burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds \$50,000.

Accordingly, the Court GRANTS Plaintiff's Motion to Remand (Docket Entry #6) and STRIKES the case management conference currently scheduled for December 18, 1995 at 2:20 p.m. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 29 day of November, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

11-17

FILED

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

NOV 29 1995

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

VEROLME BOTLEK B.V.,)
 a corporation having its seat)
 in the Netherlands,)
)
 Plaintiff-Claimant,)
)
 v.)
)
 LEE C. MOORE CORPORATION,)
 a Pennsylvania corporation,)
)
 Defendant-Respondent.)

Civil Action No. 94-C-1084-BU

ENTERED ON DOCKET
NOV 30 1995
DATE _____

FINAL JUDGMENT ON ORDER ENFORCING FOREIGN ARBITRAL AWARD

This matter came before the Court upon the application of the plaintiff-claimant, Verolme Botlek B.V. ("Verolme"), for summary confirmation and enforcement of a foreign arbitral award. The arbitral award was entered in the Netherlands against the defendant-respondent, the Lee C. Moore Corporation ("LCM"). Based upon the parties' submissions, the Court granted Verolme's application for summary confirmation and enforcement of the award in an order entered on September 7, 1995. In particular, the Court ordered that Verolme is entitled to: (1) judgment in the amount of the arbitrator's final award; (2) interest on the arbitrator's award; and (3) the reasonable costs and expenses Verolme has incurred in prosecuting this enforcement action. Pursuant to this order, it is therefore

ORDERED that judgment is entered for the plaintiff-claimant, Verolme, and against the defendant-respondent LCM as follows. The amounts of the various categories of the judgment are given in Dutch guilders ("NLG"). The equivalent amounts in United States dollars ("\$"), which are shown parenthetically, have been computed at the middle rate of exchange on

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September 20, 1995, of 1.6610 guilders to the dollar.

1. **AMOUNT OF THE ARBITRATOR'S BASIC AWARD:** The LCM shall pay to Verolme the total outstanding sum of money due under the Verolme invoice (the "basic award"), as specified in the arbitrator's final award dated January 19, 1994: NLG 168.604,59 (\$101,507.88).

2. **STATUTORY INTEREST ON THE BASIC AWARD:** The LCM shall pay to Verolme interest on the arbitrator's basic award, as shown in paragraph No. 1 of this judgment, at the Dutch statutory rate from August 22, 1991, until the date of payment. All parties have stipulated that the total interest due on the basic award as of September 29, 1995, was NLG 74.475,32 (\$44,837.64). Accordingly, the additional amount of interest owed on the basic award shall be computed, based upon the applicable Dutch statutory rate, for the period beginning on September 30, 1995, and continuing until the date of payment.

3. **COSTS OF THE ARBITRATION:** The LCM shall pay to Verolme the costs of the arbitration, as specified in the arbitrator's final award dated January 19, 1994: NLG 21.027 (\$12,659.24).

4. **ATTORNEY'S FEES INCURRED IN THE ARBITRATION:** The LCM shall pay to Verolme the attorney's fees Verolme incurred during the arbitration, as specified in the arbitrator's final award dated January 19, 1994: NLG 24.486,10 (\$14,741.78).

5. **REASONABLE ATTORNEY'S FEES AND COSTS INCURRED IN THIS ACTION TO ENFORCE THE ARBITRAL AWARD:** The LCM shall pay to Verolme the following reasonable attorney's fees and costs incurred in this action to enforce the arbitrator's award, as follows:

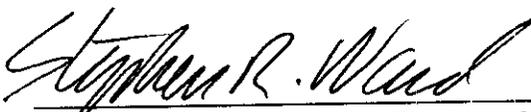
a. Attorney's fees and costs incurred by Gardere & Wynne, L.L.P., in this cause as of September 21, 1995: NLG 17.386,99 (\$10,467.79).

b. Attorney's fees and costs incurred by Nauta Dutilh as of September 21, 1995: NLG 12.708,91 (\$7,651.36).

ENTERED this the 29 day of Nov, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM BY ALL COUNSEL:

By: 
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COUNSEL FOR PLAINTIFF-CLAIMANT VEROLME BOTLEK B.V.

By: 
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COUNSEL FOR DEFENDANT-RESPONDENT LEE C. MOORE CORPORATION

advised him of all of his rights to appeal. I advised him to go ahead with the appeal and told him it was against my advice not to.

It's my understanding that he has chosen not to follow my advice and he does not wish to appeal at this time.

In that regard, Judge, we'd ask to be allowed to withdraw from this case subject to being re-appointed if Mr. Burns applies to this Court to have our office re-appointed in the event he changes his mind and wishes to appeal.

(Sentencing Tr. at 5, attached to docket #11.) Judge Hopper granted Ms. Conway's request to withdraw and adjourned the hearing. Petitioner did not file a direct appeal.

Subsequently, Petitioner filed an application for post-conviction relief alleging "conspiracy, perjury, and fraud." On October 12, 1990, Judge Hopper denied relief, finding Petitioner had not offered sufficient reason for failing to file a timely direct appeal. Petitioner did not appeal the denial of his application for post-conviction relief until August 12, 1994. On September 15, 1994, the Court of Criminal Appeals affirmed the district court's order denying post-conviction relief, but did so on the ground that Petitioner had not filed a timely appeal.

In the instant petition for a writ of habeas corpus, Petitioner again alleges "conspiracy, perjury, and fraud." He also alleges he could not read and write at the time of his direct appeal and he was denied assistance of counsel to perfect a direct criminal appeal. Respondent contends that Petitioner's claims are procedurally barred.

II. ANALYSIS

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. 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 on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

The alleged procedural default in this case results from Petitioner's failure to appeal the district court's order denying post-conviction relief and his failure to file a direct criminal appeal. 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. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (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 finds Petitioner's claims barred by the procedural default doctrine. The procedural bars applied by the Tulsa County District Court and the Court of Criminal Appeals were independent and adequate state procedural grounds and Petitioner has not shown cause and prejudice for his default. See Coleman, 510 U.S. at 750. Petitioner has alleged "no objective factor external to the defense" which could have impeded his ability to timely appeal the denial of his application for post-conviction relief.¹ Nor does the fact that Petitioner is a layman constitute sufficient cause. See Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991) (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).

Even if Petitioner could show sufficient cause and prejudice for the above default, he cannot show either cause or prejudice to excuse his failure to file a direct criminal appeal. Cf. Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991) (where appointed counsel never advised defendant of pros and cons of appealing conviction and did not ascertain whether defendant wanted to appeal, and state

¹ 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).

public defender's office, which was to take over defendant's representation, did not contact defendant during ten-day period in which notice of appeal was due). Petitioner's contention that he was denied counsel during the period to perfect his appeal is patently frivolous. As noted above, Ms. Conway advised Petitioner of his right to file a direct criminal appeal and that it was against her advice to waive that right. Petitioner, however, ignored counsel's admonitions and chose to waive his right to a direct criminal appeal.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, has neither alleged nor shown that he is actually innocent of the crime at issue in this habeas action. Therefore, Petitioner's claims are procedurally barred.

Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 29 day of November, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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FILED

NOV 29 1995

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

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

WILLIAM L. PATCH,
Plaintiff,
vs.
USAA FEDERAL SAVINGS BANK,
Defendant.

Case No. 95-C-54-BU

ENTERED

NOV 30 1995

ADMINISTRATIVE CLOSING ORDER

This Court has reviewed Defendant's Application to Strike Case Management Conference (Docket Entry #40). Having done so, the Court GRANTS Defendant's application. However, since the parties have reached a settlement and compromise of this matter and are in the process of executing settlement documents, the Court hereby ORDERS the Court Clerk to administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 29 day of November, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 29 1995

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

WILLIAM L. PATCH,)
)
Plaintiff,)
)
vs.)
)
USAA FEDERAL SAVINGS BANK,)
)
Defendant.)

Case No. 95-C-54-BU

O R D E R

In light of the parties' settlement and compromise, the Court hereby declares MOOT Defendant's Motion for Protective Order (Docket Entry #28).

Entered this 29 day of November, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 29 1995

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

JAMES PIGG,)
)
 Petitioner,)
)
 vs.)
)
 RON J. CHAMPION, et al.,)
)
 Respondents.)

No. 95-C-552-BU

ENTERED ON DOCKET

DATE NOV 30 1995

ORDER

This matter comes before the Court on a pro se petition for a writ of habeas corpus which Respondents have moved to dismiss as a mixed petition.

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

In this case we consider whether the exhaustion rule in 28 U.S.C. § 2254(b), (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts. Because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.

Id. at 510 (emphasis added).

Respondents contend Petitioner has not presented to the Oklahoma state courts his second ground for habeas relief--i.e., that the Oklahoma Court of Criminal Appeals improperly dismissed his appeal from denial of his application for post-conviction relief because it was not filed within thirty days of the trial

court's order. Petitioner does not object to the proposed dismissal as long as this Court's order provides that "the State may not apply an[y] procedurall [sic] bypass ruling [sic] on any matter previously brought forth." (Petitioner's reply, docket #6, at 3.) The Court liberally construes this statement as a request for dismissal without prejudice. Such a dismissal will permit Petitioner to refile his petition in this Court in the event he is not granted any relief after filing his second application for post-conviction relief (presenting his second ground) and appealing any denial to the Court of Criminal Appeals.

Accordingly, Petitioner's application for a writ of habeas corpus is hereby DISMISSED as a mixed petition.

SO ORDERED THIS 29 day of Nov, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

FILED

NOV 29 1995

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

ROBERT B. REICH, Secretary of)
Labor, United States Department)
of Labor,)

Civil Action

Plaintiff,)

vs.)

No. 95-C-117-BU

PUBLIC SERVICE COMPANY OF)
OKLAHOMA, GARY KNIGHT,)
SCOTT QUAID, & TRACY BABST)
Defendants.)

ENTERED ON DOCKET
DATE NOV 30 1995

ORDER

The Court, upon consideration of the parties' Joint Stipulation of Dismissal With Prejudice, finds that the parties' Joint Stipulation should be, and the same hereby is GRANTED.

The Court further finds that the parties shall bear their own respective attorneys' fees and costs incurred in connection with this action, and the same is hereby ORDERED.

The Court further finds that this Court shall retain jurisdiction of this matter over Public Service Company of Oklahoma and the Secretary of Labor, and no other parties, in order to enforce the Settlement Agreement between them, if required, and the same is hereby ORDERED.

IT IS SO ORDERED this 29 day of Nov, 1995.

s/ MICHAEL BURRAGE

United States District Judge

FILED

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

NOV 29 1995

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

TULSA TYPOGRAPHICAL UNION NO. 403,

Plaintiff,

v.

WORLD PUBLISHING COMPANY, an Oklahoma
corporation,

Defendant.

Case No. 94-C-996-H ✓

ENTERED ON DOCKET

DATE 11-30-95

ORDER

This matter comes before the Court on a Motion to Dismiss and/or for Summary Judgment by the Defendant, a Motion for Partial Summary Judgment by the Plaintiff, and a Motion for a stay pursuant to Rule 56(f) by Plaintiff.

Tulsa Typographical Union Number 403 (the "Union") and World Publishing Company ("WPC") were parties to a collective bargaining agreement which was in effect from February 7, 1993 through February 6, 1994. The collective bargaining agreement contained a job security provision which provision stated:

[i]n order to afford the maximum job security to employees named in the attached Appendix "A", the Employer guarantees to make five shifts of work available each week in the Composing Room for each employee whose name appears on Appendix "A" until such employee's death, resignation, retirement or discharge for cause. (emphasis added).

Jack D. Benning was an employee of WPC whose name appeared on the aforementioned Appendix A. On July 20, 1994, WPC discharged Mr. Benning without cause. Thereafter, the Union filed this lawsuit seeking to enforce the job security provision contained in the expired collective bargaining agreement.

Defendant moves to dismiss and/or for summary judgment claiming that the Court lacks jurisdiction over Plaintiff's claim. Plaintiff asserts that this lawsuit is properly before the Court under federal question jurisdiction. See 29 U.S.C. § 185. Defendant, on the other hand, asserts that there is no jurisdiction because the collective bargaining agreement expired before Mr. Benning was terminated.

In response to Defendant's Motion, Plaintiff cross-moved for Partial Summary Judgment asserting that the job security provision extended beyond the term of the collective bargaining agreement.

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

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute

between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

In the instant case, the Court finds that there is a genuine issue of material fact remaining as to whether there was a valid contract in existence for purposes of jurisdiction pursuant to 29 U.S.C. § 185. Further, issues of fact remain as to whether the integration clause effectively terminated the job security provision of the collective bargaining agreement, or whether such provision survived as a contractual obligation after the expiration date of the agreement. Accordingly, Defendant's Motion to Dismiss and/or for Summary Judgment is hereby denied.

The Court further finds that the job security provision is ambiguous and, thus, the Court is unable to determine as a matter of law whether that provision survived the expiration of the collective bargaining agreement. Therefore, Plaintiff's Motion for Partial Summary Judgment is hereby denied.

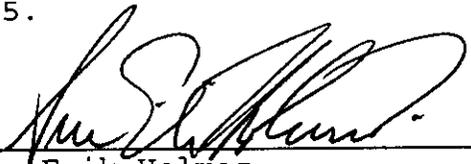
As a result of the denial of the motions, Plaintiff's motion brought under Rule 56(f) is moot.

In conclusion, Defendant's Motion to Dismiss and/or for Summary Judgment (Docket #8) is hereby denied. Plaintiff's Motion for Partial Summary Judgment (Docket #23) is hereby denied. Plaintiff's Motion for a stay under Rule 56(f) (Docket #19) has become moot.

The parties are further ordered to appear for a case management conference on the 5th day of January, 1996, at 9:30 a.m.

IT IS SO ORDERED.

This 28TH 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 29 1995

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

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
MICHAEL E. ERBAUGH, INC., an)
Ohio corporation, WILLIAM CARR,)
an individual, and MICHAEL E.)
ERBAUGH, an individual,)
)
Defendants.)

Case No. 95-C-233-H ✓

ENTERED ON DOCKET

DATE 11-30-95

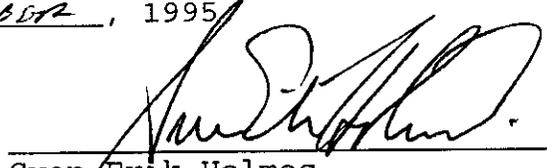
ADMINISTRATIVE CLOSING ORDER

Michael E. Erbaugh, having filed his petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

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

IT IS SO ORDERED.

This 28th day of November, 1995



Sven Erik Holmes
United States District Judge

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

FILED

NOV 29 1995

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

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
MICHAEL E. ERBAUGH, INC., an Ohio)
corporation, WILLIAM CARR, an)
individual, and MICHAEL E. ERBAUGH,)
an individual,)
)
Defendants.)

CASE NO. 95-C-233H

ENTERED ON DOCKET

DATE 11-30-95

**ORDER GRANTING JUDGMENT AGAINST
MICHAEL E. ERBAUGH, INC. AND WILLIAM CARR**

NOW, on this 22 day of Nov, 1995, this cause comes before the Court on the joint motion for entry of judgment by Thrifty Rent-A-Car System, Inc. ("Thrifty"), Michael E. Erbaugh, Inc. ("MEI") and William Carr ("Carr"). The Court, having reviewed the Court file and being fully advised in the premises finds that the Defendants, MEI and Carr, have accepted service in this action, and have agreed to this *in personam* judgment in favor of Thrifty and against each of them, jointly and severally, in the amount of \$170,000.00.

The Court further finds: that the judgment should be granted as requested by the parties; that this Order granting judgment resolves all claims in the case by and between Plaintiff Thrifty and Defendants, MEI and Carr; that the only claims remaining in the case are between Thrifty and Michael E. Erbaugh; and that the claims between Thrifty and Michael E. Erbaugh are currently stayed as a result of the filing by Michael E. Erbaugh of his bankruptcy petition in the United States Bankruptcy Court for the Southern District of Ohio. Based on these findings, this

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 54.9% per annum for all of which let execution issue.

DATED this 28 day of Nov, 1995.

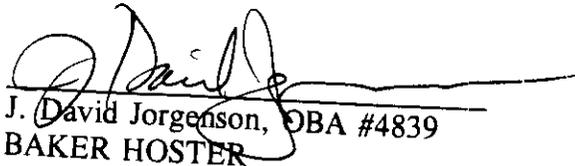
S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

AGREED AND APPROVED:


Michael J. Gibbens, OBA #3339
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ATTORNEYS FOR PLAINTIFF



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BAKER HOSTER

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Tulsa, Ok 74103

(918) 592-5555

ATTORNEYS FOR DEFENDANTS,
WILLIAM CARR AND
MICHAEL E. ERBAUGH, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)

v.)

ROBERT E. ZIEGLER;)
CITY OF TULSA, Tulsa, Oklahoma;)
RESOLUTION TRUST CORPORATION, as)
Conservator for Standard Federal Savings Association,)
Transferee of Resolution Trust Corporation,)
as Receiver for Standard Federal Savings Bank;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

FILED

NOV 29 1995

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

ENTERED ON DOCKET

DATE 11-30-95

CIVIL ACTION NO. 95-C-555-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of Nov, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, 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; that the Defendant, **City of Tulsa, Tulsa, Oklahoma,** does not appear, having filed its Disclaimer; that the Defendants, **Robert E. Ziegler and Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank,** appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Robert E. Ziegler**, executed a Waiver of Service of Summons on July 10, 1995 which was filed on July 17, 1995; that the Defendant, **Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, was served by certified mail, return receipt requested, delivery restricted to the addressee on June 26, 1995 and October 3, 1995.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 11, 1995; that the Defendant, **City of Tulsa, Tulsa, Oklahoma**, filed its Disclaimer on July 12, 1995; that the Defendants, **Robert E. Ziegler and Resolution Trust Corporation**, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

**Lot Three (3), Block One (1), MIXON TROTTER HEIGHTS
ADDITION to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on December 11, 1985, the Defendant, **Robert E. Ziegler**, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$33,000.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Robert E. Ziegler, a single person, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated December 11, 1985, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on December 12, 1985, in Book 4912, Page 635, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Robert E. Ziegler**, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$31,160.57, plus administrative charges in the amount of \$475.00, plus penalty charges in the amount of \$103.88, plus accrued interest in the amount of \$2,374.16 as of March 3, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing and any other advances.

The Court further finds that the Defendant, **City of Tulsa, Tulsa, Oklahoma**, disclaims any 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 Defendants, **Robert E. Ziegler and Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank**, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against Defendant, **Robert E. Ziegler**, in the principal sum of \$31,160.57, plus administrative charges in the amount of \$475.00, plus penalty charges in the amount of \$103.88, plus accrued interest in the amount of \$2,374.16 as of March 3, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.45 percent per annum until fully paid, plus the costs of this action accrued and accruing, 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, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Robert E. Ziegler; City of Tulsa, Tulsa, Oklahoma; Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

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

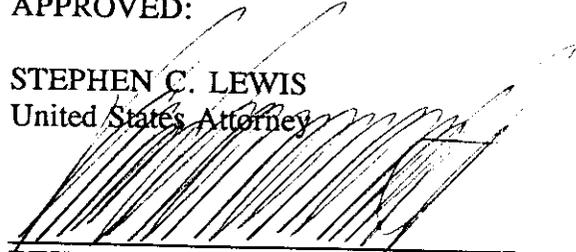
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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


PETER BERNHARDT, OBA #741

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



DICK A. BLAKELEY, OBA #0852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4835

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

Judgment of Foreclosure
Case No. 95-C-555-H (Ziegler)

PB:css

FILED

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

NOV 29 1995

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

EDDIE O'NEIL,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Case No. 94-C-274-H ✓

ENTERED ON DOCKET
DATE 11-30-95 *ja*

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by March 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 28TH day of November, 1995.

Sven Erik Holmes

Sven Erik Holmes
United States District Judge.

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

FILED

NOV 29 1995

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

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION,)
an Unincorporated Association and Labor)
Organization, and KENYON WALLIS,)

Plaintiffs,)

v.)

TRANSPORT WORKERS UNION OF AMERICA, Local)
514, Air Transport Division - AFL-CIO,)

Defendant.)

No. 94-C-924-H ✓

ENTERED ON DOCKET

DATE 11-30-95

J U D G M E N T

This matter came before the Court on a motion for summary judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 28, 1995.

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

IT IS SO ORDERED.

This 28TH day of NOVEMBER 1995.



Sven Erik Holmes
United States District Judge

29

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

FILED

NOV 29 1995

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

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION,)
an Unincorporated Association and Labor)
Organization, and KENYON WALLIS,)

Plaintiffs,)

v.)

TRANSPORT WORKERS UNION OF AMERICA, Local)
514, Air Transport Division - AFL-CIO,)

Defendant.)

