

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

ENTERED ON DOCKET

DATE 9-20-96

DAVID RAY BEEDE,

Plaintiff,

vs.

No. 96-CV-733-H ✓

COUNTY COMMISSIONER FOR WASHINGTON)
COUNTY, SHERIFF PAT BALLARD, JAIL)
ADMINISTRATOR MIKE SILVA,)
UNDERSHERIFF JACK JOHNSON,)

Defendants.)

FILED

SEP 19 1996

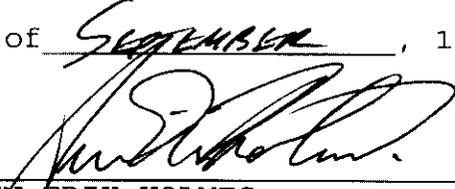
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On August 21, 1996, the Court informed Plaintiff that this action would be dismissed for failure to state a claim unless Plaintiff filed an amended complaint setting out his allegations with more specificity within fifteen days. 28 U.S.C. §§ 1915(e)(2)(B), 1915A. On August 27, 1996, the above order was returned to the Court because Plaintiff was no longer at the address listed on his complaint.

Accordingly, this action is hereby DISMISSED without prejudice for failing to state a claim upon which relief can be granted.

IT IS SO ORDERED this 19TH day of SEPTEMBER, 1996.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 19 1996

PHIL Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WALTER C. SMITH,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, LT. FITZGIBBONS,)
 and SGT. JOSEPH MESAK,)
)
 Defendants.)

No. 96-CV-696-H ✓

9-20-96

ORDER

On August 21, 1996, the Court informed Plaintiff that this action would be dismissed for failure to state a claim unless Plaintiff filed an amended complaint setting out his allegations with more specificity within fifteen days. On August 27, 1996, the above order was returned to the Court because Plaintiff was no longer at the address listed on his complaint.

Accordingly, this action is hereby DISMISSED without prejudice for failing to state a claim upon which relief can be granted.

IT IS SO ORDERED this 19TH day of SEPTEMBER, 1996.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 19 1996

Phil Lombard, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRANK WESTERLING,)
)
 Plaintiff,)
)
 vs.)
)
 LISA LYNETTE GLORY,)
)
 Defendants.)

No. 96-C-764-H

ENTERED ON DOCKET
DATE 9-20-96

ORDER

Plaintiff, an inmate at the Delaware Correction Center, has filed with the Court a civil rights complaint, pursuant to 42 U.S.C. § 1983, and motion for leave to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915. He requests this Court to modify the divorce decree to show that he is the father of Amanda Glory and to stay any child support payments until his release from custody.

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

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 it lacks subject matter jurisdiction over Plaintiff's action to modify the divorce decree. Federal courts have traditionally abstained from hearing suits in the domestic relations area even though the prerequisites of diversity jurisdiction exist. See Hickey v. Duffy, 827 F.2d 234, 238 (7th Cir. 1987).

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (Docket #2) is GRANTED and this action is hereby DISMISSED for lack of subject matter jurisdiction. The Clerk shall mail Plaintiff a copy of the complaint.

IT IS SO ORDERED this 19TH day of SEPTEMBER, 1996.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ROBERT COTNER,)
)
Petitioner,)
)
vs.)
)
R. MICHAEL CODY, et al.,)
)
Respondents.)

No. 94-C-323-H

ENTERED ON DOCKET

9-20-96

ORDER

This matter comes before the Court on Respondent's Motion to Dismiss this habeas corpus action for failure to exhaust state remedies (Docket #79) and Respondent's Response and Supplemental Response to Court's Amended Order (Docket #93 and #94). Also before the Court are Petitioner's numerous motions for entry of default judgment, for release, for evidentiary hearing, for partial summary judgment, for permanent injunction, for immediate hearing, for evidentiary hearing, and for relief (Docket #89, #92-1, #92-2, #98, #100, #101, #102, #103, #104-1, #104-2, #105).

In its latest pleadings, Respondent advises the Court that on June 6, 1996, the Oklahoma Court of Criminal Appeals vacated its prior order declining jurisdiction in Case No. PC 95-0983 and granted Petitioner thirty days within which to file a certified copy of the district court order denying post-conviction relief and a response to show cause why a certified copy of the order was not filed. On June 20, 1996, Petitioner submitted the certified copy of the district court order and his response. Respondent contends that Petitioner has not exhausted his state court remedies because

his appeal of the denial of post-conviction relief is currently pending before the Oklahoma Court of Criminal Appeals. Petitioner replies that dismissal is improper in this case and that the Court should stay this action for ninety days to permit the Court of Criminal Appeals to review his appeal.

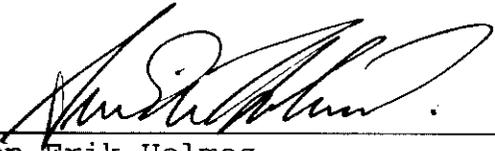
The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific 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). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has yet to exhaust all of his state remedies. The Court of Criminal Appeals has before it Petitioner's appeal from the denial of his application for post-conviction relief. Therefore, the Court dismisses this action without prejudice at this time. The Court declines to stay this action pending exhaustion of state remedies because this case has been pending for more than 29 months and, due to Petitioner's repeated, duplicitous and frivolous filings, the

file contains more than 100 documents.

Accordingly, Respondent's motion to dismiss (Docket #79) is **granted** and this habeas corpus action (Docket #1 and #74) is hereby **dismissed without prejudice**. Petitioner's motions for entry of default judgment, for release, for evidentiary hearing, for partial summary judgment, for permanent injunction, for immediate hearing, for evidentiary hearing, and for relief (Docket #89, #92-1, #92-2, #98, #100, #101, #102, #103, #104-1, #104-2, #105) are **denied**.

SO ORDERED THIS 19th day of SEPTEMBER, 1996.



Sven Erik Holmes
United States District Judge

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

F I L E D

SEP 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE O. BULLARD,)

Plaintiff.)

vs.)

ALLISON ANDERSON,)

Defendant.)

No.: 96C0026B

ENTERED ON DOCKET
DATE SEP 20 1996

**JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT**

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

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation necessary.

Dated this 19th day of Sept, 1996.

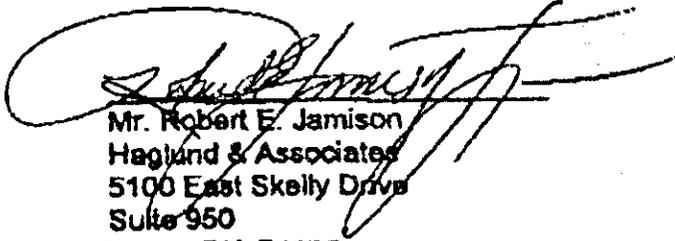
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED TO FORM:



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(918) 592-7887 (FAX)
ATTORNEY FOR PLAINTIFF



Mr. Robert E. Jamison
Haglund & Associates
5100 East Skelly Drive
Suite 950
Tulsa, OK 74135
ATTORNEY FOR DEFENDANT

ENTERED ON DOCKET

DATE 9/20/96

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

BONNIE R. BREWER,
SS# 447-48-8392

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER OF
THE SOCIAL SECURITY ADMINISTRATION

Defendant.

Case No. 95-C-877-J ✓

F I L E D

SEP 19 1996 *SE*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMENDED JUDGMENT

On August 22, 1996, the Commissioner filed a Motion to Alter or Amend the Court's Judgment pursuant to Fed. R. Civ. P. 59(e). The Court, after consideration of the Motion and relevant case law, entered an Order dated September 19, 1996, altering its prior Order of August 8, 1996 (which was entered on August 12, 1996), and affirming the decision of the Commissioner. The Court's prior Judgment of August 8, 1996 is hereby vacated. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's September 19, 1996 Order.

It is so ordered this 19 day of September 1996.


Sam A. Joyner
United States Magistrate Judge

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ENTERED ON DOCKET
DATE 9/20/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BONNIE R. BREWER,
SS# 447-48-8392

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER OF
THE SOCIAL SECURITY ADMINISTRATION

Defendant.

Case No. 95-C-877-J ✓

F I L E D

SEP 19 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On August 8, 1996, this Court entered an Order reversing the decision of the Commissioner and remanding the case for further proceedings consistent with the Court's opinion. On August 22, 1996, the Commissioner filed a Motion to Alter or Amend [the August 8, 1996] Order [Doc. No. 17-1]. The Commissioner asserts, in part, that the Tenth Circuit's decision in Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1049 (10th Cir. 1993), is limited to its facts, that it does not require the Administrative Law Judge in this case to "make every reasonable effort to ensure that a qualified psychiatrist or psychologist" completes a Psychiatric Review Technique Form ("PRT Form"), and that under the facts of this case the Court should not remand for completion of a PRT Form. For the reasons hereinafter stated, the Commissioner's Motion to Alter or Amend is granted.

The Court has reviewed the **briefs** filed by both parties with respect to this issue, and has reviewed in detail the Tenth Circuit decisions in Andrade, and Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988).

In view of the Andrade court's clear intent not to overrule Bernal, the modification of our August 8th Order is compelled by this Court's attempt to reach a decision consistent with both Bernal and Andrade. The August 8th Order followed the Andrade directive that "the Secretary cannot determine that the claimant is not under a disability without first making every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." A closer review of the Bernal case and a search for the fine thread of consistency between the two cases compels a different result in this case, and a modification of this Court's prior Order.

The regulations and case law are clear--an ALJ does not have an absolute duty to obtain the assistance of a medical advisor when completing a PRT Form. The Social Security Act requires only that "[a]n initial determination under subsection (a), (c), (g), or (i) of this section^{1/} that an individual is not under a disability, in any case where

^{1/} If the claimant does not assert a claim of a "mental impairment" until the administrative hearing level, the ALJ may be in the position to make the first or "initial" determination of the mental impairment. If the ALJ's determination was considered the "initial determination" under 42 U.S.C. § 421(h), the ALJ would be required, by the statute, to make every reasonable effort to obtain the assistance of a qualified psychiatrist or psychologist. However, the statute specifically includes only certain subparts (a, c, g, and i) of the statute in the "duty" to use all reasonable efforts to obtain the assistance of a medical advisor. The statute excludes subpart (d) which is judicial review. Thus there is no such duty at the ALJ hearing level. See, e.g., 42 U.S.C. § 421(h) (the duty applies, e.g., at the state determination level, at the review of the state determination, and at the subsequent review of a prior disability determination). The regulations are also fairly clear and track the statute. See 20 C.F.R. § 404.1520a(d)(1)(iii). The easier way to decide this case, in accordance with the apparent wording and intent of 42 U.S.C. § 421(h), is to conclude that the statutory requirement to obtain the assistance of a medical advisor does not apply at the administrative hearing level, even when the issue of a mental impairment is raised for the first time at the ALJ hearing level. This

there is evidence which indicates the existence of a mental impairment, shall be made only if the Commissioner of Social Security has made every reasonable effort to insure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.” 42 U.S.C. § 421(h). When a mental impairment is alleged for the first time at the administrative hearing level, the regulations provide that the ALJ may remand the case to the State agency for completion of the PRT Form and for a new disability determination. 20 C.F.R. § 404.1520a(d)(1)(i).

In Bernal, the claimant did not allege a “mental impairment” until the administrative hearing level. One of Bernal’s doctors reported that Bernal had “symptoms consistent with depression.” In addition, Bernal was examined by a consulting psychologist, who made a final diagnosis of “[m]ajor depression, recurrent, with melancholia.” The consulting psychologist did not conclude that Bernal would be unable to perform his past relevant work.

The claimant in Bernal challenged the decision of the Secretary asserting that the ALJ erred by completing the medical review and RFC assessment (PRT Form) without the assistance of a qualified psychiatrist or psychologist. The Tenth Circuit noted that at the initial and reconsideration levels the standard document must be signed by a medical consultant, but that at the ALJ hearing level, the regulations

conclusion would in no way relieve the ALJ of the duty to fully develop the record with respect to the mental impairment, or of the duty to support all conclusions with substantial evidence. However, because Andrade suggests that this duty applies at the ALJ hearing level, the Court further analyzes the decisions in both Andrade and Bernal in determining whether the Commissioner’s actions in this case were adequate.

provide that the ALJ may complete the form by himself, may request the assistance of a medical advisor, or may remand the case to the State agency for completion of the document. Bernal, 851 F.2d at 302. The Tenth Circuit concluded that the completion of the PRT Form by the ALJ without the assistance of a psychiatrist or psychologist was not error.

In light of this legislative history, the court cannot find that the Secretary or the ALJ has the absolute duty to have a psychiatrist or psychologist complete the reports. Nor are we compelled to delineate the boundaries of the duties imposed under 421(h) at this time. In this case, the record is completely devoid of any evidence seriously challenging the ALJ's final determination regarding the severity of Bernal's impairments or the appropriateness of the RFC assessment given by the ALJ. Since the ALJ's decision is amply supported by the medical reports and the record, Mr. Bernal was not prejudiced by the ALJ's actions. For these reasons, we find no error in the fact that the case review and RFC were completed by the ALJ without the assistance of a mental health professional.

Id. at 302-03.

In Andrade, the claimant did not assert a "mental impairment" until just prior to the ALJ hearing. The ALJ completed the PRT Form at the administrative hearing without the assistance of a psychiatrist or psychologist. Andrade notes that "as allowed by the regulations, the ALJ appears to have completed the standard document, including the residual functional capacity assessment, without the assistance of a medical consultant." Andrade, 985 F.2d at 1049.

The record in Andrade indicated that the claimant was undergoing an intense psychochemotherapeutic treatment program since August of 1988. (The hearing

before the ALJ occurred on December 20, 1988.) At the hearing, the claimant additionally testified about his severe depression. The claimant submitted a letter from his doctor at the hearing, and his attorney submitted additional records from the claimant's doctor after the hearing.

The Tenth Circuit concluded that the ALJ did not sufficiently consider the claimant's alleged mental impairment. Andrade, 985 F.2d at 1048. The Tenth Circuit additionally explained its conclusion in conjunction with Bernal.

In a previous case, this court found "no error in the fact that the case review and [residual functional capacity assessment] were completed by the ALJ without the assistance of a mental health professional." Bernal v. Bowen, 851 F.2d 297, 302-03 (10th Cir. 1988). Our conclusion in Bernal was based on three considerations. First, we found no absolute duty under 42 U.S.C. § 421(h) for the Secretary or the ALJ to have a psychologist or psychiatrist complete the medical portion of the case review and the residual functional capacity assessment. Bernal, 851 F.2d at 302. Second, the record lacked any evidence seriously challenging the ALJ's assessment of Mr. Bernal's residual functional capacity or the ALJ's conclusion regarding the severity of Mr. Bernal's mental impairment. Id. And, third, "Mr. Bernal was not prejudiced by the ALJ's actions" because "the ALJ's decision was amply supported by the medical reports and the record." Id.

In this case, however, we cannot conclude that substantial evidence supports the ALJ's decision regarding the extent of claimant's mental impairment.

* * *

In Bernal, we did not "delineate the boundaries of the duties imposed under 421(h)" Bernal, 851 F.2d at 302. And, we do not, by this decision, attempt to define the phrase "every reasonable effort." We hold only that, based on the particular circumstances of this case, the ALJ abused the discretion afforded to him by the regulations, 20 C.F.R. §§ 404.1520a & 416.920a, by assessing claimant's

residual functional capacity without making any effort to obtain the assistance of a mental health professional. Accordingly, we remand this case for proper consideration of claimant's alleged mental impairment.

Id. at 1050.

However, the Andrade Court also states that "when the record contains evidence of a mental impairment, the Secretary cannot determine that the claimant is not under a disability without first making every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment." Andrade, 985 F.2d at 1048. To reconcile this statement with the above-quoted language from Andrade, one must conclude that the Andrade Court finds that it is not error for the ALJ to complete the PRT Form, without the assistance of a mental health professional, where the record contains some evidence of a mental impairment but lacks any evidence seriously rebutting the ALJ's assessment of the mental impairment, and where the ALJ's decision is supported by substantial evidence.

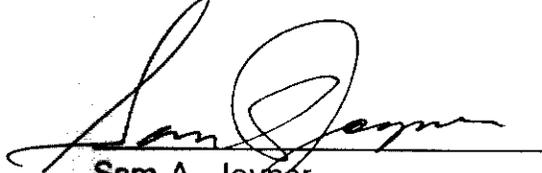
In this case, the record contains little evidence to support Plaintiff's claim of a mental impairment. As noted in this Court's August 8, 1996 Order, Plaintiff, in the hearing, stated that one of her impairments was "nerves." [R. at 197]. In addition, Plaintiff listed one of her medications as being "for nerves." [R. at 158-59]. Finally, a general practice consulting physician stated that Plaintiff "suffers from anxiety and depression from her chronic illnesses and the diseases. She shows to have a dysphoric mood with evidence of depressive symptomatology but also ha[d] findings

consistent with anxiety and nervousness." [R. at 165]. No medical records or tests support the consulting physician's statement. And, as noted in the Court's prior Order, the Plaintiff's statements alone are not sufficient to establish a mental impairment. See 20 C.F.R. § 404.1508.

In the August 8th Order, the Court found that the ALJ's determination on mental impairment and on the Plaintiff's physical RFC were supported by substantial evidence. This Court concludes, as in Bernal, that "the record lack[s] any evidence seriously challenging the ALJ's assessment of Mr. Bernal's residual functional capacity or the ALJ's conclusion regarding the severity of [the claimant's] mental impairment. . . and [the claimant] was not prejudiced by the ALJ's actions because the ALJ's decision was amply supported by the medical reports and the record." Andrade, 985 F.2d at 1050.

In the August 8, 1996 Order, this Court relied upon the Andrade directive and reversed the decision of the Commissioner due to the failure of the Commissioner to use every reasonable effort to have a qualified medical advisor complete the PRT Form. After reconsideration of the Bernal case and applicable statutes and regulations, this Court now concludes that the ALJ did not err by completing the PRT Form without the assistance of a medical advisor. To the extent that the Court's prior Order is inconsistent with the findings in this Order, that portion of the Order is vacated. In accordance with the findings of the Court, the decision of the Commissioner is therefore **AFFIRMED**.

Dated this 19 day of September 1996.

A handwritten signature in black ink, appearing to read "Sam Joyner", written over a horizontal line.

Sam A. Joyner
United States Magistrate Judge

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

MFP PETROLEUM LIMITED)
PARTNERSHIP,)
)
Plaintiff,)
)
vs.)
)
NORAM GAS TRANSMISSION)
COMPANY, f/k/a Arkla)
Energy Resources, a)
division of Arkla, Inc.,)
)
Defendant.)

ENTERED ON DOCKET
DATE SEP 18 1996

No. 95-C-319-K ✓

FILED
SEP 18 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Defendant NorAm Gas Transmission Company ("NGT"), pursuant to F.R.C.P. 68, has served upon Plaintiff MFP Petroleum Limited Partnership ("MFP") an offer to allow judgment to be taken against NGT for the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00), inclusive of interest, costs, and attorney fees. The offer is intended to encompass all claims asserted by MFP in its Complaint. MFP has accepted the offer.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is granted in favor of Plaintiff MFP and against Defendant NGT for the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00), inclusive of interest, costs, and attorney fees.

ORDERED this 17 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

WM. ERIC CULVER, et al.,

Plaintiffs,

v.

CAROL M. BROWNER, as
Administrator of the United States
Environmental Protection
Agency, et al.,

Defendants.

ENTERED ON DOCKET

DATE SEP 18 1996

No. 95-c-1039-K

FILED

SEP 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled.

Therefore it is not necessary that the action remain upon the calendar of the Court.

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

ORDERED this 17 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

BANFIELD'S MEAT MARKET,

SEP 18 1996

Plaintiff,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.

UNITED STATES DEPARTMENT OF
AGRICULTURE, FOOD AND CONSUMER
SERVICE DIVISION

Civil Action No. 96-C-168-E

Defendant.

ENTERED ON DOCKET

DATE SEP 19 1996

ADMINISTRATIVE CLOSING ORDER

The Court has reviewed the Agreed to Order entered on April 1, 1996 pursuant to Plaintiff's application for a stay of the administrative order of the United States Department of Agriculture, dated February 1, 1996. Having done so, the Court concludes that this matter should be administratively closed pending final disposition or until further order of the court.

It is therefore ordered that the Clerk administratively terminate this action in his records.

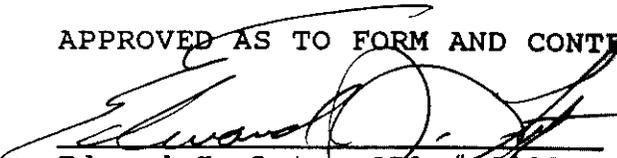
The parties are DIRECTED to notify the Court within (10) days after receipt of this order if it is necessary to obtain a final determination of this litigation so that the Court may consider the re-opening of this matter.