No. 94-C-924-H ✓

ENTERED ON DOCKET

11-30-95 [Signature]

ORDER

This matter comes before the Court on a Motion for Summary Judgment by the Plaintiff Aircraft Mechanics Fraternal Association and the Plaintiff Kenyon Wallis. A hearing was held in this matter on November 22, 1995. At the hearing, counsel for Plaintiffs conceded that jurisdiction was improper with respect to Aircraft Mechanics Fraternal Association ("AMFA") and brought on a Motion to Dismiss the action as to the Association. The Court granted Plaintiffs' Motion to Dismiss.

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

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If

the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

The parties have agreed that there are no genuine issues of material fact remaining to be decided. In essence, Plaintiff Wallis complains that the Transport Workers Union of America, Local 514, Air Transport Division, AFL-CIO ("TWU") disciplined him for signing a union card of the AMFA and for soliciting and encouraging others to do the same. As a result, pursuant to union proceedings, Plaintiff was placed in bad standing for a period of three (3) years. The sole issue for the Court to determine is whether the disciplinary actions taken by the union, pursuant to proper union procedure, violated the fundamental rights of the Plaintiff.

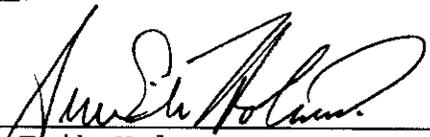
The Court believes that this dispute is covered by the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 et seq. Pursuant to 29 U.S.C. § 411(a)(2), the right of free speech of a member of a labor organization is limited to the extent that the organization has adopted and enforces "reasonable rules as to the responsibility of every member toward the organization as an institution." As a result, TWU had the right to discipline

Plaintiff for his conduct. See, e.g., Mayle v. Laborer's Int'l Union of North Amer., Local 1015, 866 F.2d 144, 146-147 (5th Cir. 1988); Ferguson v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 854 F.2d 1169, 1174-75 (9th Cir. 1988). Plaintiff is therefore not entitled to judgment as a matter of law. Accordingly, Plaintiffs' Motion for Summary Judgment is hereby denied.

Plaintiff further stated at the hearing that, if Plaintiffs' Motion for Summary Judgment was denied, then judgment for Defendant Transport Workers' Union of America was proper. Therefore, in accordance with the representations made by both parties at the hearing and as a result of the denial of Plaintiffs' Motion for Summary Judgment, summary judgment is hereby granted in favor of the Defendant.

IT IS SO ORDERED.

This 28TH day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

FILED

NOV 29 1995 *sc*

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

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

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

Case No. 94-C-190-H ✓

ENTERED ON DOCKET
DATE 11-30-95

O R D E R

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket # 67) pertaining to the Motion to Dismiss of Defendant Board of County Commissioners of Mayes County (Docket # 2); the Motion to Dismiss of Defendant Port of Catoosa (Docket # 16); the Motion to Dismiss of Defendant Board of County Commissioners of Ottawa County (Docket # 21); the Motion to Dismiss of Defendant Board of County Commissioners of Delaware County (Docket # 19); the Motion for Summary Judgment of Defendant Jimmie Mullin (Docket # 24); the Motion for Summary Judgment of Defendant Grand Gateway Economic Development Association (Docket # 27); the Motion to Dismiss of Defendants Boards of Commissioners of Rogers and Craig Counties (Docket # 30); the Motion to Dismiss of Defendant City of Miami (Docket # 32); the Motion for Summary Judgment of Defendant Board of County Commissioners of Mayes County (Docket # 35); the Motion for Summary Judgment of Defendant Board of County Commissioneres of Delaware County (Docket # 55); and the Motion for Summary Judgment of Defendants Boards of County Commissioners of Rogers and Craig Counties (Docket # 59).

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In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. Pursuant to the request of Plaintiff, the Court extended the time to respond to the Report and Recommendation to June 20, 1995. The extended time for filing objections to the Report and Recommendation has now expired, and no objections have been filed. As a result, unless the Court discerns clear error from the face of the record, the Report and Recommendation should be approved.

In her complaint, Plaintiff asserts that she experienced a "hostile and/or abusive working environment", that she was discharged in retaliation for her claims of discrimination, and that she was wrongfully discharged in violation of the public policy of the State of Oklahoma.

The Report and Recommendation recommends granting the Motion to Dismiss of Defendant Board of County Commissioners of Mayes County (Docket # 2), the Motion to Dismiss of Defendant City of Tulsa-Rogers County Port of Catoosa (Docket # 16), the Motion to Dismiss of Defendant Board of County Commissioners of Ottawa County (Docket # 21), the Motion to Dismiss of Defendant Board of County Commissioners of Delaware County (Docket # 19), the Motion to Dismiss of Defendants Boards of Commissioners of Rogers and Craig Counties (Docket # 30), and the Motion to Dismiss of Defendant City of Miami (Docket # 32) on the grounds that the above-named moving Defendants are not "employers" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 20003 through 2000e-17, see Sauers v.

Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993). The Magistrate further recommends that Plaintiff's pendent state law claim be dismissed without prejudice. Under the standards set forth above, the Court adopts this portion of the Magistrate's Report and Recommendation in its entirety.

The granting of the above Motions to Dismiss renders moot the Motion for Summary Judgment of Defendant Board of County Commissioners of Mayes County (Docket # 35), the Motion for Summary Judgment of Defendant Board of County Commissioners of Delaware County (Docket # 55), and the Motion for Summary Judgment of Defendant Board of County Commissioners of Rogers and Craig Counties (Docket # 59).

Plaintiff has also sued Jimmie Mullin, Executive Director of Grand Gateway Economic Development Association ("Gateway"), individually. The Magistrate recommends granting the Motion for Summary Judgment of Defendant Jimmie Mullin (Docket # 24) on the grounds that "[u]nder Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate." Sauers, 1 F.3d at 1125. The Court agrees that he is entitled to summary judgment on Plaintiff's Title VII claims. Further, the Court dismisses the pendent state law claim without prejudice. In this regard, the Court adopts the Magistrate's recommendation as to Defendant Mullin in its entirety.

Finally, the Magistrate reviewed Gateway's Motion for Summary Judgment (Docket # 27). Gateway argues that Plaintiff is barred from suing under Title VII because she failed to file her EEOC

charge within 180 days of the date of the last act of alleged discrimination. 42 U.S.C. § 20003-5(e). However, while Plaintiff's formal charge of discrimination was filed after the 180 day time period, the Magistrate held that she initiated the process well before that time and within the allotted 180 days by completing a mail in information sheet for filing a charge of discrimination and by sending correspondence to the EEOC within the 180 days.

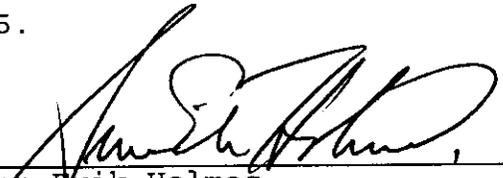
"The time limit for filing a discrimination charge may be equitably tolled where a plaintiff has been lulled into inaction by her past employer, state or federal agencies or the courts." Purrington v. University of Utah, 738 F.2d 1107, 1110 (10th Cir. 1984). The application of this doctrine is discretionary with the trial court. Purrington v. University of Utah, 996 F.2d 1025, 1030 (10th Cir. 1993). Here, the Court agrees with the Magistrate that "[t]he fact that the actual Charge of Discrimination was not filed until May 4, 1993 should not imperil her right to proceed, when she had, in fact, followed agency procedure in initiating the process." Thus, the Court holds that Plaintiff initiated the charging process in a timely fashion under Title VII. The Court hereby denies Gateway's Motion for Summary Judgment (Docket # 27).

Therefore, the Court hereby adopts the Report and Recommendation (Docket # 67) in its entirety. The remaining

parties, Plaintiff and Defendant Gateway, are ordered to appear for a case management conference on the 15th day of Dec., 1995, at 1:30 p.m.

IT IS SO ORDERED.

This 28th day of NOVEMBER 1995.



Sven Erik Holmes
United States District Judge

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

ROBERT E. SUMNER, ROY D. HARRIS,
and WARREN A. HENSLEY,

Plaintiffs,

v.

CAPSTONE ASSET MANAGEMENT
COMPANY; EDWARD L. JAROSKI; and
WILLIAM L. PRICE,

Defendants.

Case No. 95-CV-121-H

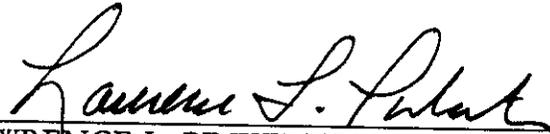
ENTERED ON DOCKET

DATE 11/30/95

DISMISSAL WITH PREJUDICE

Plaintiffs, Robert E. Sumner, Roy D. Harris, and Warren A. Hensley dismiss this
action with prejudice against all Defendants.

Respectfully Submitted,



LAWRENCE L. PINKERTON
PINKERTON AND FINN
2000 First Place
Fifteen East Fifth Street
Tulsa, Oklahoma 74103

Attorney for Plaintiffs, Robert E. Sumner,
Roy D. Harris, and Warren A. Hensley.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 29 day of November, 1995, he caused to be delivered by first-class mail, postage pre-paid, the above Dismissal With Prejudice to:

P. David Newsome, Jr.
R. Richard Love, III
CONNER & WINTERS
2400 First Place Tower
15 E. 5th Street
Tulsa, OK 74103

By: _____



COPY

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

CONTINENTAL NATURAL GAS, INC.,
an Oklahoma corporation;

Plaintiff,

vs.

R. REID INVESTMENTS, INC.,
a Texas corporation,

Defendant.

FILED
NOV 3 1995

Case No. 95 C 346 H

ENTERED ON DOCKET

DATE NOV 3 0 1995

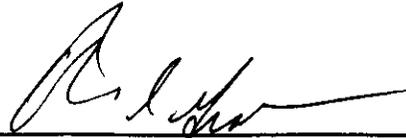
STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, plaintiff, Continental Natural Gas, Inc., does hereby dismiss its Complaint against the defendant with prejudice to the re-filing of same. Pursuant to Rule 41(c), defendant, R. Reid Investments, Inc., does hereby dismiss its Counterclaim against the plaintiff with prejudice to the re-filing of same.

Respectfully submitted,

Joel L. Wohlgemuth, OBA #9811
Thomas M. Ladner, OBA #5161
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

**ATTORNEYS FOR PLAINTIFF,
CONTINENTAL NATURAL GAS, INC.**



Thomas D. Graber
HOPKINS & SUTTER
1717 Main Street, Suite 3700
Dallas, Texas 75201
(214) 653-2100

and

D. Richard Funk, OBA #13070
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-8559

ATTORNEYS FOR DEFENDANT,
R. REID INVESTMENTS, INC.

cng.reid.stip/mdc

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

SUSAN ADAMS,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC.,)
TRANSPORT WORKERS UNION OF)
AMERICA, AFL-CIO, and LOCAL 514)
OF THE TRANSPORT WORKERS)
UNION OF AMERICA,)
)
Defendants.)

Case No. 94-C-1046-H

ENTERED ON DOCKET

DATE NOV 30 1995

FILED

NOV 21 1995

FBI Lawton, Okla

STIPULATION OF PARTIAL DISMISSAL

COME NOW the parties to the above-styled and numbered cause and stipulate to the dismissal without prejudice of the claims against Defendants Transport Workers Union of America, AFL-CIO, and Local 514 of the Transport Workers Union of America.

LAW OFFICE OF JOE L. WHITE

By:  _____

Joe L. White, ObA #10521
1718 W. Broadway
Collinsville, Oklahoma 74021
(918) 371-2531

Attorney for Plaintiff,
SUSAN ADAMS

-and-

DAVID R. CORDELL, OBA #11272
JOHN A. BUGG, OBA #13665

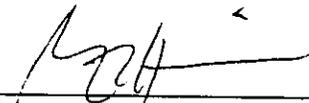
By: _____

David R. Cordell
CONNER & WINTERS
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Defendant,
AMERICAN AIRLINES, INC.

-and-

FRASIER & FRASIER

By: _____

Steven R. Hickman, OBA #4172
P.O. Box 799
Tulsa, Oklahoma 74101
(918) 584-4724

Attorneys for Defendants,
TRANSPORT WORKERS UNION OF
AMERICA, AFL-CIO and LOCAL 514
of TRANSPORT WORKERS UNION OF
AMERICA

Petitioner is presently awaiting retrial in Tulsa County District Court.

Respondents urge the reversal of Petitioner's conviction mooted the instant habeas action. They argue that when a judgment and sentence has been reversed, there is no longer a conviction upon which to grant relief. (Docket #22.) This Court agrees. "The state court's reversal of [Petitioner's] conviction and grant of a new trial . . . [has] afforded [Petitioner] all the relief the federal court could have given him." Hayes v. Evans, ___ F.3d ___, 1995 WL 675029, at *2 (10th Cir. Nov. 14, 1995) (No. 95-6069) (attached to this order). Petitioner's contention that the Oklahoma court's delay in adjudicating his appeal may prejudice his ability to defend himself on retrial is immaterial to his appellate delay claim. Petitioner may raise that claim on retrial in Tulsa County District Court and, after exhausting his state remedies, present that claim to this Court on a federal petition for a writ of habeas corpus. Id.

Therefore, the Court finds moot the original and amended petition for a writ of habeas corpus. Respondents' motion to dismiss (docket #21) is GRANTED and this action is hereby DISMISSED AS MOOT. Petitioner's motion to reurge stay of proceedings (docket #23) is DENIED.

SO ORDERED THIS 28th day of November, 1995.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

(Cite as: 1995 WL 675029 (10th Cir.(Okla.)))

Michael HAYES, Petitioner-Appellant,
v.
Edward L. EVANS; Attorney General of the
State of Oklahoma, Respondents-
Appellees.

No. 95-6069.

United States Court of Appeals,
Tenth Circuit.

Nov. 14, 1995.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF OKLAHOMA (D.C. No. CIV-92-
1868-C)

Drew Neville, Brinda K. White of Linn &
Neville, P.C., Oklahoma City, Oklahoma, for
Appellant.

W.A. Drew Edmondson, Attorney General, Diane
L. Slayton, Assistant Attorney General, Oklahoma
City, Oklahoma, for Appellees.

Before BRORBY, LOGAN, and EBEL, Circuit
Judges.

BRORBY, Circuit Judge.

*1 Michael Hayes appeals the district court's order denying his habeas petition filed pursuant to 28 U.S.C. 2254. The district court concluded that Mr. Hayes was no longer in custody pursuant to the conviction that was the subject of his original petition, because the state court had since reversed that conviction. The court further concluded that he had failed to exhaust his state remedies with respect to his subsequent retrial and reconviction, and that no good reason existed for excusing exhaustion with respect to this conviction. The court then entered judgment denying Mr. Hayes' habeas petition. [FN1]

Mr. Hayes was convicted in Oklahoma state court in 1988 and appealed that conviction to the Oklahoma Court of Criminal Appeals. When Mr. Hayes filed the present habeas petition, the Oklahoma court had yet to issue a decision in his direct appeal. Mr. Hayes contended that this delay in adjudicating his appeal violated his rights to due

process and equal protection and excused his failure to exhaust his state court remedies.

While Mr. Hayes' petition was pending in federal court, the Oklahoma Court of Criminal Appeals reversed his conviction and remanded the action for a new trial. Mr. Hayes was retried in the spring of 1993 and convicted. He argued in the district court that the reversal of his conviction did not moot his habeas petition because the Oklahoma court's delay in adjudicating his appeal prejudiced his ability to defend himself on retrial. Mr. Hayes conceded that the delay did not prejudice the appeal itself.

On appeal, Mr. Hayes argues that the magistrate judge erred in concluding, without benefit of an evidentiary hearing, that the delay in adjudicating Mr. Hayes' direct appeal did not prejudice his defense on retrial. Mr. Hayes also argues that his habeas petition is not moot. He contends that because the constitutional error he raised in his federal habeas petition concerned appellate delay, rather than trial error, the reversal of his conviction and remand for a new trial did not provide him all the relief requested.

In *Harris v. Champion*, 15 F.3d 1538, 1566 (10th Cir.1994), we held that a habeas petitioner whose direct appeal had yet to be decided by the state court could obtain habeas relief if he could establish that delay in adjudicating his direct appeal had violated his due process rights. One way a petitioner could establish such a due process violation would be by asserting a colorable state or federal claim that would warrant reversal of his conviction and demonstrating that excessive delay in adjudicating his appeal had impaired his defense on retrial. *Id.* at 1564. We further held that the most appropriate form of habeas relief in such circumstances would be to grant a conditional writ directing the state to release the petitioner if it did not decide his appeal within a specified period. *Id.* at 1566-67. Another option would be for the district court to excuse exhaustion and address the merits of the petitioner's federal challenges to his conviction and sentence. *Id.* at 1567.

*2 In this case, the state court reversed Mr. Hayes' conviction and remanded the action for a new trial before the federal district court reached the merits of the habeas petition. Had the situation been reversed, and the district court had addressed the

--F.3d--

(Cite as: 1995 WL 675029, *2 (10th Cir.(Okla.)))

merits of the petition before the state court ruled, the most relief Mr. Hayes could have received would have been either the grant of a conditional writ or a review by the district court of his federal challenges to his conviction and sentence. The state court's reversal of his conviction and grant of a new trial, therefore, afforded Mr. Hayes all the relief the federal court could have given him. Because Mr. Hayes does not suggest that the delay in adjudicating his direct appeal somehow affected the outcome of that appeal, there is no further relief that the federal court can grant him with respect to the 1988 conviction that was the subject of the habeas petition. Therefore, the original habeas action is moot.

Mr. Hayes, however, would avoid the mooting of his action by converting his habeas action into one that challenges his conviction in 1993 after retrial, rather than his original conviction in 1988. This, he cannot do. As the district court correctly noted, Mr. Hayes must exhaust his state court remedies with respect to this new conviction before he can bring a challenge in federal court. If Mr. Hayes believes that the delay in adjudicating his appeal from the 1988 conviction somehow prejudiced his ability to defend himself on retrial in 1993, he must raise that challenge in the context of his 1993 proceedings. The parties' arguments and the magistrate judge's conclusions about prejudice on retrial are, therefore, quite premature.

The district court correctly recognized that Mr. Hayes' challenge to his 1988 conviction is moot and that he must exhaust his state court remedies before bringing a federal habeas action challenging his 1993 conviction. Rather than denying the petition, however, the court should have dismissed the action as moot. Therefore, we VACATE the judgment of the United States District Court for the Western District of Oklahoma, and REMAND the matter with directions to dismiss the action as moot. Mr. Hayes' motion to consolidate this appeal with appeal Nos. 94-6383, 94-6404, and 94-6435, which have already been decided, is DENIED as moot.

FN1. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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

TERRY COTTEN,)
)
 Petitioner,)
)
 vs.)
)
 RON CHAMPION,)
)
 Respondent.)

ENTERED ON DOCKET
DATE NOV 30 1995

No. 95-C-1101-K

FILED

NOV 29 1995

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

ORDER OF TRANSFER

Before the court is a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the Court's attention that Petitioner was convicted in Atoka County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is hereby **transferred** to the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d). The Clerk shall **mail** a copy of the petition to Petitioner and to the Office of the Oklahoma Attorney General.

IT IS SO ORDERED this 28 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED

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

NOV 28 1995

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

FEDERAL INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 TRI-STATE INSURANCE COMPANY,)
)
 Defendant.)
)
 CITATION OIL AND GAS CORPORATION,)
)
 Plaintiff,)
)
 vs.)
)
 TRI-STATE INSURANCE COMPANY and)
 HEALDTON TANK TRUCK SERVICE, INC.,)
)
 Defendants.)

Case No. 93-C-715-B
Consolidated with

ENTERED ON DOCKET
DATE NOV 29 1995

Case No. 94-C-697

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

In this subrogation action Plaintiff, Federal Insurance Company ("Federal"), seeks to be reimbursed by Defendant, Tri-State Insurance Company ("Tri-State"), the sum of \$2.75 million paid in settlement of a personal injury claim by Mike McElroy for burn injuries as a result of a fire occurring at its insured's, Citation Oil and Gas Corporation ("Citation") oil tank location. Federal asserts that Tri-State had applicable primary liability insurance coverage through Healdton Tank Truck Service, Inc. ("Healdton") and/or subcontractors who had agreed in writing to indemnify Citation during the tank cleaning operation. Tri-State defends, asserting that Citation's negligence was the sole cause of the fire and resulting personal injury to Mike McElroy. Both Citation and Healdton assert a bad faith refusal to provide coverage claim

against Tri-State which has been bifurcated for later hearing.

Federal's subrogation claim was tried to the Court without a jury on October 18 and October 23, 1995. Following a review of the evidence presented, arguments of the parties and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Citation Oil and Gas Corporation, was at the time of filing this action a Delaware corporation with its principal place of business in Texas.*¹

2. Plaintiff, Federal Insurance Company, was at the time of filing of this action an Indiana corporation with its principal place of business in New Jersey.*

3. Defendant, Healdton Tank Truck Service, Inc., was at the time of filing of this action an Oklahoma corporation doing business primarily in Oklahoma.*

4. Defendant, Tri-State Insurance Company, was at the time of filing of this action an Oklahoma corporation with its principal place of business in Oklahoma.*

5. The amount in controversy exceeds \$50,000.00.

6. On October 16, 1991, Healdton had been issued a business auto policy by Tri-State, number A005111 for the policy period March 1, 1991, through March 1, 1992, and the policy was in effect with a coverage of \$1 million.* (Joint Pre-Trial Ex. 1)

¹ Findings of Fact followed by an asterisk (*) are facts to which the parties have stipulated in the Pre-Trial Order filed October 18, 1995.

7. Citation was an additional insured under the business auto policy on October 16, 1991.*

8. On October 16, 1991, Mike McElroy had been issued a business auto policy by Tri-State, number A017219, effective from 8-5-91 to 8-5-92 with a One Million Dollar (\$1,000,000.00) limit.* (Joint Pre-Trial Ex. 11)

9. Tri-State never made Citation an additional insured under that policy.* (McElroy's BAP)

10. On October 16, 1991, Glenn Mitchell had been issued a business auto policy by Tri-State, number A005109, effective 3-1-91 to 3-1-92 with a One Million Dollar (\$1,000,000.00) limit.* (Joint Pre-Trial Ex. 12)

11. Tri-State never made Citation an additional insured under that policy.* (Mitchell's BAP)

12. On October 16, 1991, Healdton had been issued a commercial general liability policy (CGL) by Tri-State, number G085436 for the policy period March 1, 1991 through March 1, 1992, and the policy was in effect with a coverage of One Million Dollars (\$1,000,000.00).* (Joint Pre-Trial Ex. 2)

13. For purposes of this litigation, Citation is declared to have been an additional insured under that policy on October 16, 1991.* (Healdton's CGL)

14. Until July 3, 1995, Tri-State denied that Citation was an additional insured on the commercial general liability policy.*

15. On October 3, 1990, a Master Service Agreement (MSA) was executed by Citation and Healdton.* (Joint Pre-Trial Ex. 7)

16. The MSA is a form contract drafted by the International Association of Drilling Contractors.*

17. Citation is a member of the International Association of Drilling Contractors.*

18. Paragraph 6.1 of the MSA provided for Healdton to obtain corporate general liability coverage and automobile liability coverage of at least \$1 million on its employees, subcontractors, and others performing Healdton's work on Citation's premises.*

19. Paragraph 6.3 of the MSA required Healdton to have Citation named as an additional insured on Healdton's insurance policies.*

20. The MSA was in effect on October 16, 1991.*

21. The MSA is governed by the laws of Texas.*

22. On October 16, 1991, Healdton was called to clean out tanks and remove tank bottoms from tanks at Citation's Healdton unit in Healdton, Oklahoma. Mike McElroy and Glen Mitchell brought two tank trucks to Citation's Healdton (Oklahoma) unit to perform that service. Mr. McElroy and Mr. Mitchell were performing Healdton's work pursuant to the MSA.*

23. Glen Mitchell's truck was a 1984 International Model S1900 bearing Serial No. LHTLDUXN8EHA 25057.*

24. Mike McElroy's truck was a 1985 International Model S1900 bearing Serial No. LHTLDTVNXFHA 21798.*

25. On October 13, 1990 and throughout the period to October 16, 1991, Glenn Mitchell and Mike McElroy each owned 10% of the corporate stock of Healdton.

26. Mike McElroy and Glenn Mitchell each received 1099 tax reports rather than W-2s for sums paid to them by Healdton during 1991.

27. Mike McElroy and Glenn Mitchell were compensated according to the rates set by the Oklahoma Corporation Commission for leased tank trucks and operators based on the work they performed under Healdton's permit.

28. On October 13, 1990 and throughout the period to October 16, 1991, Tri-State was aware of the work relationship between Healdton and Mitchell and McElroy.

29. The trucks were owned by Mitchell and McElroy, respectively, but were leased to Healdton and were operated under Healdton's Oklahoma Corporation Commission permit.*

30. Under the Healdton business auto policy and McElroy and Mitchell business auto policies, the trucks are "covered autos" for purposes of the liability coverage under the business auto policy.*

31. The tank where the fire/explosion occurred was owned and operated by Citation.

32. Mitchell and McElroy had cleaned this tank before when it was owned by Arco. However, October 16, 1991 was the first time they had cleaned the tank for Citation.

33. When Mitchell and McElroy had cleaned the tank for Arco, an Arco representative had been on-site to supervise their work.

34. When Mitchell and McElroy cleaned tanks for other companies, it was customary for the companies to have a company representative on-site to supervise the cleaning. However,

occasionally no company representative would appear.

35. Many companies like Citation use gas sniffers in their supervisory work to identify when excess gas is at the site. Most tank truck companies do not have their own gas sniffers.

36. Citation did not have a company representative on-site to supervise Healdton's work as is customary in the industry.

37. The tank where the fire/explosion occurred was used for gathering, storing, and transporting oil, salt water, and fresh water.*

38. Mr. McElroy's truck was parked within 26 inches of Mr. Mitchell's truck.*

39. Both trucks had their engines running before the fire ignited.*

40. McElroy was not an employee of Citation (nor of Healdton).*

41. Mitchell was not an employee of Healdton nor Citation.

42. McElroy and Mitchell were Healdton's subcontractor, not Healdton's employees.

43. McElroy was an owner/operator contracting with Healdton in a written lease agreement to provide a truck and operator, as was Mitchell (Ex. 75)

44. On October 16, 1991, Mike McElroy was burned in a fire on Citation's premises near Healdton, Oklahoma.*

45. Ignition of vapors occurred while McElroy's and Mitchell's trucks were parked next to the Citation tank.

46. Both trucks were parked too close to the tank and had

their engines running before the fire ignited. Mitchell's truck had just commenced the tank cleaning operation by vacuuming residue from the bottom of the tank.

47. McElroy's truck was running but he had not yet started his water pump to inject water into the tank following the vacuuming.

48. As Mitchell was standing by his truck he concluded there was an excess accumulation of fumes and vapors presenting a possible fire hazard with the running truck engines. He advised McElroy he was going to move his (Mitchell's) truck.

49. Mr. Glen Mitchell ("Mitchell") saw ignition first occur by the front of McElroy's truck.

50. The only expert testimony as to causation was that fumes escaped and/or were drawn from the tank by the vacuum pump of the Mitchell vehicle, which were ignited by McElroy's running truck engine.

51. Gas vapors escaped from the tank through the manhole Mitchell and McElroy opened in order to clean out the residue in the bottom of the tank.

52. The gas vapors caught fire between the two trucks, burning Mike McElroy severely.

53. The fire that caused Mr. McElroy's bodily injury resulted from the use of his and/or Mitchell's truck.

54. Fumes which passed through the Mitchell tank increased the flammable vapors available at the McElroy truck for ignition.

55. Tri-State received timely notice of the loss.*

56. On July 24, 1992, McElroy and his wife filed suit against Citation in the United States District Court for the Western District of Oklahoma, Case No. 92-1369-W.*

57. In the McElroy litigation McElroy accused Citation of negligence in its general supervision of Healdton's work on October 16, 1991, and of negligence in failing to isolate the tank.*

58. An adjoining tank was still connected to the tank being cleaned, thus permitting a continuous flow of vapors.

59. Citation demanded indemnity from Healdton.*

60. Healdton presented the demand for indemnity to its insurer, Tri-State.*

61. Citation presented the McElroy claim to Tri-State under both the commercial general liability and business auto policies.*

62. Tri-State paid half of the cost of defense of the McElroy litigation against Citation.*

63. Tri-State paid half the cost of Citation's defense in the McElroy litigation subject to a reservation of rights under the Healdton BAP only.

64. Tri-State did not reserve any rights under the Healdton CGL to Citation in writing.

65. Tri-State agreed that \$2.75 million was a reasonable settlement for resolving the McElroy litigation but refused to pay the \$1 million of the business auto policy or any of the \$1 million limits of the commercial general policy towards settlement of the McElroy litigation.*

66. At the McElroy settlement conference Tri-State offered to

contribute \$500,000 to the settlement in exchange for a complete release.*

67. By the settlement Citation became legally obligated to pay the \$2.75 million as damages for Mike McElroy's bodily injury.*

68. Federal, Citation's own insurer, paid \$2.75 million to settle the McElroy litigation on behalf of Citation.*

69. Tri-State did not concede coverage of its CGL policy to Healdton and/or Citation herein at anytime before trial in this matter. Mid-trial same was conceded by Tri-State's witness, Vice President Robert Fagerburg.

70. Ken Webster was the Plaintiffs' attorney in the McElroy litigation.*

71. F. Thomas Cordell, Jr., was Citation's attorney in the McElroy litigation.*

72. None of the settlement documents in the McElroy litigation extinguished the tort liability of either Tri-State or Healdton.*

73. It has been stipulated between the parties that neither Healdton Tank Truck Service nor Tri-State Insurance Company were released in the settlement documents in the McElroy litigation.

74. Witnesses deposed concerning the cause of ignition included: Bernard Harold Waychoff, Jr., designated as an expert by McElroy and Darby Gray, designated as an expert by Citation.*

75. Witness Waychoff did not qualify as an expert concerning cause and origin of the subject fire and explosion.

76. Tri-State has refused to pay the limits of the business

auto and commercial general liability policies.*

77. Federal issued a general liability policy to Citation, Policy Number 35171390, effective on October 16, 1991, with coverage of up to \$1 million.*

78. Federal issued a commercial umbrella liability insurance policy to Citation, Policy Number 7966-2599, effective on October 16, 1991, with coverage of up to \$10 million.*

79. Federal issued a business auto policy to Citation, Policy Number BAP-92-7306-27-08 with coverage of up to \$1 million.*

80. Federal issued a business auto policy to Citation, Policy Number FAP-92-7310-62-91 with coverage of up to \$1 million.*

81. Federal disclosed the existence of Citation's business auto policy BAP-92-7306-27-08 on the 4th day of January, 1994, in its document production to Tri-State. Citation's business auto policy BAP-92-7310-62-91 was disclosed on January 5, 1994, and a copy was furnished to Tri-State on January 13, 1994.*

82. Citation paid the \$2.75 million under these policies: Federal general liability policy issued to Citation, Policy Number 35171390, effective on October 16, 1991, with coverage of up to \$1 million; Federal commercial umbrella liability insurance policy to Citation, Policy Number 7966-2599, effective on October 16, 1991, with coverage of up to \$10 million.

83. Any Conclusion of Law included below that is more appropriately a Finding of Fact is so found.

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. Tri-State's commercial general liability policy insures Healdton's liability to indemnify Citation to \$1,000,000, and insures Citation as an additional insured to indemnify Citation to \$1,000,000 regarding the Master Service Agreement (MSA) tank cleaning contract. (Ex. 7)

4. The Tri-State business auto policy of Healdton insures Healdton's liability to indemnify Citation to \$1,000,000⁰ regarding vehicles used in performing the Master Service Agreement. (Ex.7)

5. Healdton was obligated to indemnify Citation for the subject McElroy personal injury claim pursuant to the MSA.

6. The commercial general liability policy issued by Tri-State to Healdton covers the McElroy settlement because that liability arose out of Citation's negligence in its general supervision of Healdton's work, including Citation's failure to isolate the tank in question.

7. McElroy's injuries jointly arose out of Healdton's work under the MSA and out of Citation's alleged negligence in supervising or failing to supervise Healdton's work.

8. The Master Service Agreement is an "insured contract" for purposes of the two Tri-State Healdton policies (BAP AND CGL).

9 The Tri-State Healdton policies (CGL and BAP) were issued to comply with the Master Service Agreement which required them to be primary insurance.

10. By contract and because of the insured promise to

indemnify, and Citation being an additional named insured, both of Healdton's Tri-State policies are primary coverage. (CGL and BAP)

11. The MSA is an "insured contract" for purposes of Tri-State's CGL and BAP policies to Healdton.

12. The Tri-State policies (CGL and BAP) provide total primary coverage of \$2,000,000 for this loss.

13. The Federal commercial general liability policy and umbrella policy are excess policies to the two Tri-State Healdton policies (CGL and BAP). The Federal auto policies do not apply because Citation vehicles were not involved.

14. Federal is entitled to recover the amount of \$2,000,000 from Tri-State.

15. Citation's, Federal's and Healdton's entitlement to attorneys' fees from Tri-State, if any, shall be determined postjudgment in accordance with Rule 54(d)(2) of the Federal Rules of Civil Procedure and Local Rule 54.2.

16. Healdton breached the Master Service Agreement by not indemnifying Citation on the McElroy litigation.

17. The Tri-State business auto policies of McElroy and Mitchell do not provide coverage herein to Citation because Citation is not an additional named insured in said policies. Further, McElroy's BAP was not intended to provide coverage to him for his injuries because it is a liability policy to provide McElroy coverage for claims of injured third parties. It is not first party insurance

18. The fire and explosion resulted in part from the use of

the McElroy truck.

19. Mr. Mike McElroy ("McElroy")'s injuries occurred while he was performing Healdton Tank Truck Service, Inc. ("Healdton")'s obligations under the Healdton/Citation Oil and Gas Corporation ("Citation") Master Service Agreement ("MSA").

20. The claims which Federal paid for Citation arose in part from the use of McElroy's vehicle.

21. The trucks are not "mobile equipment" within the definition in the Tri-State policies.

22. The Court will defer entry of Judgment herein until the conclusion of the remaining issues. The matters of costs, pre-judgment interest, post-judgment interest and attorneys fees will be addressed at or after the entry of Judgment.

The parties will comport with the following schedule regarding the remaining bifurcated issues of alleged breach of contract, alleged bad faith, compensatory damages and punitive damages:

(March 1, 1996)	COMPLETE ALL DISCOVERY
(February 16, 1996)	EXCHANGE THE NAMES AND ADDRESSES OF ALL WITNESSES, INCLUDING EXPERTS, IN WRITING, ALONG WITH A BRIEF STATEMENT REGARDING EACH WITNESS' EXPECTED TESTIMONY (NOT NECESSARY IF WITNESS' DEPOSITION TAKEN)
(March 15, 1996)	DEADLINE FOR FILING DISPOSITIVE MOTIONS
(March 29, 1996)	RESPONSES TO DISPOSITIVE MOTIONS DUE
(April 8, 1996)	REPLIES TO RESPONSES TO DISPOSITIVE MOTIONS DUE

(April 12, 1996)

PRE-TRIAL CONFERENCE AND
HEARING ON PENDING MOTIONS AT
1:30 p.m..

(May 6, 1996)

FILE AN AGREED PRETRIAL ORDER
AND EXCHANGE ALL PRENUMBERED
EXHIBITS

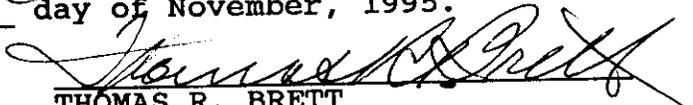
(May 13, 1996)

FILE REQUESTED VOIR DIRE,
REQUESTED INSTRUCTIONS AND ANY
TRIAL BRIEFS

(May 20, 1996)

JURY TRIAL AT 9:30 A.M.

IT IS SO ORDERED this 28th day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 27 1995

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

DONALD EDWARD BREEN,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

No. 95-C-414-B

ENTERED ON DOCKET

DATE NOV 29 1995

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Federal Correctional Facility in Sheridan, Oregon, challenges his conviction for Robbery with Firearms in Tulsa County District Court Case No. CRF-79-743. Respondent has filed a Rule 5 response to which Petitioner has not replied. As more fully set out below the Court concludes this petition should be denied.

On May 14, 1979, Petitioner pled guilty to Robbery with Firearms in Tulsa County District Court, and received a five-year sentence. While in the custody of the Oklahoma Department of Corrections (DOC), Petitioner was extradited to Nevada where on November 29, 1979, he pleaded guilty to Armed Robbery and received a four-year sentence to be served concurrently with his Oklahoma sentence. Petitioner remained in the DOC until he was released on parole on June 10, 1980. In May 9, 1990, the U.S. District Court for the Eastern District of California sentenced Petitioner as a career offender to 168 months imprisonment for Bank Robbery. In enhancing the sentence, the court relied on Petitioner's 1979

10

robbery conviction in Tulsa County District Court.

In the present petition for a writ of habeas corpus, Petitioner alleges his 1979 guilty plea was not knowingly and intelligently entered because he lacked notice that, if he committed a future crime, his conviction would be used to enhance his sentence. He also alleges his counsel failed to inform him of the consequences of his plea in violation of his Sixth Amendment rights.

Petitioner's contention is meritless. When accepting a guilty plea, a court is not obligated by the Due Process Clause to advise the defendant of the possible collateral consequence of his present conviction where he to commit a future crime. See United States v. Brownlie, 915 F.2d 527, 528 (9th Cir. 1990) (finding a guilty plea voluntary because the possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea); Lewis v. United States, 902 F.2d 576, 577 (7th Cir.), cert. denied, 498 U.S. 875 (1990) (plea court did not have to advise defendant that his conviction might expose him to more severe punishment for any future crime); see also Parry v. Rosemeyer, 64 F.3d 110, 113-118 (10th Cir. 1995) (petitioner's guilty plea to charges of second-degree robbery and criminal conspiracy was not unknowing and involuntary in violation of due process merely because petitioner was not informed of consequences of violation of probation), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Nov. 13, 1995) (No. 95-6719). Nor is defense counsel

constitutionally ineffective for failing to warn the defendant of the possibility that a felony guilty plea may lead to a habitual offender conviction if a future crime is committed. Lewis, 902 F.2d at 577.

Accordingly, Petitioner is not in custody in violation of the Constitution or laws of the United States. His petition for a writ of habeas corpus is, therefore, DENIED.

SO ORDERED THIS 27 day of Nov., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

GOLDIE MASTERS,

Plaintiff,

vs.

SHIRLEY S. CHATER,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

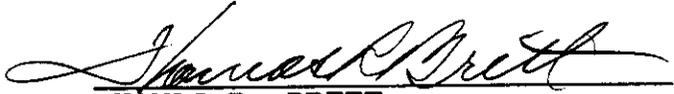
94-C-1085-B

FILED
ENTERED ON DOCKET
NOV 29 1995
DATE _____

J U D G M E N T

In accord with an Order entered simultaneously herein, granting attorneys fees to Plaintiff in the amount of \$1,209.23, judgment is hereby entered in favor of Plaintiff, for the benefit of her attorney, Michael D. Clay, and against the Defendant in the amount of \$1,209.23.

DATED this 28th day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

(5)

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

GOLDIE MASTERS,

Plaintiff,

vs.

SHIRLEY S. CHATER,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

94-C-1085-B

FILED

ENTERED ON DOCKET
DATE NOV 29 1995

ORDER

This matter comes on for consideration of Plaintiff's Attorney Michael D. Clay's Motion for Attorney's Fees in the amount of \$1,209.23.

Plaintiff seeks an enhanced attorney fee, pursuant to 28 U.S.C. §2412(d)(2)(A) because of an increase in the cost of living (CPIU) since the Act was implemented. Plaintiff states the increase would justify an enhanced hourly fee of \$122.46 rather than the usual fee of \$75.00 per hour. Plaintiff's attorney states that he has worked 3.75 hours on this matter (at \$122.46 per hour).

The defendant has filed a response stating the defendant has no objection to the Court approving an attorney fee of \$1,209.23 as requested.

A Judgment granting attorney fees to Plaintiff's attorney will be simultaneously entered herewith.

IT IS SO ORDERED this 28th day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

NOV 28 1995

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

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

DANA J. BAKER,

Plaintiff,

vs.

66 FEDERAL CREDIT UNION,
DEBBIE LUCAS, MARK WILBURN,
ROBERTA MAGES, LARRY KNOLL,
GERALD L. COAST, and PATTY
J. KEATON,

Defendants.

Case No. 95-C-358 B

ENTERED ON DOCKET

DATE NOV 29 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

All the parties to this action hereby stipulate that any and all causes of action and claims against the Defendants, 66 Federal Credit Union, Debbie Lucas, Mark Wilburn, Roberta mages, Larry Knoll, Gerald L. Coast and Patty J. Keaton, are hereby dismissed with prejudice.