ENTERED this 18th day of Sept., 1996.

S/ JAMES O. ELLISON

THE HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:


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ENTERED ON DOCKET

DATE 9/19/96

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

F I L E D

SEP 18 1996 *SRL*

RICKEY R. WARD

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-186-W ✓

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed September 18, 1996.

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 9/19/96

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

F I L E D

SEP 18 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICKEY R. WARD

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No: 95-C-186-W ✓

ORDER

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

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not

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

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disabled within the meaning of the **Social Security Act**.²

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant suffered from severe right and left hand pain, but that he had the residual functional capacity to perform work, except that involving lifting more than twenty pounds occasionally and ten pounds frequently and using vibrating machines, power gripping, and more than minor cold exposure. The ALJ found that claimant's past relevant work as an expeditor did not require the performance of work-related activities precluded by these limitations and therefore he was not prevented from performing his past relevant work. Having determined that claimant could perform his past relevant work, the ALJ concluded that he was not disabled under the **Social Security Act** at any time through the date of the decision.

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

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

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

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

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

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

- (1) The ALJ erred when he concluded that claimant had no disabling lumbar and shoulder impairments.
- (2) The ALJ erred by not giving proper weight to the medical evidence developed after Dr. Browning's evaluation in 1991 and to claimant's testimony of his alleged symptoms.
- (3) The ALJ erred by not including a left hand grasping and strength impairment in his hypothetical to the vocational expert.

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

Claimant contends he had to stop working on September 5, 1991, because of "carpel tunnel in both hands," vibration disease, and shoulder and lumbar impairments (TR 53). The ALJ found that his testimony regarding these complaints was not credible (TR 14).

Claimant complained to his doctor in the fall of 1989 that he had carpal tunnel syndrome (TR 81). On November 20, 1989, his doctor reported: "[t]his man has symptoms of right carpal tunnel. He needs to have a release. His E.M.G. studies do not support this; however, too many times in the past we have been through this situation, and had relief of symptoms with outpatient surgery; therefore, I would advise that we proceed" (TR 81). The surgery was performed on December 5, 1989. By January 26, 1990, he was provided with equipment to strengthen his grip, and on February 16, 1990, his doctor concluded: "[P]atient's hand has improved greatly since he has been using a hand exerciser. Increased to three rubberbands. Instructed that he can return to gainful employment, light duty." (TR 80).

On March 2, 1990, the doctor reported that claimant was back at work, but not using heavy tools. (TR 80). On March 23, 1990, the doctor stated that claimant was working light duty, but did not have his usual grip strength. (TR 80). On April 20, 1990, the doctor reported:

[p]atient complaining of discomfort in his right long finger radiating up his arm. He has problems when he uses a hammer at work or 'slaps a wrench.' He is doing what is considered light work at Electric Boat which sounds heavier than the average light work. Mr. Ward may be forced to look for other employment, since he cannot accommodate this.

(TR 80).

By May 17, 1990, the doctor reported that:

[p]atient comes in complaining of problems with his hand. He has pain in his right hand at work doing heavy jobs that are required. Because of the discomfort, he is unable to use his hand at home either. The patient is awakened at night with paresthesias of the hand, indicating a drop of the wrist during the night. A cock-up splint has been prescribed for him that he can wear during sleeping hours and this should relieve his paresthesias. Ricky will have to entertain thoughts of a different occupation. It is obvious that his hand cannot take the pounding and trauma that is required in his current employment.

(TR 80). On June 6, 1990, claimant told the doctor he was no longer using tools at his job and was "doing better." (TR 78). By July 16, 1990, the hand was stable (TR 78).

Significantly, on August 31, 1990, claimant's doctor stated: "Patient's hand is doing well. He has complete range of motion and he has good grip strength. He is now working as an expeditor, which means he does not have to use tools and this seems to have given him relief from the pounding his hand was taking. The patient is doing well." (TR 78). On October 12, 1990, the doctor discharged claimant from

his care, reporting "[p]atient's scar is well healed and has reached its end result. He has a full range of motion of his hand and he has reached his end result. There is no measurable loss of use. He is working." (TR 78).

Dr. S.P. Browning examined claimant on January 25, 1991, and reported that he was "still employed," although he complained of numbness, weakness, and pain in his hands (TR 85-86). The doctor reported as follows:

The Allen test on the right hand is weakly positive, on the left hand, there is very significant delay in the Allen test. The Tinel's sign at the left wrist and flexion test are not really positive, but on the right wrist, he is sore through the palm of the hand in the distal half of the scar and the center of the palm of the hand. I believe this is what limits his grasp, which is right 43, left 108. The pinch is right 18, left 23. He has diminished sensation to light touch, vibration and pinwheel in both hands.

It is my opinion that Mr. Ward has vibration disease in both hands, he should not return to work as an outside machinist.

....

His work restrictions would be no vibrating tools, no air-driven tools and minimal cold exposure. He also has sensory impairment and he has trouble with small objects, such as small screws, but not with large bolts, such as half and three-quarter inch size. The right grasp is weak due to pain. It is still strong enough for use in the job which he now holds.

(TR 86).

Dr. Browning concluded that claimant was 10% permanently impaired in his right hand and 6% permanently impaired in his left hand, adding that he was "particularly concerned about the delayed Allen response in the left hand" and reserved the right to reevaluate claimant in 3-5 years. (TR 87).

A consultative examination of claimant was done by Dr. Beau Jennings on February 24, 1992 (TR 99-100). The doctor reported that claimant was complaining of pain in both wrists and lumbar pain. The doctor stated:

There is a surgical scar over the palm of the right hand. He complains of pain when pressure is applied to both median nerves of the wrist. When asked to perform ranges of motion of the right wrist his effort appeared to this examiner to be poor and he fussed and groaned throughout. Ranges of motion were less than 10 degrees in all 4 directions of both wrists. Again, the effort appeared poor. There was no swelling, redness, or tenderness of any of the joints in the upper extremities and peripheral pulses were equal bilaterally. When asked to squeeze my hands, he gave an extremely poor effort with very little strength being exerted. It is extremely difficult to quantify the amount of weakness. No muscle atrophy was noted in the hands or forearms. He is able to oppose his thumbs and fingers. He is able to grasp small objects and when asked to use a percussion hammer, he held it between his thumb and the proximal phalanx of his index finger in such a manner that if this was the best way that he could effectively grasp an object then he essentially has no use of his hands. Again, it was my impression that the effort was very poor and an unreliable response on his part. Examination of the LUMBAR SPINE: Range of motion was again carried out with a great deal of groaning and grimacing and heavy breathing. He moved less than 10 degrees in all directions except flexion which was no more than 30 degrees. Deep tendon reflexes were equal in the lower extremities. Good peripheral pulses. Leg lengths were equal. Deep tendon reflexes were equal in the lower extremities. Toe extensor strength was good. He is able to walk on his heels and toes. He is well muscled and no muscle atrophy in the lower extremities. Sensory examination is negative. Peripheral pulses were equal and good in the lower extremities.

(TR 100) (emphasis added).

An electromyography ("EMG") was performed of claimant's arms on March 20, 1992, which showed: "[t]here is no significant abnormalities found in today's EMG test except for borderline delay of left median sensory nerve distal latency which could reflex mid or borderline CTS [carpal tunnel syndrome] L [left] side. There is no

EMG evidence of CTS involving R [right] side or cervical radiculopathy." (TR 95). On April 16, 1992, a doctor found that claimant had normal Tinel's signs, equal deep tendon reflexes, and no skin abnormality or muscle atrophy in his hands, in spite of his complaints of numbness (TR 91).

Claimant complained of lumbar pain long before he stopped working in 1991. He testified at a hearing on October 22, 1992 that he injured his back in 1975 and receives disability payments for the injury (TR 153). A report from a Veterans Administration hearing on May 1, 1986, related that x-rays taken in April of that year showed "a degenerative narrowing of the L4-5 and L5-S1." (TR 109). The rest of the report merely discussed claimant's complaints of lumbar pain (TR 109-117). The rating board required him to supply recent x-rays and a complete CMP examination before an evaluation of his condition could be made (TR 109-117).

In August of 1992, he reported back pain to a Veterans Administration doctor, who replaced his back brace and told him to see an orthopedist (TR 121-122). On September 21, 1992, the doctor reported that claimant was complaining of back and right leg pain, but the report showed "mild to borderline CT," and the doctor saw no reason to x-ray his back (TR 119).

Claimant also reported that he underwent surgery for a dislocated left shoulder in 1982, long before he stopped working in 1991 (TR 91, 99, 153-154). He was able to lift weights of over 100 pounds and continuously stand and walk at least until 1991 (TR 42-44).

There is no merit to claimant's first contention that the ALJ erred in finding that

claimant had no disabling back and shoulder impairments. The ALJ correctly noted that claimant's allegations of pain must be analyzed in accordance with the guidelines set out in Luna v. Bowen, 834 F. 2d 161, 165 (10th Cir. 1987). (TR 12-13). The court in Luna discussed what a claimant must show to prove a claim of disabling pain:

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

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

The ALJ properly concluded that there was no objective medical evidence to support claimant's allegations of back pain and limited shoulder rotation. (TR 14). The only medical evidence of a pain-producing back ailment in the record is the Veterans Administration hearing transcript indicating that x-rays taken on April 8, 1986 revealed a degenerative narrowing "in one area" (TR 109). Claimant was able to work for several years after the x-rays were taken. The remainder of that

transcript and the August 1992 and September 1992 medical reports were merely claimant's subjective descriptions of his symptoms reduced to writing. It is well settled that the ALJ's decision must be upheld if it is supported by substantial evidence. Richardson v. Perales, 402 U.S. 389, 390 (1971).

The ALJ dismissed claimant's claim of a disabling shoulder impairment in much the same way as the back condition, by finding that there was no objective medical evidence offered. While the record indicated that claimant had a screw placed in his left shoulder in 1982 (TR 91, 99, 153-154), the only other mention of claimant's shoulder is his assertion at the hearing on October 22, 1992 that "I can't raise my [left] arm above my head" and "I can't scratch my back anymore with my left hand because I can't bend-- it won't bend around far enough for me to reach my back, the small of my back." (TR 154). The hearing transcript indicates that claimant performed a demonstration by lifting his left arm in front of the ALJ. (TR 154). The ALJ found no objective medical evidence to support the "inability to lift above shoulder level." (TR 14). This conclusion is supported by substantial evidence.

There is also no merit to claimant's next contention that the ALJ relied on Dr. Browning's evaluation without considering claimant's subjective complaints or the opinion of other doctors. Claimant argues that the ALJ based his decision solely on Dr. Browning's two year old evaluation and ignored the EMG finding of carpal tunnel syndrome in the left wrist. (TR 95). Claimant further argues that because an EMG is not always accurate when diagnosing CTS, the ALJ should have considered claimant's symptoms and testimony.

The ALJ analyzed the medical evidence, including the EMG performed on March 20, 1992 and the September 21, 1992 examination (TR 12, 95, 121-122). Since objective medical evidence established only mild carpal tunnel syndrome in the left wrist, the ALJ considered claimant's subjective allegations of pain and determined that claimant was not credible.

The ALJ was required to offer specific evidence of why he found that claimant was not credible, rather than mere conclusions. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995). "[I]t is well settled that administrative agencies must give reasons for their decisions." Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988). Credibility determinations are peculiarly the province of the finder of fact, and the court on appeal should not upset such determinations when supported by substantial evidence. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

The ALJ determined that claimant was not credible by looking at the entire record and comparing the medical evidence to claimant's allegations of pain. (TR 14). The ALJ found that claimant was not cooperative during his examination with Dr. Beau Jennings, and therefore the ALJ gave the doctor's examination report no weight. (TR 14). The ALJ also found claimant not credible because there was no objective medical evidence to support his back and shoulder pain. Finally, the ALJ noted that while the record indicated a mild case of carpal tunnel syndrome in claimant's left wrist, this did not establish a basis for believing claimant's allegations of disabling pain. The ALJ did not, as plaintiff argues, overrely on the diagnostic

findings (EMG) and evaluations by his treating physician and the consultative examiner (Plaintiff's Brief at 3-4). A claimant's subjective statements alone cannot establish an alleged disability, especially when they are inconsistent with the objective medical evidence. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990).

There is no merit to claimant's final contention that the ALJ erred by not including any lumbar, shoulder, or left hand grasping impairments in his hypothetical to the vocational expert. A decision at step four of the sequential evaluation process that claimant can return to his past relevant work does not require the opinion of a vocational expert. Glenn v. Shalala, 21 F.3d 983, 988 (10th Cir. 1994). In addition, in forming a hypothetical question to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley, 908 F.2d at 588.

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

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 9/19/96

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

F I L E D

GERTRUDE BROWN for)
KHILARNEY WALLACE, a minor,)

SEP 18 1996 *SAL*

Plaintiff,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

v.)

Case No: 95-C-675-W ✓

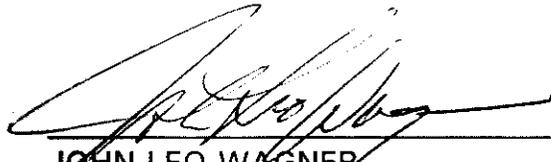
SHIRLEY S. CHATER,)
Commissioner of Social Security,)

Defendant.)

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in
accordance with this court's Order filed September 18, 1996.

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 9/19/96

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

F I L E D

SEP 18 1996 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERTRUDE BROWN for)
KHILARNEY WALLACE, a minor,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 95-C-675-K(W) ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

A

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

In the case at bar, the ALJ found that claimant did not have an impairment of comparable severity to that which would disable an adult, was capable of functioning in an age-appropriate manner, and therefore was not disabled under the Social Security Act.³

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

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hepfner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations at 20 C.F.R. § 416.924 require that the following evaluation be made in considering a claim for benefits for a child under the Social Security Act:

If you are a child, we will find you disabled if you are not engaging in substantial gainful activity and you have an impairment or combination of impairments that is of comparable severity to an impairment or combination of impairments that would disable an adult and which meets the duration requirement (see § 416.909). By the term comparable severity, we mean that your physical or mental impairment(s) so limits your ability to function independently, appropriately, and effectively in an age-appropriate manner that your impairment(s) and the limitations resulting from it are comparable to those which would disable an adult. Specifically, your impairment(s) must substantially reduce your ability to--

- (1) Grow, develop, or mature physically, mentally, or emotionally and, thus, to attain developmental milestones (see § 416.924b (b)(2)) at an age-appropriate rate; or
- (2) Grow, develop, or mature physically, mentally, or emotionally and, thus, to engage in age-appropriate activities of daily living (see § 416.924b(b)(3)) in self-care, play and recreation, school and academics, community activities, vocational settings, peer relationships, or family life; or
- (3) Acquire the skills needed to assume roles reasonably expected of adults (see § 416.924b(b)(4)).

A functional analysis is applied to child disability claims. Sullivan v. Zebley, 439 U.S. 521, 540 (1990). The ALJ examines the impact of the impairment on the normal activities of a child the plaintiff's age: playing, speaking, washing, going to school, walking, dressing, and feeding herself. Id.

- (1) That the ALJ failed to give proper consideration to the testimony of claimant's mother, Gertrude Brown, and to make proper credibility findings regarding the testimony.
- (2) That the ALJ failed to consider all of claimant's impairments in combination.

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

Claimant's mother testified at a hearing on October 5, 1993 that claimant has the following impairments: asthma, bronchitis, visual problems, speech problems, and an emotional and nervous condition. (TR 175). The ALJ concluded that none of these were sufficiently severe to be comparable to an impairment that would disable an adult (TR 18).

Credibility determinations are peculiarly the province of the finder of fact, and a court on appeal will not upset such determinations when supported by substantial evidence. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995), citing Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). However, "[f]indings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." Kepler, 68 F.3d at 391, quoting Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988).

The ALJ correctly concluded that there was no medical evidence of disabling vision, speech, or emotional problems. Dr. Walter Exon noted that her "lazy eye" was not a problem on March 16, 1992 (TR 101). Claimant underwent ophthalmic surgery

on May 7, 1993 on both eyes for **bilateral lateral rectus recession of 6 millimeters, due to significant esotropic imbalance and divergence excess** (TR 127-128, 134). No refractive error was found at an examination on April 27, 1993 (TR 127). Claimant's mother testified at the hearing that **the claimant** was to begin wearing glasses the following month (TR 178). Her kindergarten teacher reported no visual problems (TR 139). This evidence **does not reflect an eye impairment** so severe that it would disable an adult.

Claimant had slurred speech and stuttering which was noticed and treated by a speech therapist who babysat her (TR 73). Claimant's mother admitted at the hearing that her speech had "gotten a lot better." (TR 183). Her kindergarten teacher reported no speech problems (TR 139). The evidence does not show severe speech problems which would disable an adult.

Claimant's mother also indicated that at one time claimant was very emotional and nervous (TR 183-184). However, she testified at the hearing that the medicine Phenergan made claimant emotional and tearful and caused her to scratch herself and pull her hair out (TR 183). When the medication was discontinued, the problems ended (TR 183-184). Claimant's kindergarten teacher did not report that she was emotional or nervous (TR 139). There is no medical evidence of any such problems, and claimant has never received any psychological testing or treatment.

Claimant's teacher noted that any problems claimant had were "quite normal for her age level." (TR 139). The only specific problem noted was "a short attention span," which was common at her age (TR 140). The teacher stated that claimant

could do all the things other students could do (TR 140). It is significant that the teacher gave claimant satisfactory ratings in almost every category in kindergarten, including self-direction, ability to run, hop, skip, and gallop, and reading, language, and mathematics development (TR 142).

There was no mention of any restrictions in claimant's activities in any school or medical evaluations, and no medical documents suggested that she limit her activities or diet. While her mother testified that she could not eat sugars and chocolate and that "running and playing overexerts her" (TR 178), there is no medical basis for this testimony. A witness may be found to lack credibility if testimony conflicts with the objective record. Eggleston v. Bowen, 851 F.2d 1244, 1247 (10th Cir. 1988).

Because claimant's alleged vision, speech, and emotional impairments either had no objective medical support or had very little impact on her functioning, the ALJ was not required to consider them in combination with her other respiratory impairment. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). However, the ALJ did consider all of the impairments in his written decision (TR 17-18).

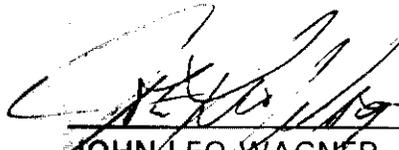
The record shows that claimant has suffered respiratory problems periodically for some years. She was treated for asthma and bronchitis in the emergency room on November 30, 1991 (TR 78-82), September 13, 1992 (TR 104-109), January 4, 1993 (TR 116-120), November 18, 20, and 21, 1993 (TR 148-163), and February 28, 1994 (TR 164-169). However, her asthma was characterized as mild at other

times (TR 85, 101, 150). On September 13, 1992, the doctor noted that claimant had not used her inhaler in a while (TR 107), and on January 4, 1993 the doctor stated claimant was "very active." (TR 117). On February 28, 1994, the doctor stated that claimant was able to perform regular activities, such as running and playing (TR 166). On November 18, 1993, a school nurse reported that she had not treated claimant for anything and "as far as she is concerned there is nothing wrong with her." (TR 145).

Although claimant's mother claimed that she missed a great deal of school during the school year 1992-93 due to "having asthma" (TR 129), there is reason to suspect that other circumstances may have caused some of the absences, because her headstart teacher reported that she had missed a great deal of school "due to no car - at first - then a new baby and illness in family." (TR 70). Her mother admitted that she had only missed two days of school due to sickness in the fall of 1993 and that "[a]cademically she's doing pretty good. She's . . . pretty well advanced as far as her reading -- well, learning to read, learning to spell, writing." (TR 186). A lack of objective supportive evidence for an impairment may properly lead to a denial of benefits. Flint v. Sullivan, 951 F.2d 264, 267 (10th Cir. 1991). Taken as a whole, the evidence substantially supports the ALJ's finding that plaintiff's respiratory impairment was controlled with medication and did not interfere with her cognitive, motor, or social development (TR 18).

There is no merit to claimant's contentions. The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

DATE 9/19/96

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

F I L E L

WAYNE BOONE,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,¹

Defendant.

SEP 17 1996

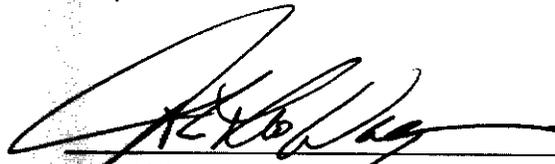
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-353-W

JUDGMENT

Judgment is entered in favor of ~~the~~ Plaintiff, Wayne Boone, in accordance with this court's Order filed September 17, 1996.