Dana Baker

DANA BAKER, PLAINTIFF

Ronald Main

RONALD MAIN, OBA #5634
P.O. Box 521150
Tulsa, Oklahoma 74152-1150
(918) 742-1990

Attorney for Plaintiff,
Dana Baker

ELLER AND DETRICH
A Professional Corporation

By: 

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Suite 200, Midway Building
Tulsa, Oklahoma 74114
(918) 747-8900

Attorneys for Defendants,
66 Federal Credit Union,
Debbie Lucas, Mark Wilburn,
Roberta Mages, and Larry Knoll

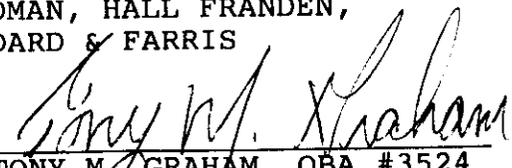
BREWER, WORTEN, ROBINETT,
JOHNSON, WORTEN & KING

By: 

JAMES R. JOHNSON, OBA #4701
P.O. Box 1066
Bartlesville, Oklahoma 74005
(918) 336-4132

Attorneys for Defendant,
Gerald L. Coast

FELDMAN, HALL FRANDEN,
WOODARD & FARRIS

By: 

TONY M. GRAHAM, OBA #3524
525 South Main, Suite 1400
Tulsa, Oklahoma 74103-4523
(918) 583-7129

Attorneys for Defendant,
Patty J. Keaton

FILED

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

NOV 28 1995

FEDERAL INSURANCE COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
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 Defendant.)
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 CITATION OIL AND GAS CORPORATION,)
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 Plaintiff,)
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 vs.)
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 TRI-STATE INSURANCE COMPANY and)
 HEALDTON TANK TRUCK SERVICE, INC.,)
)
 Defendants.)

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

Case No. 93-C-715-B

Consolidated with

ENTERED ON DOCKET

DATE NOV 29 1995

Case No. 94-C-697

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

In this subrogation action Plaintiff, Federal Insurance Company ("Federal"), seeks to be reimbursed by Defendant, Tri-State Insurance Company ("Tri-State"), the sum of \$2.75 million paid in settlement of a personal injury claim by Mike McElroy for burn injuries as a result of a fire occurring at its insured's, Citation Oil and Gas Corporation ("Citation") oil tank location. Federal asserts that Tri-State had applicable primary liability insurance coverage through Healdton Tank Truck Service, Inc. ("Healdton") and/or subcontractors who had agreed in writing to indemnify Citation during the tank cleaning operation. Tri-State defends, asserting that Citation's negligence was the sole cause of the fire and resulting personal injury to Mike McElroy. Both Citation and Healdton assert a bad faith refusal to provide coverage claim

against Tri-State which has been bifurcated for later hearing.

Federal's subrogation claim was tried to the Court without a jury on October 18 and October 23, 1995. Following a review of the evidence presented, arguments of the parties and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Citation Oil and Gas Corporation, was at the time of filing this action a Delaware corporation with its principal place of business in Texas.*¹
2. Plaintiff, Federal Insurance Company, was at the time of filing of this action an Indiana corporation with its principal place of business in New Jersey.*
3. Defendant, Healdton Tank Truck Service, Inc., was at the time of filing of this action an Oklahoma corporation doing business primarily in Oklahoma.*
4. Defendant, Tri-State Insurance Company, was at the time of filing of this action an Oklahoma corporation with its principal place of business in Oklahoma.*
5. The amount in controversy exceeds \$50,000.00.
6. On October 16, 1991, Healdton had been issued a business auto policy by Tri-State, number A005111 for the policy period March 1, 1991, through March 1, 1992, and the policy was in effect with a coverage of \$1 million.* (Joint Pre-Trial Ex. 1)

¹ Findings of Fact followed by an asterisk (*) are facts to which the parties have stipulated in the Pre-Trial Order filed October 18, 1995.

7. Citation was an additional insured under the business auto policy on October 16, 1991.*

8. On October 16, 1991, Mike McElroy had been issued a business auto policy by Tri-State, number A017219, effective from 8-5-91 to 8-5-92 with a One Million Dollar (\$1,000,000.00) limit.* (Joint Pre-Trial Ex. 11)

9. Tri-State never made Citation an additional insured under that policy.* (McElroy's BAP)

10. On October 16, 1991, Glenn Mitchell had been issued a business auto policy by Tri-State, number A005109, effective 3-1-91 to 3-1-92 with a One Million Dollar (\$1,000,000.00) limit.* (Joint Pre-Trial Ex. 12)

11. Tri-State never made Citation an additional insured under that policy.* (Mitchell's BAP)

12. On October 16, 1991, Healdton had been issued a commercial general liability policy (CGL) by Tri-State, number G085436 for the policy period March 1, 1991 through March 1, 1992, and the policy was in effect with a coverage of One Million Dollars (\$1,000,000.00).* (Joint Pre-Trial Ex. 2)

13. For purposes of this litigation, Citation is declared to have been an additional insured under that policy on October 16, 1991.* (Healdton's CGL)

14. Until July 3, 1995, Tri-State denied that Citation was an additional insured on the commercial general liability policy.*

15. On October 3, 1990, a Master Service Agreement (MSA) was executed by Citation and Healdton.* (Joint Pre-Trial Ex. 7)

16. The MSA is a form contract drafted by the International Association of Drilling Contractors.*

17. Citation is a member of the International Association of Drilling Contractors.*

18. Paragraph 6.1 of the MSA provided for Healdton to obtain corporate general liability coverage and automobile liability coverage of at least \$1 million on its employees, subcontractors, and others performing Healdton's work on Citation's premises.*

19. Paragraph 6.3 of the MSA required Healdton to have Citation named as an additional insured on Healdton's insurance policies.*

20. The MSA was in effect on October 16, 1991.*

21. The MSA is governed by the laws of Texas.*

22. On October 16, 1991, Healdton was called to clean out tanks and remove tank bottoms from tanks at Citation's Healdton unit in Healdton, Oklahoma. Mike McElroy and Glen Mitchell brought two tank trucks to Citation's Healdton (Oklahoma) unit to perform that service. Mr. McElroy and Mr. Mitchell were performing Healdton's work pursuant to the MSA.*

23. Glen Mitchell's truck was a 1984 International Model S1900 bearing Serial No. LHFLDUXN8EHA 25057.*

24. Mike McElroy's truck was a 1985 International Model S1900 bearing Serial No. LHFLDTVNXFHA 21798.*

25. On October 13, 1990 and throughout the period to October 16, 1991, Glenn Mitchell and Mike McElroy each owned 10% of the corporate stock of Healdton.

26. Mike McElroy and Glenn Mitchell each received 1099 tax reports rather than W-2s for sums paid to them by Healdton during 1991.

27. Mike McElroy and Glenn Mitchell were compensated according to the rates set by the Oklahoma Corporation Commission for leased tank trucks and operators based on the work they performed under Healdton's permit.

28. On October 13, 1990 and throughout the period to October 16, 1991, Tri-State was aware of the work relationship between Healdton and Mitchell and McElroy.

29. The trucks were owned by Mitchell and McElroy, respectively, but were leased to Healdton and were operated under Healdton's Oklahoma Corporation Commission permit.*

30. Under the Healdton business auto policy and McElroy and Mitchell business auto policies, the trucks are "covered autos" for purposes of the liability coverage under the business auto policy.*

31. The tank where the fire/explosion occurred was owned and operated by Citation.

32. Mitchell and McElroy had cleaned this tank before when it was owned by Arco. However, October 16, 1991 was the first time they had cleaned the tank for Citation.

33. When Mitchell and McElroy had cleaned the tank for Arco, an Arco representative had been on-site to supervise their work.

34. When Mitchell and McElroy cleaned tanks for other companies, it was customary for the companies to have a company representative on-site to supervise the cleaning. However,

occasionally no company representative would appear.

35. Many companies like Citation use gas sniffers in their supervisory work to identify when excess gas is at the site. Most tank truck companies do not have their own gas sniffers.

36. Citation did not have a company representative on-site to supervise Healdton's work as is customary in the industry.

37. The tank where the fire/explosion occurred was used for gathering, storing, and transporting oil, salt water, and fresh water.*

38. Mr. McElroy's truck was parked within 26 inches of Mr. Mitchell's truck.*

39. Both trucks had their engines running before the fire ignited.*

40. McElroy was not an employee of Citation (nor of Healdton).*

41. Mitchell was not an employee of Healdton nor Citation.

42. McElroy and Mitchell were Healdton's subcontractor, not Healdton's employees.

43. McElroy was an owner/operator contracting with Healdton in a written lease agreement to provide a truck and operator, as was Mitchell (Ex. 75)

44. On October 16, 1991, Mike McElroy was burned in a fire on Citation's premises near Healdton, Oklahoma.*

45. Ignition of vapors occurred while McElroy's and Mitchell's trucks were parked next to the Citation tank.

46. Both trucks were parked too close to the tank and had

their engines running before the fire ignited. Mitchell's truck had just commenced the tank cleaning operation by vacuuming residue from the bottom of the tank.

47. McElroy's truck was running but he had not yet started his water pump to inject water into the tank following the vacuuming.

48. As Mitchell was standing by his truck he concluded there was an excess accumulation of fumes and vapors presenting a possible fire hazard with the running truck engines. He advised McElroy he was going to move his (Mitchell's) truck.

49. Mr. Glen Mitchell ("Mitchell") saw ignition first occur by the front of McElroy's truck.

50. The only expert testimony as to causation was that fumes escaped and/or were drawn from the tank by the vacuum pump of the Mitchell vehicle, which were ignited by McElroy's running truck engine.

51. Gas vapors escaped from the tank through the manhole Mitchell and McElroy opened in order to clean out the residue in the bottom of the tank.

52. The gas vapors caught fire between the two trucks, burning Mike McElroy severely.

53. The fire that caused Mr. McElroy's bodily injury resulted from the use of his and/or Mitchell's truck.

54. Fumes which passed through the Mitchell tank increased the flammable vapors available at the McElroy truck for ignition.

55. Tri-State received timely notice of the loss.*

56. On July 24, 1992, McElroy and his wife filed suit against Citation in the United States District Court for the Western District of Oklahoma, Case No. 92-1369-W.*

57. In the McElroy litigation McElroy accused Citation of negligence in its general supervision of Healdton's work on October 16, 1991, and of negligence in failing to isolate the tank.*

58. An adjoining tank was still connected to the tank being cleaned, thus permitting a continuous flow of vapors.

59. Citation demanded indemnity from Healdton.*

60. Healdton presented the demand for indemnity to its insurer, Tri-State.*

61. Citation presented the McElroy claim to Tri-State under both the commercial general liability and business auto policies.*

62. Tri-State paid half of the cost of defense of the McElroy litigation against Citation.*

63. Tri-State paid half the cost of Citation's defense in the McElroy litigation subject to a reservation of rights under the Healdton BAP only.

64. Tri-State did not reserve any rights under the Healdton CGL to Citation in writing.

65. Tri-State agreed that \$2.75 million was a reasonable settlement for resolving the McElroy litigation but refused to pay the \$1 million of the business auto policy or any of the \$1 million limits of the commercial general policy towards settlement of the McElroy litigation.*

66. At the McElroy settlement conference Tri-State offered to

contribute \$500,000 to the settlement in exchange for a complete release.*

67. By the settlement Citation became legally obligated to pay the \$2.75 million as damages for Mike McElroy's bodily injury.*

68. Federal, Citation's own insurer, paid \$2.75 million to settle the McElroy litigation on behalf of Citation.*

69. Tri-State did not concede coverage of its CGL policy to Healdton and/or Citation herein at anytime before trial in this matter. Mid-trial same was conceded by Tri-State's witness, Vice President Robert Fagerburg.

70. Ken Webster was the Plaintiffs' attorney in the McElroy litigation.*

71. F. Thomas Cordell, Jr., was Citation's attorney in the McElroy litigation.*

72. None of the settlement documents in the McElroy litigation extinguished the tort liability of either Tri-State or Healdton.*

73. It has been stipulated between the parties that neither Healdton Tank Truck Service nor Tri-State Insurance Company were released in the settlement documents in the McElroy litigation.

74. Witnesses deposed concerning the cause of ignition included: Bernard Harold Waychoff, Jr., designated as an expert by McElroy and Darby Gray, designated as an expert by Citation.*

75. Witness Waychoff did not qualify as an expert concerning cause and origin of the subject fire and explosion.

76. Tri-State has refused to pay the limits of the business

auto and commercial general liability policies.*

77. Federal issued a general liability policy to Citation, Policy Number 35171390, effective on October 16, 1991, with coverage of up to \$1 million.*

78. Federal issued a commercial umbrella liability insurance policy to Citation, Policy Number 7966-2599, effective on October 16, 1991, with coverage of up to \$10 million.*

79. Federal issued a business auto policy to Citation, Policy Number BAP-92-7306-27-08 with coverage of up to \$1 million.*

80. Federal issued a business auto policy to Citation, Policy Number FAP-92-7310-62-91 with coverage of up to \$1 million.*

81. Federal disclosed the existence of Citation's business auto policy BAP-92-7306-27-08 on the 4th day of January, 1994, in its document production to Tri-State. Citation's business auto policy BAP-92-7310-62-91 was disclosed on January 5, 1994, and a copy was furnished to Tri-State on January 13, 1994.*

82. Citation paid the \$2.75 million under these policies: Federal general liability policy issued to Citation, Policy Number 35171390, effective on October 16, 1991, with coverage of up to \$1 million; Federal commercial umbrella liability insurance policy to Citation, Policy Number 7966-2599, effective on October 16, 1991, with coverage of up to \$10 million.

83. Any Conclusion of Law included below that is more appropriately a Finding of Fact is so found.

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. Tri-State's commercial general liability policy insures Healdton's liability to indemnify Citation to \$1,000,000, and insures Citation as an additional insured to indemnify Citation to \$1,000,000 regarding the Master Service Agreement (MSA) tank cleaning contract. (Ex. 7)

4. The Tri-State business auto policy of Healdton insures Healdton's liability to indemnify Citation to \$1,000,000 regarding vehicles used in performing the Master Service Agreement. (Ex.7)

5. Healdton was obligated to indemnify Citation for the subject McElroy personal injury claim pursuant to the MSA.

6. The commercial general liability policy issued by Tri-State to Healdton covers the McElroy settlement because that liability arose out of Citation's negligence in its general supervision of Healdton's work, including Citation's failure to isolate the tank in question.

7. McElroy's injuries jointly arose out of Healdton's work under the MSA and out of Citation's alleged negligence in supervising or failing to supervise Healdton's work.

8. The Master Service Agreement is an "insured contract" for purposes of the two Tri-State Healdton policies (BAP AND CGL).

9 The Tri-State Healdton policies (CGL and BAP) were issued to comply with the Master Service Agreement which required them to be primary insurance.

10. By contract and because of the insured promise to

indemnify, and Citation being an additional named insured, both of Healdton's Tri-State policies are primary coverage. (CGL and BAP)

11. The MSA is an "insured contract" for purposes of Tri-State's CGL and BAP policies to Healdton.

12. The Tri-State policies (CGL and BAP) provide total primary coverage of \$2,000,000 for this loss.

13. The Federal commercial general liability policy and umbrella policy are excess policies to the two Tri-State Healdton policies (CGL and BAP). The Federal auto policies do not apply because Citation vehicles were not involved.

14. Federal is entitled to recover the amount of \$2,000,000 from Tri-State.

15. Citation's, Federal's and Healdton's entitlement to attorneys' fees from Tri-State, if any, shall be determined postjudgment in accordance with Rule 54(d)(2) of the Federal Rules of Civil Procedure and Local Rule 54.2.

16. Healdton breached the Master Service Agreement by not indemnifying Citation on the McElroy litigation.

17. The Tri-State business auto policies of McElroy and Mitchell do not provide coverage herein to Citation because Citation is not an additional named insured in said policies. Further, McElroy's BAP was not intended to provide coverage to him for his injuries because it is a liability policy to provide McElroy coverage for claims of injured third parties. It is not first party insurance

18. The fire and explosion resulted in part from the use of

the McElroy truck.

19. Mr. Mike McElroy ("McElroy")'s injuries occurred while he was performing Healdton Tank Truck Service, Inc. ("Healdton")'s obligations under the Healdton/Citation Oil and Gas Corporation ("Citation") Master Service Agreement ("MSA").

20. The claims which Federal paid for Citation arose in part from the use of McElroy's vehicle.

21. The trucks are not "mobile equipment" within the definition in the Tri-State policies.

22. The Court will defer entry of Judgment herein until the conclusion of the remaining issues. The matters of costs, pre-judgment interest, post-judgment interest and attorneys fees will be addressed at or after the entry of Judgment.

The parties will comport with the following schedule regarding the remaining bifurcated issues of alleged breach of contract, alleged bad faith, compensatory damages and punitive damages:

(March 1, 1996)	COMPLETE ALL DISCOVERY
(February 16, 1996)	EXCHANGE THE NAMES AND ADDRESSES OF ALL WITNESSES, INCLUDING EXPERTS, IN WRITING, ALONG WITH A BRIEF STATEMENT REGARDING EACH WITNESS' EXPECTED TESTIMONY (NOT NECESSARY IF WITNESS' DEPOSITION TAKEN)
(March 15, 1996)	DEADLINE FOR FILING DISPOSITIVE MOTIONS
(March 29, 1996)	RESPONSES TO DISPOSITIVE MOTIONS DUE
(April 8, 1996)	REPLIES TO RESPONSES TO DISPOSITIVE MOTIONS DUE

(April 12, 1996)

PRE-TRIAL CONFERENCE AND
HEARING ON PENDING MOTIONS AT
1:30 p.m..

(May 6, 1996)

FILE AN AGREED PRETRIAL ORDER
AND EXCHANGE ALL PRENUMBERED
EXHIBITS

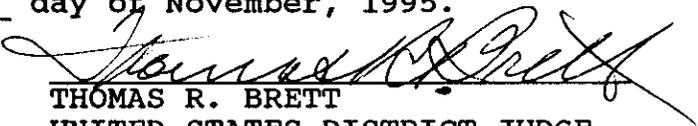
(May 13, 1996)

FILE REQUESTED VOIR DIRE,
REQUESTED INSTRUCTIONS AND ANY
TRIAL BRIEFS

(May 20, 1996)

JURY TRIAL AT 9:30 A.M.

IT IS SO ORDERED this 28th day of November, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
NORA MARIE ALVARADO aka Nora)
Spencer aka Nora M. Alvarado; STATE)
OF OKLAHOMA, ex rel. OKLAHOMA)
TAX COMMISSION; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE 11-28-95

FILED

NOV 24 1995

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

Civil Case No. 95-C 549H ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd 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; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears not having previously filed a Disclaimer; and the Defendant, NORA MARIE ALVARADO aka Nora Spencer aka Nora M. Alvarado, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on June 19, 1995, by Certified Mail.

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The Court further finds that the Defendant, NORA MARIE ALVARADO aka Nora Spencer aka Nora M. Alvarado, 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 7, 1995, and continuing through October 12, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, NORA MARIE ALVARADO aka Nora Spencer aka Nora M. Alvarado, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, NORA MARIE ALVARADO aka Nora Spencer aka Nora M. Alvarado. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on June 27, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Disclaimer on July 12, 1995; and that the Defendant, NORA MARIE ALVARADO aka Nora Spencer aka Nora M. Spencer, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, NORA MARIE ALVARADO, is one and the same person as Nora Spencer and Nora M. Alvarado, and will hereinafter be referred to as "NORA MARIE ALVARADO." The Defendant, NORA MARIE ALVARADO, is a single unmarried person.

The Court further finds that on September 17, 1990, Nora M. Alvarado aka Nora Spencer, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Norther District of Oklahoma, Case No. 90-B-2724 C. On January 11, 1991, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on April 3, 1991.

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 Five (5), BOMAN ACRES ADDITION,
a Subdivision to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on March 16, 1990, Ovidio Alvarado, executed and delivered to COMMERCIAL BANK & TRUST CO. OF TULSA, his mortgage note in

the amount of \$41,904.00, payable in monthly installments, with interest thereon at the rate of Eight and Forty-Seven Hundredths percent (8.470%) per annum.

The Court further finds that as security for the payment of the above-described note, Ovidio Alvarado, a single person, executed and delivered to COMMERCIAL BANK & TRUST CO. OF TULSA, a mortgage dated March 16, 1990, covering the above-described property. Said mortgage was recorded on March 20, 1990, in Book 5242, Page 514, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 31, 1990, COMMERCIAL BANK & TRUST CO. OF TULSA, assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corp. This Assignment of Mortgage was recorded on August 1, 1990, in Book 5268, Page 488, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1991, BancOklahoma Mortgage Corp., 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 May 2, 1991, in Book 5319, Page 3, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendant, NORA MARIE ALVARADO, currently holds the title to the property by virtue of a Divorce Decree Filed on December 5, 1990, in Tulsa County, Oklahoma. The Defendant, NORA MARIE ALVARADO, is the current assumptor of the subject indebtedness.