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET

DATE 9/19/96

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

F I L E D

WAYNE BOONE,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

SEP 17 1996 *SAL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-353-W ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(l) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

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

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

9

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

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional requirements of work, except for lifting over 20 pounds maximum weight, but was unable to perform his past relevant work as a truck driver. He concluded that the claimant's residual functional capacity for the full

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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

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

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

range of light work was reduced by his inability to crawl or work on ladders. The ALJ found that the claimant was 53 years old, which is defined as closely approaching advanced age, had a 12th grade education, and did not have any acquired work skills which were transferable to the skilled or semiskilled work functions of other work. He concluded that, although the claimant's additional nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy which he could perform, such as delivery work and motor repair. Having determined that claimant could do certain types of light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The decision that claimant can do light work is not supported by substantial evidence.
- (2) The reliance on the medical expert's testimony and rejection of the treating physician's opinion was improper.

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

Claimant contends that he has not worked since July 28, 1992, when he suffered a heart attack (TR 112, 264). He was driving a truck when he began to feel dizzy and weak, had shortness of breath, along with chest pain and numbness radiating into his left arm, and completely lost consciousness for some period of time.

(TR 154, 164). He sought medical attention from Dr. David Caughill and was eventually transferred to the hospital and the care of Dr. Stan DeFehr, who determined that he had suffered a recent inferior wall myocardial infarction (TR 264). It was Dr. DeFehr's opinion that the heart attack might have occurred approximately two weeks prior to claimant seeking medical care. (TR 264).

Claimant underwent an angiogram on July 29, 1992, and his arteries were found to be too small for angioplasty or bypass surgery (TR 154, 265). A heart catheterization on July 30, 1992, showed:

[m]oderate left ventricular dysfunction with a mildly dilated left ventricle. Ejection fraction only 49% with diffuse hypokinesis and elevated end diastolic pressure of 22.

Severe three vessel coronary artery disease with very small vessels in general. The LAD and diagonals were diffusely diseased; circumflex was diffusely diseased and occluded in its mid-portion with what appears to be a fresh thrombus; right coronary artery totally occluded in its mid-portion with a very poor distal fill.

(TR 158, 164). Chest x-rays revealed "[m]ild left ventricular enlargement in a normal overall heart size [and] [m]ild prominence of the hilar vascularity." (TR 160, 166).

Dr. DeFehr stated on July 29, 1992, that claimant suffered from:

Severe ischemic coronary artery disease with severe 3 vessel involvement and moderate cardiomyopathy. Recent inferior wall infarction probably two weeks ago with continued symptoms of angina and mild congestive failure.

Hypertension.

Non-insulin dependent diabetes mellitus.

Cardiac catheterization revealing diffuse LAD disease, moderate in severity with very small vessels; occluded mild circumflex with thrombus

which probably occluded two weeks ago; totally occluded right coronary artery probably old with no distal fill. Ejection fraction 49% with elevated left ventricular diastolic pressure and diffuse hypokinesis.

(TR 154).

Claimant was discharged back to the care of his regular physician, Dr. Flora, to see him every two months to check on thinning of his blood (TR 154, 265). He was given medications, including Sectral 400 milligrams, ISMO 20 milligrams, Dilacor 240 milligrams, Glucotrol for diabetes, and Vaseretic for blood pressure. He was advised to take one enteric-coated Bayer aspirin daily, Coumadin, a blood thinner, and Nitroglycerin as needed (TR 154, 170, 265, 296). Dr. DeFehr "limited him greatly in his activity and told him he could not drive a coal truck anymore or do heavy farm labor as he was used to doing." (TR 154).

On September 8, 1992, claimant took a treadmill test (TR 238). He exercised for nine minutes with no ischemic changes, but the ST segment was depressed one millimeter after exercise (TR 238). The T-wave was also inverted (TR 238). No angina or arrhythmias occurred (TR 238).

On October 2, 1992, Dr. Griffith Miller evaluated claimant for workers compensation purposes (TR 167-171). He concluded that claimant's heart had "a normal sinus rhythm without evidence of murmurs or cardiomegaly." (TR 168). The doctor stated:

Due to the fact that Dr. DeFehr states that he will never work again because of the severe angina because it is not controlled with the medication, he does have cardiomyopathy, and Dr. DeFehr says that he must go on Social Security and must not do any kind of work in the future, he has total occlusion of two vessels, and eighty percent of one

and they cannot do bypass surgery due to the small caliber of vessels, it is my opinion that he has 100% impairment to the body due to this heart condition.

(TR 170).

On December 4, 1992, Dr. DeFehr saw claimant and stated that he was "totally disabled, has marked shortness of breath and chest heaviness when he tries to do much of anything at all." (TR 232). On December 18, 1992, the doctor filled out a pain report for the state and noted that claimant's pain was severe and limiting with minimal activity (TR 184).

On February 26, 1993, claimant was admitted to the hospital because of faintness, swelling, and a rash, which was diagnosed as a "severe urticarial reaction." (TR 172, 174). At that time, Dr. DeFehr stated that claimant suffered from "[s]evere ischemic coronary artery disease with three vessel involvement. Moderate cardiomyopathy deemed inoperable." (TR 173). The doctor concluded that claimant was "unable to work because of recurrent angina and severe medical problems as outlined above. He is on numerous medications and is functional as long as he has minimal activity." (TR 173).

On April 16, 1993, Dr. Casey Truett reported that he had examined claimant (TR 264-268). The claimant reported that he was taking nitroglycerin for extreme shortness of breath, and it helped the problem and his medications had eliminated his chest pain (TR 265). He told the doctor he walked one-half mile daily in twenty minutes and got shortness of breath after one-quarter mile (TR 265). The doctor found that x-rays showed an enlarged heart and an electrocardiogram showed

"marked slowing of the heart, probably related to medications. Criteria were met for enlargement of the left ventricle [and] [a]n inferior myocardial infarction of undetermined age with posterior extension, as well as ST-T wave abnormalities, was noted. This would be evidence of the patient's previous myocardial infarction." (TR 266). The doctor concluded:

When considering all of the above facts, it is my professional opinion that Mr. Boone's myocardial infarction was a direct result of stress arising out of the course of his employment. I believe that his job duties were a substantial factor in precipitating his heart ailment. His coronary artery disease was pre-existing but dormant and, in my opinion, the emotional and physical stresses of Mr. Boone's job at the time of his heart attack were the precipitating causes of the myocardial infarction in question.

When referring [sic] the Third Edition, Revised of the AMA Guides to the Evaluation of Permanent Impairment, on Page 137, we find that Mr. Boone falls into Class IV of the Classes of Coronary Heart Disease There are signs and laboratory evidence of cardiac enlargement, as well as abnormal ventricular function. In this class of impairment, a 55-100 percent impairment to the whole person range is recommended.

When considering the history above, as well as Mr. Boone's education, training and experience, it is my considered medical opinion that he is 100 percent permanently and totally disabled as a direct result of his occupationally-induced heart attack. I believe that to return to any job duties for which he is qualified would put him at risk for other heart attacks.

(TR 267-268).

A medical expert, Dr. Ralph Redding, testified on May 17, 1994, as follows:

Q. Now, I'd [sic] for you to first address documents only with regard to next question, and what I would like to do is have you express your opinion with regard to what the documents show or what you would expect the residual functional capacity to be, in other words, what you would expect him to be able to do on a day-in and day-out basis despite

his problems, and then we'll add in the testimony in a few minutes but only documents for the moment.

A. Yes, Your Honor. I had documentation that he was on a treadmill in September of '92, which was about three or four months, two months after his heart attack, and on the treadmill he walked for nine minutes which is certainly much better than six METs and stopped because of shortness of breath, and there was no abnormality of the electrocardiogram at that time. He had an angiogram of -- in '94, and it shows some diffused disease. It's mainly peripheral. I'm surprised -- so using this objective evidence, I don't think he meets the standards. If I include his statements today, I can't believe that he's been told not to walk, exercise, lose weight in order to control his diabetes, hyperlipidemia, and coronary artery disease.

Q. Now, based on the documents alone and let me come back to the testimony in a minute, would it -- would you expect this claimant to be able to perform work on a day-in and day-out basis? Work-like activity?

A. Yes.

Q. And what kind of limitations, if any, in other words, would there be any lifting restrictions or climbing restrictions or anything like that you see would be pertinent or appropriate?

A. I would think he'd fit into the light category.

Q. Okay.

A. Light work.

Q. So basically lift 20 pounds occasionally --

A. Yeah.

Q. -- and ten pounds frequently, no limit on climbing, that kind of thing or --

A. I think he could climb one flight of stairs --

Q. Okay.

A. -- several times a day. I guess he would have some difficulty crawling.

Q. Okay. Now, what about ladders? It would seem to me ladders would be more difficult than stairs.

A. Yeah, I would think ladders would be not a recommendation.

(TR 56-58).

.....

Q. [I]s the documentation and the testimony consistent or is it inconsistent?

A. It's inconsistent.

Q. Okay, and what particulars? Can you help me get a good grasp on that?

A. The difference in the treadmill, for example --

Q. Okay.

A. -- in what the claimant can do or says he can do and what the treadmill -- he was able to do.

Q. Okay.

A. Secondly, there's a more recent angiogram this last year I think I saw in the new notes --

Q. Okay.

A. -- in which he -- it was said that he had an ejection fraction of something like 60 percent --

Q. Okay.

A. -- and that would suggest he should be able to do what I first started out saying he could do.

Q. Basically a full range of light?

A. Yeah.

(TR 59).

.....

Q. (By attorney). And isn't it possible that if the claimant was -- a treadmill test conducted now that it may not necessarily be as good a result or --

A. It's possible, but I only have documents -- talked about documents, and the only thing that I have in document is a recent echocardiogram of his heart, which reveals surprising good left ventricular function

Q. The occurrence of the angina which the claimant has, that would have no affect on his ability to perform light work now?

A. Yeah, of course, it would have an affect. If his claims of angina doing these things, if that's inconsistent with what the objectives suggest.

Q. Okay. So this latest report where he's hospitalized from chest pain occurring during the night, that's inconsistent with his complaint? There's no objective verification here of that?

A. No.

Q. Well, what other problems could have that type of complaint?

A. Are you talking about chest pain?

Q. Yes.

A. There's a whole differential of chest pain, including chest wall pain, from costural congreitis, muscular skeletal pain, lung infections, reflex esophagitis, spasm of the esophagus.

Q. Okay. Would pain from any of those factors stop after the --

A. Nitroglycerin.

Q. -- nitro was taken?

- A. Yes, several of them.
- Q. This documentation don't show any objective evidence of pain from any other (INAUDIBLE) does it?
- A. I think the documentation suggests some curiosity on the parts of the objective data because the echocardiogram doesn't fit with the complaints of the individual

(TR 60-61).

A vocational expert at the same hearing testified as follows:

- Q. Okay. Now, if we go ahead and accept all of the testimony exactly as it's been given, what would that do to the job base?
- A. Okay. The testimony is very limiting. He can only walk a quarter of a mile, actually half of that before he experiences fatigue, can only stand five minutes. The light jobs would require him to stand and walk six hours out of an eight-hour day, and he has testified that he can only sit 15 to 20 minutes. Any sedentary work, which he has no transferrable skills to, require him to sit 15 to -- six hours out of an eight hour day, and then the testimony concerning his medications making him sleeping [sic], needing an hour nap after he takes it in order to get out of the drowsiness and of course, his testimony concerning his inability to drive more than probably five miles would affect his ability to perform the light delivery driving job.
- Q. So I'm understanding --
- A. There would be --
- Q. -- be no jobs.
- A. Right.
- Q. Let me back up a second. If we go ahead and start with the scenario, no more than 20 pounds and frequently ten pounds, very little crawling, no climbing of ladders, scaffolds, so forth, can climb one flight of stairs several times a day, are there any other jobs that come to your mind whether they use transferrable skills or not?

A. There's light assembly work. There's 661,000 of those jobs in the national economy and 80,000 in this region. There's light machine operating jobs, such as a grinding machine operator. There's 326,000 in the national economy and 40,000 in this region, and there's sedentary assembly work. There's 144,000 in the national economy and 18,000 in this region.

Q. Okay. Would you expect this claimant to have to make any significant adjustment to do any of these jobs?

A. The assembly and the machine operating, probably. He would be going into an industrial environment he was not familiar with. Yes. Delivery driving, probably a minor adjustment.

(TR 64-65).

There is merit to claimant's contentions that the decision of the ALJ is not supported by substantial evidence and that he did not give sufficient weight to the opinions of the doctors who treated and evaluated claimant. Under the social security requirements "light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567. There is not substantial evidence that claimant can do a good deal of walking or standing or sit for eight hours and push and pull arm or leg controls.

"A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. U.S. Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995). When the treating physician's opinion is not consistent with other medical evidence, the ALJ must examine the other medical

evidence to determine if it outweighs the treating physician's report. *Id.* at 290. A treating physician's opinion regarding the severity of a claimant's impairments is generally favored over that of a consulting physician. *Reid v. Chater*, 71 F.3d 372, 374 (10th Cir. 1995).

In this case, three doctors who were treating or examining doctors said claimant was limited to minimal activity and unable to work. Only the medical expert, who merely reviewed the records and observed claimant, concluded that he could do light work. The ALJ relied on this decision (TR 20-21). He noted that Dr. Miller and Dr. Truett had each examined claimant only once and that

The Administration does not recognize the AMA Guides to the Evaluation of Permanent Impairments (3rd Edition-Revised) used to evaluate disability in workers' compensation claims, and is not bound by determinations made by other agencies. While the conclusions of Drs. Miller and Truett have been considered, the Administrative Law Judge finds that Dr. Redding's assessment given at the hearing reflects a more current evaluation of the claimant's condition.

(TR 20).

The ALJ also discussed Dr. DeFehr's conclusion that claimant was totally disabled, but found

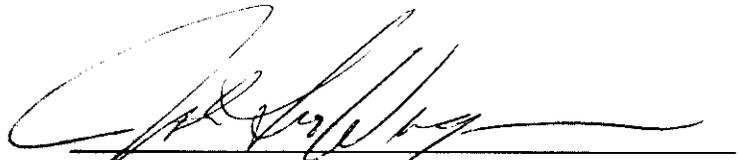
Dr. DeFehr's sympathetic notations are inconsistent with the objective medical evidence such as the treadmill test dated September 1992 in which the claimant exercised for 9 minutes with no ischemic changes noted during exercise . . . and the more recent electrocardiogram done May 1994 which demonstrated no changes. . . . Additionally the History and Physical Examination Record taken May 1994 indicated that the claimant had not had much problem with chest pain and that his blood sugars and blood pressure had been generally well controlled . . .

(TR 21).

The court finds that there is substantial evidence that claimant is restricted to minimal activity. Even assuming he can do sedentary work, the ALJ found that he was fifty-three years old, which is closely approaching advanced age, and had no transferable skills. Under the social security guidelines listed at 20 C.F.R., Pt. 404, Subpt. P, Appendix 2, Rule 201.14, this would direct a conclusion that he is disabled.

The decision of the ALJ is reversed, and claimant is found to be entitled to disability benefits under § 216(i) and 223 of Title II of the Social Security Act. The Secretary shall compute and pay benefits accordingly.

Dated this 17th day of September, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\BOONE.OR

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SUN COMPANY, INC., (R & M), a Delaware corporation,)
and TEXACO INC., a Delaware corporation,)

Plaintiffs,)

vs.)

BROWNING-FERRIS, INC., a Delaware corporation, et al.,)

Defendants.)

SEP 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-820-K

ENTERED ON BOOKET

SEP 18 1996

ORDER GRANTING VOLUNTARY DISMISSAL

There came on for consideration before the undersigned Judge this 16 day of September, 1996, the Motion for Voluntary Dismissal Without Prejudice of Defendant, Tulsa Construction & Management, Inc. The Court, having been fully advised in the premises, finds that said Motion should be and is hereby granted.

Defendant Tulsa Construction & Management, Inc. is dismissed without prejudice from this litigation.


TERRY C. KERN
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SUN COMPANY, INC., (R & M), a Delaware corporation,
and TEXACO INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, et al.,

Defendants.

SEP 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

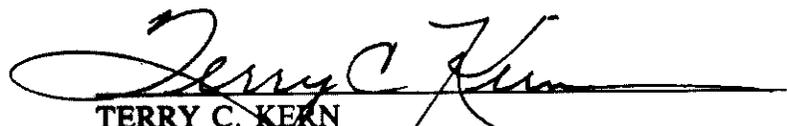
Case No. 94-C-820-K

SEP 18 1996

ORDER GRANTING VOLUNTARY DISMISSAL

There came on for consideration before the undersigned Judge this 16 day of ~~August~~ ^{September}, 1996, the Motion for Voluntary Dismissal Without Prejudice of Defendant, J. B. Stallings d/b/a Stallings Construction Company. The Court, having been fully advised in the premises, finds that said Motion should be and is hereby granted.

Defendant J. B. Stallings d/b/a Stallings Construction Company is dismissed without prejudice from this litigation.


TERRY C. KERN
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUN COMPANY, INC., (R & M), a Delaware corporation,)
and TEXACO INC., a Delaware corporation,)

Plaintiffs,)

vs.)

BROWNING-FERRIS, INC., a Delaware corporation, et al.,)

Defendants.)

SEP 18 1996

Case No. 94-C-820-K

FILED

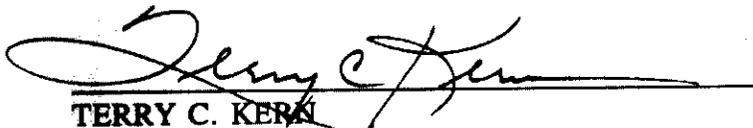
SEP 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER GRANTING VOLUNTARY DISMISSAL

There came on for consideration before the undersigned Judge this 16 day of September, 1996, the Motion for Voluntary Dismissal Without Prejudice of Defendant, Pet Care Cemetery. The Court, having been fully advised in the premises, finds that said Motion should be and is hereby granted.

Defendant Pet Care Cemetery is dismissed without prejudice from this litigation.



TERRY C. KERN
United States District Court Judge

220

RECEIVED
SEP 11 1996
U.S. DISTRICT COURT
N.B. OKLAHOMA

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

FILED ON CLERK
SEP 16 1996

JAMES W. STOVALL,

Plaintiff,

v.

**MARVIN T. RUNYON, Postmaster
General,**

Defendant,

No. 95-C 591-K ✓

FILED

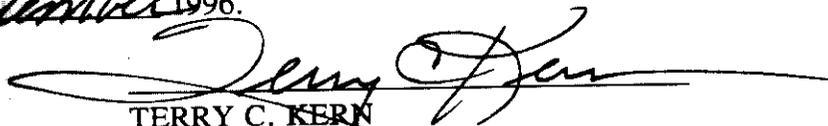
SEP 17 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

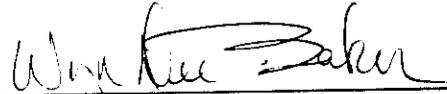
ORDER

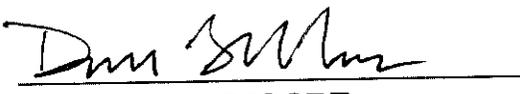
This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, James W. Stovall, against the United States of America are hereby dismissed with prejudice.

Dated this 16 day of September 1996.


TERRY C. KERN
United States District Judge

APPROVED AS TO CONTENT AND FORM:


WYN DEE BAKER, OBA #465
Assistant United States Attorney
U.S. Courthouse
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
Attorney for Defendant


DARRELL L. MOORE
Attorney at Law
Court Place att North Vann
Pryor, Oklahoma 74362 Oklahoma
Attorney for Plaintiff

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

FILED ON DOCKET
SEP 11 1996

TOMMIE LUE BOWLING, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 PAT WIGGINS and D.W. STEWARD,)
)
 Defendants.)

No. 96-CV-728-K

FILED

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, an inmate at the Tulsa 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 against Nurse Pat Wiggins and Tulsa Police detective D.W. Steward. He alleges defendants sexually harassed him and threatened him during an examination to remove samples from his body. He further alleges that the evidence should be suppressed because he was not properly advised of his Miranda rights. Plaintiff requests a formal investigation and \$20,000 in damages.

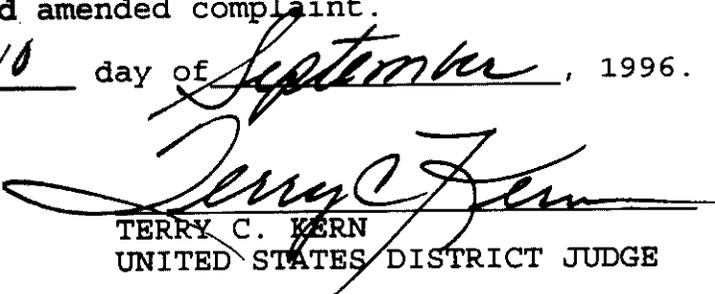
The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time"

if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

After liberally construing the complaint in this action, 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 allegations are conclusory. Plaintiff does not specify the remarks, comments or threats which Defendants allegedly made to him during the examination at issue in this action. Nor does he specify what samples Defendants took from his body and whether Defendants did so on the basis of a court order or warrant.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is **granted**. Plaintiff shall **file** an amended complaint, on or before fifteen (15) days from the date of filing of this order, setting out his allegations with more specificity. Otherwise, the Court will dismiss this action as frivolous or for failure to state a claim. The Clerk shall **mail** a copy of the complaint to Plaintiff along with some blank civil rights complaint forms labeled amended complaint.