The Court further finds that on May 1, 1991, the Defendant, NORA MARIE ALVARADO, 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 August 1, 1992, November 1, 1992, and March 1, 1993.

The Court further finds that the Defendant, NORA MARIE ALVARADO, 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, NORA MARIE ALVARADO, is indebted to the Plaintiff in the principal sum of \$57,855.68, plus interest at the rate of 8.470 percent per annum from May 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 \$19.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that 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, NORA MARIE ALVARADO, in the principal sum of \$57,855.68, plus interest at the rate of 8.470 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of ~~8.470~~ ^{5.45} 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, County, Oklahoma, have and recover judgment in the amount of \$19.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION and NORA MARIE ALVARADO, 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, NORA MARIE ALVARADO, 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 \$19.00, personal property taxes which are currently due and owing.

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

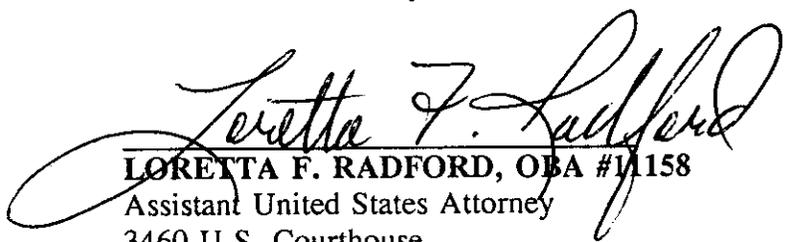
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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 549H

LFR:flv

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

FILED
NOV 27 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GILFORD RAY ESCUE, PRO SE)
)
 Plaintiff,)
)
 vs.)
)
 THE GOVERNMENT OF)
 THE UNITED STATES,)
)
 Defendant.)

Case No. 95-C-450-B

ENTERED ON DOCKET

DATE NOV 28 1995

O R D E R

This matter comes on for consideration of the Defendant's Motion To Dismiss on the grounds that service was not perfected upon Defendant within the required 120 days as provided in Federal Rules of Civil Procedure, Rule 4(m).

The Complaint was filed herein on May 16, 1995. Service of summons was not made until September 20, 1995. Rule 4(m) provides that a plaintiff may show good cause for failure to perfect service within the required time. Plaintiff's responses is essentially that he was busy pursuing in Forma Pauperis status, which was denied by the Court by Order dated and filed August 23, 1995.

Plaintiff proceeds pro se and the Court has traditionally extended liberal treatment to the pleadings of pro se litigants. On the other hand such status does not allow one to re-write the rules to suit the litigant.

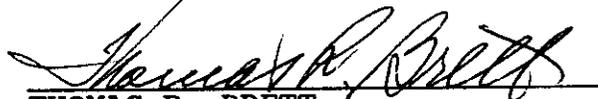
In this action Plaintiff seeks \$250 million dollars damages from the Government because, he alleges, it encouraged him to begin smoking some 40 years ago to counteract the virus disease herpes simplex which Plaintiff contracted through no fault of his own

while serving in the U.S. Air Force. Plaintiff alleges that as a result of smoking he has "advanced, incurable COPD", resulting in complete disability.

While the Court is not prejudging Plaintiff's claim, and is in fact dismissing the action without prejudice to the bringing of a subsequent action, the Court suggests Plaintiff may be better served with an attorney of his own hiring or assistance through some form of legal services agency. In the Court's experience this type of case frequently fails because a claimant has not pursued in a timely fashion administrative remedies, if available.

The Court concludes Plaintiff's case should be and is hereby DISMISSED WITHOUT PREJUDICE.

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


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 27 1995

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

STATE FARM FIRE AND CASUALTY
COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 BUILDING SYSTEMS OF TULSA,)
 INC.,)
)
 Defendant,)
)
 v.)
)
 U-HAUL COMPANY OF OKLAHOMA,)
 INC.,)
)
 Third-Party Defendant.)

Case No. 95-C 187B

ENTERED ON DOCKET

DATE NOV 28 1995

ORDER

NOW on this 24 day of Nov., 1995, comes for consideration the Plaintiff State Farm Fire and Casualty Company to Dismiss without prejudice all of its claims against Third Party Defendant U-Haul Company of Oklahoma, Inc. Having examined the pleadings, the Court hereby grants Plaintiff State Farm Fire and Casualty Company's request to Dismiss without prejudice all of its claims against Third Party Defendant U-Haul Company of Oklahoma.

Dated this 24 day of Nov., 1995

S/ THOMAS R. BRETT

HONORABLE THOMAS R. BRETT, DISTRICT JUDGE

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

RONALD D. GUINN,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN NATIONAL CAN CO.,)
 d/b/a LIBERTY GLASS CO.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE NOV 28 1995

No. 95-C-838-K

FILED

NOV 27 1995

JUDGMENT DISMISSING ACTION

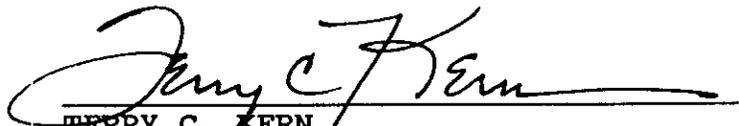
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Plaintiff Ronald D. Guinn and Defendant American National Can Company have informed this Court that they have resolved their issues and wish the case be dismissed with prejudice as to any further action, each side bearing their own costs and attorneys' fees. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the action be dismissed with prejudice as to both defendants, American National Can Company and Liberty Glass Company, and that each side bear its own costs and attorneys' fees.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

ORDERED this 22 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ARLENE BROWN-McLEMORE,)

Plaintiff,)

vs.)

STANLEY GLANZ, individually)
and in his official capacity)
as Sheriff of Tulsa County,)
Oklahoma; and)

CORRECTIONAL MEDICAL SYSTEMS,)
INC., a corporation; and)
AN UNKNOWN NUMBER OF DOES,)
individually, and in their)
capacity as jailers and)
custodians of the inmates)
of Tulsa County Jail,)

Defendants.)

No. 93-CV-1116 H

FILED

NOV 24 1995

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

ORDER DISMISSING CLAIMS OF PLAINTIFF
AGAINST JOHN W. TIPTON, M.D. WITH PREJUDICE

This matter came before the Court on the joint motion of plaintiff Dolores Hardeman as Personal Representative of the Estate of Arlene Brown-McLemore and defendant John W. Tipton, M.D. to dismiss with prejudice the claims of plaintiff against defendant Tipton set forth in plaintiff's amended complaint filed herein on August 23, 1995.

The Court finds that, for good cause shown, the joint motion of plaintiff and defendant Tipton for order dismissing claims with prejudice should be, and hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the claims of plaintiff against defendant John W. Tipton, M.D. as set forth in plaintiff's amended complaint filed on August 23, 1995 are dismissed with prejudice as to defendant Tipton only.

IT IS SO ORDERED this 21st day of November, 1995.

s/ SVEN ERICK HOLMES

THE HONORABLE SVEN ERICK HOLMES,
UNITED STATES JUDGE

Pursuant to the Memorandum of Understanding and the Addendum thereto executed by all parties in this action, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Michael B. Fine shall be dismissed without prejudice in this action.

IT IS SO ORDERED.

DATED: *November 21, 1995*

S/ SVEN ERIK HOLMES

THE HONORABLE SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

A CERTIFIED TRUE COPY

OCT 10

JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

FILED

NOV 27 1995

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

DOCKET NO. 875

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Sept. 21, 1995

PATRICIA D. HOWARD
CLERK OF THE PANEL

95-0-803 K

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

RECEIVED

OCT 17 1995

ENTERED ON DOCKET (SEE ATTACHED SCHEDULE CTO-79)

DATE NOV 27 1995

CONDITIONAL TRANSFER ORDER

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

On July 29, 1991, the Panel transferred 27,696 civil actions to the United States District Court for the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 27,620 additional actions have been transferred to the Eastern District of Pennsylvania. With the consent of that court, all such actions have been assigned to the Honorable Charles R. Weiner.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Eastern District of Pennsylvania and assigned to Judge Weiner.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Eastern District of Pennsylvania for the reasons stated in the opinion and order of July 29, 1991, 771 F.Supp. 415, as corrected on October 1, 1991, October 18, 1991, November 22, 1991, December 9, 1991, January 16, 1992, and March 5, 1992, with the consent of that court, assigned to the Honorable Charles R. Weiner.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

OCT 10 1995

Patricia D. Howard
Clerk of the Panel

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A TRUE COPY CERTIFIED TO FROM THE RECORD

DATED: 10/13/95

ATTEST: DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

FILED

NOV 22 1995

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

MAX D. BIRD, D.D.S.,)
)
 Plaintiff,)
)
 vs.)
)
 ST. PAUL FIRE AND MARINE)
 INSURANCE COMPANY, a)
 Minnesota Corporation,)
)
 Defendant and Third-)
 Party Plaintiff,)
)
 vs.)
)
 JESSICA GILMORE,)
)
 Third-Party Defendant.)

CASE NO. 94-C-609-B

ENTERED ON DOCKET
DATE NOV 24 1995

ORDER RULING ON DEFENDANT'S
MOTION FOR RECONSIDERATION
AND DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ON THE BAD FAITH AND
PUNITIVE DAMAGES ISSUES

This matter comes on for consideration of Defendant St. Paul Fire and Marine Insurance Company's (St. Paul) Motion To Reconsider The Order Dated September 13, 1995, (docket # 34) denying St. Paul's motion for partial summary judgment. Also for consideration is St. Paul's Motion For Summary Judgment (docket # 35) on the issue of bad faith breach of contract and punitive damages.

As set forth in that order the history of this case is as follows:

On May 3, 1993, Jessica Gilmore, filed a personal injury action (Jessica Gilmore vs. Max D. Bird, D.D.S., Case No. CJ-93-02030, in the District Court of Tulsa County, State of Oklahoma)

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against Dr. Max D. Bird, dentist, alleging that on July 29, 1992, while a patient of Dr. Bird, he intentionally committed a sexual battery, by fondling, upon her and she sought actual and punitive damages in excess of \$10,000.00. Dr. Bird made demand upon his professional liability carrier, the Defendant herein, St. Paul Fire and Marine Insurance Company, to defend and indemnify him in reference to Jessica Gilmore's state court action. St. Paul Fire and Marine Insurance Company initially undertook defense of the state court action on behalf of Dr. Bird under a reservation of rights, and then subsequently withdrew the defense on the theory the subject insurance policy, and Oklahoma public policy, afforded no coverage for such alleged sexual battery.

Dr. Bird employed private counsel and incurred significant attorney's fees in defense of the state court action. Dr. Bird denied the alleged sexual battery and asserted throughout that the allegations were false and groundless. St. Paul Fire and Marine Insurance Company's counsel, Ronald D. Wood, following an investigation advised St. Paul, "It is my opinion, based upon the investigation conducted so far, that Dr. Bird is probably innocent of any wrongdoing in regard to Jessica Gilmore."

Dr. Bird then filed this action seeking actual and punitive damages from St. Paul Fire and Marine Insurance Company for alleged tortious bad faith refusal to defend and indemnify him regarding Jessica Gilmore's state court action. St. Paul, as defendant herein, filed a counterclaim against Dr. Bird and a third-party claim against Jessica Gilmore seeking a declaration that it had no

duty to defend or indemnify in the state court action. While the instant matter was pending, Jessica Gilmore dismissed her state court action without prejudice.

In their earlier pleadings both Dr. Bird and St. Paul agree that as originally alleged in the state court petition of Jessica Gilmore, St. Paul has no obligation to indemnify Dr. Bird if it were ultimately determined in the state court action that Dr. Bird committed a sexual battery upon his dental patient, Jessica Gilmore. The Court concluded that, notwithstanding the possibility of a court verdict that Dr. Bird was guilty of a sexual battery (if such verdict occurred) St. Paul was obligated to defend Dr. Bird as to such charge.

The issue now before the court posed by St. Paul's motion to reconsider is whether an insurance company, under a professional liability policy, is obligated to defend an insured against alleged false charges which, if true, would not be covered under the policy. This, of course, is essentially the same issue as previously addressed by the Court.

St. Paul cites Foutty v. Equifax Services, Inc., 764 F.Supp. 621 (D.Kan.1991) for the proposition that a motion to reconsider is appropriate when the Court has misapprehended a party's position, the facts or the law. In the Court's view it has neither misapprehended St. Paul's position, nor the facts, nor the law. The Court concludes that St. Paul's motion to reconsider should be and is denied. Also, the Court concludes that St. Paul's alternative motion for an order allowing an interlocutory appeal should be and

is denied.

ST. PAUL'S MOTION FOR SUMMARY
JUDGMENT ON THE BAD FAITH ISSUE

In its Order of September 13, 1995, denying St. Paul's motion for partial summary judgment, the Court directed the parties to file pleadings addressing the bad faith issue. St. Paul's Statement Of Undisputed Material Facts are set forth herein, which will be adopted by the Court for the purposes of this motion.¹

1. On May 3, 1993, Jessica Gilmore filed a sexual battery lawsuit against Max D. Bird, D.D.S., Case No. CJ-93-2030, Tulsa County, Oklahoma, wherein Jessica alleges that on July 29, 1992, while at the dental office of Dr. Bird for examination and treatment and under the influence of gas, that Dr. Bird began touching and fondling the Plaintiff, and made other unwanted and offensive sexual advances towards her. Jessica Gilmore further alleges in that lawsuit that the sexual advances were not welcomed nor invited, and that the acts of Dr. Bird constituted sexual battery upon Jessica Gilmore.

2. This claim of Jessica Gilmore was initially presented before the lawsuit was filed through her attorney, Mr. Charles Richardson, by letter dated August 18, 1992.

3. At the time of the alleged occurrence on July 29, 1992, Dr. Bird was insured with St. Paul under a professional liability insurance policy, Policy No. EM06615017.

¹ In his response brief Plaintiff failed to recite "a concise statement of material facts as to which the party contends a genuine issue exists" as required by Local Rule 56.1 (B).

4. Dr. Bird turned the claim over to St. Paul and requested that it be defended and investigated. St. Paul agreed to do so under a reservation of rights agreement, signed by Dr. Bird.

5. St. Paul retained Gallmeier & Associates to investigate the claim, and on October 16, 1992, took a recorded statement from Jessica Gilmore. In that statement, she stated that on July 29, 1992, she went to the offices of Dr. Bird for dental treatment. Dr. Bird recommended a tooth extraction and she agreed. She further stated that she was given nitrous oxide and, while alone with Dr. Bird, her next sensation was a cupped palm proceeding slowly down her right breast with an upward stroke.

6. During the course of the investigation, St. Paul was advised that Dr. Bird had previously been criminally charged with a similar allegation of sexual assault and battery, Case No. CM 89-1347, Tulsa County, Oklahoma. The complainant, Jamie Geiger, was a 16-year-old trainee observing Dr. Bird's dental practice. While alone in the offices, Dr. Bird assaulted her by cupping both her breasts with his bare hands, sticking money down her top and under her bra, touching her bare breasts, attempting to kiss her, and pressing her against the wall. That Dr. Bird also came up behind her and stuck his hand down the back of her shorts, all without permission. As a result of that charge, Dr. Bird pled "no contest", received 2 years probation, 160 hours of community service, and 4 years probation from the Board of Governors of Registered Dentists where he admitted to the physical assault of Jamie Geiger.

7. From the beginning, Dr. Bird has denied the claims of

Jessica Gilmore.

8. On February 25, 1993, after a full and complete investigation by St. Paul, the decision was made to deny liability to Jessica Gilmore.

9. A lawsuit was filed by Gilmore on May 3, 1993, and only one claim was made: sexual battery.

10. Dr. Bird referred the Petition to St. Paul for defense, and St. Paul agreed to undertake a defense, subject to a full reservation of rights, and retained Mr. Ronald Wood to defend the lawsuit.

11. On October 14, 1993, St. Paul obtained a legal opinion from attorney Bethany Culp to the effect that a sexual battery does not constitute a professional service and, thus, is not covered under a professional liability insurance policy.

12. On October 18, 1993, St. Paul advised Dr. Bird that the claim of sexual battery is not a professional service and, thus, is not a covered claim under the insurance policy, and that St. Paul had no duty to defend or indemnify the sexual battery lawsuit of Gilmore.

13. On October 27, 1993, St. Paul advised Ronald Wood that the defense was being withdrawn, allowing Dr. Bird 30 days to make a decision regarding defense counsel [legal expenses would be paid until November 24, 1993].

14. On November 24, 1993, the time period for Dr. Bird to retain defense counsel was extended to December 10, 1993. St. Paul assumed responsibility of all defense costs through December 10,

1993.

15. Dr. Bird retained Ronald Wood to continue the representation of Dr. Bird in connection with the Jessica Gilmore lawsuit, and was pleased and satisfied with the representation by Mr. wood to the conclusion of the case.

16. On July 20, 1995, Jessica Gilmore dismissed without prejudice her sexual battery lawsuit.

17. Dr. Bird has admitted in this proceeding that St. Paul owes him no obligation of indemnity under the professional liability insurance policy for the allegations of Jessica Gilmore in connection with the sexual battery lawsuit.

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).

In the Court's view the issue of St. Paul's obligation to defend, under the facts herein, is indeed a close question. It is further apparent to the Court that close questions of coverage as to duty to defend and/or indemnify often form the basis for an insurer's good faith refusal to either defend or indemnify. The seminal case, Christian v. American Home Assurance Co., 577 P.2d 899 (Okla.1978), teaches that bad faith is not present where a legitimate dispute arises between an insurer and its insured.

"We recognize that there can be disagreements between insurer and insured on a variety of matters such as insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to

a judicial form is not *per se* bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured."

See, also Manis v. Hartford Fire Ins. Co., 681 P.2d 760 (Okla.1984); McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583 (Okla.1981)

In its Order of September 13, 1995, the Court drew attention to the recent case of Willis v. Midland Risk Ins. Co., 42 F.3d 607 (10th Cir.1994). In that case the Tenth Circuit alluded to two factors in determining whether an inference of bad faith is permissible: (1) reasonableness of the insurer's actions in light of the law applicable to the claim at the time of denial; and (2) the facts the insurer knew or should have known at the time it was requested to perform its contractual obligations.

Applying the Willis rationale to the present record the Court has no hesitation in viewing St. Paul's refusal to continue providing a defense to Dr. Bird as reasonable under the circumstances. The Court concludes St. Paul's motion as to this issue should be and is granted.

The Court's decision herein subsumes St. Paul's second issue on summary judgment, i.e. even if St. Paul did, in bad faith, breach its contractual duty to defend Dr. Bird, such claim must be supported by some proof that an insurer is guilty of oppression, fraud, malice or gross negligence in its conduct towards the insured. McLaughlin v. National Benefit Life Ins. Co., 772 P.2d 383 (Okla.1989); Willis v. Midland, *supra*, at 615.

The Court concludes that, assuming *arguendo* St. Paul has breached its contract of insurance with Dr. Bird by withdrawing from his defense, the facts herein do not support a claim for punitive damages. Norman's Heritage Real Estate Co. v. Aetna Casualty & Surety Co., 727 F.2d 911 (10th Cir.1984). In that regard St. Paul's motion for summary judgment on that issue should be and is sustained.

SUMMARY

In summary, the Court DENIES St. Paul's Motion To Reconsider The Order Dated September 13, 1995, or in the Alternative, Motion For Order Stating An Interlocutory Appeal Is Appropriate; GRANTS St. Paul's Motion For Summary Judgment on the issue of bad faith breach of its insurance contract and GRANTS St. Paul's Motion For Summary Judgment on the issue of failure to support a claim for punitive damages.

IT IS SO ORDERED this 22nd 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
NOV 24 1995
DATE _____

FLOSSIE M. SCHROEDER,)
SS# 447-36-2876)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration)
Defendant.)

NO. 93-C-984-M

FILED

NOV 22 1995

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

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 22nd day
of Nov., 1995.

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

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

ENTERED ON DOCKET
DATE NOV 24 1995

FRANCISCO FRANCO,)
SS# 407-86-4105,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration,)
Defendant.)

486
NO. 94-C-4105-M

FILED

NOV 22 1995

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

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated this 22nd day
of Nov., 1995.

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

9

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

FILED

NOV 21 1995

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

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

Case No. 94-C-641-H ✓

FILED ON DOCKET
11-22-95

O R D E R

This matter comes before the Court on the Motion of Plaintiff Aysel D. Ozturk objecting to the Court's Order and Judgment of November 8, 1995 and requesting the recusal of United States District Judge Holmes. The Court construes the first part of Plaintiff's Motion as a Motion to modify or vacate the Court's Order and Judgment of November 8, 1995.

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

In the instant motion, Plaintiff has also moved to recuse United States District Judge Holmes from her case. She states that, "[i]t is painfully apperant [sic] to this Plaintiff that this Court's actions show bias and prejudice towards this Plaintiff and favoritism towards Defendants in this case." However, she does not offer any evidence, anecdotal or otherwise, which would support her

broad statement. The federal recusal statute provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455. Plaintiff appears to question the impartiality of Judge Holmes simply because he has ruled against her on various motions. This alone does not provide a rational basis for questioning his impartiality.

Plaintiff's Motion (Docket # 42) is hereby denied.

IT IS SO ORDERED.

This 20TH day of NOVEMBER 1995.



Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

DATE 11-22-95

GARY LADD,)
)
Plaintiff,)
)
v.)
)
SERTOMA HANDICAPPED)
OPPORTUNITY PROGRAM, INC.,)
an Oklahoma corporation, and)
CLARENCE CAGLE,)
)
Defendants.)

Case No. 95-C-499-H ✓

FILED

NOV 21 1995

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

O R D E R

This matter comes before the Court on Defendants' motion to dismiss (Docket #2).

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the court must accept as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

At the time of the incidents giving rise to this complaint, Plaintiff Gary Ladd was an employee of Defendant Sertoma Handicapped Opportunity Program, Inc. ("Sertoma"). Mr. Ladd claims that in the course of his employment he was subjected to unwelcome sexual advances by his male supervisor, Defendant Clarence Cagle. Mr. Ladd filed this action, asserting a claim under Title VII, 42 U.S.C. § 2000e et seq., and state law claims for intentional infliction of emotional distress and constructive discharge.

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Defendants allege that Mr. Ladd's claims of same-gender sexual harassment against his male supervisor are not actionable under Title VII. In support of this position, Defendants rely upon Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994). Although Garcia does support Defendants' proposition, the Court concludes that the position of the Fifth Circuit is without merit.

The Supreme Court has interpreted Title VII to prohibit sexual harassment in the workplace. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); see Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). In Vinson, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile and abusive working environment." Id. at 66 (emphasis added). The Supreme Court also noted that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" Id. at 68.

Neither the Supreme Court nor the Tenth Circuit has construed "based on sex" to mean "based on Plaintiff's status as a member of the opposite sex." The Court finds that the plain language of Title VII dictates the inclusion of all harassment in which the victim's sex is a factor, whether the victim's gender is the same as or different from that of the alleged harasser. Clearly, "sexual advances can be 'unwelcome' regardless of the harasser's gender." McCoy v. Johnson Controls World Servs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995).

This position is supported by the EEOC's Compliance Manual,

which states:

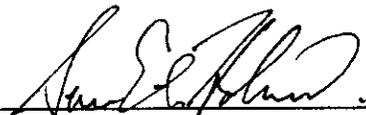
The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

EEOC Compliance Manual (CCH) § 615-2(b)(3). Although not binding on this Court, the EEOC's position on a subject squarely within its field of expertise is significant.

The Court therefore holds that Mr. Ladd has stated a cognizable Title VII claim of same-sex sexual harassment. Accordingly, Defendants' motion to dismiss (Docket #2) is hereby denied.

IT IS SO ORDERED.

This 20TH 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 21 1995

sa

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

GREAT ENTERTAINMENT)
MERCHANDISE, INC.,)
)
Plaintiff,)
)
v.)
)
PHYLLIS C. STUCK, MAGIC)
FASHIONS & SCREEN PRINT,)
INC., and TONY CATERINE,)
)
Defendants.)

Case No. 94-C-44-H ✓

ENTERED ON DOCKET
DATE 11-22-95

O R D E R

This matter comes before the Court on Plaintiff's motion for summary judgment as to liability against Defendants Phyllis S. Stuck and Magic Fashions & Screen Print, Inc. ("Magic Fashions") (Docket #56).

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

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

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477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

Plaintiff filed its motion for summary judgment on September

22, 1995. Defendants have not filed a response to the motion. Therefore, pursuant to Local Rule 7.1(c), the matter is deemed confessed. Based on Plaintiff's failure to respond and thus to controvert the facts set out in Defendant's motion, the Court finds that summary judgment against Defendants Stuck and Magic Fashions on the liability issue is proper.

The Court further concludes that the following facts are undisputed:

1. that Plaintiff has standing to maintain all of its claims as the exclusive licensee of Billy Ray Cyrus;
2. that the shirts bearing the Billy Ray Cyrus likeness that were sold by Defendants were unauthorized products;
3. that the Billy Ray Cyrus likeness has established a secondary meaning;
4. that the sale of the infringing Billy Ray Cyrus merchandise by Defendants will cause likelihood of confusion; and
5. that Defendants Stuck and Magic Fashions sold unauthorized merchandise bearing the Billy Ray Cyrus mark.

Because Defendants have failed to controvert the above facts, they are deemed established and are not subject to future litigation.

The Court notes that the only issues remaining to be litigated are the liability of Defendant Tony Caterine and determination of the damages owed by all Defendants.

Accordingly, Plaintiff's motion for summary judgment against Defendants Stuck and Fashion Magic on the issue of liability is

hereby granted (Docket #56).

IT IS SO ORDERED.

This 20TH day of November, 1995.



Sven Erik Holmes
United States District Judge

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

DAVE RYCROFT, d/b/a PROFESSIONAL)
PROPELLER SERVICE)

Plaintiff(s),)

vs.)

PREDATOR PROPS, INC.)

Defendant(s).)

ENTERED ON DOCKET

DATE 11-22-95

Civil No.: 95-CV-924-H ✓

F I L E D

NOV 21 1995

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

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of November 21, 1995
and the affidavit of Sam P Daniel III, that the defendant(s),
Predator Props, Inc.

against whom judgment for affirmative relief is sought in this action, ha(s)(ve) failed to plead
or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, RICHARD M. LAWRENCE, Clerk of said Court, pursuant to the requirements of
Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, OK this 21st day of November 1995.

RICHARD M. LAWRENCE,
By Mark C. McCartt
Clerk, U.S. District Court

By: S. Adam

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

F I L E D

NOV 21 1995

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

HELEN GREY TRIPPET,)
)
Plaintiff,)
)
v.)
)
CAMERON DEE SEWELL,)
)
Defendant.)

Case No. 93-C-1144-H ✓

ENTERED ON DOCKET

DATE 11-22-95

C R D E R

This matter comes before the Court on consideration of the Report and Recommendation of the United States Magistrate Judge with respect to the Motion for Partial Summary Judgment by Defendant Cameron Dee Sewell (Docket #65). Plaintiff has filed a timely motion for reconsideration of the Magistrate's Report and Recommendation (Docket #68), and Defendant has timely objected to same (Docket #69).

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

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

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v.

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Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he 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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some

metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

In the instant case, the Court finds that material issues of fact exist as to whether Defendant concealed his actions from Plaintiff. Therefore, summary judgment on Plaintiff's claims for fraud, breach of fiduciary duty, and negligence (claims 1, 2, and 6) is not appropriate. Accordingly, the Court hereby accepts the Report and Recommendation of the Magistrate Judge with respect to claims 1, 2, and 6.

The Court further finds that a question of fact exists as to whether Plaintiff was the real party in interest in connection with the purchase of Tri-Texas shares for \$64,000. Therefore, Defendant's summary judgment motion with respect to Plaintiff's first claim for breach of contract (claim 3) is denied.

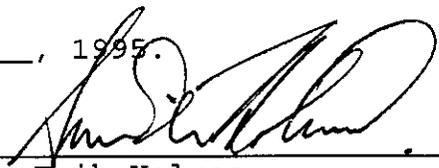
Accordingly, the Report and Recommendation of the Magistrate Judge with respect to claim 3 is hereby rejected.

Finally, the Court concludes that summary judgment is appropriate on Plaintiff's remaining breach of contract claim (claim 4). Upon review of the record and briefs of counsel, the Court finds that any alleged agreement between Plaintiff and Defendant regarding the \$40,500 repayment was oral in nature. Because the statute of limitations for breach of oral contracts in Oklahoma is three years and Plaintiff filed this action outside of that time period, claim 4 is time-barred. 12 Okla. Stat. Ann. § 95(2). Therefore, Defendant's motion for summary judgment with respect to that claim is granted, and the Report and Recommendation of the Magistrate Judge with respect to claim 4 is hereby accepted.

In conclusion, Defendant's Motion for Partial Summary Judgment (Docket #27) is granted in part and denied in part. The Report and Recommendation of the Magistrate Judge (Docket #65) is hereby accepted with respect to claims 1, 2, 4, and 6, and rejected with respect to claim 3.

IT IS SO ORDERED.

This 21st day of NOVEMBER, 1995.



Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

DATE NOV 22 1995
NOV 22 1995

FILED

NOV 21 1995

FLOSSIE M. SCHROEDER,)
SS# 447-36-2876)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner, ¹)
Social Security Administration)
Defendant.)

NO. 93-C-984-M

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

ORDER

Plaintiff, Flossie M. Schroeder, 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 examine the record. However, the court may not substitute its discretion for that of the

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 November 29, 1991 application for disability benefits was denied February 18, 1992, the denial was affirmed on reconsideration, April 30, 1992. A hearing before an Administrative Law Judge ("ALJ") was held October 28, 1992. By decision dated May 28, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 21, 1993. 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.

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.

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.

Plaintiff alleges that the record does not support the determination that she can return to her past relevant employment as a gas station cashier by substantial evidence and that the ALJ failed to perform the correct analysis. Specifically, Plaintiff claims: (1) that her former job as a gas station cashier was too distant in the past and was not performed for a long enough period to qualify as past relevant employment; (2) that the ALJ failed to consider the limiting effects of her morbid obesity; and (3) had the evaluation proceeded to step-5 of the required sequential analysis, the medical/vocational guidelines (grids) direct a finding of disabled.

The regulations state that work experience qualifies as past relevant work if it was performed in the past 15 years, lasted long enough for the person to learn to do it and was substantial gainful activity³. 20 C.F.R. §§ 404.1565(a), 416.965(a). According to Plaintiff, she worked as a gas station cashier for 4-5 months in 1978 and 1979 [R. 27-8, 89]. The hearing was held October 28, 1992, 13-14 years from her dates of employment. The vocational expert

³ Plaintiff has not disputed that her work as a gas station cashier qualifies as substantial gainful employment.

classified this work as "Cashier II," a category in the Dictionary of Occupational Titles ("DOT"), which is unskilled work [R. 44]. According to the definition trailer accompanying the description of Cashier II in the DOT, the job has a specific vocational preparation level of 2, which is defined as "Anything beyond short demonstration up to and including 1 month." See *DOT* 211.462-010, p. 183; Appendix C, p. 1009 (4th ed., revised 1991). The Court concludes there is substantial evidence in the record to support the ALJ's inclusion of Plaintiff's work as a gas station cashier as past relevant work.

Plaintiff argues that because she cannot read or write, she did not possess the skills to complete the reports required by the job. Plaintiff's brief suggests that this may be the reason for such a short duration of employment at the gas station and that it would be reasonable to infer that her illiteracy contributed to her inability to retain that employment. The Court notes that Plaintiff was represented by the same counsel at the administrative hearing who now urges the Court to accept this "inference" and that counsel made no effort to establish this alleged "inference" as the factual basis for the short duration of Plaintiff's employment at the gas station. Despite the ALJ's duty to develop the factual record, the Court notes that Plaintiff bore the burden of proof at this point. Plaintiff's attorney should not sit silently by during the development of the factual record and then assert on appeal speculative factual inferences as a basis of reversal when the concrete facts could have been established by Plaintiff's testimony at the hearing.

There is certainly nothing in the record to establish that Plaintiff's employment was terminated because of an inability to complete the reports required. In fact, Plaintiff testified that she can read some and that she can do arithmetic [R. 25]. The reports she prepared

consisted of recording numbers from the gas pumps and cash register which she was taught to do [R. 27-8]. In addition, Plaintiff testified that if the service station job was available she could do it, "If I was moving all the time, you know, I'd go, could go sit down for a little while at a time," which was how she performed the job when she had it [R. 37]. Under the relevant regulations, 20 C.F.R. §§ 404.1520(e) and 416.920(e), a claimant will be found to be "not disabled" when it is determined that he or she retains the residual functional capacity to perform either: (1) the actual functional demands and job duties of a particular past relevant job; or (2) the functional demands and job duties of the occupation as generally required by employers throughout the national economy. The DOT can be relied upon to define the job as it is usually performed in the national economy. See Social Security Ruling 82-61. The Court finds that the determination that Plaintiff can perform her past relevant work as a gas station cashier is supported by substantial evidence.

Plaintiff alleges that the ALJ did not consider the limiting effects of her obesity in his decision. The Court notes that Plaintiff did not allege obesity as a basis for disability. Moreover, although Plaintiff satisfies the height/weight portion of the requirements (height 61" and weight greater than 236) to be disabled per se as a result of obesity, she does not meet any of the other requirements for that listing to apply. See 20 C.F.R. Pt. 404, Subpt. P, App. 1, 9.09, Table II. Listing 9.09 requires obesity plus any one of several medical findings, including "Hypertension with diastolic blood pressure persistently in excess of 100 mm. Hg measured with appropriate size cuff." According to Plaintiff's brief, she suffers from hypertension with diastolic blood pressure which frequently hovers in the 100mm range. Review of the medical record reveals that although Plaintiff has, on occasion, had a diastolic reading of over 100mm Hg, the medical records reflect it was consistently below that range throughout the 32 month

period of time covered by the administrative record⁴. Further, the medical records characterize Plaintiff's hypertension as controlled [R. 123, 125, 132-40, 185-6]. It is well established that when an impairment can be reasonably controlled with medication or is reasonably amenable to treatment, it cannot serve as a basis for a finding of disability. See Pacheco v. Sullivan, 931 F.2d 695, 698 (10th Cir. 1991); Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985); 20 C.F.R. § 404.1530. Plaintiff's hypertension is reasonably controlled. Moreover, there is no indication in the record that Plaintiff's obesity, as such, restricts her abilities further than the ALJ's findings.

The review was properly terminated at step-4 once the ALJ found Plaintiff is able to return to her past relevant work. Gossett v. Bowen, 862 F.2d 802, 805 (10th Cir. 1988). Because the determination that Plaintiff is capable of returning to her past relevant work as a gas station cashier is supported by substantial evidence, no discussion of what may have happened had the evaluation proceeded to step-5 is necessary.

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 21ST day of NOV., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

⁴ Blood pressure readings in the record are as follows: 2-14-90 140/110; 2-16-90 150/90; 3-2-90 160/100; 3-19-90 170/98; 4-2-90 140/100; 4-9-90 150/80; 5-7-90 120/80; 5-29-90 140/80; 6-29-90 128/80; 7-27-90 138/90; 8-9-90 146/94; 8-16-90 120/80; 8-30-90 130/86; 10-4-90 140/90; 5-8-91 172/110, 168/102, 160/100; 5-10-91 130/100; 5-17-91 142/98; 5-24-91 138/88; 6-25-91 110/70; 7-23-91 120/70; 8-26-91 120/80; 7-10-92 110/90; 8-10-92 120/78; 10-26-92 160/100.

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

ENTERED ON DOCKET
DATE NOV 22 1995

FRANCISCO FRANCO)
SS# 407-86-4105)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner, ¹)
Social Security Administration)
Defendant.)

NO. 94-C-4105

FILED
486-111 NOV 21 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, Francisco Franco, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits. 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.

Plaintiff's January 7, 1991 application for disability benefits was denied March 5, 1991, the denial was affirmed on reconsideration, June 7, 1991. Plaintiff waived a hearing before an Administrative Law Judge ("ALJ"), asking that a decision be made on the record for a closed period of benefits from June 1989 to August 1, 1991 [R. 160]. By decision dated January 9, 1992 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 1, 1992. 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.

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.

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According to the relevant statute, a person is disabled if "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" which meets the durational requirement of 12 months. 42 U.S.C. §1382c(a)(3)(A). A five-step inquiry is employed to determine whether a person qualifies for disability benefits. If at any point in the process it can be determined that a person is disabled or not disabled, the analysis is terminated. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). The first step in the process is to determine whether the claimant is currently working. *Id.* In the present case the ALJ determined that Plaintiff was working during the period of time for which he is seeking benefits. Accordingly, the ALJ terminated the review and entered the denial decision, finding Plaintiff was not disabled.

Plaintiff alleges the finding that Plaintiff's work constituted substantial gainful activity is not supported by substantial evidence. Plaintiff does not dispute that his earnings during the relevant time period (6/89 to 8/1/91) exceed the amount that the regulations provide will ordinarily show that a claimant has engaged in substantial gainful activity.² However, Plaintiff claims that the ALJ mechanically applied the earnings guidelines in the regulations and failed to take into account other factors such as Plaintiff's pain.

The role of the Court 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

² 20 C.F.R. § 404.1574(b)(2) provides: "We will consider that your earnings from your work activities as an employee show that you have engaged in substantial gainful activity if-- . . . (vi) Your earnings averaged more than \$300 a month in calendar years after 1979 and before 1990; or (vii) Your earnings averaged more than \$500 a month in calendar years after 1989."

court must meticulously 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.

The presumption that earnings above the upper limit established in 20 C.F.R. § 404.1574(b)(2) reflect substantial gainful activity so as to disqualify one from receiving disability benefits is a rebuttable one. Courts have counseled that the presumption is not to be rigidly applied and that it is inappropriate to base a finding of no disability solely on the fact that claimant's earnings exceeded the specified dollar amount. *Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991); *Thompson v. Sullivan*, 928 F.2d 276, 277 (8th Cir. 1991); *Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990). Factors other than the amount earned which may be used to rebut the presumption that a disability claimant is engaged in substantial gainful activity include: time spent working, quality of claimant's performance, special working conditions, and possibility of self-employment. *Katz v. Secretary of Health & Human Services*, 972 F.2d 290, 293 (9th Cir. 1990); 20 C.F.R. §§ 404.1573-1574.

When Plaintiff became injured in April of 1989 he was working at the Beaumont State Center for the Mentally Retarded. According to a handwritten note submitted by Plaintiff, he was also working part-time, teaching in two separate programs: at Lamar University as an instructor in the oral hygiene clinic, average 4 hours work per week; and as a professor at the

adult learning center for the Beaumont Independent School District, average 4.5 hours work per week [R. 165]. The record reflects that following his injury, and throughout the time he alleges he was disabled, Plaintiff continued to work at the two part-time jobs [R. 166-198].

As a professor in the adult learning center, Plaintiff earned \$15 per hour teaching English, Government and History [R. 81]. According to a questionnaire, completed by the acting supervisor of the program, Plaintiff taught one class for 2 1/2 hours on 2 days per week. He was hired because the program enrollment had increased and additional teachers were needed. He was paid hourly on the same basis as other teachers, was absent for only a few days due to his surgery, and "does an exceptional job, and the students really enjoy his classes." [R. 90-2]. Further, according to the questionnaire, Plaintiff did not receive any unusual assistance or supervision [R. 94]. On the occasions when Plaintiff was absent, the school followed its usual practice of hiring a substitute teacher to follow his lessons plans [R. 92].

Plaintiff worked during the spring semesters at Lamar University. According to the record he contracted to work 14 sessions at 3 hours per class in the dental lab in a supervisory and instructional position [R. 89]. He earned \$100 per session for this work [R. 63].

The relevant regulations specifically state that "work may be substantial even if it is done on a part-time basis." 20 C.F.R. § 404.1572(a). Therefore the fact that Plaintiff worked part-time, standing alone, is not enough to mandate a conclusion that he was not engaged in substantial gainful activity. Work activity is considered gainful "if it is the kind of work usually done for pay or profit, whether or not a profit is realized." 20 C.F.R. §404.1572(b). Substantial work activity "involves doing significant physical or mental activities." Finding nothing in the record to the contrary, the Court concludes that there is substantial evidence to

support the finding of the ALJ that Plaintiff's teaching at the college level and in an adult education program constitutes work activity that is both substantial and gainful.

The evidence of record does not show that Plaintiff worked under such a special environment or under such accommodating circumstances to overcome the presumption that he engaged in substantial gainful activity. Rather the evidence shows that after his injury, Plaintiff continued working at the same two part-time positions he had before his injury. The Court's review of the record finds no evidence in the record to rebut the presumption of substantial gainful activity.

Once the ALJ determined that Plaintiff did not meet the first step of the required sequential evaluation, he had no obligation to proceed further. 20 C.F.R. § 404.1520(a). The regulations provide that if a claimant is found to be performing substantial gainful activity, a finding of not disabled follows, regardless of medical condition, age, education or work experience. 20 C.F.R. § 404.1520(b). In this case, the ALJ properly found that Plaintiff was engaged in substantial gainful activity during the time for which benefits are sought. Therefore, the review was properly terminated at step-one, making Plaintiff's allegations of pain irrelevant to the determination of whether he was disabled.

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 21ST day of NOV., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

NOV 21 1995

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

ANGEL MARTINEZ SUAREZ,)
)
 Plaintiff,)
)
 vs.)
)
 JUDGE JOHN G. LANNING, DISTRICT)
 ATTORNEY FREDERICK ESSER, and)
 BARLESVILLE POLICE DEPARTMENT,)
)
 Defendants.)