IT IS SO ORDERED this 10 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 17 1996

CP

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUSSELL GORDON WOODS,)

Petitioner,)

vs.)

DENISE SPEARS, (Warden) and)

THE ATTORNEY GENERAL OF)

THE STATE OF OKLAHOMA,)

Respondents.)

95-C-308 H ✓

CASE NO. 95-C-225-B

ENTERED ON DOCKET

DATE SEP 18 1996 ✓

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge.

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 service of the report. The time allowed for filing objections to the Report and Recommendation has expired and no objections have been filed.

Based upon a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts the Report and Recommendation [Dkt 7].

SO ORDERED this 17 day of Sept, 1996.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

6/10

F I L E D

SEP 17 1996

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOAN HILL,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,

Defendant.

No. 95-C-911B

ENTERED ON DOCKET

DATE SEP 18 1996

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 17th day of Sept., 1996, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT

United States District Judge

Clmbd

F I L E D

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

SEP 17 1996

WILLARD MORE,

Plaintiff,

v.

**EL DORADO CARTRIDGE
CORPORATION, INC., a
foreign corporation**

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95 C 1248E

ENTERED ON DOCKET

DATE SEP 18 1996

ORDER OF DISMISSAL WITH PREJUDICE

UPON the stipulation of the Plaintiff, Willard More, with his attorney of record, and for an adequate consideration, the receipt of which has been acknowledged, this action is dismissed **with prejudice** to further action in the above styled and numbered cause of action which the Plaintiff now has against the Defendant, El Dorado Cartridge Corporation, a foreign corporation, and any others, for any and all damages arising heretofore or hereafter out of the incident described in the removed petition.

Dated this 17 day of Sept, 1996

(Signed) H. Dale Cook

James O. Ellison
United States District Judge

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

FILED

SEP 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA GLENN,

Plaintiff,

v.

STATE OF OKLAHOMA, ex rel,
DEPARTMENT OF CORRECTIONS,
LARRY A. FIELDS, DIRECTOR,
RITA ANDREWS, WARDEN, and
ROBERT JACKSON,

Defendants.

No. 96-C-384-E

ENTERED ON DOCKET
DATE SEP 17 1996

ORDER

Now on this 16th day of September, 1996, the Court has before it the Unopposed Application for the Dismissal Without Prejudice of Defendant, State of Oklahoma, ex rel, Department of Corrections, and after careful consideration finds that same should be granted.

IT IS HEREBY ORDERED, that Defendant, State of Oklahoma, ex rel, Department of Corrections is dismissed from this action without prejudice.

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

GLENN.ORD

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

F I L E D

SEP 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ST. PAUL MERCURY INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
QUALITY DENTAL PRODUCTS, INC.,)
)
Defendant.)

Case No. CIV-95-C-991K

ENTERED ON DOCKET
DATE SEP 17 1996

ORDER OF DISMISSAL

The above matter comes on to be heard this 16 day of September, 1996, upon the written stipulation of the parties for a dismissal of this case with prejudice, and the Court, having examined the stipulation, finds that the parties have entered into an agreement settling all claims involved in the action, and the Court, being fully advised, finds that this case should be dismissed pursuant to the stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's cause of action filed against the Defendant be, and the same is hereby, dismissed with prejudice to any future action.

s/ TERRY C. KERN

TERRY C. KERN, U. S. DISTRICT JUDGE

F I L E D

SEP 16 1996

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

WAKELY ENTERPRISES, INC., a)
foreign corporation; PATRICK W.)
WAKELY, an individual; and TERESA)
HELLAND-WAKELY, an individual,)

Defendants.)

Civil Action No. 95-C-686-B

ENTERED ON DOCKET ✓
DATE **SEP 17 1996**

JUDGMENT

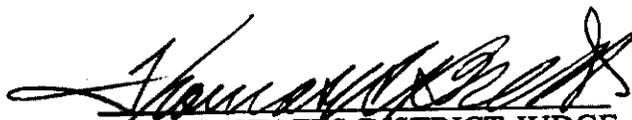
The Court has before it for consideration the Motion of the Plaintiff, Thrifty Rent-A-Car System, Inc., for the entry of Judgment.¹

The Court has considered all matters relevant to a determination of Plaintiff's Motion. In particular, the Court has reviewed its Order filed June 27, 1996. Pursuant to the terms of that Order, the Defendant Patrick W. Wakley was to have entered an appearance pro se or have retained counsel to enter an appearance by July 17, 1996. The Defendant Wakely Enterprises, Inc. was to have counsel enter an appearance on its behalf by the same date. In its June 27, 1996 Order, the Court also provided that failure by the Defendants to comply with the July 17 deadline may result in the entry of judgment against them. To date, neither Defendant has engaged counsel who has entered an appearance, nor has Patrick Wakely appeared pro se. The Defendants have therefore failed to comply with the terms of the Court's Order filed on June 27, 1996.

¹ Teresa-Helland Wakely has filed a proceeding seeking relief under Chapter 7 of the United States Bankruptcy Code, and Plaintiff no longer seeks any relief as to her.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment be, and hereby is, entered in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc., and against the Defendants, Patrick W. Wakely and Wakely Enterprises, Inc., in the amount of One Hundred Thousand and 00/100 Dollars (\$100,000.00). This Judgment shall bear interest at the rate of 5.90% per annum until paid. Plaintiff may also move for an award of attorney fees and costs as provided by Local Rule.

IT IS SO ORDERED this 16th day of Sept, 1996.


UNITED STATES DISTRICT JUDGE

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

FILED

SEP 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REMINGTON UNIVERSITY, INC.
d/b/a Remington College, Wichita,
KS and Remington College, Little
Rock, AR,

Plaintiff,

vs.

RICHARD W. RILEY, Secretary
of the United States Department
of Education, in his official
capacity,

Defendant.

Case No: 96-C-656-H

ENTERED ON DOCKET
DATE SEP 17 1996 ✓

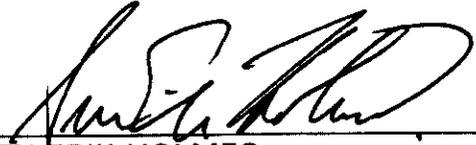
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed August 6, 1996, in which the Magistrate Judge recommended that this case be set for a case management conference within thirty to sixty days and an early date set for the production of the administrative record to allow the motion for a preliminary injunction to be handled in an expedited manner. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

A Case Management Conference is set on September 17, 1996 at 1:30 p.m.

Dated this 16TH day of SEPTEMBER, 1996.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

S:\orders\Remington

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

JOHN BAYLISS, JR., KAREN
QUARLES,

Plaintiffs,

vs.

THE CITY OF TULSA,
et al.,

Defendants.

ENTERED ON DOCKET
DATE SEP 17 1996

No. 96-C-199-K

FILED

SEP 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the motion of the defendants to dismiss. Plaintiffs, pawnshop customers, bring this purported class action to challenge the Oklahoma Pawnbroker Act, 59 O.S. §1501 et seq. ("the Act"). The Act establishes a comprehensive scheme to regulate licensing of pawnbrokers, monitor pawn transactions, and control usury rates charged by pawnshops. One provision of the Act requires pawnbrokers to record certain information as to each pawn transaction, including name, address, and physical description of the customer, and to make such information available to law enforcement. See 59 O.S. §1515(C).

Dismissal is inappropriate under Rule 12(b)(6) F.R.Cv.P. unless the plaintiffs can prove no set of facts in support of their claims to entitle them to relief. The court must accept as true all the factual allegations in the complaint, construe them in a light most favorable to the plaintiffs, and resolve all reasonable inferences in plaintiffs' favor. Seamons v. Snow, 84 F.3d 1226, 1231-32 (10th Cir.1996).

The Act has twice before withstood constitutional challenges, brought by the same plaintiff's attorney as in the instant case. See S & S Pawn Shop, Inc. v. City of Del City, 947 F.2d 432 (10th Cir.1991); Winters v. Bd. of County Comm., 4 F.3d 848 (10th Cir.1993), cert. denied, 114 S.Ct. 1539 (1994). The present lawsuit is not brought by pawnbrokers, but by two pawn customers, who allege a violation of the Fourth Amendment. Without using these precise terms, plaintiffs construe 59 O.S. §1515(C), which states pawnbrokers shall "make available" their reports to law enforcement as a passive requirement, while Tulsa Ordinance Ch. 11 §1104(C), which states pawnbrokers "shall cause to be delivered" the reports to law enforcement is construed as an active requirement and somehow more intrusive. Plaintiffs cite 59 O.S. §1514, which prohibits the passage of municipal ordinances more restrictive than the Act itself.

In response, defendants rely on the principle "when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities." Securities and Exchange Comm'n v. O'Brien, Inc., 467 U.S. 735, 743 (1984). See also Smith v. Maryland, 442 U.S. 735, 742-43 (1979) (no legitimate expectation of privacy regarding the numbers one dials on a telephone); United States v. Miller, 425 U.S. 435, 441-43 (1975) (depositor has no expectation of privacy and thus no "protectable Fourth Amendment interest" in financial records retained by bank).

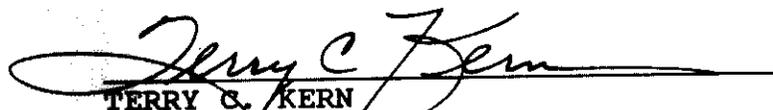
Upon review, the Court agrees these cases are dispositive. Plaintiffs' "passive/active" distinction is, in the Court's view, not supported by the cited language. The Act requires pawnbrokers to "make available" the reports within three days of the pawn transaction. To make an item available within a strict time limit strongly suggests delivery of the item. Even if the plaintiffs' distinction is viable, it does not distinguish the Supreme Court precedent quoted above. A requirement of physical delivery is an added burden on pawnshop owners, not pawn shop customers. The Tulsa municipal ordinance does not create a Fourth Amendment violation as to pawn shop customers where none previously existed. The reports in question are the pawnbrokers' own business records, which the pawnbrokers are required by state law to make available to law enforcement. Pawn customers have no legitimate expectation of privacy in pawnbrokers' business records.

Plaintiffs also apparently attempt to assert some sort of Equal Protection claim, based upon the fact that pawn shop customers tend to be indigent. The complaint states at ¶3: "Typically the pawn loan customer is a person for whom other types of loans are not available and is often economically disadvantaged and must rely solely on the secured pawn transaction for their ability to borrow money." The Supreme Court has declined to treat the poor as a suspect class. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Therefore, the Act must bear only a rational relationship to a legitimate state interest to withstand equal protection review. See Shifrin v. Fields, 39 F.3d 1112, 1114

(10th Cir.1994). This Court finds the Act bears a rational relationship to the legitimate state interest of law enforcement, given the frequency with which stolen property is pawned.

It is the Order of the Court that the motion of the defendants to dismiss (#9) is hereby GRANTED.

ORDERED this 16 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED ON DOCKET
SEP 17 1996
DATE _____

GAYLE SIPULT,
Plaintiff,

v.

WAL-MART STORES, INC.,
a Delaware corporation,

Defendants.

No. 94-C-1171-K ✓

FILED

SEP 16 1996

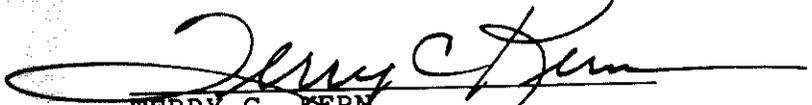
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial before the Court on August 26 and 27, 1996, the Honorable Terry C. Kern, District Judge, presiding, and the jury having returned its verdict for the Defendant and against the Plaintiff.

Judgment is therefore ENTERED for the Defendant and against the Plaintiff as to the Plaintiff's claim for personal injury.

ORDERED THIS 16 DAY OF SEPTEMBER, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

SEP 16 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SAMUEL M. BROWN,
SSN: 450-17-0894,

Plaintiff,

vs.

SHIRLEY S. CHATER, COMMISSIONER
OF SOCIAL SECURITY,

Defendant.

Case No. 93-C-216-BU ✓

ENTERED ON DOCKET

DATE 9-17-96

ORDER

This matter comes before the Court upon the Application by Plaintiff for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act. In response to the motion, Defendant states that she agrees to an award of attorney fees in the amount of \$4,059.90 and expenses in the amount of \$64.00, as requested by Plaintiff. However, Defendant also states that if Plaintiff's counsel is ultimately awarded attorney fees under 42 U.S.C. § 406(b)(1), he shall refund the smaller award to Plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Having reviewed Plaintiff's application and Defendant's response, the Court

1. **GRANTS** the Application by Plaintiff for Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act (Docket Entry #22); and

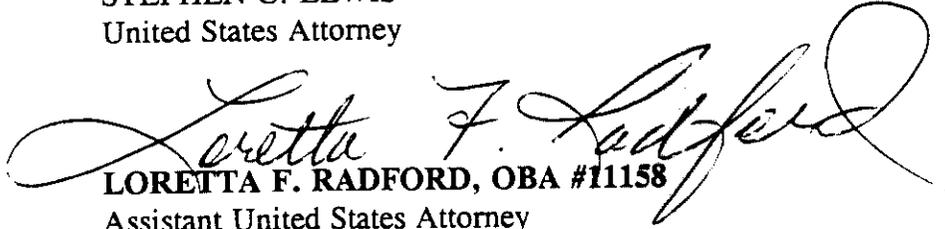
2. **ORDERS** that Defendant shall pay Plaintiff the total amount of \$4,059.90 for attorney's fees and \$64.00 for expenses.

ENTERED this 16th day of September, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

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

FILED
 SEP 13 1996

Phil Lombardi, Clerk
 U.S. DISTRICT COURT

KAREN STONE,)
)
 Plaintiff,)
)
 vs.)
)
 PHILLIPS PETROLEUM COMPANY,)
 INC., a Delaware Corporation, d/b/a)
 PHILLIPS 66 COMPANY,)
)
 Defendant.)

Case No. 96-C-341-C

ENTERED ON DOCKET
 SEP 16 1996
 DATE _____

ORDER

Now before this Court is the motion by Defendant, Phillips Petroleum Company, to dismiss Cause III of the Complaint in this case. Plaintiff's Complaint alleges that she was subjected to retaliation and was discharged for opposing employment practices which Plaintiff believed to be racially discriminatory against her black coworker. Plaintiff's Complaint alleges three causes of action: (i) employment discrimination in violation of the Civil Rights Act of 1866 ("Section 1981"), 42 U.S.C. § 1981, (ii) employment discrimination in violation of the Civil Rights Act of 1964 as amended ("Title VII"), 42 U.S.C. § 2000e-2, et seq.; and (iii) employment discrimination in violation of Oklahoma law and public policy. Defendant moves to dismiss Plaintiff's third cause of action claim for wrongful discharge in violation of public policy and Oklahoma law.

Defendant argues that the recent Oklahoma Supreme Court opinion, *List v. Anchor Paint Manufacturing*, 910 F.2d 1011 (Okla. 1996) forecloses Plaintiff's common law claim for wrongful discharge in violation of public policy. This Court agrees. In 1989, the Oklahoma Supreme Court created a common law cause

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of action for employment discrimination in violation of public policy. *Burk v. K-Mart*, 770 P.2d 24 (Okla. 1989). The court explained that it had adopted a "public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law." *Id.* at 28. Three years later, the Supreme Court held that a racially motivated discharge violated public policy. *Tate v. Browning-Ferris*, 833 P.2d 1218 (Okla. 1992).

In *List*, the Oklahoma Supreme Court held that an employee whose complaint stated allegations of discharge unlawfully motivated by age could not bring suit for wrongful discharge under a common law tort theory because the statutory remedies available to plaintiff under the federal Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, were plaintiff's exclusive remedies. In holding that the ADEA was plaintiff's exclusive remedy, the Court distinguished its previous holding in *Tate, supra.*, as follows:

Had we not held in *Tate* that plaintiff was entitled to assert a common law cause of action, he would have had no right to a jury trial because neither the state Act nor the Civil Rights Act provided for such a remedy. Further, plaintiff's damages would have been limited to back pay with no right to additional compensatory or punitive damages.

List, 910 P.2d at 1014. In other words, the statutory remedies available to plaintiff in *Tate* were significantly inferior to those available under common law. The court explained that the ADEA provided comprehensive remedies, including the right to a jury trial and compensatory and liquidated (punitive) damages. Therefore, the statutory remedies were plaintiff's exclusive remedies.

Here, like *List*, the provisions of Title VII afford Plaintiff adequate legal remedies to redress all injuries allegedly suffered by Plaintiff during her

employment and upon her discharge. As in *List*, Plaintiff in this case has a right to jury trial, to actual and compensatory damages, and to punitive damages under Title VII. 42 U.S.C. § 1981a(a)(1). Consequently, this Court believes, following *List*, that Plaintiff's statutory remedies for discriminatory and retaliatory discharge under Title VII are both adequate and exclusive. *List, supra*.

In addition, Plaintiff has asserted a claim under the Oklahoma Anti-Discrimination statute, 25 O.S. § 1101, *et seq.*. This Court finds there is no private right of action under the Oklahoma statute for Plaintiff's claims.

For the reasons stated herein, Count III of the Complaint is hereby dismissed.

IT IS SO ORDERED THIS 7th day of ^{Sept.}~~August~~, 1996.


H. DALE COOK
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 13 1996

ROBERT V. BROWNLIE,)
)
) Plaintiff,)
)
) vs.)
)
) CONTINENTAL BAKING COMPANY)
) and TERRY HICKMAN,)
)
) Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-521 E

ENTERED ON DOCKET

DATE SEP 16 1996

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration on this 12th day of September, 1996 upon the Application and Stipulation of the parties hereto for an Order dismissing this case with prejudice. The Court, having reviewed the Application and Stipulation of the parties hereby and by these presents enters an Order dismissing the above-entitled lawsuit with prejudice.

Be it therefore, **ORDERED, ADJUDGED** and **DECREED** that the claims of the Plaintiff, ROBERT V. BROWNLIE, against the Defendants, CONTINENTAL BAKING COMPANY and TERRY HICKMAN, be and are hereby dismissed with prejudice.

S/ JAMES O. ELLISON

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

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

SINCLAIR OIL CORPORATION,

Plaintiff,

v.

BOGLE STATIONS, INC., TED T. BOGLE,
and DEBBY BOGLE,

Defendants.

SEP 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 16 1996

Case No. 96-CV-139-C

ENTRY OF JUDGMENT AGAINST DEFENDANT, TED BOGLE

JUDGMENT IS HEREBY ENTERED against Defendant, Ted Bogle ("Bogle"), as follows:

1. Judgment is entered in favor of Plaintiff Sinclair Oil Corporation ("Sinclair") and against Bogle on Sinclair's claim of breach of contract as set forth in Sinclair's Complaint in the principal amount of \$52,276.29, plus prejudgment interest at the rate of 18% per annum having accrued thereon since January 30, 1996, in the amount of \$5,104.44.

2. Sinclair is entitled to an award of attorneys' fees in the amount of \$2,848.45 and costs in the amount of \$1,299.06.

3. Post-judgment interest at the statutory rate shall accrue on the entire judgment amount of \$61,528.24 from the date of this Judgment.

DATED: 7 day of Sept, 1996.

(Signed) H. Dale Cook

Honorable H. Dale Cook
United States District Court

F I L E D

SEP 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

WILLARD MORE,

Plaintiff,

v.

**EL DORADO CARTRIDGE
CORPORATION, INC., a
foreign corporation**

Defendant.

Case No. 95 C 1248E

ENTERED ON DOCKET

DATE SEP 16 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES now the Plaintiff, Willard More, ("More"), with his attorney of record, and for an adequate consideration, the receipt of which is hereby acknowledged, stipulate that this action be dismissed **with prejudice** to further action in the above styled and numbered cause of action which the Plaintiff now has against the Defendant, El Dorado Cartridge Corporation, a foreign, and any others, for any and all damages arising heretofore or hereafter out of the incident described in the petition.

Dated this 11th day of September, 1996.

Respectfully submitted,

Willard More

Willard More, Plaintiff

Stanley D. Monroe

Stanley D. Monroe, Esq.
525 South Main, Suite 600
Tulsa, Oklahoma 73104-4509
Attorney for Plaintiff

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

F I L E D

SEP 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PORT CITY PROPERTIES, INC. d/b/a,)
HODGES WAREHOUSE,)

Plaintiff,)

vs.)