No. 95-C-1086-B ✓
(Base file)

ENTERED ON DOCKET
DATE NOV 22 1995

ORDER

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

In this civil rights action, Plaintiff sues District Judge John G. Lanning, District Attorney Frederick Esser, and the Bartlesville Police Department for slander and defamation of character. He alleges that in August of 1995 he was arrested for failure to pay fines and costs in front of friends and neighbors, although all fines and costs had been paid in full. He further alleges that Defendants notified the local newspaper of the bogus charges in violation of his constitutional rights. Plaintiff seeks actual and punitive damages and a written apology from the Defendants named in this case. (Doc. #1.)

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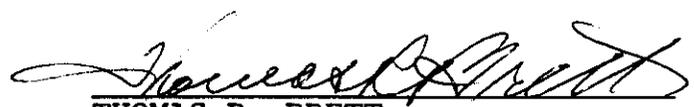
The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal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

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claims against Judge Lanning, District Attorney Esser, and the Bartlesville Police Department do not amount to a constitutional violation. Slander and defamation are state tort claims. See West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). In any event, District Attorney Esser is entitled to absolute immunity for his actions taken in his role as prosecutor. Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). Similarly, Judge Lanning is absolutely

immune from this action because he acted in his judicial capacity in issuing the arrest warrant. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). "A judge acting in his judicial capacity is absolutely immune from civil rights suits unless the judge acts clearly without any colorable claim of jurisdiction." Snell v. Turner, 920 F.2d 673, 686 (10th Cir. 1990), cert. denied, 111 S.Ct. 1622 (1991). Immunity does not dissolve when the judge is accused of acting maliciously or corruptly. Pierson v. Ray, 386 U.S. 547, 554 (1967); Christensen v. Ward, 916 F.2d 1462, 1473 (10th Cir.), cert. denied, 111 S. Ct. 559 (1990). There is no argument that the judge involved here acted without jurisdiction, and therefore the Court concludes that he is absolutely immune from this action.

Accordingly, Plaintiff's complaint is hereby DISMISSED as frivolous under 28 U.S.C. § 1915(d). The Clerk shall MAIL to Plaintiff a copy of the complaint.

IT IS SO ORDERED this 20 day of Nov, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

AIR GRAND-MERE, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 RICK ROMANS, INC. and HIGH)
 PERFORMANCE AIRCRAFT ENGINES)
 AND COMPONENTS, INC.,)
)
 Defendants.)

No. 94-C-990-K

ENTERED ON DOCKET
DATE NOV 22 1995

FILED

NOV 21 1995

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

ORDER

The Court has been advised by Plaintiff Air Grand-Mere, Inc. and Defendant Rick Romans, Inc. that those two parties have reached resolution of the issues in the litigation and that they request that their claims for relief against each other be dismissed with prejudice.

IT IS THEREFORE ORDERED that the claims by Plaintiff Air Grand-Mere, Inc. and Defendant Rick Romans, Inc. against each other be dismissed with prejudice. IT IS FURTHER ORDERED that any claims by either Plaintiff Air Grand-Mere, Inc. or Defendant Rick Romans, Inc. against Defendant High Performance Aircraft Engines and Components, Inc. be dismissed without prejudice.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the

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parties appearing in this action.

ORDERED this 20 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

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

FILED

NOV 21 1995

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

Case No. 95-C-817-H ✓

RECORDED ON ELECTRONIC
DATE 11-21-95

O R D E R

This matter comes before the Court on Plaintiff's application for emergency order to seize Eastern timber wolves under the Endangered Species Act, Plaintiff's motion for order setting matter for hearing, and Plaintiff's motion for judgment.

Plaintiff's lawsuit is predicated on the Endangered Species Act, 15 U.S.C. §§ 1531 et seq. (the "Act"). The Act permits a person to commence a civil suit on his or her own behalf "to enjoin any person . . . who is alleged to be in violation of any provision" 15 U.S.C. 1540(g) (1) (A).

In response to Plaintiff's application, Defendant Wanda Wright has attached as an exhibit a letter dated August 9, 1995 from the United States Department of the Interior stating that the animals in question, pet wolves, are not protected as endangered species under the Act. See 16 U.S.C. §§ 1532(15) & 1533 (Secretary of the Interior vested with authority to determine whether species is protected as endangered under the Act). Therefore, the provisions

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of the Act do not apply to Plaintiff's wolves, and Plaintiff's lawsuit must be and is hereby dismissed.

IT IS SO ORDERED.

This 20TH day of November, 1995.



Sven Erik Holmes
United States District Judge

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

FILED

NOV 21 1995

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

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

Plaintiffs,)

v.)

Case No. 95-C-817-H ✓

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

Defendant(s).)

FILED ON BOOKLET
DATE 11-21-95

J U D G M E N T

This matter came before the Court on Plaintiff's application for emergency order to seize Eastern timber wolves under the Endangered Species Act and Plaintiff's motion for judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 21, 1995.

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

IT IS SO ORDERED.

This 21st day of November, 1995.



Sven Erik Holmes
United States District Judge

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

F I L E D

NOV 20 1995

UNITED STATES OF AMERICA,)
)
vs.)
)
GENE RENALDO PATTON,)
)
Defendant.)

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

CIVIL ACTION NO. 95-C-989-B

ENTERED ON DOCKET

DATE NOV 21 1995

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$10,303.25, plus accrued interest of \$10,171.83, plus interest thereafter at the rate of 15% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation

of the defendant that Gene Renaldo Patton will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 2nd day of December, 1995, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$550.00 per month, and a like sum on or before the 2nd day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Debt Collection Unit, 333 W. 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

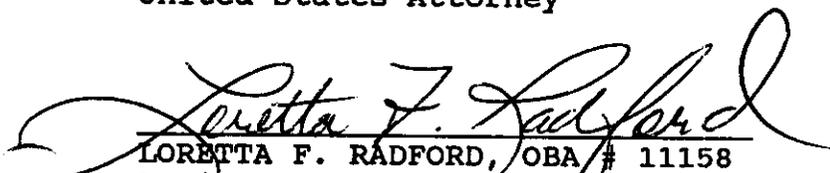
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Gene Renaldo Patton, in the principal amount of \$10,303.25, plus accrued interest in the amount of \$10,171.83, plus interest at the rate of 15% until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

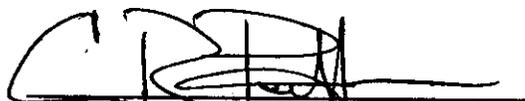
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney


Gene Renaldo Patton

FILED

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

NOV 20 1995

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

UNITED STATES OF AMERICA,)
)
vs.)
)
GENE RENALDO PATTON,)
)
Defendant.)

CIVIL ACTION NO. 95-C-989-B

ENTERED ON DOCKET

DATE NOV 21 1995

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$10,303.25, plus accrued interest of \$10,171.83, plus interest thereafter at the rate of 15% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation

of the defendant that Gene Renaldo Patton will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 2nd day of December, 1995, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$550.00 per month, and a like sum on or before the 2nd day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

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(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

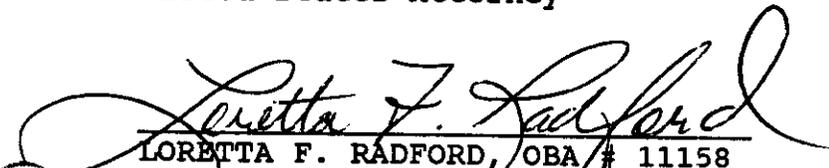
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Gene Renaldo Patton, in the principal amount of \$10,303.25, plus accrued interest in the amount of \$10,171.83, plus interest at the rate of 15% until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

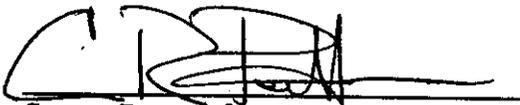
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney


Gene Renaldo Patton

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

ENTERED ON DOCKET

DATE ~~NOV 21 1995~~

ROBERT LEE DUFFY,)
)
 Petitioner,)
)
 vs.)
)
 RITA ANDREWS, et al.,)
)
 Respondents.)

No. 95-C-824-K

FILED

NOV 20 1995

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

ORDER

This matter comes before the Court on Respondents' motion to dismiss this petition for a writ of habeas corpus for failure to exhaust state remedies.¹ Respondents contend Petitioner has yet to file a post-conviction application in Tulsa County District Court and appeal any denial to the Court of Criminal Appeals. Petitioner's response and the exhibits attached to Respondents' motion to dismiss show otherwise. In May 1995, Petitioner filed an application for post-conviction relief in Tulsa County District Court which the court denied on June 19, 1995. On August 1, 1995, the Court of Criminal Appeals dismissed the appeal as Petitioner had failed to file a complete, certified copy of the district court's order. (Appendix A to Petitioner's Response, and Exs C-12

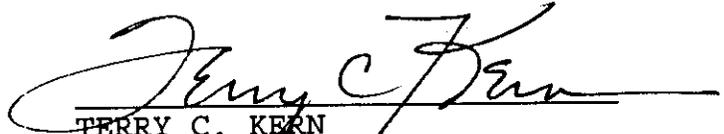
¹ The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991).

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and D to Respondents' Brief in Support of Motion to Dismiss.)

Accordingly, Respondents' motion to dismiss Petitioner's application for failure to exhaust state remedies (docket #3) is hereby DENIED and Petitioner's motion for summary judgment on exhaustion grounds (docket #5) is GRANTED. Respondents shall file a RESPONSE addressing the merits of Petitioner's habeas claims on or before twenty (20) days from the date of filing of this order. Petitioner may file a REPLY within twenty (20) days thereafter.

SO ORDERED THIS 17 day of November, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

NOV 17 1995



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

JIM LUMAN,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Respondent.)

No. 93-C-297-B

ENTERED ON DOCKET

DATE NOV 20 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 convictions in Tulsa County District Court Case Nos. CF-89-1006 (Luman I) and CF-90-1277 (Luman II).¹ In Luman I, Petitioner primarily contends he was denied effective assistance of counsel when his retained counsel, Jim Fransein, failed to prepare properly for trial as a result of his alcoholism. In Luman II, Petitioner contends he did not validly choose to proceed pro se at trial when Fransein withdrew as counsel of record. As more fully set out below, the Court concludes that Petitioner is entitled to habeas relief only as to his conviction in Luman II.

I. LUMAN I

A. Background and Procedural History in Luman I

On December 5, 1988, Monfort Food Distributing Company

¹ Petitioner initially challenged his conviction in Luman II. In November 1994, the Court granted Petitioner leave to amend his petition to challenge his conviction in Luman I as well as Luman II.



discovered that 95 boxes of meat had been stolen from its refrigerated trucks. On December 6, 1988, Petitioner rented a refrigerated truck in North Tulsa. During the month of December, Petitioner and Hugh Carraway discussed trading a three wheeler for some meat Petitioner had in a refrigerated truck and on December 28, 1988, actually traded 3 boxes of meat contained in Monfort Food boxes. In early December, Wendell West also bought a few boxes of meat (in Monfort boxes) from Petitioner to sample them. On December 29, 1988, he received 27 additional boxes of Monfort meat from Petitioner.

In March 1989, Petitioner was charged in Luman I with Knowingly Concealing Stolen Property--i.e. three boxes of meat-- After Two or More Felony Convictions. Petitioner initially retained attorney Robert Lowery. In March 1990, however, the trial court ordered him to retain new counsel as Lowery's had failed to contact Petitioner for almost a year. In the meanwhile, Petitioner was charged in Luman II with Attempted Grand Larceny, After Two or More Felony Convictions. Petitioner retained attorney James Fransein in April 1990 to represent him in both cases.

On May 9, 1990, a jury found Petitioner guilty in Luman I. At sentencing on May 24, 1990, Fransein moved to withdraw as attorney of record on the ground that Petitioner had not paid his legal fee. The trial court granted counsel's request and sentenced Petitioner to thirty years imprisonment in accordance with the jury verdict. The Court of Criminal Appeals affirmed by unpublished opinion. Luman v. State, No. F-90-1231 (Okla Crim. App. 1993).

On November 30, 1993, Petitioner sought post-conviction relief, alleging among other issues ineffective assistance of counsel. The district court denied relief as the claims could have been raised on direct appeal. In February 1994, the Oklahoma Court of Criminal Appeals affirmed as to all grounds except for ineffective assistance of counsel. After a two-day evidentiary hearing at which thirteen witnesses testified, the Honorable Clifford E. Hopper denied post-conviction relief.² The Court of Criminal Appeals affirmed on August 23, 1994.

B. Ineffective Assistance of Counsel

In the instant action, Petitioner alleges Fransein provided ineffective assistance of counsel. He alleges Fransein failed to investigate and prepare for trial as a result of his alcohol addiction, failed to object or offered objections for the wrong reason, and failed to cross examine a witness.

Although factual determinations made by the Tulsa County District Court following the evidentiary hearing are presumptively correct, the findings that pertain to the performance and prejudice components of the ineffectiveness test are not entitled to the same presumption of correctness as they involve mixed questions of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). Subsidiary findings of historical fact and findings that certain decisions by counsel were tactical choices, however, are entitled

² The Honorable Joe Jennings, the trial judge, disqualified himself based upon Petitioner's motion.

to a presumption of correctness under section 2254 as questions of fact. Kimmelman v. Morrison, 477 U.S. 365, 389 (1986). Thus, this Court defers to the state court's findings of fact but applies its own judgment as to whether the conduct constitutes ineffective assistance of counsel.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.³ To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

³ "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

a. Failure to Investigate and Prepare for Trial

Petitioner contends that Fransein's failure to interview potential witnesses and prepare for trial constituted ineffective assistance of counsel. "'The decision to interview a potential witness is not a decision related to trial strategy. Rather it is a decision related to adequate preparation for trial.'" Whitmore v. Lockhart, 8 F.3d 614, 618 (8th Cir. 1993) (quoting Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 498 U.S. 950) (1990)). Counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989) (cited cases omitted).

Such is the situation presented in this case. Although Fransein testified at the evidentiary hearing that he met Petitioner, the investigator, and few of the witnesses, he could not recall when the meetings took place and which witnesses he talked to. (May 5 and 6, 1994 evid. hrg, Vol. IV, at 14.) His secretaries, his private investigator, and three defense witnesses testified instead that Fransein did not interview any of the witnesses prior to trial and totally failed to prepare for trial. Fransein's legal secretaries testified that they scheduled numerous

appointments for Petitioner to meet with Fransein at his office, but Fransein failed to appear for every appointment scheduled. Defense Witnesses Loyd Anderson, Patricia Preston-Elias, and Alan Elias testified that Fransein never spoke with them prior to calling them to the stand. Dale Vickers, a licensed private investigator, also testified that he appeared for numerous appointments at Fransein's office with Petitioner, witness Herb Michaelberg, and his associate. Fransein, however, failed to keep any of the appointments and, as a result, Vickers was unable to discuss with Fransein, the investigation and witness interviews.

In a January 14, 1994 affidavit, Michaelberg attests he met Petitioner at Fransein's office on five separate occasions to discuss his proposed testimony, but Fransein failed to keep any of the scheduled appointments. On the first day of jury trial, Michaelberg waited in the courtroom until jury selection was complete and then introduced himself to Fransein who told him to wait for him at his office. After waiting more than two hours at the office, Michaelberg observed Fransein leaving a club located in the basement of the office building. Michaelberg returned to the office during noon recess the next day, as Fransein had suggested, but Fransein did not show up. (Ex. B, amended petition.)

Under the circumstances in this case, Fransein's failure to investigate was not based on an informed decision but merely upon a lack of diligence. The Court, therefore, holds that Fransein's complete abdication of the "duty to investigate" recognized in Strickland, 466 U.S. at 690, caused his performance to fall below

the minimum standard of reasonable professional representation. Ineffective assistance, however, is not in itself sufficient to grant habeas relief. Under Strickland's second prong, Petitioner must establish a reasonable probability--one sufficient to undermine confidence in the outcome--that the jury's verdict would have been different if not for counsel's errors. Id. at 695. Such a showing may not be based on mere speculation about what the witnesses might have testified had Fransein properly interviewed them prior to trial. See Sanders v. Trickey, 875 F.2d 205, 209 (8th Cir.), cert. denied, 493 U.S. 898 (1989).

Petitioner contends he was prejudiced because the terms of the agreement between Loyd Anderson and Petitioner, which included subleasing the refrigerated van to a Muskogee retailer, was not clearly established at trial. Petitioner has not produced an affidavit from Anderson outlining the proposed testimony. Cf. Sanders, 875 F.2d at 210 (plaintiff failed to show he was prejudiced by counsel's failure to interview alleged accomplice because he offered nothing more than speculation that the alleged accomplice might somehow have testified in his favor). Therefore, Petitioner's mere speculation about Anderson's testimony is inadequate to "undermine confidence in the outcome." Strickland, 466 U.S. at 694.⁴

In any event, the Court concludes Petitioner was not

⁴ At the evidentiary hearing Patricia Preston-Elias and Alan Elias testified that their knowledge about potential exculpatory evidence were ignored at trial because Mr. Fransein failed to interview them prior to trial. Petitioner has produced no affidavit or testimony from Mr. and Ms. Elias.

prejudiced by Fransein's failure to interview Anderson prior to trial. At trial, Fransein questioned Anderson about the rental agreement on the refer van. Anderson, however, could not recall specific information concerning the dates and times. Anderson, then testified that the deal with the Muskogee retailer fell through, thus making the intended testimony nonexistent. (Trial tr. at 140-145.)

Petitioner further contends he was prejudiced by Fransein's failure to interview Michaelberg prior to trial. Petitioner, however, does not explain the "many important facts and details" that Fransein failed to address on direct examination. Mere speculation about testimony that could have been developed at trial is insufficient to undermine confidence in the outcome.

b. Failure to object to closing argument

Next Petitioner contends that Fransein was ineffective in that he failed to object to remarks the prosecutor made in his closing argument regarding Petitioner's right to interview witnesses.

Fransein's failure to object to the prosecutor's comments during closing argument was a matter of trial strategy and did not deny Petitioner reasonably effective assistance of counsel. Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements by the prosecutor, the failure to object during closing argument and opening statement is within the "wide range" of permissible professional legal conduct. United States v. Necochea, 986 F.2d

1273, 1281 (9th Cir. 1993). See also Bussard v. Lockhart, 32 F.3d 322, 323 (8th Cir. 1994) (deferring to counsel whether to object to prosecutor's closing argument as a "strategic" decision).

In the case at hand, defense counsel's decision to object to the comments was reasonable. The comments were not so egregious that they tainted the entire trial. Accordingly, Fransein's failure to object to the statements made by the prosecutor did not constitute ineffective assistance of counsel.

c. Rod Baker's Testimony

Petitioner also contends that counsel was ineffective when he offered a wrong objection to the testimony of Rod Baker, Petitioner's former U.S. Probation Officer, and failed to cross-examine him. The transcript reveals that Baker's testimony was very limited in scope, not allowing any reference to the type of authority Baker had over Petitioner. Baker simply testified that through his employment he knew Petitioner, that Petitioner was required to give details of his business activities which included income, that Petitioner had previously reported trading as a source of income, and that Petitioner did not report a trade of meat during the period in question. (Vol II at 116-119.)

Petitioner contends that Fransein should have objected on the ground that Baker's testimony violated Petitioner's constitutional right against compelled self-incrimination.⁵ A wrong question or

⁵ Fransein submitted the following objection immediately before the testimony was offered:

objection will seldom be considered as a decisive element of ineffective assistance. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Therefore, Petitioner's contention that a different objection may have been more effective is insufficient to establish ineffective assistance of counsel.

Similarly Fransein's failure to cross-examine Baker does not amount to ineffective assistance of counsel. "[T]he mere failure to cross-examine a witness does not necessarily require a finding of ineffective assistance of counsel." United States v. Miller, 907 F.2d 994 (10th Cir. 1990). Petitioner has not shown how he was prejudiced by counsel's failure to cross-examine. Moreover, any cross-examination would only have brought undue attention to Baker's testimony and his relationship with Petitioner.

d. Counsel's alcohol addiction

Lastly, Petitioner contends that Fransein was addicted to alcohol in the months immediately preceding and during his jury

I just had a thought, as I was sitting there, his [Baker's] capacity he is a law enforcement officer and his making any inquiry of Mr. Luman, that is should be shown that he was advised of his rights prior to any parole violation or anything like that. Consequently, I'd object, unless there was a showing of advising him of his rights.

(Vol II. at 116). Fransein also moved for a mistrial following Baker's testimony.

trial and that, as a result of that addiction, counsel completely failed to prepare for trial.⁶ It is well established that Fransein's alcohol use cannot constitute per se ineffective assistance of counsel. See Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (failure to name specific instances during trial where counsel's performance was deficient due to alcohol abuse warranted dismissal of Sixth Amendment claim); cf. Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) (defense counsel's alleged mental incapacity did not per se require reversal without showing of prejudice), cert. denied, 488 U.S. 829 (1988); Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir.) (failure to indicate specific evidence of how attorney's drug use impaired his performance at trial did not satisfy Strickland's prejudice standard), cert. denied, 484 U.S. 966 (1987). "[U]nder Strickland the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether the deficiency prejudiced the defendant." Burnett, 982 F.2d at 930 (quoted case omitted). Because counsel's failure to prepare for trial did not prejudice the trial in the constitutional sense, Petitioner is not entitled to relief.⁷

⁶ Petitioner has abandoned in this habeas action his contention that Fransein's alcohol abuse during trial amounted to ineffective assistance of counsel. (Amended petition at 13-15.)

⁷ Petitioner requests an evidentiary hearing to contest counsel's testimony at the state hearing that he experienced no alcohol problems from 1981 up to Petitioner's trial in 1990. Petitioner contends that since the state hearing he has discovered additional evidence relating to treatment of counsel's alcohol

C. Right to Trial by an Impartial Jury and Right Against Compulsory Self-Incrimination

In Grounds II and III of his petition, Petitioner alleges that he was denied his right to trial by an impartial jury and that he was deprived of his right against compulsory self-incrimination, in that Baker was allowed to testify as to what Petitioner had failed to disclose in his monthly supervision reports.

Respondent contends that these claims are procedurally barred as they were raised for the first time in Petitioner's application for post-conviction relief. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the states 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, 750 (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. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting

addiction from 1989 to 1992. Because counsel's failure to adequately prepare for trial did not prejudice the trial in the constitutional sense, the proposed testimony is immaterial.

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 claims are barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims 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 courts have consistently declined to review claims which were not raised on direct appeal. Jones v. State, 704 P.2d 1138 (Okla. Crim. App. 1985).

Petitioner contends that his appellate counsel raised by way of "an appellate level motion for new trial filed [on] May 24, 1991," Petitioner's claim that he was denied the right to an impartial jury. He contends, however, that the Court of Criminal Appeals "simply ignored that issue in its summary opinion dated September 14, 1993." (Petitioner's Reply, docket #40, at 8.)

Petitioner is mistaken. "A supplemental brief is intended to be limited to supplementation of recent authority bearing on the issues raised in the brief in chief, or on issues specifically directed to be briefed as ordered by this Court." Castro v. State, 745 P.2d 394, 404 (Okla. Crim. App. 1987), cert. denied, 485 U.S. 971 (1988); see also Brown v. State, 871 P.2d 56, 68 (Okla. Crim. App.), cert. denied, 115 S.Ct. 517 (1994); Rule 3.4(F), Rules of the Court of Criminal Appeals, 22 O.S. 1991, Ch. 18, App, ("Propositions of error advanced for the first time in any

supplemental brief will be deemed forfeited for consideration"). Therefore, as Petitioner did not raise the impartial jury issue in his brief in chief, the issue was not before the Oklahoma Court of Criminal Appeals for ruling and was waived.

Because of this procedural default, the Court may not consider Petitioner's claims 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, 501 U.S. at 750.⁸ Petitioner has not shown either cause and prejudice for his failure to raise his second and third claims on direct appeal nor a fundamental miscarriage of justice. Accordingly, this Court must conclude that Petitioner's second and third grounds are procedurally barred.

D. Trial Judge's Private Meeting with Juror Bacon

In his Fourth Ground of his amended petition, Petitioner contends it was error for the trial judge to meet privately with juror Bacon who had seen news accounts of Petitioner's involvement

⁸ 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).

in the notorious Abello trial in this Court.⁹

The incident at issue occurred in part on the evening following jury selection when juror Bacon saw a sketch of Petitioner on television, but did not hear what was said, and at noon the next day, when she read a newspaper account of the Abello trial and noticed Petitioner's name. In a private meeting with the trial judge, juror Bacon informed the judge that she stopped reading the newspaper as soon as she read Petitioner's name, and immediately notified the bailiff who in turn notified the judge. She further stated that she did not share what she had read with any of the other jurors and did not see any problem if she continued to sit as a juror. (Tr. vol. II at 131-135, docket #35.)

After juror Bacon left the judge's chambers, the judge informed both attorneys of the conversation with juror Bacon and informed them he felt comfortable in continuing with the case. The judge then gave each side an opportunity to present objections or ask additional questions of the juror. Counsel, however, declined to do so. (Id. at 135-136.)

Petitioner contends that it was prejudicial error to exclude him and his counsel from the in camera interview. In support of this proposition, Petitioner cites Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir. 1970), where the Tenth Circuit Court of Appeals held that a defendant does not have an absolute constitutional right to be a participant in an in camera discussion concerning a juror's

⁹ Petitioner was called as a witness in the Abello trial as he had been called with Boris Olarte, one of the main witnesses against Abello.

qualifications where his lawyer is present. In Ellis, defendant's counsel was present when the judge interviewed the juror.

Since Ellis, the Tenth Circuit Court of Appeals has held that it is within the trial court's discretion to proceed with in camera interviews of jurors without the presence of defendants and their counsel. United States v. Santiago, 977 F.2d 517 (10th Cir. 1992); United States v. Gagnon, 470 U.S. 522, 526 (1985) (defendant does not have constitutional right to be present at every interaction between the trial judge and juror); Aiello, 771 F.2d at 630. "[t]he trial judge, aided by his personal observation and appraisal of all persons concerned may choose a private inquiry in the more relaxed atmosphere of [chambers]." Aiello, 771 F.2d at 629. Even if the ex parte discussion with juror Bacon was improper, the exclusion of Petitioner and his counsel was harmless error in this case. The trial judge immediately informed counsel of the substance of his conversation with juror Bacon and granted them an opportunity to interview juror Bacon further or present any objection.

E. Right to Present Witnesses or Confront Adverse Witnesses

In his fifth ground, Petitioner contends he was denied the right to recall Wendell West as a witness because the court found that a violation of the Rule of Sequestration had occurred.

During the first day of testimony on May 8, 1990, West testified for the State that his first conversation with Petitioner about the meat was a few days after December 9, 1988, and that they made the first exchange of meat on or about December 16 and 19,

1988. (Vol. II at 87-88.) West further testified that at the end of May or beginning of June 1989, Petitioner notified him that the meat might be stolen. (Vol. II at 93.) After a brief cross-examination by defense counsel, the trial court excused West. After resting its case and before Fransein proceeded with his opening statement and first witness, the State invoked the Rule of Sequestration.

Overnight, Petitioner telephoned West at home and asked him to check his records to verify the accuracy of his testimony. Petitioner mentioned to West that Elias would be testifying the next day that he had been contacted by Petitioner and told not to sell any of the meat. (Vol. II at 176-77.) After checking his records, West advised Petitioner of the inaccuracies of his testimony and Petitioner subpoenaed him as a defense witness. The following morning, when defense counsel attempted to call West, the State objected on the ground that Petitioner had violated the Rule of Sequestration. The trial court agreed and refused to permit West to testify. (Id.)

Even if the trial court abused its discretion in excluding West's testimony under the Rule, the Court finds that any error was harmless and therefore does not entitle Petitioner to habeas relief. Prior to the Supreme Court's decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), the standard for determining whether a conviction must be set aside because of federal constitutional error was whether the error "was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

The error now must have "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 113 S.Ct. at 1722 (cited case omitted). "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993).

Application of the standard to this case leads the Court to conclude that the exclusion of West's testimony did not have a substantial injurious effect or influence in determining the jury's verdict. West's testimony--that he met Petitioner on the 16th of December instead of a few days after December 9th--did not actually prejudice Petitioner. Moreover, the fact that Petitioner advised West that the meat was probably stolen in April or early part of May 1989, instead of late May or early June, is immaterial since Petitioner had been charged in Luman I prior to either of those dates. (Vol. II at 179.) Accordingly, Petitioner is not entitled to habeas relief.

II. LUMAN II

A. Background and Procedural History Luman II

Immediately following sentencing in Luman I, the trial judge turned to Luman II and granted Fransein's request to withdraw as counsel of record in that case as well. The court then continued the matter for a week, and ordered Petitioner to retain new counsel.¹⁰ (Doc. #4, ex. B.) Next Petitioner appeared in court on May 31, 1990, at which time the following transpired:

THE COURT: . . . Have you retained an attorney yet in this matter Mr. Luman?

MR. LUMAN: No, sir.

THE COURT: Are you going to do so?

MR. LUMAN: I thought that I moved the Court to um, for pro se in this matter, Your Honor.

THE COURT: Well, you mentioned that to me the other day but you also mentioned as I recall, that perhaps you were going to hire an attorney. If you are not going to hire an attorney, and want to proceed pro se, why then we'll proceed accordingly.

MR. LUMAN: Yes, sir, that's my desire.

THE COURT: Now, maybe you'd ought to tell me why I'd ought to allow you to represent yourself in this matter, Mr. Luman? And if there's anything funny about that you be sure and tell me that too?

MR. LUMAN: Well, in light of the previous representation, that I had in the, um, companion case, um, I just, I feel that I'm better qualified to represent myself, than, um, retain the services of an attorney. I've had two on the case that was before the court last week for judgment, the last attorney was, um, somewhat inebriated throughout the trial. The attorney before him absconded with all the money I had given him plus the monies that I had paid out for the preliminary hearing transcript, consequently, we didn't um, file any motions in that case, because the transcript was not prepared.

THE COURT: Well in all your past you've surely had some attorneys that represented you well, haven't you?

MR. LUMAN: To be quite honest with you, Your Honor, the only case that I believe I've ever won is those that I've represented myself on.

¹⁰ The trial judge gave no reason for counsel's withdrawal in Luman II.

THE COURT: And you've represented yourself before?

MR. LUMAN: That's correct.

THE COURT: I don't have any problems whatsoever in allowing people to represent themselves, Mr. Luman, um, but the problem that I've run into before in allowing people to do that . . . [is that] when they're convicted, and want an appeal, what would you think the first error is that they complain about?

MR. LUMAN: I would assume that it would be ineffective assistance of counsel.

THE COURT: Well yeah, Judge, you never should have let me do that, you should have known, Judge, that I wasn't able to do that and you should have never let me do that. . . . But in any event, um, you are aware, I assume, that if you want the matter passed, um, for you to hire your own attorney, I'll continue the matter for you to do that. If you don't have funds to hire an attorney, and you qualify according to financial guidelines, why then the Court would consider appointing an attorney to represent you. You understand that, I'm sure?

MR. LUMAN: Yes, sir.

THE COURT: . . . You understand, that the Court, um, if you represent yourself, is not going to be your legal advisor, you know, and give you any, um, short courses on rules of evidence or things like that. Do you understand that?

MR. LUMAN: Yes, sir, I would move the Court to, um, possible, I'm not familiar with the procedures in the state insofar as, um, appointing somebody perhaps from the Public Defenders Office to, um, to assist, is this possible?

THE COURT: Well, yeah, it's possible . . . If that's what you want, the Public Defender is for stand by, I think it's my understanding I'm required to do that. Pity the poor soul that has to do it but I'll do that. Is that what you want.

MR. LUMAN: Yes, sir.

(Doc. #4 ex. D.) After inquiring whether Petitioner was financially able to hire standby counsel, the Court gave him a blank financial affidavit and set a hearing for the following week to appoint a public defender as standby counsel in the event Petitioner would qualify. (Id. ex. D.)

At the following hearing on June 21, 1990, the trial court concluded that Petitioner qualified for appointment of counsel for standby purposes, but again passed the hearing to the following

week to permit the district attorney time to refute Petitioner's financial status. (Id., ex. F.) On June 28, 1990, the Court then heard testimony from Wade Farnan, who had worked for Petitioner as private investigator before he ran out of funds. Farnan testified that, although he had received money from Petitioner's brother, from a friend of the Petitioner, and from Petitioner's girlfriend, that the Petitioner still owed him \$1200 for services performed. Farnan further testified that he was holding a bracelet, which allegedly belonged to the Petitioner, until he would receive payment in full. (Id., ex. G at 4-8.)

After determining Petitioner still desired to proceed pro se and understood the inherent risks and disadvantages of proceeding pro se, the Court concluded that Petitioner was competent to waive his right to counsel and allowed him to proceed pro se. The Court then stated as follows:

I have previously advised him that if he could not afford an attorney and met within financial guidelines that the Court would appoint an attorney to represent him for purposes of this jury trial. And, um, based upon the capacity that Mr. Luman has to waive that right, I will allow him to do so and allow him to proceed pro se in this case. So this isn't a question of whether or not to appoint a Public Defender to represent Mr. Luman for trial purposes or not, he very well might fit within those guidelines as it certainly takes much more to hire a lawyer for trial purposes than it does as stand by counsel. It's my understanding stand by counsel, at least, as far as court appointment's concerned is merely a lawyer who sits in the courtroom during the jury trial and is available for counsel to the Defendant, if he desires it, during the jury trial. I felt that although I know many lawyers would be reluctant to do that, and have some complaint with being put in that capacity, I'm sure the Public Defender doesn't appreciate it that much either, although they are generally ordered to do so by the Court. But as far as just the financial guidelines for appointing a stand-by counsel at public expense, I'll

determine that Mr. Luman based upon the affidavit filed previously in this case and the testimony I've heard today does not fit within those financial guidelines and the Court would decline to appoint a stand by counsel in this case. Now, this matter, then for arraignment today Mr. Luman, how do you plead?

MR. LUMAN: Not guilty.

(Id., ex. G at 12-13.)

Without further mention of assistance of counsel, Petitioner went to trial pro se on September 10, 1990. The jury returned a guilty verdict and recommended a sixty-two-year sentence. The Court of Criminal Appeals affirmed Petitioner's conviction by summary opinion in January 1993.

In the instant petition, Petitioner alleges he was denied the assistance of trial counsel. He contends he did not waive his right to the assistance of counsel, and his pro se defense without the benefit of standby counsel was neither voluntary, knowing, nor intelligent. He argues he "did not waive counsel, nor did [he] wish to do so; [he] clearly and unequivocally ple[]d for assistance of counsel and ha[d] every reasonable expectation that the court would fulfill its repeated promises to appoint counsel." He also asserts his "desire to conduct and manage his defense was conditioned on being provided counsel to assist me" and "was not a valid request to proceed pro se." (Doc. #5 at 5b.)

B. Sixth Amendment Right to Counsel

The Sixth Amendment guarantees not only a defendant's right to the assistance of counsel at a criminal trial, but also the right to waive counsel and personally present his or her own defense.

Because a defendant faces serious risks by pursuing the latter course, the Supreme Court has required that the decision to proceed pro se be made knowingly and intelligently. Faretta v. California, 422 U.S. 806, 835 (1975).

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id. (citation omitted).

"The task of ensuring that [a] defendant possesses the requisite understanding initially falls on the trial judge, who must bear in mind the strong presumption against waiver." United State v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987). The Faretta right to self-representation involves two inquiries: (1) whether the defendant voluntarily chose self-representation, and (2) whether the defendant knowingly and intelligently waived his right to counsel. Sanchez v. Mondragon, 858 F.2d 1462 (10th Cir. 1988), overruled on other grounds by United States v. Allen, 895 F.2d 1577, 1579-80 (10th Cir. 1990). The first inquiry focuses on "whether the defendant [even] knew of his right to competent counsel." Id. The second inquiry instead centers on whether the trial judge sufficiently determined that the defendant knew and understood all the factors relevant to his decision to waive counsel. Id. at 1466.

This same standard applies on collateral review when the petitioner, as in this case, alleges he did not voluntarily,

knowingly, and intelligently waive his right to counsel at trial. Id. at 1464-65. However, when an accused seeks to revisit an earlier conviction by means of a collateral proceeding, a presumption of regularity attaches to the prior conviction. Parke v. Raley, 113 S.Ct. 517, 523-24 (1992). Moreover, in such a case, the burden falls on the defendant to show that his waiver of rights was not knowing and intelligent. Id.

Even assuming Petitioner properly expressed a desire to proceed pro se in Luman II after the trial court permitted Fransein to withdraw, (Doc. #4, ex. D at 2), Petitioner's waiver was not voluntary because the trial judge at no time properly advised Petitioner of his right to counsel.¹¹ The record reveals that the trial judge only once stated "[i]f you don't have funds to hire an attorney, and [if] you qualify according to financial guidelines, why then the Court would consider appointing an attorney to represent you." (Id., ex. D at 6.) At no time, however, did the trial judge advise Petitioner that he need not be indigent to qualify for appointed counsel, but only that he be financially unable to obtain counsel. After all, the record reveals that Petitioner did not have adequate funds to retain new counsel except for a bracelet held by the private investigator pending full payment.

¹¹ The Court declines to address at this time Petitioner's argument that he had never expressed a desire to proceed pro se in the first place in this case and that he only confused this case with Luman I, where he had decided to initiate the appellate process pro se until he was able to retain appellate counsel. (Doc. #4 at xi.)

The record further reveals that Petitioner was dissatisfied with the performance of his previous counsel and believed he could do better on his own. (Id., ex. D at 2-3) As noted above, Fransein failed to prepare adequately for trial in Luman I in part due to his alcohol addiction, and Petitioner's first counsel left with all the money without doing any work.

Although Petitioner at no time asked for substitution of counsel as in Padilla and Sanchez, the Court concludes that Petitioner's statement that Fransein was unprepared due to his alcohol addiction should have put the trial judge on notice that Petitioner's waiver necessitated further inquiry. The Tenth Circuit has stated that "[i]n order to determine that a defendant voluntarily chose to represent himself, the trial court must find that he does not have 'good cause' warranting a substitution of counsel." Sanchez, 858 F.2d at 1466. A choice 'between incompetent or unprepared counsel and appearing pro se' is 'a dilemma of constitutional magnitude,' and such a choice "cannot be voluntary in the constitutional sense when such a dilemma exists." Id. at 1465 (quoting Padilla, 819 F.2d at 955). The trial court "should make formal inquiry into the defendant's reasons for dissatisfaction with present counsel when substitution of counsel is requested." Id. at 1466.

In the instant case Petitioner was faced with the same Hobson's choice criticized by the Tenth Circuit in Padilla and Sanchez. Absent a proper offer of counsel at public expense, Petitioner had no choice but to announce his intent to proceed pro

se. Accordingly, the Court concludes that the trial judge's failure to ensure adequately that Petitioner was not exercising a choice between no counsel and appearing pro se, vitiated Petitioner's waiver. Sanchez, 858 F.2d at 1466.

Even if the record were sufficient to establish that Petitioner voluntarily chose to represent himself, the Court concludes that his waiver was not knowing and intelligent. While the trial judge may have sufficiently advised Petitioner against proceeding pro se in this case and that he would be expected to follow the rules of evidence just like a lawyer, the trial judge never informed Petitioner "of the nature of the charges, the statutory offenses included within them, [and] the range of allowable punishments thereunder." Id. at 1467 (quoting Padilla, 819 F.2d at 956.) Nor did the trial judge discuss with Petitioner "possible defenses or mitigating factors which might be available to the defendant." Id. "Only by bringing home to the defendant the perils of dispensing with legal representation can a judge be certain that a waiver of counsel is knowingly and intelligently made." Piankhy v. Cuyler, 703 F.2d 728, 731 (3rd Cir. 1983).

Accordingly, the Court concludes that the trial judge's inquiry in this case was insufficient to establish that Petitioner knowingly and intelligently waived his right to counsel. It is well established that a trial judge "can make certain that an accused's professed waiver of counsel is understandably and wisely made only from a penetrating and comprehensive examination of all circumstances under which the waiver was entered." Sanchez, 858

F.2d at 1467 (quoting Padilla, 819 F.2d at 956-57). In this case, the trial judge's general admonitions against proceeding pro se do not meet that standard. Petitioner is, therefore, entitled to habeas relief.¹²

IV. CONCLUSION

After reviewing the record in this case, the Court holds that Petitioner is in custody in violation of the Constitution and laws of the United States as to his conviction in Luman II but not Luman I. Therefore, a writ of habeas corpus SHALL ISSUE unless within ninety (90) days after this order becomes final, including any appeals from it, the State of Oklahoma grants Petitioner a new trial in Luman II with the benefit of appointed counsel, unless Petitioner knowingly and intelligently elects to proceed pro se. Petitioner's motion for an evidentiary hearing (docket #41) is hereby DENIED.

SO ORDERED THIS 17 day of Nov., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹² Because the Court concludes that Petitioner did not voluntarily, knowingly, and intelligently waive his right to counsel, the Court need not reach Petitioner's remaining arguments - e.g., that Oklahoma precedent needs correction; that Petitioner had a right to standby counsel as a matter of fact; and that Petitioner had a right to counsel at arraignment.