No. 95-C-648-C

WESTERN TEX-PACK, INC.,)
MISTLETOE TEX-PACK, EXPRESS,)
INC., CONSOLIDATED TEX-PACK,)
INC., TEX-PACK EXPRESS OF DALLAS,)
INC., and O & A TEX-PACK EXPRESS,)
INC.,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 16 1996

ORDER

Currently pending before the Court are the motions filed by defendants seeking an award of attorney fees and other costs.

On July 14, 1995, plaintiff filed the present action against defendants, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. A non-jury trial commenced on June 20, 1996, and continued through June 27. On July 22, 1996, the Court entered a directed verdict in favor of all defendants and against plaintiff with respect to all of plaintiff's claims in the present action. On August 2, defendants filed the present motions seeking attorney fees, pursuant to 12 Okla. Stat. § 936, and deposition and transcript costs, pursuant to 28 U.S.C. § 1920.

"In a diversity action, the right to recover attorneys' fees as a part of costs depends on state law." Rockwood Insurance Co. v. Clark Equipment Co., Inc., 713 F.2d 577, 579 (10th Cir.1983). In Keel v. Covey, 241 P.2d 954, 958 (Okla. 1952), the Oklahoma Supreme Court held that the right

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to recover attorney fees from one's opponent does not exist at common law. The recovery of such fees are therefore not allowable under Oklahoma law in the absence of a statute or some agreement between the parties which specifically provides for the recovery of such fees. Id. Furthermore, in Beard v. Richards, 820 P.2d 812, 816 (Okla. 1991), the Oklahoma Supreme Court held that "[l]iberal application of statutes authorizing prevailing party attorney fees has a chilling affect on [Oklahoma's] open access to the courts guarantee, [which is contained in the Oklahoma Constitution]. Accordingly, statutes authorizing prevailing party attorney fees are strictly applied Exceptions to the American Rule are carved out with great caution."

Defendants seek an award of attorney fees pursuant to 12 Okla. Stat. § 936, which provides that,

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

Defendants contend that the "labor or services" provision of § 936 entitles defendants to an award of attorney fees in the present action. Defendants maintain that plaintiff sought damages for future revenues as well as for past revenues which plaintiff claimed were diverted to another carrier in violation of the parties' alleged agreement.

In Russell v. Flanagan, 544 P.2d 510, 512 (Okla. 1975), the Oklahoma Supreme Court interpreted § 936 and held that the phrase "or for labor or services" properly comes within the initial category of "a civil action" and not the antecedent classification of a "contract relating to . . ." An "improper and unintended meaning would result if . . . this clause were construed to allow attorney

fees in the all encompassing field of 'contracts related to . . . , labor or services.'" Id.

In Ferrell Construction Co. Inc. v. Russell Creek Coal Co., 645 P.2d 1005, 1011 (Okla. 1982), the Oklahoma Supreme Court held that an action to recover profits for which a plaintiff would have realized had it been able to perform its contract does not fall within § 936. Section 936 only applies to a case in which a claim is made for labor or services performed. Neither party is entitled to § 936 attorney fees in a suit to recover anticipated profits which plaintiff claims it would have realized had defendant not breached the agreement. Id.

In Burrows Construction Co. v. Independent School District No. 2 of Stephens County, 704 P.2d 1136, 1138 (Okla. 1985), the Oklahoma Supreme Court held that "a suit for damages in the form of loss of profits flowing from the breach of an agreement [is not] within the contemplation of 12 O.S.1981 § 936." The court went on to state that it "is the underlying nature of the suit itself which determines the applicability of the labor and services provisions of section 936. . . . The question is whether the damages arose directly from the rendition of labor or services, such as a failure to pay for those services, or from an aspect collaterally relating to labor and services, such as loss of profits on a contract involving the rendition of labor and services." Id. An action which does not relate directly to the rendition of labor or services is not subject to the provisions of § 936.

In Merrick v. Northern Natural Gas Co., 911 F.2d 426, 434 (10th Cir.1990), the Tenth Circuit interpreted § 936 and held that in order to "recover under section 936, a prevailing party on a labor or services contract claim must demonstrate that the claim is for labor or services rendered, not just that the claim relates to the performance of labor or services." In Holbert v. Echeverria, 744 P.2d 960, 966 (Okla. 1987), the Oklahoma Supreme Court held that § 936 applies if "recovery is sought for labor and services, as in the case of a failure to pay for them. . . . Its provisions are inapposite if

the suit be one for damages arising from the breach of an agreement that relates to labor and services.”

Given the above authorities, this Court concludes that defendants’ claims for attorney fees are without merit. As noted in this Court’s Order directing verdict in favor of all defendants, and as defendants concede, plaintiff only sought damages for the loss of future revenues at trial. Clearly, such a claim for future lost profits related to a labor or services agreement does not invoke the provisions of § 936.

Defendants also make much of the fact that plaintiff sought an accounting in order to recover revenues allegedly diverted to another carrier during plaintiff’s business relationship with defendants. However, even if plaintiff had raised this issue at trial, this form of damages does not fall within the provisions of § 936. The diversion of revenues to another carrier which performed a service for defendants does not directly relate to labor or services which plaintiff rendered, even if such a diversion of revenues was wrongful and in violation of a valid agreement. Hence, such a claim for past losses cannot give rise to an award of attorney fees pursuant to § 936.

It is undisputed that plaintiff never sought to be compensated in this action for labor or services that it actually rendered for defendants. On the contrary, the parties acknowledge that plaintiff was paid its proportionate share of revenues each time it hauled freight in conjunction with defendants. Thus, this case does not involve damages arising directly from the rendition of labor or services, such as a failure to pay for those services. Consequently, the “labor or services” provision of § 936 cannot apply in the instant case, and, therefore, attorney fees cannot be awarded to either party.

Defendants also argue that plaintiff is “judicially estopped” from contesting an award of

attorney fees since plaintiff specifically requested such fees in its pleadings. Defendants cite Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 128 (Okla. 1984), as support for their argument. In Messler the Oklahoma Supreme Court noted that under the doctrine of judicial estoppel, a party who has knowingly and deliberately assumed a particular position is estopped from assuming an inconsistent position to the prejudice of the adverse party. Hence, defendants maintain that since plaintiff originally sought attorney fees as part of its claim against defendants, plaintiff cannot now reverse its position by objecting to defendants' motion to recover such fees. The Court concludes that defendants' contention is without merit.

In asserting their judicial estoppel argument, defendants failed to cite or acknowledge Oklahoma case-law contrary to defendants' contentions on this point. In Panama Processes v. Cities Service Co., 796 P.2d 276, 286 (Okla. 1990), the Oklahoma Supreme Court noted that while "Oklahoma jurisprudence recognizes this form of preclusion bar, it is applied only to prevent advancement of inconsistent positions vis-a-vis matters of fact. It does not prevent a party from asserting a legal theory contrary to one advanced earlier in litigation. Consequently, a change of position with respect to a pure matter of law ordinarily will not work an estoppel, particularly where the party was unsuccessful in pressing its earlier contrary position." Likewise, the Supreme Court of Oklahoma upheld this conclusion in Parker v. Elam, 829 P.2d 677, 680 (Okla. 1992), in which the court held that judicial estoppel applies only to prevent the advancement of inconsistent positions vis-a-vis matters of fact.

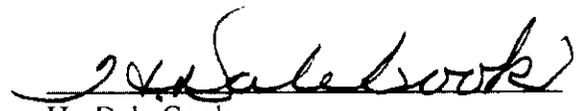
Hence, defendants' judicial estoppel argument is not well-taken. Even if plaintiff were reversing itself with respect to the entitlement of attorney fees in the present action, such a change in position relates only to a matter of law, not a matter of fact. Judicial estoppel does not prevent

plaintiff from asserting a legal theory contrary to one advanced earlier in litigation. As such, plaintiff is not barred from asserting the position that attorney fees are not recoverable in the instant case, even though plaintiff sought such fees earlier in the litigation. That is, since the issue regarding entitlement to attorney fees under § 936 is entirely legal in nature and not one of fact, plaintiff is not barred from reversing its position with respect to such entitlement. Accordingly, defendants' claims for attorney fees are hereby **DENIED**.

Defendants also seek certain costs pursuant to 28 U.S.C. § 1920. Defendants filed a bill of costs, to which plaintiff has objected. Local Rule 54.1(C) states that where a party files an objection to a bill of costs, a hearing will be scheduled by the clerk to review the bill of costs and the objections. Local Rule 54.1(E) provides that the taxation of costs by the clerk is subject to review by the Court. The Court fully expects that the parties will comply with Local Rule 54.1. A ruling with respect to defendants' bill of costs is therefore inappropriate in this Order.

Additionally, on August 30, 1996, plaintiff filed a motion seeking to set defendants' motions for award of attorney fees and other costs for a hearing. Plaintiff also filed a motion seeking to strike defendants' reply to plaintiff's response to defendants' motion for attorney fees and other costs, and to file briefs in support of its motions. However, plaintiff's motions filed on August 30, 1996, are rendered moot by entry of this Order.

IT IS SO ORDERED this 7th day of September, 1996.


H. Dale Cook
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 13 1996

MARKIE K. GARNER,)
)
 Plaintiff,)
)
 vs.)
)
 MAYES COUNTY JAIL, et al.,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-91-B
(Base file)

ENTERED ON DOCKET

DATE SEP 16 1996

ORDER

This matter comes before the Court on the complaint of Plaintiff Markie K. Garner.

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996), added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v.

Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109.

Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's claim that he was unjustly strip searched in August or September of 1992, the Court concludes that claim lacks an arguable basis in law. It is clear from the face of the complaint that this claim arose in 1992 and, thus, it is barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988) (the applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another"). The State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989).

Moreover, Mayes County Commissioners, Jimmy Montgomery, John Mazingo, and Melvin E. Pritchett, cannot be held liable for the

incidents alleged in the instant complaint. "Under Oklahoma law, the Board [of County Commissioners] has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies." Meade, 841 F.2d 1512, 1528. Therefore, unless the Board of County Commissioner voluntarily undertook responsibility for hiring or supervising county law enforcement officers, which is not alleged, they were not "affirmatively linked" with the alleged constitutional violations at issue in this action. Id.

Accordingly, Garner's claims as to the 1992 strip search is hereby DISMISSED WITHOUT PREJUDICE as it lacks an arguable basis in law. Defendants Jimmy Montgomery, John Mozingo, and Melvin E. Pritchett are DISMISSED.

IT IS SO ORDERED this 9 day of Sept., 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 13 1996

CP

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GARY LYNN TROUTT,)
)
 Defendant.)

No. 93-CR-36-B
(96-CV-349-B)

ENTERED ON DOCKET

DATE **SEP 16 1996**

ORDER

This matter comes before the Court on the motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 of Defendant Gary Lynn Trout. The government has objected.

I. BACKGROUND

On November 21, 1991, Defendant's ex-wife, pawned a shotgun at a Tulsa Pawn Shop. On the same date, Defendant returned to the pawn shop to redeem the shotgun. Defendant completed Alcohol, Tobacco, and Firearms (ATF) Form 4473, and indicated in part 8b that he had not been convicted of a crime punishable by imprisonment for a term exceeding one year. By his signature, Defendant certified that the answers were true and correct. Defendant then took possession of the rifle.

On October 21, 1993, the ATF interviewed Defendant. In a hand printed and signed "Affidavit," Defendant stated that his father gave him the firearm in November 1988. Prior to receiving the firearm, Defendant asked his State Probation Officer if he could possess a firearm during hunting season, and the officer informed him that he could as long as he did not use pistol ammunition.

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Defendant admitted that he had three prior felony convictions.

On March 5, 1993, Defendant was charged in a two-count indictment. Count One charged Defendant with False Statement to Licensed Firearm Dealer in violation of 18 U.S.C. § 922(a)(6). Count Two charged Defendant with Receipt of Firearm After Prior Felony Conviction in violation of 18 U.S.C. § 922(g). On June 11, 1993, Defendant pled guilty to Count One of the Indictment. In exchange for his plea of guilty, the Government agreed to dismiss Count Two of the Indictment. On August 27, 1993, the Court sentenced Defendant to 60 months imprisonment and ordered Count Two dismissed pursuant to the plea agreement. Defendant did not file a direct appeal.

In the present motion, Defendant contends that counsel provided ineffective assistance, that the statement given to the ATF was not knowing and voluntary, and that the court's refusal to depart from the Sentencing Guidelines was improper.

II. ANALYSIS

A. Ineffective Assistance of Counsel (Counts One and Two)

Defendant contends that counsel failed to advise him that redeeming a weapon from a pawnbroker does not violate 18 U.S.C. § 922(a)(6), and that if he had been informed of this he would not have pled guilty and would have insisted on going to trial. In support of this contention, Defendant relies on United States v. Laisure, 460 F.2d 709 (5th Cir. 1972), where the Fifth Circuit Court of Appeals held that redemption of a rifle from a pawnbroker

does not constitute an "acquisition" as set out in section 922(a)(6).

To establish ineffective assistance of counsel a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).¹ A defendant 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. To establish the second prong, a defendant 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, 368-373 (1993).

Counsel's failure to inform Defendant of the Laisure case did not fall below the level expected from a reasonably competent attorney in criminal cases. Laisure was no longer good law in 1991 when Defendant pled guilty. In Huddleston v. United States, 415 U.S. 814 (1974), the Supreme Court resolved the conflict between the Fifth Circuit in Laisure and the Ninth and Tenth Circuits. Id. at 818 n.6. The Court held that section 922(a)(6) was applicable to the redemption of firearms from a pawnbroker who was a

¹ Defendant's claim of ineffective assistance of counsel is not procedurally barred although it was raised for the first time in this section 2255 motion. See United States v. Galloway, 56 F.3d 1239 (10th Cir. 1995) (procedural bar does not apply to ineffective assistance of counsel claims which could have been raised on direct appeal but were brought in post-conviction proceedings instead).

registered dealer. Id. at 818-823. The Supreme Court stated as follows:

In sum, the word 'acquisition,' as used in § 922(a)(6), is not ambiguous, but clearly includes any person, by definition, who 'come[s] into possession, control, or power of disposal' of a firearm. As noted above, 'acquisition' and 'sale or other disposition' are correlatives. It is reasonable to conclude that a pawnbroker might 'dispose' of a firearm through a redemptive transaction. And because Congress explicitly included pawnbrokers in the Act, explicitly mentioned pledge and pawn transactions involving firearms, and clearly failed to include them among the statutory exceptions, we are not at liberty to tamper with the obvious reach of the statute in proscribing the conduct in which the petitioner engaged.

Id. at 823.

Accordingly, the Court concludes that Defendant cannot establish constitutionally ineffective assistance of counsel and Counts One and Two are hereby denied.

B. Statement to ATF Agents and Downward Departure

In Count Three, Defendant alleges that the ATF agents failed to advise him of his rights before asking him to make the written statement. He states that the "[a]gents were obligated to provide fair warnings" and "make a seasoned and informed judgment as to whether subject giving statement was doing so knowingly and voluntarily, and that he was aware of his rights and the potential use of the statement." (Docket #7.) In Count Four, Defendant argues the Court erred in determining that it could not depart from the Guidelines. The government has raised the defense of procedural default.

It is well settled that "[s]ection 2255 motions are not

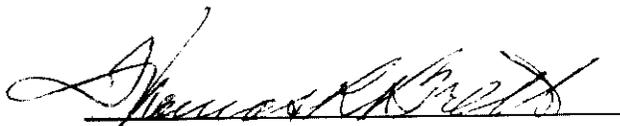
available to test the legality of matters which should have been raised on direct appeal.'" United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995) (quoting United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994)). Consequently, Defendant's failure to present an issue on direct criminal appeal bars him from raising that issue in his section 2255 motion, unless he can show cause for excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. Cook, 45 F.3d at 392.

Defendant has not shown sufficient cause and prejudice to excuse his procedural default. In any event Defendant would not be entitled to relief on the basis of Counts Three and Four. Defendant's knowing and voluntarily plea of guilty waived any non-jurisdictional defects in the proceedings, including the alleged defect in the ATF's interview. See United States v. Robertson, 45 F.3d 1423, 1434 (10th Cir. 1995), cert. denied, 115 S.Ct. 2258 (1995); Lattin v. Cox, 355 F.2d 397 (10th Cir. 1966). Moreover, it is clear from the sentencing transcript that this Court recognized that it had discretion to consider additional factors which might warrant a downward departure, but declined to do so in the instant case. (Sentencing Transcript at 10-11); see also United States v. Nelson, 54 F.3d 1540 (10th Cir. 1995); United States v. Stewart, 37 F.3d 1449 (10th Cir. 1994); United States v. Rodriguez, 30 F.3d 1318, 1319 (10th Cir. 1994).

III. CONCLUSION

Accordingly, Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket # 7) is hereby DENIED. Defendant's motion to compel evidentiary hearing (Docket #17) is DENIED as moot.

SO ORDERED THIS 10th day of Sept., 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 13 1996

[Handwritten signature]

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
GARY LYNN TROUTT,)
)
Defendant.)

No. 93-CR-36-B
(96-CV-349-B)

ENTERED ON DOCKET
DATE SEP 16 1996

JUDGMENT

In accord with the order denying Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, the Court hereby **enters judgment** in favor of the government and against the Defendant Gary Lynn Troutt.

SO ORDERED THIS 10th day of Sept., 1996.

[Handwritten signature of Thomas R. Brett]

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

19

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

FILED
SEP 13 1996

SHANNON K. HUNT,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-508-B

ENTERED ON DOCKET
DATE SEP 16 1996

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on August 7, 1996. Plaintiff, a pro se litigant, has not responded.

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

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (doc. #7) is **granted** and the above captioned case is **dismissed without prejudice**.

SO ORDERED THIS 9th day of Sept., 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹Local Rule 7.1.C reads as follows:

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

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it lacks jurisdiction to review this matter as 56 Okla.Stat. § 168 provides that applicants and recipients of public assistance, who are aggrieved by a decision of the Director of DHS may petition the district court in which the applicant or recipient resides for a judicial review of the decision pursuant to the provisions of Sections 318 through 323 of Title 75 of the Oklahoma Statutes.

The Court concludes that Plaintiff has erroneously filed his request for review in this Court rather than Tulsa County District Court. The Court further concludes that this matter should be and the same is hereby DISMISSED.¹

IT IS SO ORDERED this 11th day of September, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ The Court notes that Plaintiff failed to appear at the Case Management Conference scheduled and held September 10, 1996, notwithstanding notice having been given to the Plaintiff by the District Court Clerk's office of the scheduled conference.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-CV-371-K

RENARD ELVIS NELSON,

Petitioner,

vs.

TULSA COUNTY, OKLAHOMA and THE
ATTORNEY GENERAL OF THE STATE OF
OKLAHOMA,

Respondents.

ENTERED ON DOCKET
DATE SEP 13 1996

REPORT AND RECOMMENDATION^{1/}

On April 26, 1995, Petitioner filed a Petition for Writ of Habeas Corpus, alleging a violation of his right to a speedy trial.^{2/} [Doc. No. 1]. Petitioner amended his Petition on June 2, 1995. [Doc. No. 2].

On November 16, 1995, the Court entered an Order requiring Respondents to show cause why the requested writ of habeas corpus should not issue. [Doc. No. 5]. Respondents did not receive a copy of this Order and on January 19, 1996, the Court entered an Order requiring Respondents to show cause by February 8, 1996. [Doc. No. 7]. Respondents responded by filing a motion to dismiss on February 7, 1996. [Doc. No. 8]. Petitioner failed to timely respond to Respondents' motion to dismiss,

^{1/} Failure to file objections within the time specified by 28 U.S.C. § 636 and/or Fed. R. Civ. P. 72 will result in a waiver of the right to appeal. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

^{2/} Petitioner incorrectly filed this action as a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner should have filed a pre-trial petition for a writ of habeas corpus under 28 U.S.C. § 2241. This was brought to Petitioner's attention, and he filed the correct pleading on August 29, 1996. [Doc. No. 28].

and on March 7, 1996, the Court ordered Petitioner to respond by March 27, 1996, which Petitioner did. [Doc. Nos. 10 & 11].

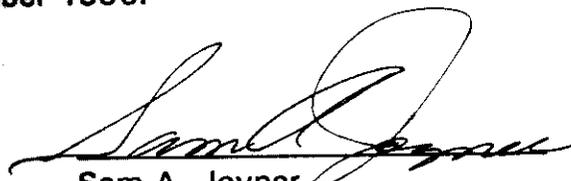
On May 7, 1996, the undersigned filed a Report and Recommendation, recommending that this case be dismissed for failure to exhaust state remedies. [Doc. No. 12]. Petitioner objected to this recommendation, and on June 28, 1996, Judge Terry Kern sustained Petitioner's objection and refused to adopt the undersigned's recommendation. [Doc. No. 14]. At that time, Judge Kern also ruled that Respondents were to respond on the merits by July 18, 1996.

On July 18, 1996, Respondents filed a motion for an extension of time until August 6, 1996 within which to respond on the merits. [Doc. No. 16]. This request was granted by Judge Kern. [Doc. No. 18]. On August 7, 1996, Respondents again asked for an extension of time until August 26, 1996 within which to respond on the merits. [Doc. No. 19]. This request was granted by the undersigned. [Doc. No. 20]. In each request for an extension, Respondents stated that they needed additional time to obtain affidavits from the trial counsel representing Petitioner.

Petitioner filed an objection to Respondents' second request for an extension of time. In this objection, Petitioner moved for "a summary judgment in this matter based on the ground of Respondents [sic] untimely [sic] response and 'bad faith' delays in this matter." [Doc. No. 21]. The undersigned finds no justification for a summary adjudication of this matter. The record as described above does not support Petitioner's allegation of "bad faith delays" by Respondents. Therefore, the

undersigned recommends that Petitioner's motion for summary judgment [doc. no. 21] be DENIED.

Dated this 12 day of September 1996.



Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE ESTATE OF CHARLES HENRY)
HUNT; CLIFFORD HUNT, personal)
representative of the estate)
of Charles Henry Hunt,)
individually; BRANDON SHAW,)
individually; KHOLTER JAMES)
HUNT, individually; JESSICA)
KASEY HUNT, individually;)
MARY J. HUNT, individually;)
and, KATHRYN E. POST,)
individually,)

Plaintiffs,)

v.)

DEWEY JOHNSON, a/k/a BUCK)
JOHNSON, Sheriff of Rogers)
County, Oklahoma, officially)
and individually; JIMMY L.)
HICKS, Undersheriff of Rogers)
County, Oklahoma, officially)
and individually; ROBERT)
STEWART, Deputy Sheriff of)
Rogers County, Oklahoma,)
officially and individually;)
DEPUTY/JAILER, Rogers County)
Deputy Sheriff, officially)
and individually; ROGERS)
COUNTY, a political sub-)
division of the State of)
Oklahoma,)

Defendants.)

FILED

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-480-B

ENTERED ON DOCKET
DATE SEP 13 1996

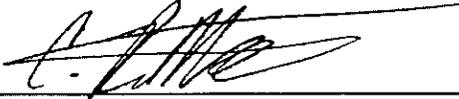
ORDER

This matter comes before the Court on the 11 day of
Sept., 1996, and for good cause shown, the Application for
an Order of Dismissal With Prejudice as to the Defendants, above-
named, is granted.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:



C. RABON MARTIN, OBA #5718
Martin & Associates
The Martindale Penthouse
403 S. Cheyenne Avenue
Tulsa, Oklahoma 74103
(918) 587-9000
ATTORNEY FOR PLAINTIFFS

RMH:laf - HUNT.ORD 9/4/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
ROGER L. SOLF aka ROGER LYNN)
SOLF; VICKIE K. SOLF aka VICKIE)
KAY SOLF; UNION MORTGAGE)
COMPANY, INC.; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma; MICHAEL DALRYMPLE,)
)
)
)
Defendants.)

FILED

SEP 12 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 13 1996

Civil Case No. 95-C 864B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12th day of Sept.,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, ROGER L. SOLF aka Roger Lynn Solf, VICKIE K. SOLF aka Vickie Kay Solf aka Vickie K. Dalrymple, MICHAEL DALRYMPLE and UNION MORTGAGE COMPANY, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, ROGER L. SOLF aka Roger Lynn Solf, signed a Waiver of Summons on October 12, 1995; that the Defendant, VICKIE K. SOLF aka Vickie Kay Solf aka Vickie K. Dalrymple, was served a copy of Summons and Complaint on November 8, 1995, by Certified

Mail; that the Defendant, UNION MORTGAGE COMPANY, INC., was served a copy of Summons and Complaint on September 1, 1995, by Certified Mail; that Defendant, MICHAEL DALRYMPLE, was served a copy of Summons and Complaint on June 4, 1996, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 13, 1995; and that the Defendants, ROGER L. SOLF aka Roger Lynn Solf, VICKIE K. SOLF aka Vickie Kay Solf aka Vickie K. Dalrymple, MICHAEL DALRYMPLE and UNION MORTGAGE COMPANY, INC, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, ROGER L. SOLF, is one and the same person as Roger Lynn Solf, and will hereinafter be referred to as "ROGER L. SOLF." The Defendant, VICKIE K. SOLF, is one and the same person as Vickie Kay Solf and Vickie K. Dalrymple, and will hereinafter be referred to as "VICKIE K. SOLF." The Defendants, ROGER L. SOLF and VICKIE K. SOLF, were granted a Divorce on November 22, 1989, case number FD 89-6960 in Tulsa County, Oklahoma. The Defendant, ROGER L. SOLF is a single unmarried person. The Defendants, VICKIE K. SOLF and MICHAEL DALRYMPLE, are husband and wife.

The Court further finds that on October 11, 1985, Kenneth A. Jackson and Janice L. Jackson, executed and delivered to FIRSTIER MORTGAGE CO., their mortgage note in the amount of \$56,200.00, payable in monthly installments, with interest thereon at the rate of 11 percent per annum.

The Court further finds that as security for the payment of the above-described note, **KENNETH A. JACKSON and JANICE L. JACKSON, HUSBAND AND WIFE**, executed and delivered to **FIRSTIER MORTGAGE CO.**, a real estate mortgage dated October 11, 1985, covering the following described property, situated in the State of Oklahoma, Tulsa County:

LOT EIGHT (8), BLOCK ONE (1), BRIARGLEN CENTER, A RESUBDIVISION OF A PORTION OF THE AMENDED PLAT OF A RESUBDIVISION OF BLOCKS 2 AND 3 BRIARGLEN CENTER ADDITION, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

This mortgage was recorded on October 16, 1985, in Book 4899, Page 1546, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 30, 1986, **FIRSTIER MORTGAGE CO.** assigned the above-described mortgage note and mortgage to **LEADER FEDERAL SAVINGS & LOAN ASSOCIATION**. This Assignment of Mortgage was recorded on September 17, 1986, in Book 4970, Page 1405, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 11, 1990, **LEADER FEDERAL BANK FOR SAVINGS F/K/A LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION** assigned the above-described mortgage note and mortgage to the **SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON, DC, 20410**, his successors in office and assigns. This Assignment of Mortgage was recorded on December 13, 1990, in Book 5293, Page 2021, in the records of Tulsa County, Oklahoma.

The Court further **finds** that the Defendants, ROGER L. SOLF and VICKIE K. SOLF, became the **current record** owners of the property by virtue of a General Warranty Deed dated **May 1, 1987**, and recorded on **May 1, 1987** in Book 5020, Page 507, in the records of **Tulsa County, Oklahoma**. The Defendants, ROGER L. SOLF and VICKIE K. SOLF, became the **current assumptors** of the subject indebtedness.

The Court further **finds** that on **January 1, 1991**, the Defendant, ROGER L. SOLF, entered into an **agreement** with the Plaintiff lowering the amount of the monthly installments due under **the note** in exchange for the Plaintiff's forbearance of its right to foreclose. A **superseding agreement** was reached between these same parties on **December 1, 1991** and **December 1, 1992**.

The Court further **finds** that on **November 9, 1988**, the Defendants, ROGER L. SOLF and VICKIE K. SOLF, filed their petition for Chapter 7 relief, case number 88-3456-W, in the **United States Bankruptcy Court** for the Northern District of Oklahoma. This case was discharged on **April 5, 1989**, and was subsequently closed on **May 24, 1989**. On **February 21, 1989**, the Defendants reaffirmed their debt with Plaintiff on the property which is the **subject matter** of this action.

The Court further **finds** that on **February 26, 1993**, the Defendant, VICKIE K. SOLF, filed her petition for Chapter 7 relief in the **United States Bankruptcy Court** for the Northern District of Oklahoma, case number 93-00622-W, which was discharged on **June 23, 1993**, and closed on **September 17, 1993**. The subject property was listed on **Schedule D** of the petition.

The Court further finds that the Defendant, ROGER L. SOLF, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, ROGER L. SOLF, is indebted to the Plaintiff in the principal sum of \$80,501.88, plus interest at the rate of 11 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$52.00 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 Defendants, ROGER L. SOLF, VICKIE K. SOLF, UNION MORTGAGE COMPANY, INC., and MICHAEL DALRYMPLE, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, ROGER L. SOLF, in the principal sum of \$80,501.88, plus interest at the rate of 11 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$52.00, 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, ROGER L. SOLF, VICKIE K. SOLF, UNION MORTGAGE COMPANY, INC., MICHAEL DALRYMPLE and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, ROGER L. SOLF, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for

the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

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

Second:

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

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$52.00, personal property taxes which are currently due and owing.

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

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

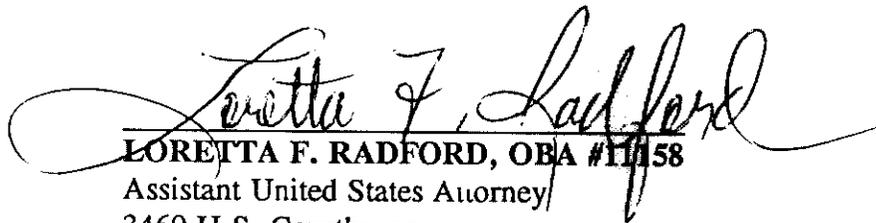
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 864B

LFR:flv

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

In re:)
)
Tulsa Energy, Inc.,)
)
Debtors,)
)
Tulsa Energy, Inc.,)
)
Plaintiff(s),)
)
vs.)
)
OKLAHOMA OIL & GAS MANAGEMENT,)
INC.; KPL PRODUCTION COMPANY;)
DALCO PETROLEUM, INC.; DYNEX)
ENERGY, INC.; DALCO FIFTH)
GEOSTRATIC LIMITED PARTNER-)
SHIP; ASSOCIATED TRANSPORT)
AND TRADING; TOTAL PETROLEUM,)
INC.; and TRIDENT NGL, INC.,)
)
Defendant(s).)

Case No. 95-C-417-C

F I L E D

SEP 13 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 13 1996

ORDER

Now on this 12th day of Sept., 1996, the Agreed Motion to Set Cash Bond came on for consideration by this Court and for good cause shown, the Court finds that the Motion should be granted.

IT IS THEREFORE ORDERED that the Clerk of this Court is directed to accept the sum of \$13,000.00 as security against that certain judgment entered by Order of this Court on June 26, 1996 (filed June 27, 1996), deposit the \$13,000.00 into an interest-bearing account, and hold such sum until further order of this Court. Execution of the referenced judgment shall be stayed pending the outcome of the appeal of this case. In the event that the referenced judgment is finally affirmed on appeal, Dalco

Petroleum, Inc., the judgment creditor, shall be entitled to immediate payment from such deposit toward satisfaction of its judgment. Nothing in this Order shall prevent Dalco Petroleum, Inc. from moving this Court for additional security.

IT IS FURTHER ORDERED that counsel for KPL Production Company shall serve a copy of this Order upon the Clerk of this Court, or the Chief Deputy, personally, and that absent such service the Clerk is hereby relieved of any personal liability relative to the compliance with this Order.

s/H. DALE COOK

JUDGE OF THE DISTRICT COURT

JMC/TJD/.../DIST/CASHBOND.ORD

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

CORINE CHILLIOUS,)
)
 Plaintiff,)
)
 vs.)
)
 FARMERS ALLIANCE MUTUAL)
 INSURANCE COMPANY, a)
 foreign insurance carrier, and,)
 NANCY BAGLEY, dba TULSA)
 CLAIMS SERVICE)
)
 Defendants.)

ENTERED ON DOCKET
~~DATE~~ SEP 12 1996
433K
No. 96-C-~~300~~

FILED
SEP 11 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the Motion of Defendant Farmers Alliance Mutual Insurance Company ("Farmers") to Drop Co-Defendant Nancy Bagley d/b/a Tulsa Claims Service ("TCS") for improper joinder, pursuant to Fed.R.Civ.P. 21 (doc. 7).

Plaintiff Corine Chillious filed a claim for insurance bad faith against Farmers, her insurer, and TCS, an independent insurance adjuster, as a result of their alleged malicious, willful, and wanton failure to pay a claim for insurance arising from water damage to the Plaintiff's property. Defendant asserts that bad faith insurance claims cannot be asserted against insurance adjusters as they are not parties to the insurance contract, and are therefore not subject to a good faith obligation. Additionally, Defendant submits that Plaintiff has improperly joined Defendant TSC in an attempt to defeat diversity jurisdiction.

Plaintiff has failed to respond to Defendant Farmers' Motion by June 17, 1996 as required by this Court's order (doc. 9), and therefore said Motion is deemed confessed pursuant to N.D. LR 7.1(C); however, the Court will briefly address the merits of the Defendant's Motion.

It is well settled law in the Tenth Circuit that nondiverse parties may be dismissed in order to preserve diversity jurisdiction. Tuck v. United States Auto. Ass'n, 859 F.2d 842 (10th Cir. 1988). A court's authority to dismiss, however, is limited to those parties which are deemed dispensable under Fed. R. Civ. P. 19.¹ This determination depends, in part, upon the merits of the claim asserted against Defendant TSC which must be analyzed pursuant to state law as a substantive issue. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); Meyers v. Ideal Basic Indus. Inc., 940 F.2d 1379, 1382 (10th Cir. 1991), cert. denied, 502 U.S. 1058 (1992); McNickle v. Bankers Life & Casualty Co., 888 F.2d 678, 680 (10th Cir. 1989). Since the insurance policy at issue is silent as to which law applies in disputes arising under the insurance contract, the conflicts law of the forum state, in this case, Oklahoma, determines which law governs an insurance bad faith cause of action. TPLC, Inc. v. United Nat. Ins. Co., 44 F.3d 1484, (10th Cir. 1995).

Actions for the breach of the implied duty of good faith in insurance contracts are tort claims. Willis v. Midland Risk Ins. Co., 42 F.3d 697, 611 (10th Cir. 1994); Claborn v. Washington Nat. Ins. Co., 910 P.2d 1046, 1051 (Okla. 1996). Under Oklahoma conflicts law, tort cases are governed by the law of the state with the most significant relationship to the occurrence and to the parties. Barrett v. Tallon, 30 F.3d 1296 (10th Cir. 1994). Under the facts of the case as presented in the record, it is clear that Oklahoma law should govern the Plaintiff's

¹A party is deemed indispensable if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19.

bad faith claim against Defendant, TSC. Both the Plaintiff and the Defendant TSC reside in Oklahoma, the property insurance contract was entered into in the state of Oklahoma, the water damage was sustained by property located within the state of Oklahoma, and the alleged acts giving rise to this claim occurred in Oklahoma.

Under Oklahoma law, the Defendant, TSC cannot be held liable for bad faith. In 1977, the Oklahoma Supreme Court recognized that all insurance contracts impose upon an insurer an implied duty to deal fairly and act in good faith when handling the claims of insureds. Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977). Violation of this duty will give rise to an action in tort for which consequential and punitive damages may be sought. Id. at 904. This duty, however, extends only to parties to the insurance contract, and does not impose obligations upon strangers to the contract. Timmons v. Royal Globe Ins. Co., 653 P.2d 907, 912-13 (Okla. 1982). In Timmons, the Court held that an insurance agent was not a party to a contract for insurance, and, as a stranger to the contract, could not be held liable for a breach of the implied duty of good faith.

Like the defendant agent in Timmons, Nancy Bagley was not a party to the insurance contract between Farmers and Ms. Chillious. As an independent insurance adjuster acting on behalf of Farmers, Nancy Bagley's position is analogous to that of an insurance agent. Under Oklahoma law, Defendant TSC therefore cannot be held liable as a matter of law for bad faith breach of the insurance contract in question. As such, TSC cannot be considered an indispensable party under Fed. R. Civ. P. 19, and therefore has been improperly joined in this action.

For the reasons cited herein, Farmers Alliance Mutual Insurance Company's Motion to Drop Co-Defendant is GRANTED and the claim against Defendant Nancy Bagley d/b/a Tulsa

Claims Service is hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 11 DAY OF SEPTEMBER, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ROBERT GIBSON and TRISHA
GIBSON,

Plaintiffs,

vs.

NMP CORPORATION, an Oklahoma
corporation,

Defendant.

No. 96-C-64-K

ENTERED ON DOCKET
DATE SEP 12 1996

FILED
IN OPEN COURT

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiffs bring this action pursuant to 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964. Robert Gibson ("Robert") is a Native American; Trisha Gibson, formerly Tucker, ("Trisha") is white. Both were hired, while still single, by defendant on January 18, 1993. Both were assigned to the same department. Trisha was classified as a Contracts Administrator and Robert was a supervisor of the hardware products production line.

At some point during their employment, Robert and Trisha notified defendant they intended to marry. The company had in effect, since March 31, 1988, an unwritten policy which prohibited husband and wife working in the same department. On September 2, 1994, the day before plaintiffs were leaving for the Labor Day weekend to get married, defendant advised plaintiffs that, under the company policy, if they married one of them would have to resign. Plaintiffs were married on September 5, 1994. A few days later, the plaintiffs were called into a meeting with company

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executives and were again advised one of them would have to resign. Plaintiffs refused, and were told the company would make the decision based on seniority. Plaintiffs were offered the opportunity to apply for a transfer, but both declined. Robert had seniority, because he had previously been with a company acquired by defendant; therefore, Trisha was terminated by defendant on September 29, 1994.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

In Count 1 of the Complaint, Robert alleges he was subjected to differential terms and conditions of employment, including but not limited to harassment and discrimination in promotion and pay. In Count 2 of the Complaint, Trisha alleges that her discharge for marrying Robert was in violation of §1981 and Title VII.

The same analysis applies to Title VII and §1981 claims. See Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989).

Under McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973), an employee carries the initial burden of establishing a prima facie case of discrimination. If this is done, the burden then shifts to the employer to show a legitimate, non-discriminatory reason for terminating the plaintiff. Id. If the employer does so, the burden then shifts back to the plaintiff to establish the employer's reasons as pretext. Id. At 804. Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995). Each plaintiff's claims will be addressed in turn.

Robert alleges he was "subjected to differential terms and conditions of employment because of his race and color", including harassment and discrimination in promotion and pay. (Complaint at 2). Robert concedes he did not file a charge with the Equal Employment Opportunity Commission or the Oklahoma Human Rights Commission. Accordingly, his claim pursuant to Title VII is dismissed for failure to exhaust administrative remedies. See Gulley v. Orr, 905 F.2d 1383, 1384 (10th Cir.1990). Exhaustion of administrative remedies is not a prerequisite to bringing an action pursuant to 42 U.S.C. §1983. Patsy v. Board of Regents, 457 U.S. 496, 512 (1982). The same reasoning applies to a §1981 claim. See Deskins v. Barry, 729 F.Supp. 1, 3 (D.D.C.1989). Robert's §1981 claim will be considered on the merits.

Robert has no claim relative to his wife's discharge for the simple reason she was the one discharged. One cannot sue for the

deprivation of another's civil rights.¹ O'Malley v. Brierley, 477 F.2d 785, 789 (3rd Cir.1973). Cf. Brown v. Youth Services, 904 F.Supp. 469 (D.Md.1995) (loss of consortium).

To make out a claim under §1981, a plaintiff must show the defendant intentionally or purposefully discriminated against him. Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1532 (10th Cir.1995). To make out a prima facie case of racial discrimination under §1981, plaintiff must show: (1) he is a member of a protected class; (2) he is qualified for the position; (3) adverse employment action; (4) some evidence that would allow the inference of improper motivation. Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 258 (8th Cir.1996). A prima facie case of retaliation is made by proving: (1) statutorily protected participation; (2) adverse employment action; (3) a causal relationship between the two. Id. Finally, a prima facie case under a failure to promote theory requires proof plaintiff (1) belongs to a minority group; (2) was qualified for the promotion; (3) was not promoted; (4) the position remained open or was filled with a non-minority. Reynolds, 69 F.3d at 1534.

In Robert's deposition, he was unable to articulate any "adverse employment action" committed against him by defendant, aside from his wife's discharge based upon the "no-spouse" rule. Apart from that incident, he said he could not recall any instances

¹In any event, a claim based upon his wife's discharge is not encompassed by the language of the complaint. His wife's discharge did not "deprive [Robert] of employment and other contractual opportunities. . . ." (Complaint at 2, ¶8).

in which he had been discriminated against because he was a Native American. He testified he had no evidence he had not been interviewed for one job opening because of his race. However, in an affidavit attached to his summary judgment response, Robert states he has been treated differently by the company since the filing of the lawsuit. He states he formerly was included in many meetings and received annual raises up to 10%. Now, the affidavit states, he is shunned, treated as an outcast, and was passed over for the promotion in favor of a white man from outside the company with less experience.

In reply, defendant asks the Court to disregard the affidavit, citing Franks v. Nimmo, 796 F.2d 1230 (10th Cir.1986). The court in Franks stated a court may disregard an affidavit which is contrary to prior sworn testimony if it constitutes an attempt to create a sham fact issue. This raises the familiar question of whether prior testimony which states the witness "can't recall" is in fact contradicted by later affirmative statements. It obviously puts defendant at a grave disadvantage for plaintiff to wait until completion of discovery to "remember" crucial details. The Court need not disregard the affidavit, because the Court concludes it does not raise a genuine issue of material fact. Robert does not identify the "white man" who received the promotion or by what personal knowledge Robert knew this person had less experience than he. The affidavit does not state Robert was qualified for the position, or what other qualifications the person hired had. In his deposition, Robert testified he made no complaint at the time

about not being interviewed for the position. In sum, an insufficient showing has been made to raise a genuine issue of material fact regarding the promotion.

Robert does not assert his pay has been affected, but only that he is being ostracized. He provides no evidence he is being "shunned" at the behest of defendant's management, or how he is damaged thereby. The Court concludes Robert has failed to make a prima facie case under §1981 and his claims are dismissed.

Both Trisha's Title VII claim and her §1981 claim involve only her discharge based upon the "no-spouse rule" of defendant. While upholding the policy before it, the Tenth Circuit stated "we suspect, as others have claimed, that 'no-spouse' rules in practice often result in discrimination against women, and are generally unjustified." Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 (10th Cir.1987) (footnote omitted). Here, however, Trisha does not allege she was discharged because of her gender, but because of her marriage to a minority.² To assert a claim of disparate treatment, the plaintiff must show she was treated differently than other similarly situated non-minority employees who violated the same rule. Elmore v. Capstan, Inc., 58 F.3d 525, 529-30 (10th Cir.1995). Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline. Mazzella v. RCA Global

²Such a claim is cognizable under the civil rights laws. See Faraca v. Clements, 506 F.2d 956 (5th Cir.1975). Contrary to a suggestion made by defendant in its opening brief, §1981 is available to white persons for redress. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

Communications, Inc., 642 F.Supp. 1531, 1547 (S.D.N.Y.1986), aff'd, 814 F.2d 653 (2d Cir.1987).

Trisha's attack upon defendant's "no-spouse" rule takes the form of showing it has been inconsistently applied. She cites three other couples who worked for defendant while married. Defendant responds--and plaintiffs do not contradict--that these couples, Stacy and Mary Evans, Tom and Vickie Shaffer, and Jaci and Jerry McAllister, did not work in the same department. It is undisputed defendant's policy only applied to married couples working in the same department. Finally, Trisha points to Brittnyn and Matthew Deves, a married couple hired in 1993 by Matt McKee, a different supervisor than the supervisor who discharged Trisha. Defendant describes this hiring as an "oversight" and a "single deviation" from the policy.

Defendant is correct that this single incident, standing alone, is insufficient to create an inference of discrimination. Trisha does not stop at this point. In her affidavit, she asserts that when she drew Mike McGee's attention to the previous hiring of the Deves, McGee stated "he was going to make an example out of us" (i.e., Robert and Trisha)[Affidavit of Trisha Gipson at ¶7]. Further, "I told Mike that neither of us could afford to lose our jobs, so I would move out and we would just stay single. Mike told us that it didn't matter, that we could not have any kind of relationship, dating, living together or marriage." [Id at ¶5]. In other words, Trisha has arguably presented direct, not merely inferential, evidence of an illegal discriminatory motive, and that

she was discharged for reasons beyond the "no-spouse" rule. Coupled with the fact that the unwritten policy was apparently only revealed to Robert and Trisha as they were about to leave for their marriage weekend, the Court finds genuine issues of material fact sufficient to conclude Trisha's claims survive the present motion.

It is the Order of the Court that the motion of the defendant for summary judgment (#6) is hereby GRANTED as to the claims of Robert Gipson and is hereby DENIED as to the claims of Trisha Gipson.

ORDERED this 11 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 10 1996

STATE BANK & TRUST, N.A.,)
a national banking association,)

Plaintiff,)

vs.)

JOHN CHRIST; CREW RESOURCES, a)
trust; DENNIS DAZEY, individually and)
as trustee of CREW RESOURCES, a)
trust; MARCUS CRAIG OSWALT; and)
JIM LAMBERT,)

Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-414B

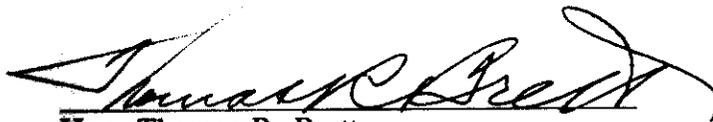
SEP 12 1996

ORDER FOR DISMISSAL WITH PREJUDICE
OF DEFENDANT JOHN CHRIST

UPON the Joint Motion for Dismissal With Prejudice of Defendant John Christ (the "Motion") filed by STATE BANK & TRUST, N.A. ("State Bank"), Plaintiff herein, and Defendant JOHN CHRIST, good cause appearing,

IT IS ORDERED that the Complaint is dismissed with prejudice solely as to Defendant JOHN CHRIST. This leaves the Complaint pending against defendants Dennis Dazey, Marcus Craig Oswald and Jim Lambert; judgment was previously entered against defendant Crew Resources.

Dated: 9-10-96



Hon. Thomas R. Brett
U.S. District Judge

Submitted by:

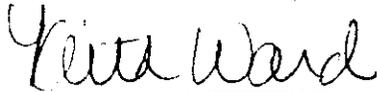


ANDREW R. TURNER, OBA #9125

of

CONNER & WINTERS
A Professional Corporation
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103
(918) 586-5711

Attorneys for Plaintiff
STATE BANK & TRUST, N.A.



KEITH WARD, OBA #9346

of

TILLY & WARD
Two West Second Street, Suite 2220
Tulsa, Oklahoma 74103
(918) 583-8868

Attorney for Defendant
JOHN CHRIST

RECEIVED

SEP 11 1996

U.S. DISTRICT COURT
N.D. OKLAHOMA

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

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES W. STOVALL,

Plaintiff,

v.

No. 95-C 591-K

MARVIN T. RUNYON, Postmaster
General,

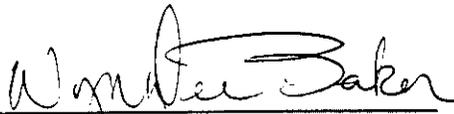
Defendant,

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DATE SEP 12 1996

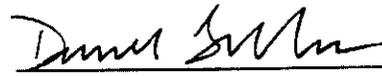
STIPULATION OF DISMISSAL

The plaintiff, James W. Stovall, by his attorney of record, Darrell L. Moore, and the defendant, Marvin T. Runyon, Postmaster General, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 11th day of September 1996.



WYN DEE BAKER, OBA #465
Assistant United States Attorney
U.S. Courthouse
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
Attorney for Defendant



DARRELL L. MOORE
Attorney at Law
Court Place att North Vann
Pryor, Oklahoma 74362 Oklahoma
Attorney for Plaintiff

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

JAMES MORGAN,

Plaintiff,

vs.

MYERS-AUBREY COMPANY,

Defendant.

Case No. 95-C-1225K

ENTERED ON DOCKET

DATE SEP 12 1996

FILED

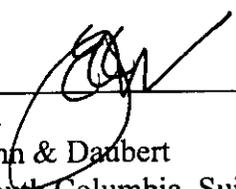
SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

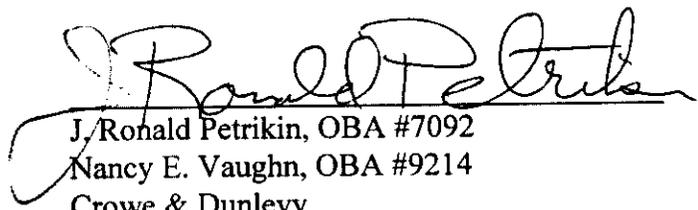
Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, James Morgan, and the Defendant, Myers-Aubrey Company, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice. Each party has agreed to bear its own costs, attorneys fees, and expenses.

Dated this 10th day of September, 1996.



Jeff Nix
Nix, Rinn & Dabert
2121 South Columbia, Suite 710
Tulsa, Oklahoma 74114-3521
(918)742-4486
(918) 749-4729 fax

ATTORNEYS FOR PLAINTIFF



J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214
Crowe & Dunlevy
321 South Boston, Suite 500
Tulsa, OK 74103-3313
(918) 592-9800
(918) 592-9801 fax

ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GLEN ANTHONY WYATT,)
)
 Plaintiff,)
)
 v.)
)
 NORTHERN ASSURANCE COMPANY OF)
 AMERICA, a Massachusetts)
 corporation,)
)
 Defendant.)

Case No: CIV-95-C-1062E

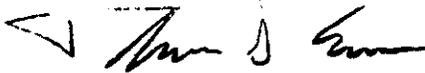
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DATE _____

STIPULATION OF DISMISSAL

COMES NOW the plaintiff through his attorney of record, Thomas S. Evans joining with the defendant through their attorney of record, Richard M. Glasgow, of King, Roberts & Beeler, and submit the following stipulation of dismissal with prejudice to the Court.

It is stipulated and agreed by and between the parties that the above-captioned cause is dismissed with prejudice as to the refiling of any future actions thereon, for the reason that the parties entered into a compromise settlement of any and all claims of plaintiff against said defendant.

Respectfully submitted,



THOMAS S. EVANS, OBA# 10642
EVANS LAW CENTER
P.O. Box 2646
Ponca City, OK 74602
(405) 762-2889
ATTORNEYS FOR PLAINTIFF



RICHARD M. GLASGOW OBA #13135
TOM L. KING OBA #5040
KING, ROBERTS & BEELER
15 North Robinson, Suite 1150
Oklahoma City, OK 73102
(405) 239-6143
ATTORNEYS FOR DEFENDANT

ENTERED ON DOCKET
DATE 9/12/96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RADHA R. M. NARUMANCHI, and
RADHA B. D. NARUMANCHI,

Plaintiffs,

v.

KINARK CORPORATION, a Delaware corporation;
PAUL CHASTAIN, individually; JOHN Q. HAMMONS,
individually; JAMES M. REED, individually; HALL,
ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, an
Oklahoma professional corporation,

Defendants.

No. 95-C-220-J ✓

F I L E D

SEP 11 1996 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court are the following motions: (1) Plaintiffs' motion to compel the deposition of John Q. Hammons [Doc. No. 118-1]; (2) Plaintiffs' motion for sanctions against Mr. Hammons for his failure to appear at a deposition [Doc. No. 118-2]; and (3) Plaintiff's motion to extend the discovery deadline set in this case. [Doc. No. 118-3].

The Court held a hearing on these motions on September 11, 1996. Radha Ramana Murty Narumanchi and Radha B.D. Narumanchi, *pro se*, appeared by telephone. James Reed, with the law firm Hall, Estill, Hardwick, Gable & Nelson, appeared by phone on behalf of Defendants, Kinark Corporation, Paul Chastain and John Q. Hammons.

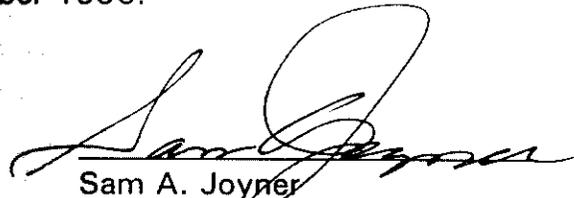
After reviewing the parties' submissions and hearing oral argument on the issues presented by Plaintiffs' motions, the Court makes the following findings and orders:

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1. Plaintiffs' motion to compel [doc. no. 118-1] is **GRANTED**. John Q. Hammons shall make himself available in Springfield, Missouri at a court reporter's office to be selected by Plaintiffs. The Court will leave the date and time for the deposition of Mr. Hammons to the agreement of the parties.
2. Plaintiffs' motion for sanctions [doc. no. 118-2] is **GRANTED**. Due to his failure to appear at a previously noticed deposition, John Q. Hammons is ordered to pay to Plaintiffs the reasonable and necessary costs for one Plaintiff to travel back to Springfield, Missouri and take Mr. Hammons' deposition. See Fed. R. Civ. P. 37(d). Within five days from the date this Order is filed, Plaintiffs shall submit to Mr. Reed and this Court, a written and itemized estimate of the costs they expect to incur in traveling to Springfield to take Mr. Hammons' deposition. Within three days of receiving this itemization, Mr. Hammons shall submit his written objections, if any, to Plaintiffs' proposed expenses. Once the Court has received these pleadings, the Court will enter an Order setting a specific sanction amount.
3. Plaintiffs' motion to extend the discovery deadline in this case [doc. no. 118-3] is **GRANTED**. The discovery deadline shall be extended for seven days past the date Mr. Hammons' deposition is taken. This extension is for the sole purpose of obtaining discovery from Mr. Hammons.
4. At Mr. Reed's request, and with no objection by Plaintiffs, the dispositive motion deadline is also extended for seven days past the date of Mr. Hammons' deposition. The parties will be permitted to file dispositive motions that refer to Mr. Hammons' deposition testimony without attaching a transcript of Mr. Hammons' testimony. Once the transcript of Mr. Hammons' deposition is available, the parties shall supplement their dispositive motions with the relevant portions of Mr. Hammons' deposition.

IT IS SO ORDERED.

Dated this 11 day of September 1996.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing)
and Urban Development,)

Plaintiff,)

v.)

DAVID RUSSELL GOLDEN)

aka David R. Golden aka Dave R. Golden;)

SPOUSE, if any, of David Russell Golden;)

CAROL LOUISE GOLDEN aka Carol L. Golden)

aka Carol Golden;)

SPOUSE, if any, of Carol Louise Golden;)

STATE OF OKLAHOMA *ex rel.*)

Oklahoma Tax Commission;)

COUNTY TREASURER, Rogers County,)

Oklahoma;)

BOARD OF COUNTY COMMISSIONERS,)

Rogers County, Oklahoma,)

Defendants.)

FILED ON DOCKET

SEP 11 1996

CIVIL ACTION NO. 95-C-382-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 11th day of September, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 2, 1996, pursuant to an Order of Sale dated February 29, 1996, of the following described property located in Rogers County, Oklahoma:

Lot 4, in Block 3, of Sunset Acres Subdivision, an Addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendant, David Russell Golden

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aka David R. Golden aka Dave R. Golden, by mail; the Defendants, Spouse, if any, of David Russell Golden; Carol Louise Golden aka Carol L. Golden aka Carol Golden; and Spouse, if any, of Carol Louise Golden, by publication; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, by mail; and the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, through Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

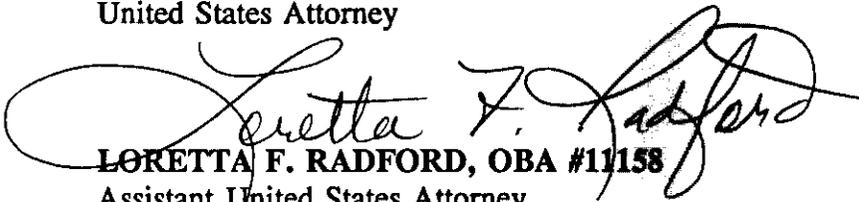
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagney
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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

Report and Recommendation of United States Magistrate Judge
Case No. 95-C-382-K (Golden)

LRF:cas

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

CATHEY L. EASTMAN; STATE OF)

OKLAHOMA, ex rel. OKLAHOMA TAX)

COMMISSION; FORD MOTOR CREDIT;)

COUNTY TREASURER, Tulsa County,)

Oklahoma; BOARD OF COUNTY)

COMMISSIONERS, Tulsa County,)

Oklahoma,)

Defendants.)

Civil Case No. 95 C 1026K

ADDED ON DOCKET
SEP 11 1996
DATE _____

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 11th day of ~~September~~, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 3, 1996, pursuant to an Order of Sale dated March 26, 1996, of the following described property located in Tulsa County, Oklahoma:

LOT EIGHTEEN (18), BLOCK (5), AMENDED GOLF ESTATES II, AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT NO. 4356.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Cathy L. Eastman, State of Oklahoma, ex rel. Oklahoma Tax Commission, Ford Motor Credit, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma and to the

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purchaser, Susan Khoury, Inc., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Susan Khoury, Inc., it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Susan Khoury, Inc., a good and sufficient deed for the property.

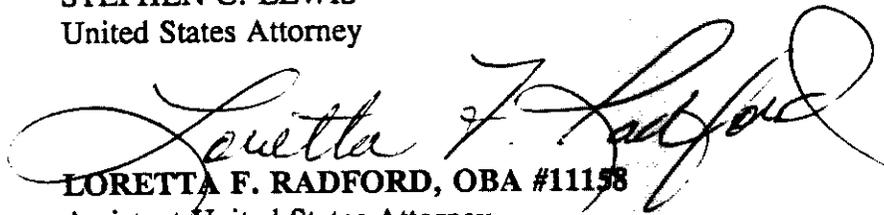
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 1026K

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

F I L E D

SEP 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PRUDENTIAL PROPERTY AND CASUALTY)
INSURANCE COMPANY,)

Plaintiff,)

vs.)

WILLIAM PRESTON DOUGLAS and THELMA)
LUELLA DOUGLAS; and PHILLIP WAYNE)
UNDERWOOD and MARGARET ANN)
UNDERWOOD,)

Defendants.)

Case No. 96-C-462-E ✓

ENTERED ON DOCKET

DATE SEP 11 1996

ORDER

Now before the Court is the **Motion to Dismiss** (Docket #2) of the Defendants William Preston Douglas and Thelma Luella Douglas (the Douglasses) which was joined by Phillip Wayne Underwood and Margaret Ann Underwood (the Underwoods)(Docket # 5).

The Douglasses argue that this declaratory judgment action should be dismissed because the value of the claim does not satisfy the jurisdictional amount of \$50,000 required for diversity cases. 28 U.S.C. §1332. Here, plaintiff, Prudential, filed this action, asserting in its Complaint, that the amount in controversy is in excess of \$50,000. Prudential, however, also notes in its Complaint that the purpose the declaratory judgment is to determine its obligation to its insured in an underlying action wherein the "Underwoods claim damages in excess of \$10,000." (Complaint, par. V).

The standard for determining the amount in controversy in a diversity action is as follows: "When federal subject matter jurisdiction is challenged based on the amount in controversy requirement, the plaintiffs must show that it does not appear to a legal certainty that they cannot

recover at least \$50,000.” Watson v. Blankinship, 20 F.3d 383 (10th Cir.1994). The plaintiff in this case must demonstrate a good faith belief that the amount in controversy is met. Id. Additionally, the requisite amount in controversy must be established on the face of the complaint. Maxon v. Texaco Refining and Marketing, Inc., 905 F. Supp. 976 (N.D. Okla. 1995).

Here the Plaintiff fails that burden in light of the conflicting allegations made in the complaint as to the amount in controversy. Moreover, the Underwoods, who are plaintiffs in the underlying action, deny that they seek in excess of \$50,000, and in fact answered an interrogatory that they sought approximately half that in damages. Lastly, it is not reasonable to suggest that the attorney fees recoverable by the Underwoods would exceed their damages, thus making the amount in controversy more than \$50,000.

Defendants’ Motion to Dismiss (Docket #2) is granted.

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


JAMES O'CONNELL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

EDDY'S STEAKHOUSE, INC.,)
)
 Plaintiff,)
)
 v.)
)
 HARTFORD INSURANCE COMPANY OF)
 THE MIDWEST,)
)
 Defendant.)

F I L E D

SEP 11 1996

No. 95-C-761E Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 11 1996

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 10th day of Sept, 1996, it appearing to
the court that this matter has been compromised and settled, this
case is herewith dismissed with prejudice to the refiling of a
future action.

S/ JAMES O. ELLISON

United States District Judge

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

FILED

SEP 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES BAUHAUS,

Plaintiff,

vs.

JOHN W. KELSON, LES EASLY, SALLIE
HOWE SMITH, JUDGE JESSE HARRIS,

Defendants.

No. 96-CV-689-E ✓

ENTERED ON DOCKET
DATE SEP 11 1996

ORDER

Plaintiff, an inmate at the Oklahoma Department of Corrections, 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 against Assistant District Attorney John Kelson, former Associate Warden Les Easley, Tulsa County Court Clerk Sally Howe Smith, and Tulsa District Judge Jesse Harris.

Plaintiff alleges that Defendants have obstructed his attempts to find a ground to exonerate him from 1973 charges from Tulsa County District Court. He contends that Mr. Kelson violates his constitutional rights by preventing him from having exculpatory evidence examined by an expert, and that Judge Harris supports Mr. Kelson's actions by denying Plaintiff's petition for post-conviction relief without waiting for Petitioner's reply. As to Ms. Smith, Petitioner contends she generally delays filing of court orders in order to obstruct Plaintiff's attempt to file a timely notice of appeal.

Plaintiff requests the Court to "seize the blood evidence [in

3

the custody of the Tulsa Police Department] before it is compromised and transfer it to Dr. Allen, Ph.D., Director of Laboratories, 5300 E. Skelly Dr., Tulsa, OK 74135, in my name." He further requests that the Court "seize all unidentified fingerprint evidence in case number CRF-73-24 and check it against the updated . . . fingerprint archive by non-Tulsa police operating under double-blind testing procedures." (Complaint, Docket #1.)

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable

legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

Even liberally construing the complaint in this case, 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 Plaintiff's allegations do not raise constitutional claims and, thus, lack an arguable basis in law. West v. Atkins, 487 U.S. 42, 48 (1988). Apparently Mr. Kelson filed an objection to Plaintiff's motion for post-conviction relief and Judge Harris sustained the objection without waiting for Plaintiff's reply. While the better practice would have been to wait for Plaintiff's reply, this Court cannot say that such failure amounts to a constitutional violation. Similarly Ms. Smith's failure to mail the order denying post-conviction relief in a timely manner does not amount to a constitutional violation. While Plaintiff may have experienced some delay in receiving the order, that delay did not prevent Plaintiff from preparing a petition in error and filing a timely notice of appeal with the Court of Criminal Appeals. Okla. Stat. tit. 22, § 1087 provides that a final judgment entered under the Post-Conviction Procedure Act may be appealed to the Court of Criminal Appeals within thirty days from the entry of the judgment.

Lastly, the Court notes that the relief which Plaintiff seeks

is not cognizable in this civil rights action and may be more appropriate by petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254(a). That section permits a person in custody pursuant to the judgment of a State court to seek relief on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is **granted** and that this action is hereby **dismissed without prejudice**. The Clerk shall **mail** a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 10th day of September, 1996.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMeward BOUND, INC.

et al.,

Plaintiffs,

v.

THE HISSOM MEMORIAL CENTER,

et. al.,

Defendants.

Case No. 85-C-437-E

ENTERED ON DOCKET

DATE SEP 11 1996

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on August 6, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees and approves the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of \$ 33,916.25 and out-of-pocket expenses in the amount of \$ 7,250.69.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority, and the Department of Rehabilitation Services are jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of \$ 33,916.25 plus expenses in the amount of \$ 7,250.69, and a judgment in the amount of \$ 41,166.94 is hereby entered on this day.

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ORDERED this 6th day of September, 1996.

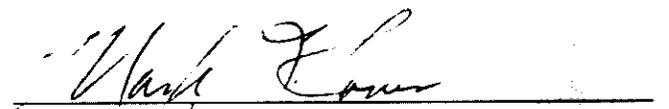

JAMES O. ELLISON
United States District Court

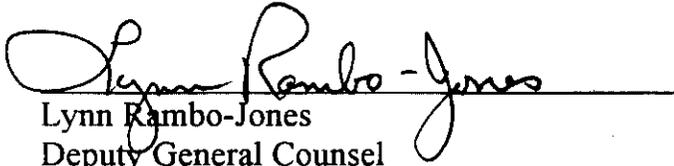


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ATTORNEYS FOR PLAINTIFFS


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Oklahoma City, Oklahoma 73105-3498
(405) 521-4274

A handwritten signature in black ink, reading "Lynn Rambo-Jones", written over a horizontal line.

Lynn Rambo-Jones
Deputy General Counsel

OKLAHOMA HEALTH CARE AUTHORITY

4545 North Lincoln, Suite 124

Oklahoma City, Oklahoma 73105

(405) 530-3439

ATTORNEY FOR DEFENDANTS

(ORDER35.FEE)

ENTERED ON DOCKET

DATE 9/10/96

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

F I L E D

SEP 09 1996 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARQUETTA GIBBS,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security, ¹)
)
Defendant.)

Case No: 95-C-446-W ✓

JUDGMENT

Judgment is entered in favor of the Plaintiff, Marquetta Gibbs, in accordance with this court's Order filed September 9, 1996.

Dated this 9th day of September, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET

DATE 9/11/96

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

F I L E D

MARQUETTA GIBBS,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

SEP 09 1996 *SAK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-446-W ✓

ORDER

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

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

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

1

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

In the case at bar, the ALJ made his decision at the fourth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform work-related activities, except for work involving lifting over twenty pounds maximum and ten pounds frequently. The ALJ concluded that the claimant's past relevant work as a maintenance supervisor did not require the

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

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

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

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

performance of work-related activities precluded by the above limitation, and therefore her impairment did not prevent her from performing her past relevant work. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

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

- (1) The ALJ's finding that claimant can perform light work is not supported by substantial evidence.
- (2) The ALJ ignored and incorrectly discounted the opinions of claimant's treating physicians and the consulting physician.
- (3) The ALJ did not give sufficient consideration to claimant's complaints of pain.
- (4) The ALJ failed to consider claimant's indigent status as a factor to explain her failure to seek medical attention.
- (5) The ALJ failed to consider claimant's complaint of depression.

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

Claimant's disability application dated November 10, 1992, stated that she had been unable to work since February 8, 1991, due to chronic bone spurs of both heels (TR 150). Claimant reported to Dr. Lawrence Reed on March 25, 1991 that she had fallen off a chair she was standing on and injured her head, shoulders, and hips on February 8, 1991 (TR 173). A second disability application dated April 6, 1993, added a new diagnosis of arthritis, bursitis, and pain in her knees, shoulders, and

neck (TR 158). In a report dated August 18, 1993, she stated that she had chronic pain and stiffness in her back and shoulders (TR 162).

Claimant was treated at Westview Medical Center following her fall from the chair (TR 177-178). She was treated conservatively at first, and then was given a TENS unit, which seemed to relieve some of her back discomfort (TR 177). X-rays on March 25, 1991 showed osteophytes and degenerative changes in her cervical spine (TR 201). An MRI was performed on June 20, 1991 and revealed degenerating, nominally bulging discs at the L4-5 and at the L5-S1 levels and early degenerative facet changes at the L4 through the S1 levels (TR 178, 180). She did not return to the medical center for several months after that (TR 178).

Claimant was diagnosed as having heel spurs on September 3, 1991 (TR 164). The doctor concluded that she could not do any work that required walking or standing (TR 166). She was seen by Dr. Lawrence Reed on October 1, 1991. He concluded that she had "myofascial strain cervical spine, both shoulders, lumbar spine," and MRI evidence of degenerating nominally bulging discs L4-5 and L5-S1 as well as early degenerative facet changes L4 through S1." (TR 173). He concluded that she had a 29% impairment to the whole person, 8% to the whole person due to restricted motion of her cervical spine, 11% impairment to the whole person due to restricted motion of her lumbar spine, 5% impairment to the whole person due to restricted motion of her right shoulder, and 6% impairment to the whole person due to restricted motion of her left shoulder (TR 176).

Claimant saw Dr. Gary Davis on October 15, 1991 (TR 203-206). The doctor

reported that a back examination revealed: "decreased range of motion to forward and backward bending, and lateral motion was also impaired. Patient did have moderate paraspinal muscle spasm of the lower lumbar muscle segment. Straight leg raising was positive times 60 degrees bilaterally. Motor and sensory function were fair" (TR 204). Examination of her heels revealed "bilateral tenderness without any obvious erythema or edema; tenderness was present to deep palpation of both heel areas Station and gait were somewhat guarded." (TR 204).

The doctor stated that it was obvious:

[t]hat performing her usual duties which was being a custodian is going to present major problems for this patient and she is not going to be able to perform; however, because of her age she may be able to be retrained in a job which does not require heavy physical activity consistent with say heavy manual labor. Anything that will keep the patient on her feet for prolonged periods of time, involving any prolonged bending, standing or stooping is going to produce major problems for the patient and she probably will not be able to perform these duties in my opinion.

(TR 204).

On October 19, 1992, Dr. Davis opined that claimant could do no work, because her physical limitations were so severe (TR 260). He concluded that she could only walk for ten minutes, sit for forty minutes, and stand for five minutes in an eight-hour day, and could not bend, climb, crawl, squat, lift, twist, or kneel (TR 260).

On February 17, 1993, claimant again saw Dr. Davis, who reported:

[e]xamination revealed tenderness of both heels without any obvious edema or erythema. The patient did have limited range of motion to straight leg raising with the knee flexed at about 40 degrees and with

knee extended, the patient had hip flexion of about 80 degrees. Station and gait were somewhat guarded.

(TR 223). The doctor concluded that she had

[m]ultiple medical problems which include chronic low back pain syndrome, most likely secondary to degenerative joint disease or degenerative disk disease. She also suffers from moderate muscle strain and spasm of the lower lumbar muscle segment and association with chronic heel spurs. This patient now presents for a reevaluation because of her above problems. The patient has noticed some deterioration in her range of motion compared to her examination one year ago. She is still unable to perform her usual custodial duties because of her major medical problems. In my opinion, this patient is unemployable and I doubt very seriously if retraining would be of any benefit

(TR 223).

On October 7, 1993, Dr. Gibbs evaluated claimant and found that she could stand/walk and sit for one hour in an eight-hour workday, lift/carry five pounds occasionally and no weight frequently, and could not push/pull at all (TR 230). He noted that she "has been very depressed with decreased ability to concentrate" and crying spells, so she was taking anti-depressant medication (TR 231). He concluded that she could not perform her "usual custodial duties" and was unemployable and could not be retrained (TR 231).

On January 24, 1994, Dr. William Dandridge, an orthopedic surgeon, examined claimant and found that she had a normal gait (TR 236). He stated that she had

[t]enderness over the right upper extremity particularly over the biceps tendon attachment and a slight restriction of motion in the right shoulder, as compared to the left. The patient has no appreciable restriction in the cervical spine except on rotation to the right. When she rotates to the right, she complains of pain in the right sternocleidomastoid and levator scapulae muscle with tenderness over

the levator scapulae muscle attachment to the scapulae.

(TR 237). He reported that x-rays of her lumbar spine disclosed normal disc spaces, and x-rays of her feet showed "no abnormal bony spur formation of any significant degree." (TR 237). The doctor concluded that she could sit, stand, and walk a total of one hour at a time in an eight-hour day, sit for six hours and stand or walk for three hours in an entire day, and infrequently lift and carry 21-25 pounds and occasionally lift 11-20 pounds (TR 238).

At a hearing on June 21, 1994, claimant testified that she could not do her past work because she cannot stoop or bend (TR 50, 66). She claimed that she could only walk or stand two or three hours in a day, for ten to twenty minutes at a time, and sit for twenty to thirty minutes at a time for four hours a day (TR 51). She listed her prescription medications as Lodine, Soma, Ansaid, Voltaren, Tentol, Motrin, and Tylenol #3 (TR 254).

The ALJ asked the vocational expert several hypothetical questions:

- Q. Say you have an individual who is 54 years of age, female, has the eleventh grade education, and has a good ability to read and write and use numbers, has the past vocational you just described a few minutes ago. Let's assume the person can perform sedentary, light or medium work, with these additional restrictions, primarily restricting as far as stooping and bending. Let's say it was limited to occasional due to back pain. And, let's see, any other restrictions here? Let's say she is not allowed to do any prolonged walking or standing or any repetitive bending -- no repetitive bending, just occasional bending. With those restrictions, would there be any jobs in the regional or national economy that such a person could perform?
- A. There would be. They would be classified as unskilled or entry level.

Q. Okay. For the second hypothetical, let's use Exhibit number 28. This is Dr. Dandridge's RFC. He has limited this claimant to sitting one hour; standing one hour; walking one hour at a time; sitting for six hours a day; standing for three hours a day; walking for three hours a day; frequently lifting ten pounds; occasionally, 20 pounds; infrequently, 25 pounds; never, above 25 pounds; and the same for carrying. No restrictions as far as arms or legs. Only occasional bending, squatting, crawling, climbing, reaching. No environmental restrictions. With those restrictions, would there be any jobs in the regional or national economy that such a person could perform?

A. Again, there would be. They would be classified as unskilled or entry level.

Q. All right. Now we'll use Exhibit 26. Let's say the person can only stand or walk for one hour in an eight-hour day or sit for one hour in an eight-hour workday; lift five pounds occasionally; zero pounds frequently; has problems with the right hand pushing and -- well -- yes -- well, actually, both hands -- have trouble pushing and pulling with right and left hand. Let's see, occasional bending, squatting, kneeling, climbing, reaching, balancing, foot controls. Those are all occasional, and then not allowed to push or pull at all, not allowed to be in the cold or the heat or dust or fumes or any kind of environmental restriction, it looks like. I mean, this looks like total environmental restrictions. No medication restrictions. No need for any assistive devices or braces. He has decreased ability to concentrate, crying spells, taking antidepressant medications. I think those are the primary restrictions. With those restrictions, would there be any jobs in the regional or national economy that such a person could perform?

A. No.

Q. Okay. In the fourth hypothetical, assuming all the testimony of the claimant is fully credible, 100 percent accurate, if that were the case, would there be any jobs in the regional or national economy that such a person could perform?

A. No.

(TR 73-75).

There is merit to claimant's contentions that the decision of the ALJ is not supported by substantial evidence and that he did not give sufficient weight to the opinions of the doctors who treated and evaluated claimant. Under the social security requirements "light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567. There is not substantial evidence, in fact, there is no evidence, that claimant can do a good deal of walking or standing or sit for eight hours and push and pull arm or leg controls.

"A treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995). When the treating physician's opinion is not consistent with other medical evidence, the ALJ must examine the other medical evidence to determine if it outweighs the treating physician's report. Id. at 290. A treating physician's opinion regarding the severity of a claimant's impairments is generally favored over that of a consulting physician. Reid v. Chater, 71 F.3d 372, 374 (10th Cir. 1995).

In this case, two of the treating doctors stated that claimant could stand and walk for only very limited periods. The reasons which the ALJ gave to disregard Dr. Gibbs' and Dr. Davis' opinions were that she was "treated conservatively with medication, physical therapy, and a TENS unit," surgery was never suggested, and

the most recent medical records from Dr. Dandridge showed she had "greater mobility in her range of motion" and x-rays showed "no abnormalities." (TR 24). The decision to disregard Dr. Gibbs' and Dr. Davis' opinions was improper, given the great weight of the evidence supporting them.

Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

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

as to be disabling. (Citations omitted).

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

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

There is merit to claimant's contention that the ALJ did not give sufficient consideration to her complaints of pain. Claimant established a nexus between her heel and spine impairments and the pain she alleged. None of her doctors disputed her claims of pain, and two of them found that it prevented her from working. The ALJ erred in concluding that claimant was not restricted by pain from returning to her past work as a maintenance supervisor.

There is no merit to claimant's final two contentions. The ALJ did not base his decision on the fact that claimant was receiving "less frequent medical treatment," so her inability to pay for medical care was not relevant. There was no medical evidence that claimant had a disabling mental impairment. The court in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must consider a claimant's mental impairment only if the

record contains evidence of a mental impairment which would prevent the person from working. No psychological testing or treatment was recommended.

The court finds that there is substantial evidence that claimant cannot do her past relevant work, particularly given her advanced age of 57.

The decision of the ALJ is reversed, and claimant is found to be entitled to disability benefits under § 216(l) and 223 of Title II of the Social Security Act. The Secretary shall compute and pay benefits accordingly.

Dated this 9th day of September, 1996



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:gibbs.ord

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OKLAHOMA

FILED

ST. PAUL MERCURY INSURANCE COMPANY, Plaintiff, v. QUALITY DENTAL PRODUCTS, INC., Defendant.

SEP 9 1996

Phil Lombardi, Clerk U.S. DISTRICT COURT

Case No. CIV-95-C-991K

STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule 41(a)(1), the Plaintiff, St. Paul Mercury Insurance Company (St. Paul), and the Defendant, Quality Dental Products, Inc. (QDP), through their attorneys stipulate and agree that the captioned case may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein. St. Paul and QDP state that they have reached an agreement settling all claims involved in the captioned case and, therefore, request that the Court dismiss this action with prejudice, pursuant to this stipulation.

[Handwritten signature of Reggie N. Whitten]

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ATTORNEYS FOR DEFENDANT, QUALITY DENTAL PRODUCTS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

ROB PASSLEY,

Plaintiff,

v.

A-1 FREEMAN NORTH AMERICAN,
INC., an Oklahoma Corporation,

Defendant.

SEP 9 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96C-273BU

ENTERED ON DOCKET

DATE SEP 11 1996

STIPULATED DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the Plaintiff, Rob Passley, hereby dismisses with prejudice his claim against A-1 Freeman North American, Inc., in the above-styled case.



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Attorneys for Defendant,
A-1 Freeman North American

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

FILED

SEP 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT L. WIRTZ,
Plaintiff,

v.

RONALD J. CHAMPION, et al.,
Defendants.

Case No.: 93-C-920-B

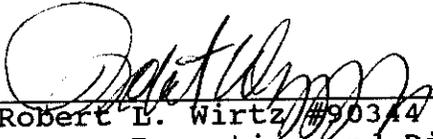
RECORDED & INDEXED

DATE SEP 11 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), the parties hereby stipulate to the dismissal of this action WITH PREJUDICE so that this lawsuit is concluded and Plaintiff Robert L. Wirtz, Jr. cannot file another lawsuit in the future concerning the facts and circumstances giving rise to this lawsuit.

Respectfully submitted,



Robert L. Wirtz #90344
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PRO SE PLAINTIFF



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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF MAILING

On this 3rd day of September, 1996, I mailed a true and correct copy of the foregoing, postage prepaid, to:

BENJAMIN GORE GAINES
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ATTORNEY FOR DEFENDANTS



ROBERT L. WIRTZ, JR.

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

FILED

SEP 10 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LA SOUND INTERNATIONAL, INC., a)
Nevada corporation,)

Plaintiff,)

vs.)

Case No. 96-C-0118-B

RICHARD C. BERTSCH, an individual; and)
METROSOUND U.S.A., INC., a California)
corporation,)

Defendants,)

and)

GENE LUM, an individual; NORA LUM, an)
individual; and MICHAEL BROWN, an)
individual, and JOHN DOE(S),)

Third Party Defendants.)

ENTERED ON DOCKET
SEP 11 1996

ORDER

The Court has for decision Third Party Defendant Michael Brown's ("Brown") Motion to Dismiss the Third Party Complaint, pursuant to Fed.R.Civ.P. 12 (b)(6). (Docket # 48).

Fed.R.Civ.P. 9 (b) provides that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity. The Third Party Complaint herein attempts to allege a conspiracy to defraud with movant Brown as one of the conspirators.

An analysis of the Third Party Complaint demonstrates Defendant/Third Party Plaintiff, Richard C. Bertsch ("Bertsch"), has not alleged sufficient particular facts to link Brown to the alleged conspiracy. Bertsch first alleges a written agreement was signed by him and the Lums after being assured their oral agreement to the contrary was the true agreement. Brown was not a party to the

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hand delivered
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written agreement, yet absent any predicate facts Bertsch alleges Brown failed to restructure the written agreement to reflect the prior oral understanding.

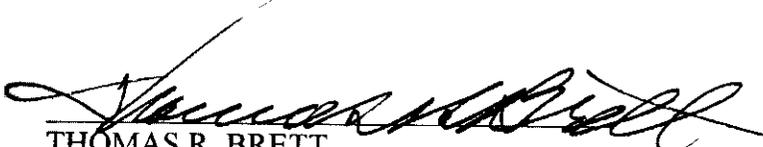
Next it is alleged Brown, in November 1995, was part of a discussion to create a new company of which Brown was to be president. No facts are alleged concerning illegal conduct or illegal object linking Brown to any alleged conspiracy.

The final reference to Brown by Bertsch alleges the Lums on behalf of themselves, Brown and other unknown persons induced Bertsch to enter into an oral understanding.

The Third Party Complaint simply lacks sufficient factual allegation of the alleged conspiracy and fraud implicating Brown to withstand Brown's Motion to Dismiss. Fed.R.Civ.P. 12 (b)(6); McCleneghan v. Union Stock Yards Co., 298 F.2d 659 (8th Cir. 1962); Schneider v. Colegio de Abogados de Puerto Rico, 546 F.Supp. 1251 (D.P.R. 1982); Cairo v. Skow, 510 F.Supp. 201 (E.D. Wis. 1981); Turley v. Hall's Motor Transit Co., 296 F.Supp. 1183 (M.D. Pa. 1969); United States v. Griffith Amusement Co., 1 F.R.D. 229 (W.D. Okla. 1940); Pearl v. Oklahoma City, 193 Okla. 597, 145 P.2d 400 (1943); See Wright & Miller, Federal Practice and Procedure, § 1233.

Therefore, Brown's Motion to Dismiss is hereby SUSTAINED pursuant to Fed.R.Civ.P. 12(b)(6). Bertsch is granted twenty (20) days from this date to file an amended third party complaint against Brown, failing in which the Order granting the Motion to Dismiss shall stand.

DATED this 10th day of September, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE